Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20571/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House (by remote video means)	**Decision & Reasons Promulgated**
On 24th February 2021	**On 9th March 2021**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THOMAS ANDERSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Simak of Counsel, instructed by Solomon Shepherd Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Skype. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. The file contained the documents in paper format.

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Shore promulgated on 8 April 2020, in which the Appellant's appeal against the decision to refuse his human rights claim dated 5 December 2019 was dismissed.

3. The Appellant is a national of Ghana, born on 10 December 1959, who entered the United Kingdom on 20 September 2001 with valid entry clearance as a visitor to 20 February 2002. Thereafter he has remained unlawfully in the United Kingdom. The Appellant made an application for indefinite leave to remain on the basis of long residence on 22 September 2010 which was refused on 9 December 2010. After this, no applications were made until 31 October 2019 when the Appellant applied for leave to remain on the basis of family life with a partner and private life; the refusal of which is the subject of this appeal.

4. The Respondent refused the application on the basis that the Appellant did not meet any of the requirements of the Immigration Rules for a grant of leave to remain and there were no exceptional circumstances. In relation to family life, the Appellant could not meet the requirements of Appendix FM because he did not meet the immigration status requirement and the exception in paragraph EX.1 was not met as there were no insurmountable obstacles to family life continuing outside of the United Kingdom. In relation to private life, the Appellant did not satisfy the requirements of paragraph 276ADE as he had not been in the United Kingdom for twenty years and there were no very significant obstacles to his reintegration on return to Ghana, where he had resided up to the age of 41.

5. Judge Shore dismissed the appeal in a decision promulgated on 8 April 2020 on all grounds. The First-tier Tribunal found that the requirements of the Immigration Rules were not met, in particular there were no insurmountable obstacles to family life being enjoyed outside of the United Kingdom; it being no more than unpleasant for his partner to relocate to a country of which she is a national and where she has family. Further, there were no very significant obstacles to the Appellant's reintegration in Ghana. The First-tier Tribunal found that there was a lack of evidence as to any adverse impact on the Appellant or his partner; considered the factors in section 117B of the Nationality, Immigration and Asylum Act 2002 and found there was no disproportionate interference with the Appellant's right to respect for private and family life.

The appeal

6. The Appellant appeals on three grounds as follows. First, that the First-tier Tribunal materially erred in law in failing to apply the principles in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40. The Appellant submitted that given the findings that he satisfied the requirements of the Immigration Rules save for the immigration status requirement, his appeal should have been allowed on this basis alone as there is no public interest in his removal. Secondly, that the First-tier tribunal materially erred in law in finding that the requirements of

paragraph 276ADE(1)(vi) of the Immigration Rules was not met given that it was clear that the Appellant's prolonged absence from Ghana and his family ties to the United Kingdom made it impossible for him to reintegrate. Thirdly, that the First-tier Tribunal materially erred in law in its assessment of proportionality for the purposes of Article 8, primarily because of the failure to take into account the principles in *Chikwamba.* There is considerable overlap between the first and third grounds of appeal which I take together in this decision.

7. At the oral hearing, Ms Sinak relied on the written grounds of appeal and made more detailed oral submissions on these and to address the points raised in the grant of permission. She submitted that the principles in *Chikwamba* remained good law, having been expressly approved by the Supreme Court in Agyarko v Secretary of State for the Home Department [2017] UKSC 11. Ms Sinak sought to distinguish the decision in Younas (section 117B(6)(b); Chikwamba; Zambrano) Pakistan [2020] UKUT 129 (IAC) on a factual basis that unlike this Appellant, the appellant in Younas could not meet the financial requirement in the Immigration Rules. In any event, it was submitted that even if, following *Chikwamba,* there remained some public interest in the Appellant's removal, that was inevitably outweighed by the strength of the Appellant's private and family life.

8. Ms Sinak also sought to rely on the factors in section 117B of the Nationality, Immigration and Asylum Act 2002, which were said to be intended to ensure integration in the United Kingdom and to save costs and were in the Appellant's favour as he could surmount the constraints contained therein.

9. It was accepted on behalf of the Appellant that *Chikwamba* was not expressly raised or relied upon before the First-tier Tribunal but Ms Sinak submitted that it was a glaringly obvious point that should have been considered; not least because that case was raised in the decision in Agyarko which itself was relied upon expressly in this appeal. It was suggested that the First-tier Tribunal would have found a way to allow the Appellant's appeal if the principles in *Chikwamba* had been considered. This is so because it will only be in relatively rare cases that a person will be required to leave if they meet the requirements of the rules for entry clearance and it is for the Respondent to show that this is one of those rare cases; as overstaying per se is insufficient for the Respondent to refuse leave.

