UPPER TRIBUNAL
(Immigration and Asylum Chamber)

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)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Field House
Heard: 13 February 2015

Before

UPPER TRIBUNAL JUDGE GILL

THE QUEEN (ON THE APPLICATION OF HIAHONG CHEN) Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Respondent

Representation:

For the Applicant: Mr I Palmer, of Counsel, instructed by Nag Law solicitors.
For the Respondent: Ms J Thelen, of Counsel, instructed by the Treasury Solicitor.

(i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40.

(ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das v SSHD [2011] EWHC 2070 (Admin)).

(iii) In an application for leave on the basis of an Article 8 claim, the Secretary of State is not obliged to consider whether an application for entry clearance (if one were to be made) will be successful. Accordingly, her silence on this issue does not mean that it is accepted that the requirements for entry clearance to be granted are satisfied.

(iv) In cases where the Immigration Rules (the "IRs") do not fully address an Article 8 claim so that it is necessary (pursuant to R (Nagre)) to consider the claim outside the IRs, a failure by the decision maker to consider Article 8 outside the IRs will only render the decision unlawful if the claimant in fact shows that there has been (or, in a permission application, arguably has been) a substantive breach of his or her rights under Article 8.

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JUDGMENT

delivered on: 24 March 2015

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Judge Gill:

Introduction

1. The applicant is a 29-year-old national of the People's Republic of China (China). She has been granted permission to challenge a decision of the respondent of 25 October 2013 (hereafter the "first decision" or the "first decision letter") refusing her application of 17 September 2013 for leave to remain on the basis of Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") outside the provisions of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "IRs"). The applicant's Article 8 claim was based on her marriage to a Raymond Hoi Wing Cheung, a British citizen born in the United Kingdom.

2. The first decision considered whether there would be insurmountable obstacles to the applicant and Mr Cheung enjoying family life in China but did not consider the possibility of the applicant applying for entry clearance in China.

3. Following the grant of permission, the respondent made a supplementary decision on 21 November 2014 (hereafter the "second decision" or the "second decision letter"). This decision elaborated upon the reasons why there were no insurmountable obstacles to family life being enjoyed in China. It then went on to consider the possibility of the applicant making an application for entry clearance in China in order to join Mr Cheung as his spouse.

4. At the hearing, I granted Mr Palmer's application for permission to amend the applicant's grounds in order to include a challenge to the second decision. I also granted permission to apply for judicial review of the second decision. As a consequence, the issue before me is whether the respondent (in the second decision) unlawfully used an "exceptionality test" or a threshold of exceptionality in applying Chikwamba v Secretary of State for the Home

Department [2008] UKHL 40 when she considered the possibility of the applicant applying for entry clearance in China.

Background facts:

5. The applicant entered the United Kingdom as a student on 30 March 2007. Her leave as a student expired on 30 November 2009 from which time she has remained in the United Kingdom without leave. In November 2008, she met Mr Cheung, who was born in the United Kingdom on 30 September 1984 of parents who were born in Hong Kong. Their relationship began on 18 July 2010. They began living together on 1 January 2012 and were married on 1 October 2012.

The decision letters

6. In the first decision letter, the respondent noted (in the context of the assessment of the applicant's case under para 276ADE of the IRs) that the applicant had parents and siblings who reside in China. This was based on the information provided by the applicant in her application for leave, at A138.

7. On 30 October 2014, the applicant was granted permission to apply for judicial review. In giving his reasons, the Upper Tribunal Judge stated that he had regard to the concession of Mr. Mandalia representing the Secretary of State in R (Iqbal) v Secretary of State for the Home Department [2014] EWHC 1822 (Admin) expressed as follows:

> "*there could therefore conceivably be cases where there were no insurmountable obstacles to the continuation of family life outside the UK, but the requirement to return to the applicant's country of origin to make an application for leave to remain outside the Immigration Rules would be a disproportionate interference with their Article 8 rights."*

8. In the light of this concession, the judge considered it arguable that "*the [first decision letter was] unlawful because the respondent failed to give any consideration (or if she did this is not adequately reasoned) to whether or not the applicant should be permitted to remain outside the rules on the basis of the principles considered by the House of Lords in Chikwamba and subsequently by the Court of Appeal in* [Secretary of State for the Home Department v Treebhowan; Hayat v Secretary of State for the Home Department [2012] EWCA Civ 1054]".

