IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002860

First-tier Tribunal No: HU/56037/2023
LH/05313/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 30 December 2024

Before

UPPER TRIBUNAL JUDGE LODATO

Between

MIRA LAMA DONG
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Symes, counsel
For the Respondent: Mr Ojo, Senior Presenting Officer

Heard at Field House on 13 December 2024

DECISION AND REASONS

Introduction

1. This decision follows the resumed hearing for this appeal, heard on 13 December 2024. The background to the appeal is set out in the error of law decision of 2 September 2024. The appellant, a Nepalese citizen, appeals against the decision of the respondent, dated 24 April 2023, refusing her human rights claim. In short, her factual case is that it would be a disproportionate interference with her and her sponsor's Article 8 human rights to a family and private life if she were required to return to Nepal without him. In the annexed error of law decision, it was found that the First-tier Tribunal, which had allowed the appellant's appeal, had erred in law and the decision was set aside. However, large parts of the fact-finding analysis were preserved.

Background

2. The broad factual background and immigration history to the appeal is not in dispute between the parties and is set out in the annexed error of law decision. This decision should be read in conjunction with that decision.

Legal Framework

3. Article 8 of the ECHR provides:

> *(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

4. The Immigration Rules regulate how the respondent will seek to balance the right to a family and private life under Article 8 against the wider interests of society.

5. At paragraph 17 of his judgment in Razgar v SSHD [2004] 2 AC 368, Lord Bingham identified a series of questions that a tribunal should ask itself when faced with an appeal that raises an Article 8 issue. In the present matter, the parties agreed that it was only the final question which was in issue, whether the refusal decision was a disproportionate interference with the engaged Article 8 rights. It is well-settled in this jurisdiction that the assessment of proportionality is best undertaken by adopting a balancing exercise which takes into account the factors weighing in favour of the appellant's and their family's personal interests against the public interest in maintaining effective immigration controls.

6. In TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109, the Senior President of Tribunals provided guidance as to how competing public and private interests should be balanced in a case where the extent of compliance with the Immigration Rules is in question as well as insurmountable obstacles to family life continuing outside the UK. He said this at paragraph 34:

> […] *An evaluation of the question whether there are insurmountable obstacles is a relevant factor because considerable weight is to be placed on the Secretary of State's policy as reflected in the Rules of the circumstances in which a foreign national partner should be granted leave to remain. Accordingly, the tribunal should undertake an evaluation of the insurmountable obstacles test within the Rules in order to inform an evaluation outside the Rules because that formulates the strength of the public policy in immigration control 'in the case before it', which is what the Supreme Court in Hesham Ali (at [50]) held was to be taken into account. That has the benefit that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.*

7. The House of Lords decision in Chikwamba v SSHD [2008] 1 W.L.R. 1420 was recently considered by the Court of Appeal in Alam v SSHD [2023] 4 W.L.R. 17. In assessing its continuing effect when seen against subsequent legal and

procedural developments, Elisabeth Laing LJ provided the following guidance about how Chikwamba should now be applied by decision-makers:

> *106. In Chikwamba, the Secretary of State met a very strong article 8 case by relying on an inappropriately inflexible policy. The decision does not in my view decide any wider point than that that defence failed. There are three other matters that should be borne in mind when it is cited nowadays.*
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> > *(i) The case law on article 8 in immigration cases has developed significantly since Chikwamba was decided.*
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> > *(ii) It was decided before the enactment of Part 5A of the 2002 Act. Section 117B(4)(b) now requires courts and tribunals to have "regard in particular" to the "consideration" that "little weight" should be given to a relationship which is formed with a qualifying partner when the applicant is in the United Kingdom unlawfully.*
> >
> > *(iii) When Chikwamba was decided there was no provision in the Rules which dealt with article 8 claims within, or outside, the Rules. By contrast, by the time of the decisions which are the subject of these appeals, Appendix FM dealt with such claims. Paragraph EX.1 of Appendix FM provided an exception to the requirements of Appendix FM in article 8 cases if the applicant had a relationship with a qualifying partner and there were "insurmountable obstacles" to family life abroad.*
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> *107. Those three points mean that Chikwamba does not state any general rule of law which would bind a court or tribunal now in its approach to all cases in which an applicant who has no right to be in the United Kingdom applies to stay here on the basis of his article 8 rights. In my judgment, Chikwamba decides that, on the facts of that claimant's case, it was disproportionate for the Secretary of State to insist on her policy that an applicant should leave the United Kingdom and apply for entry clearance from Zimbabwe.*
>
> […]
>
> *110. The core of the reasoning in Hayat is that Chikwamba is only relevant when an application for leave is refused on the narrow procedural ground that the applicant must leave and apply for entry clearance, and that, even then, a full analysis of the article 8 claim is necessary. If there are other factors which tell against the article 8 claim, they must be given weight, and may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance. I consider that, in the light of the later approach of the Supreme Court to these issues, the approach in Hayat is correct. A fortiori, if the application for leave to remain is not refused on that narrow procedural ground, a full analysis of all the features of the article 8 claim is always necessary.*
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> […]
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> *112. The two present appeals, subject to A1's ground 2, are both cases in which neither claimant's application could succeed under the Rules, to which courts must give great weight. The finding that there are no insurmountable obstacles to family life abroad is a further powerful factor*

militating against the article 8 claims, as is the finding that the relationships were formed when each claimant was in the United Kingdom unlawfully. The relevant tribunal in each case was obliged to take both those factors into account, entitled to decide that the public interest in immigration removal outweighed the claimants' weak article 8 claims, and to hold that removal would therefore be proportionate. Neither the FTT in A1's case nor the UT in A2's case erred in law in its approach to Chikwamba.