10. As to the second ground of appeal, Ms Sinak relied on the same points in relation to the statute as in the first ground of appeal and submitted that the First-tier Tribunal failed to consider the decisions in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813 and R (on the application of MC) v Secretary of State for the Home Department [2016] CSOH 7 as to the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules. Specifically on the facts in this appeal, the First-tier Tribunal failed to consider the Appellant's ties to the United Kingdom and Ms Sinak went so far as to submit that because of his family life in the

United Kingdom with his wife and her (adult) children, he would be unable to integrate at all in Ghana, including because his intention would be to return to the United Kingdom. This was then refined to the Appellant not being able to reintegrate in Ghana within a reasonable time for this reason.

11. Ms Sinak accepted that the case of MC was not specifically relied upon or raised before the First-tier Tribunal, but submitted that it was a Robinson obvious point which should have been considered because it is a well-known authority and obvious to her.

12. On behalf of the Respondent, Mr Lindsay resisted the appeal on all grounds. Firstly, the Appellant did not rely on the principle in *Chikwamba* before the First-tier Tribunal, it was not a Robinson obvious point and for that reason alone there can be no error of law in the First-tier Tribunal's decision not to consider it. Secondly, in any event, the appeal was bound to fail even if the principles in *Chikwamba* were applied. Mr Lindsay relied on the decision of Younas as clear authority for the application of the principles and contained general propositions of law as opposed to any factual comparison which is unhelpful, and in any event indistinguishable on the facts as the appellant in that case was found to meet the requirements of the rules for entry clearance and the decision assumed a successful application for entry clearance.

13. Mr Lindsay submitted that Chikwamba does not set out a general legal test about whether return would be proportionate or whether requiring return would as a result be common or uncommon. The case was about a blanket policy at the time requiring an application to return to make an application for entry clearance and required a fact sensitive assessment, which in that case involved minor children and relatively extreme facts and poor conditions on return to Zimbabwe. Since that case, the factors in section 117B of the Nationality, Immigration and Asylum Act 2002 have been introduced and will also apply. On the facts of this case, there would still be a very pressing public interest in the Appellant's removal given that he has been in the United Kingdom unlawfully for 18 years. It was submitted that this is not a very clear case where the principle applies at all and the facts are nowhere near those in Chikwamba.

14. The Upper Tribunal in Younas also suggested that Article 8 of the European Convention on Human Rights may not even be engaged in a case in which there would only be temporary separate between family members. In the present appeal, little weight is to be attached to the Appellant's private and family life established in the United Kingdom whilst here unlawfully and there was simply no evidence before the First-tier Tribunal of any significant impediment to his return, or a return of the couple together to make an application for entry clearance.

15. As to the second ground of appeal, Mr Linsday submitted that the First-tier Tribunal adequately dealt with the question of whether there were very significant obstacles to reintegration for the purposes of paragraph

276ADE of the Immigration Rules. Further, this is another point in which the Appellant seeks to advance arguments not raised before the First-tier Tribunal, including the assertion of family life with his adult step-children which was expressly not claimed previously. Again, there is no error of law in the First-tier Tribunal not considering matters not raised before it and which the evidence did not in any event support.

16. In reply Ms Sinak submitted that there was an inconsistency between the Supreme Court's decision in Agyarko and the Upper Tribunal decision in Younas, to the extent that if necessary, it would be submitted that the latter was wrongly decided but no detailed submissions were made on this point.

Findings and reasons

17. There is no error of law in the decision of the First-tier Tribunal on any of the grounds relied upon by the Appellant. First, none of the points now raised were expressly raised or relied upon by the Appellant before the First-tier Tribunal and none are Robinson obvious. As such, it can not be an error of law for a First-tier Tribunal to fail to have regard to something not relied upon by a party before it. Secondly, in any event, even if the First-tier Tribunal had taken into account the points now raised, the outcome of the appeal would inevitably have been the same and any error would not be material.

18. In relation to the principle in *Chikwamba*, whilst it is the case that this still applies, it is not the case that it establishes any threshold that only in rare cases will an entry clearance application be required and even less the case that it places the burden on the Respondent to establish that a particular case is such a rare one in which an application for entry clearance is required. The submissions from Ms Sinak on the applications of the principles put the case far too high and fail to take into account the subsequent case law that has given clear guidance on the context of that case and the extent of the principle; as well as the requirement for a Tribunal to continue to apply the factors in section 117B of the Nationality, Immigration and Asylum Act 2002.

19. First, as noted in R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC), that it would be comparatively rarely, certainly family cases involving children, that an Article 8 case should be dismissed on the basis it would be proportionate and more appropriate for an individual to apply for leave from abroad, in all cases it will be for the individual to place before the Secretary of State (or in this case, the First-tier Tribunal) evidence that such temporary separation will interfere disproportionately with protected rights.

20. In the present appeal there are no minor children and there was no evidence at all before the First-tier Tribunal as to any adverse impact of temporary separation of the Appellant and his wife and in this case, the

First-tier Tribunal did not in any event find that it would be more appropriate for the Appellant to apply for leave from abroad but instead undertook the broader Article 8 proportionality assessment required.