9. After permission had been granted, the respondent made the second decision on 21 November 2014, as stated above. The respondent concluded that the applicant had not demonstrated that there were insurmountable obstacles to family life being enjoyed in China and that she therefore did not satisfy paragraph EX.1(b) of Appendix FM. She also considered the applicant's case in the light of Chikwamba outside the IRs. The relevant paragraphs read:

> "Insurmountable obstacles
>
> Although it is also recognised that your client and her husband are in a genuine and subsisting relationship we are required to consider whether the exceptions *[sic]* paragraph EX.1(b) of Appendix FM can be applied to your client's case. This entails consideration of whether there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> It is firstly noted that your client is not able to demonstrate insurmountable obstacles to family life being lived in China. However, for the sake of completeness in considering whether there are insurmountable obstacles the following points are noted:
>
> - There is no information to show that your client and her husband cannot return to China lawfully and live there. A mere wish/preference to live in UK would not amount to an insurmountable obstacle.

- It is considered that your client and her husband were fully aware of her immigration status since your client was lawfully in the UK on a temporary basis as a student when they met and then remained here unlawfully since 30 November 2009. It is considered that both your client and her husband would have been aware that she may not be able to continue to live here.

- While there may be a cultural barrier for your client's husband to live in China and that some adjustment may be needed, this is not sufficient to amount to an insurmountable obstacle. Just as your client faced a change of culture to live in UK, it is not unreasonable to expect her husband to face a change of culture to live in China in order to continue their life together.

- It is submitted that your client's husband can speak Mandarin. Nonetheless, a lack of knowledge of a language spoken in the country in which the couple would be required to live would not usually amount to an insurmountable obstacle. It is reasonable to conclude that the couple must have been conversing in a commonly understood language whilst in the UK. Therefore, it is reasonable for that to continue outside the UK, whether or not the partner seeks to learn the language spoken in the country of proposed return.

- Even if your client and her husband have adapted to life in the UK, it would not be unreasonable to expect them to return to China and adapt to life there. Although they are receiving accommodation rent free here, because they live with her in-laws, it is considered that your client and her husband could find work in China. Although relocating to China together may cause a significant degree of hardship or inconvenience for your client and her husband, it does not amount to an insurmountable obstacle.

For these reasons it is asserted that there are no insurmountable obstacles to the family life between your client and her husband continuing in Pakistan *[sic]*.

The Secretary of State has also considered your client's application in light of Chikwamba (Chikwamba v Secretary of State for the Home Office [2008] UKHL 40). Although in some (comparatively rare) circumstances, it might not be proportionate to require an applicant to return to their country of origin to seek entry clearance through the correct immigration channels, your client's case does not meet this threshold. **Your client does not have any children, nor are there are other exceptional circumstances which would mean it would be** disproportionate to require her to seek the appropriate entry clearance.

Further consideration has been made in respect of Hayat (Secretary of State for the Home Department v Hayat (Pakistan) [2012] EWCA Civ 1054) which states that it is not only cases where children are involved in which the legitimate aim of controlling immigration is outweighed by the Applicant's circumstances. The Secretary of State submits that **there are no other factors in your client's case which would offset the weight of the Secretary of State's legitimate aim and that it is proportionate to expect her to seek entry clearance as a partner.**

There is a current immigration channel for your client to follow as a partner of a person present and settled in the UK, namely to obtain an entry clearance visa from her country of origin. As such, it considered to be appropriate for the Secretary of State to expect people to use these correct channels, especially in cases such as those which do not involve minors and any exceptional circumstances.

Summary

In summary, the Secretary of State has reviewed the decision to refuse your client's application and is satisfied that it is correct and maintains the original refusal decision. The Secretary of State has carefully considered your client's Article 8 rights and is satisfied that his *[sic]* removal from the United Kingdom would not be in breach of Articles 8 of the European Convention on Human Rights (ECHR). The Secretary of State does not consider your client's return to China to be disproportionate to the permissible aim of maintaining an effective immigration control."