8. The appellant bears the burden of substantiating the primary facts of the appeal. The standard she must meet is the balance of probabilities. Once Article 8 rights are engaged, it is for the Secretary of State to establish that the interference is proportionate.

The Remaking Hearing

9. The issues to be determined on remaking this appeal decision were crystallised in the course of the error of law decision. At [30]-[31], it was decided that the findings of Judge Hussain which touched upon the existence of insurmountable obstacles to family life continuing in Nepal were to be preserved. Seen against that factual backdrop, there was no sensible way in which it might be argued that very significant obstacles to integration might stand in the way of the appellant's effective return on private life grounds. The only issue to be determined on remaking is whether the refusal decision is a disproportionate interference with the appellant and her partner's rights to a family life.

10. Despite being in attendance at the hearing with the benefit of an interpreter, neither the appellant nor her partner, Mr Dyola were called to give oral evidence because Mr Ojo, for the respondent confirmed that he did not intend to question either witness. The appellant did not file any further evidence in advance of the remaking hearing to update the tribunal on the couple's current circumstances.

Discussion

11. As alluded to above, it is only the proportionality of the refusal decision which falls to be decided in remaking this decision.

12. In support of the proposition that the refusal amounts to a disproportionate interference with the couple's family life rights, Mr Symes pointed to the increase in the minimum income threshold which had been implemented since the earlier decisions were reached. In short, the appellant's sponsoring partner must now earn at least £29,000 which is considerably more than the figure of £18,600 which was required when the application was originally made. I was directed to the financial records submitted with the initial appeal before Judge Hussain in which it could be seen that Mr Dyola only earned approximately £25,000 which tended to indicate that the higher threshold could not be met today thereby prejudicing any future application for entry clearance which would have to be made at a time when the family finances would be further strained by his having to support the appellant in Nepal from the UK. The reality is that there is simply no evidence upon which I can safely conclude that the sponsor does not currently earn the required level of income. No further evidence was relied upon to update the couple's current financial circumstances. It would be an exercise in impermissible speculation to hold that the couple are now unlikely to meet the income requirements. Even if I were to find that an application for entry clearance under the partner requirements of Appendix FM does not have as strong a prospect of success as it once did, it is difficult to see how this might be in the

appellant's favour in the balancing exercise. Such a conclusion would only underscore that the appellant does not meet the requirements of the Immigration Rules for a reason additional to that which was originally found, namely, that she did not have the necessary immigration status as a longstanding overstayer. What is beyond doubt is that it can no longer be sensibly advanced that an application for entry clearance would be bound to succeed and that this is one of the 'narrow procedural ground' cases identified in Chikwamba and clarified in the modern context by Alam.

13. The next factual question which falls to be assessed is whether the refusal decision is likely to function as the cause of a fracture of family life. Huang v SSHD [2007] 2 AC 167, at paragraph 20, is clear that the maintenance of family life is an important factor in the assessment of proportionality. For the reasons given by Judge Hussain between [28]-[32] of the set aside First-tier Tribunal, and preserved in the error of law decision, this is manifestly not a case where there are insurmountable obstacles to family life continuing outside the UK. Mr Dyola made it clear in his witness statement of 12 January 2024 that he has no desire to relocate to Nepal because he intends to remain in the UK where he can ultimately apply to be naturalised as a British citizen. However, this falls a long way short of the kind of obstacles to family life continuing outside the UK as envisaged by Lord Bingham in Huang. The reality is that family life can continue for this couple in Nepal if they choose. This would involve adjustment difficulties and a disruption to the plans they held for their future, but these factors do not prevent the continuation of family life such that the refusal might result in unjustifiably harsh consequences. Similarly, if the couple decide that an application for entry clearance might succeed, a period of separation while this is pursued would not come close to exceptional circumstances.

14. In assessing the public interest, I am bound to have regard to the factors set out at s.117B of the Nationality, Immigration and Asylum Act 2002. The first point is that the maintenance of immigration controls is in the public interest. Here, this factor weighs particularly heavily because the relationship began when the appellant was in the UK on a precarious footing and was maintained since 2017 when she had no lawful basis to stay. This is a lengthy period of unlawful overstaying and was the primary basis on which the application was initially refused.

15. I have no reason to think that the appellant does not speak sufficient English, or will not be financially independent, such that she will be a burden to taxpayers or struggle to integrate into British society. However, as Mr Symes recognised, these are neutral factors. The little weight provision of s.117B(4)(b) was addressed in the error of law decision at [25]-[26]. I attach little weight to the appellant's private life as it has been largely built at a time when she was either in the UK on a precarious basis or unlawfully. Section 117B(6) does not apply on the facts of this case.

16. As is made clear in Alam, and addressed above, the absence of insurmountable obstacles to family life continuing in Nepal is a powerful factor weighing against the notion that the refusal decision is a disproportionate interference with this couple's family life. The reality is that there is nothing to meaningfully prevent the couple from continuing to enjoy family life together in Nepal in circumstances where the application to remain in the UK manifestly did not meet the requirements of the Immigration Rules because the appellant did not have the necessary immigration status. Alternatively, the couple can seek to make a fresh application for entry clearance. On the available evidence, it would be speculative

to assess the prospects of such an application succeeding. On either footing, I am satisfied that the respondent has established that the interference with the appellant and her partner's family life would be proportionate when measured against the strength of the public interest.

Notice of Decision

Upon remaking the decision of Judge Hussain, I dismiss the appeal on Article 8 human rights grounds.

Paul Lodato

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 December 2024