21. Secondly, as confirmed by the Court of Appeal in Kaur v Secretary of State for the Home Department [2018] EWCA Civ 1423 (at paragraphs 43 to 45), the facts in Chikwamba were striking and the application of the principle does not trump all public interest matters, including, for example a poor immigration history. Even in cases where an applicant was certain to be granted leave to enter, there *might* be no public interest in removing the applicant. What is required is a fact-specific assessment in each case, the principle will only apply in a very clear case and even then, will not necessarily result in a grant of leave to remain.

22. Thirdly, in Younas, the Upper Tribunal found, so far as relevant to this appeal:

> *"An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on Chikwamba v SSHD [2008] UKHL 40 does not obviate the need to do this."*

23. In the present appeal, the following factors from section 117B of the Nationality, Immigration and Asylum Act 2002 are relevant. First, the maintenance of effective immigration controls is in the public interest. There is a significant public interest in this case in circumstances where the Appellant has, save for a very short period with entry clearance as a visitor, remained unlawfully in the United Kingdom for over 18 years. Further, in that period, he only made a single attempt to regularise his status in 2010 before the most recent application, the refusal of which is the subject of this appeal.

24. Secondly, little weight is to be attached to the Appellant's private and family life in the United Kingdom which has been established entirely whilst he has been here unlawfully.

25. Thirdly, the fact that the Appellant speaks English and is not reliant on state funds (being financially supported by his wife) are at best neutral factors in the proportionality balancing exercise; neither strengthening the public interest nor strengthening the weight to be attached to the Appellant's private and family life.

26. Taking into account these factors, particularly the Appellant's very poor immigration history and the lack of evidence as to any adverse impact of a temporary separation from his partner (or temporary relocation with her pending an entry clearance application); this is a case in which there is a

strong public interest in removal which is not outweighed by the Appellant's private and family life (to which only little weight must be attached). In these circumstances, even if the First-tier Tribunal had applied the principles in *Chikwamba,* the appeal would still inevitably be dismissed.

27. In relation to the assessment of very significant obstacles to reintegration for the purposes of paragraph 276ADE(1)(vi) of the Immigration Rules; again, even if the First-tier Tribunal had expressly considered the authorities now relied upon (which were not Robinson obvious) the outcome also would inevitably be the same.

28. There was little if any evidence before the First-tier Tribunal as to any obstacles that the Appellant may face to reintegration on return to Ghana. This is a country of which he is a national, where he has spent the majority of his life and he would have retained knowledge of life, language and culture there. In addition, he has extended family there and the support of his partner. The First-tier Tribunal found that the Appellant had simply not established that he would face very significant obstacles to his reintegration.

29. The argument on behalf of the Appellant before me focused on the failure of the First-tier Tribunal to take into account the Appellant's ties in the United Kingdom when assessing obstacles to reintegration further to the decision in MC. However, that decision was in the context of an application for Judicial Review of a decision made under the earlier version of paragraph 276ADE of the Immigration Rules (which referred to a person having lost all ties to the country to which they would be returned rather than facing very significant obstacles to reintegration). It is not a reported decision and offers no authoritative guidance on the application of the current provisions.

30. Although reading parts of the decision in MC isolation, there appears to be an acceptance that the solidity of a person's ties in the United Kingdom is relevant to assessing obstacles to reintegration on return; when read as a whole the decision simply reaffirms the need in a proportionality balancing exercise for the purposes of Article 8 of the European Convention on Human Rights to consider and balance the respective ties in each country.

31. The decision is not authority for the proposition that the strength of a person's ties in the United Kingdom must be considered for a lawful assessment solely under paragraph 276ADE(1)(vi) of the Immigration Rules (in its current form) and far less is it an authority that such ties of themselves can be sufficient to establish very significant obstacles to reintegration on return. The submission on behalf of the Appellant that he would not be able to reintegrate at all (or even within a reasonable time) solely because of the strength of his ties in the United Kingdom was without any foundation whatsoever. The Appellant did not identify any specific obstacles to reintegration on return based on his likely

circumstances in Ghana, let alone any very significant ones and in the absence of such evidence, it can not rationally be suggested that ties in the United Kingdom could themselves create such an obstacle for the purposes of paragraph 276ADE(1)(vi) of the Immigration Rules. The mere fact that the Appellant would return to Ghana with the intention of returning to the United Kingdom as quickly as possible could not in law or fact amount to an obstacle to reintegration to establish that he met the requirements of the Immigration Rules.

32. Overall, the First-tier Tribunal undertook a full assessment of the somewhat limited evidence before it and came to clear, cogent and well reasoned conclusions that were the only ones rationally and lawfully open to it on the evidence. There is no arguable error of law in that final proportionality balancing exercise for the purposes of Article 8 of the European Convention on Human Rights and no error of law in not considering points not relied upon before it.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed G Jackson Date 2nd March 2021

Upper Tribunal Judge Jackson