(my emphasis)

The grounds

10. I should first make clear what is not challenged and the grounds upon which permission was refused.

11. The applicant has not challenged the respondent's conclusion in the first decision letter that she does not satisfy the requirements of para 276ADE. In relation to para 276ADE(vi), the respondent considered that the applicant had not shown that she had no social or cultural ties in her home country.

12. In the first decision letter, the decision maker considered the provisions of Ex.1 to Appendix FM. Ex.1 provides as follows:

> **"EX.1.** This paragraph applies if
> (a)
> (i) the applicant has a genuine and subsisting parental relationship with a child who-
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
> (bb) is in the UK;
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
> (ii) it would not be reasonable to expect the child to leave the UK; or
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

13. In the first decision, the respondent considered that Ex.1 did not apply because the applicant had not provided any evidence of a genuine and subsisting relationship with a child and she had not provided any evidence that there were insurmountable obstacles to her family life with Mr Cheung continuing in China.

14. Although the respondent's conclusion that Ex.1 did not apply was challenged in the grounds, permission was refused on this ground.

15. Para 7 of Mr Palmer's skeleton argument reads:

> "In this case it has to be accepted that the applicant would be unable to argue that there are "insurmountable obstacles" (as defined by case law) to returning to China to apply for entry clearance. The applicant however argues that it not necessary or justified and therefore disproportionate under Article 8 ECHR principles."

16. However, at the hearing, Mr Palmer informed me that it was only accepted that the applicant had not placed before the respondent any evidence to show that it would be disproportionate to expect her to return to China. At the same time, he also informed me that he was not able to put forward any exceptional circumstances because he had not been told of any, nor had the respondent before the decisions were made. This alone may suggest that this claim should never have been pursued.

Assessment

17. Statement of Changes in Immigration Rules HC 194 introduced requirements, with effect from 9 July 2012, set out in paras 398, 399 and 399A in criminal deportation cases and paras 276ADE

and Appendix FM in other cases, that are to be satisfied for leave to be granted on the basis of Article 8 under the IRs. In R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin), Sales J (as he then was) said (at para 29) that:

> "…the new rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave."

18. This two-stage approach was further explained by the Upper Tribunal (comprising Cranston J and Upper Tribunal Judge Taylor) in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC). It was approved by the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192, although the Court of Appeal held in MF (Nigeria) that the two-stage approach was not applicable in deportation cases because the provisions of the Rules that are applicable in deportation cases are a "complete code".

19. In relation to non-deportation cases, the two-stage approach has been endorsed more recently by the Court of Appeal in Singh and Khalid v Secretary of State for the Home Department [2015] EWCA Civ 74 (at para 64).

20. It is now generally accepted that the new IRs do not provide in advance for every nuance in the application of Article 8 in individual cases. At para 30 of Nagre, Sales J said:

> "30. … if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."

21. This was also endorsed by the Court of Appeal in Singh and Khalid where Underhill LJ said (at para 64):

> "64. … there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

22. Given that the IRs do not provide for every nuance in the application of Article 8 in individual cases, it is not surprising that it was accepted by Mr. V Mandalia for the respondent in R (Iqbal) that para EX.1.1(b) to Appendix FM of the IRs did not include any consideration of "the Chikwamba point" (at para 34). Mr Palmer and Ms Thelen were therefore agreed that in any case where the question arises as to whether it is disproportionate to expect an individual to return to his or her home country to make an application for entry clearance, this falls for consideration outside the IRs.

23. The judgment of Mr. Ian Dove QC sitting as Deputy High Court Judge (as he then was) in R (Iqbal) states (at para 37) as follows:

> "37. …in Mr Mandalia's submissions it is accepted that the Chikwamba point is one of those potential issues relating to proportionality which is not covered by the drafting of the Rules but which nonetheless if it arises, as it does in this case, will need to be considered when the defendant assesses whether or not, as an exercise of residual discretion outside the

> Rules, allowing leave might be appropriate. There could therefore conceivably be cases where there were no insurmountable obstacles to the continuation of family life outside the UK, but the requirement to return to the applicant's country of origin to make an application for leave to enter the UK would be a disproportionate interference with their Article 8 rights. So much is, in effect, the submission made on behalf of the defendant by Mr Mandalia."

24. This raises two questions, neither of which are material in the instant case because the instant claim falls to be dismissed for the reasons given at para 26 onwards below. However, as they have been raised at the hearing before me, I shall deal with the issues, which are as follows:

    i. Mr Palmer took issue with the suggestion that, in assessing an Article 8 claim outside the IRs, the respondent is considering whether or not the grant of leave might be appropriate in the exercise of her residual discretion outside the IRs. I take the view that a policy which provides for leave to be granted in the exercise of residual discretion if removal would be in breach of Article 8 is not contrary to the Human Rights Act 1998. The obligation of the United Kingdom to secure the rights set out in Article 8 of the ECHR (amongst other rights) to individuals on its territory does not require it to grant any particular form of leave or to provide for leave to be granted as of right. The state's obligation is not to remove the individual in breach of his or her rights under Article 8. A grant of leave pursuant to the exercise of the executive's residual discretion suffices.

    ii. I raised the question whether, if an individual accepts that there are no "insurmountable obstacles" to family life being enjoyed in his or her home country, it would be in breach of Article 8 to require the same individual to return to his or her home country temporarily for the purpose of making an application for entry clearance. Neither Mr. Palmer nor Ms Thelen addressed me on this issue but, having reflected on it, I am inclined to the view that Mr Mandalia was right to suggest in R (Iqbal) that there may well be cases in which there are no insurmountable obstacles to the continuation of family life outside the UK, but the requirement to return to the applicant's country of origin to make an application for leave to enter the UK would be a disproportionate interference with their Article 8 rights. The latter may apply to individuals affected by the decision being separated temporarily because circumstances arise which make such temporary separation disproportionate but which would not arise if they were to continue their family life abroad. This possibility was envisaged in Hayat, where (at para 18) Elias LJ said:

> > "It may at first blush seem odd that Article 8 rights may be infringed by an unjustified insistence that the applicant should return home to make the application [for entry clearance], even though a subsequent decision to refuse the application on the merits will not. The reason is that once there is an interference with family or private life, the decision maker must justify that interference. Where what is relied upon is an insistence on complying with formal procedures that may be insufficient to justify even a temporary disruption to family life. By contrast, a full consideration of the merits may readily identify features which justify a refusal to grant leave to remain."

25. I turn to the other issues raised at the hearing.

26. Firstly, Mr Palmer submitted that the respondent had analysed the judgment in Iqbal and that of Jay J in R (Mohammed) v Secretary of State for the Home Department [2014] EWHC 4392 (Admin) (at para 13) to reach the conclusion that only exceptional cases can succeed under the Chikwamba principle. He submitted that this conclusion was erroneous because para 13 of Mohammed was based upon a misunderstanding of para 30(e) of the judgment of the Court of Appeal in Hayat.

27. In Hayat, Elias LJ considered Chikwamba and three subsequent Court of Appeal judgments[1] and summarised the relevant principles that emerged from these judgments at para 30 as follows:

> "30 In my judgment, the effect of these decisions can be summarised as follows:
>
> a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8 , particularly where children are adversely affected.
>
> b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.
>
> c) Whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in Chikwamba. They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK.
>
> d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance.
>
> e) It will be a very rare case where it is appropriate for the Court of Appeal, having concluded that a lower tribunal has disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. Chikwamba was such an exceptional case. Logically the court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question.
>
> f) Nothing in Chikwamba was intended to alter the way the courts should approach substantive Article 8 issues as laid down in such well known cases as *Razgar* and Huang.
>
> g) Although the cases do not say this in terms, in my judgment if the Secretary of State has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise."

28. Mr Palmer submitted that at para 30.e), Elias LJ was not referring to Chikwamba being an exceptional case on its facts but to the fact that the House of Lords had taken the exceptional course in Chikwamba of reaching its own view of the substantive Article 8 decision (as opposed to remitting the case to the Tribunal to make a fresh decision). He submitted that para 30.e) had therefore been misinterpreted in Mohammed, where at para 13, Jay J said:

> "13. In my judgment the issue is whether the Secretary of State's decision, which is to the effect that this case does not possess exceptional features, is a decision which is Wednesbury unreasonable. The Secretary of State has at least grappled with the issue. Chikwamba appears to have turned on its own particular facts. The Court of Appeal in Hayat noted that it was an exceptional case. In the circumstances of that case there was no sensible reason to require Mr Chikwamba to return to Harare in Zimbabwe and make an application from that jurisdiction."

[1] TG (Central Africa Republic) v Secretary of State for the Home Department [2008] EWCA Civ 997; SZ (Zimbabwe) v Secretary of State for the Home Department [2009] EWCA Civ 590 and MA (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 953.

29. Ms Thelen accepted that the Court of Appeal did not suggest at para 30.e) of Hayat that Chikwamba was an exceptional case on its facts as to the Article 8 analysis, as opposed to it being an example of one of those very rare cases in which it will be appropriate for the Court of Appeal to make the substantive Article 8 decision for itself instead of remitting the case to the Tribunal. I do not think that Jay J was saying at para 13 that Chikwamba was an exceptional case on its facts. Mr Palmer's submission appears to misconstrue the second and third sentences of para 13 of Mohammed and fails to consider the paragraph as a whole.

30. Secondly, Mr Palmer submitted that the respondent had applied an exceptionality test in considering whether the applicant can be expected to return to China to make an application for entry clearance pursuant to Chikwamba. I agree with Ms Thelen that the respondent had not unlawfully applied an exceptionality test for the following reasons:

    i) The mere fact that the word "exceptional" is used does not mean that the test of exceptionality is being applied contrary to the guidance of the House of Lords in Huang v Secretary of State for the Home Department [2007] UKHL 11. In MF (Nigeria), the Court of Appeal accepted (at paras 40 and 41) the submission advanced on behalf of the Secretary of State that the phrase "*it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors*" in para 398, which applies in deportation cases, served the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. At para 42 of MF (Nigeria), the Master of the Rolls said, in effect, that the use of the phrase "exceptional circumstances" does not necessarily mean that a test of exceptionality is being applied. The explanation given at para 42 of MF (Nigeria) was as follows:

> "…it is only in "exceptional" or "the most exceptional circumstances" that removal of the non-national family member will constitute a violation of article 8. In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals."

    ii) Although MF (Nigeria) was a deportation case, there is no reason to think that the use of the word "*exceptional*" or the phrase "*exceptional circumstances*" outside the IRs in non-deportation cases means that the test of exceptionality is being applied contrary to Huang, especially given that:

        a) Strasbourg case-law indicates that, where family life is established when the immigration status of the claimant is precarious, removal will be disproportionate only in "*exceptional cases*" (Nagre at (41)); and

        b) the guidance applied by the case-workers in assessing Article 8 claims outside the IRs defines "exceptional" as follows (Nagre at para 14):

> ""Exceptional" does not mean "unusual" or "unique". Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1 of Appendix FM have been missed by a small margin. Instead, "exceptional" means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely."

At para 14 of Nagre, Sales J accepted that the definition of "*exceptional circumstances*" which is given in the guidance equates such circumstances with there being unjustifiable hardship involved in removal such that it would be disproportionate – i.e. would involve a breach of Article 8.

31. Yet, I regularly encounter objections by applicants to the use of the word "*exceptional*" or the phrase "*exceptional circumstances*" by decision-makers in assessing Article 8 claims outside the IRs on the ground that it shows that the respondent has unlawfully applied the test of exceptionality contrary to Huang. The mere use of these phrases is not enough to show that the test of exceptionality is being used contrary to Huang. An applicant must point to a defective process of reasoning that shows that the test of exceptionality was in fact applied.

32. In the instant case, the decision-maker plainly considered the question of proportionality. This is evident not only from the fact that the words "*proportionate*" and "*disproportionate*" were used a total of three times in the second decision letter in the assessment of the Article 8 claim outside the IRs and once in the "Summary" at the end but also from the reasoning (see the words in bold in the quote at my para 8 above) which shows that the decision-maker looked for factors to weigh against the state's interests.

33. I therefore reject Mr Palmer's submission that the respondent had unlawfully applied the test of exceptionality contrary to guidance in Huang.

34. The third argument concerned the proposition advanced on the applicant's behalf, in reliance upon Chikwamba, that it will only rarely be proportionate to expect a foreign national who is enjoying family life in the United Kingdom to return to his or her home country in order to make an application for entry clearance. In R (Kotecha and Das) v Secretary of State for the Home Department [2011] EWHC 2070 (Admin), Burnett J (as he then was) considered the judgment in Chikwamba and concluded, at para 48:

> "48. In suggesting that the course proposed by the Secretary of State [of requiring a claimant to make an application for entry clearance from his or her home country] would only 'comparatively rarely' be proportionate in a case involving children I do not understand Lord Brown to be laying down a legal test. Rather, he was expressing the expectation of the Committee that, having undertaken the careful evaluation explained on the same day in *EB (Kosovo),* the balance on proportionality would fall in favour of the individual in cases such as *Chikwamba.* Put differently, such cases would fall within the minority envisaged by the House of Lords in *Huang*, or more generally the exceptions referred to in the Strasbourg Court, in which article 8 would provide an obstacle to removal."

35. Thus, it is misconceived to suggest, in reliance upon Chikwamba, that it is only rarely that it will be proportionate to expect a claimant to make an application for entry clearance from abroad *irrespective of his or her individual's circumstances.* Lord Brown specifically said in Chikwamba (at para 42) that:

> "42. In an article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant".

36. Mr Palmer relied upon para 30 c) and d) of Hayat to suggest that there must be a "*sensible reason*" to require an individual to make an application for entry clearance from abroad. I reject the submission. I do not accept that, in using the phrase "*sensible reason*", Elias LJ was setting out the test for applying the guidance in Chikwamba, nor that he reversed the burden of proof. The burden remains upon the applicant to place before the Secretary of State all material that he or she relies upon to suggest that removal pursuant to the refusal of leave would breach Article 8 (Kotecha, at para 56).

37. Mr Palmer also relied upon the judgment of Turner J in R (Zhang) v Secretary of State for the Home Department [2013] EWHC 891 (Admin), in particular, paras 74 and 77, which I will now set out, including para 78:

> "74. Counsel for the Secretary of State referred to a number of cases in an effort to persuade the court that, in the face of repeated authoritative pronouncements to the contrary, it was still only in exceptional (or a small minority) of cases that Article 8 would frustrate the requirement that an applicant should leave the country before making an application. Despite his strenuous efforts to extract some forensic crumbs of comfort from a number of the fifty or more cases in which Chikwamba has been recently considered none of these could bear the weight of the his argument.
>
> Conclusion on requirement (h)(i)
>
> 77. I, therefore, come to the clear view that save in particular cases (such as those involving a poor immigration record – as in Ekinci v Secretary of State for the Home Department [2003] EWCA Civ 765 or where the engagement of Article 8 is very tenuous - as in R (Mdlovu) v Secretary of State for the Home Department [2008] EWHC 2089) it will be rare indeed that the immigration priorities of the state are such as to give rise to a proportionate answer to Article 8 rights to family life where requirement (h)(i) is engaged.
>
> 78. It must follow from this that the application of the blanket requirement to leave the country imposed by paragraph 319C(h)(i) of the immigration rules is unsustainable. It is simply not consistent with the ratio of the decision in Chikwamba that this paragraph, as presently worded, should continue to form part of the rules. I am not prepared, however, to make a formal declaration on the matter. It is not the function of the court to redraft the rules but I would predict that the Secretary of State would in future face difficulties in enforcing requirement (h)(i) as presently worded in all but a small number of cases in which Article 8 is engaged."

38. Mr Palmer relied upon para 74 of Zhang to support the proposition that it is only in a small minority of cases that a claimant should be required to leave the United Kingdom to make an application for entry clearance. However, as paras 77 and 78 make clear, Turner J was considering the blanket requirement imposed by para 319C(h)(i) of the IRs the effect of which precluded the claimant from making an application for leave to remain in the United Kingdom but not from making an application for entry clearance. Rule 319C was framed in mandatory and unambiguous terms (paras 20 and 21 of Zhang). In other words, Turner J was considering a rule that required the claimant to leave the United Kingdom for no reason other than that rules must be obeyed irrespective of the circumstances. It is in that context that para 77 of Zhang should be considered. In my judgement, Zhang is entirely consistent with the other authorities discussed above.

39. In my judgement, if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted ***and*** that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was "precarious". In other words, in the former case, it would be easier to show that the individual's circumstances fall within the minority envisaged by the House of Lords in Huang or the exceptions referred to in judgments of the ECtHR than in the latter case. However, it all depends on the facts.

40. In Chikwamba, it was accepted that an application for entry clearance would succeed and that went in the claimant's favour. It is unresolved whether, conversely, the Secretary of State's view that an application for entry clearance would be unlikely to succeed (if she took that view in any individual case) means that the Chikwamba principle cannot apply. I did not hear argument on this point. I therefore reach no concluded view on it. However, in my experience, applicants frequently rely upon the Secretary of State's silence on this point as synonymous with an acceptance by her that an application for entry clearance would succeed, in that, it is said that the Secretary of State has not said that an application would not succeed. To state the obvious, if an individual makes an application for leave to remain on the basis of Article 8, the Secretary of State is only obliged to reach a decision on that application. She is not obliged to consider further (although she is not prevented from doing so if she wishes to) whether an application for entry clearance would succeed.

41. In the instant claim, the applicant has relied upon the Chikwamba to make good her Article 8 claim. She has not placed before the respondent any evidence to show that her removal (if removal notionally took place consequent upon the refusal of leave to remain on the basis of Article 8) would interfere with any family life being enjoyed. It has been accepted on her behalf that there are no insurmountable obstacles to family life being enjoyed between her and Mr Cheung in China. Mr Palmer appeared to retract from para 7 of his skeleton argument, which specifically states that it has to be accepted that the applicant is unable to argue that there are no insurmountable obstacles to her returning to China to apply for entry clearance. Even if it is the case that this was not a concession as to the facts, the reality is that the applicant has not placed any evidence of her circumstances and/or those of Mr Cheung. The couple do not have children. There was quite simply no evidence before the respondent to show that the decision would result in any interference with family life.

42. The applicant has relied solely upon the case-law concerning the Chikwamba principle in an attempt to make good her Article 8 claim outside the IRs. Unfortunately, this misguided approach is not uncommon. Indeed, in the instant claim, it would be correct to say that such evidence as there was before the respondent undoubtedly shows that the respondent was fully entitled to take the view that it would be proportionate to require the applicant to make an application for entry clearance from China, pursuant to the guidance in Chikwamba. Her parents and siblings live in China. There was no evidence or explanation why, even if there were no insurmountable obstacles to family life being enjoyed on a permanent basis in China, temporary separation for the purpose of making an application for entry clearance would interfere with family life. The applicant simply has not descended into any detail about her Article 8 claim, choosing instead to rely upon legal principles. She made no case as to any form of hardship that she and/or her husband would suffer if she were to be required to make an application for entry clearance.

43. Against all this was the fact that the applicant's leave had expired well before she and Mr Cheung began their relationship. They were married in the full knowledge that the applicant did not have leave and that her immigration status was precarious. There was no evidence of the length of the disruption to family life (if family life was indeed disrupted) if the applicant returned to China to apply for entry clearance. Weighing all of the factors in the balancing exercise, there was plainly only one answer, on any legitimate view.

44. Finally, I turn to consider Mr Palmer's argument that the second decision was prompted by the grant of permission. Ms Thelen did not accept that the respondent was forced to make the second decision by the grant of permission. In this respect, she relied upon paras 70 and 71 of Singh and Khalid, where the Court of Appeal considered point 3 of para 9 of the judgment of Mr. Michael Fordham QC sitting as a Deputy High Court Judge in R (Ganesabalan) v Secretary of State for the Home Department [2014] EWHC 2712 (Admin). Para 9 of Ganesabalan reads:

> "Where a person seeks leave to remain, relying on private life or family life or both, and relying on Article 8, and where the claim fails at the first stage by reference to the applicable Immigration Rules (Appendix FM and Rule 276ADE):
>
> (1) There is always a "second stage" in which the Secretary of State must consider the exercise of discretion outside the Rules and must be in a position to demonstrate that she has done so.
>
> (2) The extent of that consideration and the extent of the reasoning called for will depend on the nature and circumstances of the individual case.
>
> (3) In a case in which the consideration or reasoning is legally inadequate, and leaving aside cases in which there is a right of appeal to a tribunal, it is open to the Secretary of State to resist the grant of judicial review if she is able to demonstrate that the decision would inevitably have been the same."

45. In the case of Khalid in Singh and Khalid, the decision letter treated the fact that Ms Khalid could not satisfy the requirements of the IRs as definitive. There was no record of any consideration of whether her claim under Article 8 involved issues that were not adequately addressed by reference to the IRs. She had relied upon the Chikwamba principle. The Court of Appeal said at para 68 of the judgment in Singh and Khalid that there was no reference to the possibility of a claim outside the IRs at all and, at paragraph 69, that Mr. Blundell for the Secretary of State rightly did not seek to defend the Secretary of State's failure the address the question of whether Ms Khalid had a claim outside the IRs.

46. The question then arose whether the Secretary of State's failure to consider Ms Khalid's Article 8 claim outside the IRs meant that the decision was unlawful. Underhill LJ noted that Mr. Fordham at point (3) of Ganesabalan treated the failure to consider the Article 8 claim outside the IRs as itself rendering the decision unlawful but if the overlooked claim was hopeless the Court would not grant relief. Underhill LJ considered the decisions of the House of Lords in Belfast City Council v Miss Behavin' Limited [2007] UKHL 19 and R (Nasseri) v Secretary of State for the Home Department [2009] UKHL 23 which establish that "*when a claimant seeking judicial review alleged infringement of a Convention right the court is concerned not with the quality of the decision-making process but with whether the claimant's rights had been … violated*".

47. Underhill LJ concluded that a procedural failure of the sort that had occurred in the case of Ms Khalid did not necessarily render the Secretary of State's decision unlawful. Underhill LJ accepted the submission of Mr. Blundell for the Secretary of State that it did not matter whether the Secretary of State had failed consciously to consider whether Ms Khalid had an Article 8 claim outside the IRs unless there was in fact such a claim or, in the case of a permission application, unless there was arguably such a claim (para 70 of Singh and Khalid). Underhill LJ held that Ms Khalid could only challenge the Secretary of State's decision by showing a substantive breach of her rights under Article 8 and that this was in form a different approach from that advanced by Mr. Fordham at point (3) of his summary at para 9 of Ganesabalan, albeit that "*in substance the two approaches come to much the same thing*".

48. Para 71 of Singh and Khalid is very important and is worth emphasising. In cases where the IRs do not fully address an Article 8 claim so that it is necessary (pursuant to Nagre) to consider the claim outside the IRs, a failure by the decision-maker to consider Article 8 outside the IRs will only render the decision unlawful (and thus liable to be quashed) if the claimant *in fact* shows that there has been (or, in a permission application, arguably has been) a substantive breach of his or her rights under Article 8.

49. I agree with Ms Thelen that, even if the second decision had not been made and the only issue before me was whether the first decision was lawful, it is clear that the first decision was lawful

notwithstanding the failure of the decision-maker to consider the applicant's case (that it would be disproportionate to require her to apply for entry clearance) outside the IRs. This is because she had no Article 8 claim outside the IRs, for the reasons given above.

50. For all of the reasons given above, the first decision and the second decision are lawful.

Decision

The claim is therefore dismissed.

Signed Date: 24 March 2015
Upper Tribunal Judge Gill