IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26033/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 May 2015	**On 21 July 2015**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

HEATHER LEIGH VOGEL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Burnett, instructed by Pickup Scott Solicitors
For the Respondent: Miss A Holmes, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of South Africa born 15 July 1989. She entered the United Kingdom on 28 May 2008 as a visitor with leave conferred until 29 November 2008, and has lived here since that date. The appellant thereafter made an application for leave to remain as a dependent relative, which was refused in July 2009. She subsequently made an application for a Certificate of Entitlement to a Right of Abode, but this application was rejected in a decision of 5 August 2011 and the Secretary

of State thereafter maintained her position in this regard in a decision of 6 November 2012.

2. A further application for a Certificate of Entitlement to a Right of Abode was made by the appellant on the 17 May 2013, which was once again refused on 12 June 2013. The substance of this decision reads as follows:

> "You have applied for a Certificate of Entitlement on the basis of being born outside the United Kingdom after 1 January 1983 to a person born, registered or naturalised in the United Kingdom prior to your birth.
>
> You have provided birth certificates for your father, mother, paternal grandparents and marriage certificates for your parents and paternal grandparents in support of your claim. Based on the evidence provided the Secretary of State is of the opinion that you have no claim to a Certificate of Entitlement.
>
> Your father was born in South Africa in 1965 and became a British citizen and citizen of the United Kingdom and Colonies at birth by descent under Section 5(1) of the British Nationality Act 1948 due to his father being born in the United Kingdom. Any consular registration after his birth did not alter his birth status. Your father became a British citizen by descent on 1 January 1983 under Section 11(1) of the British Nationality Act 1981. British citizenship cannot be passed down by two generations except in certain circumstances, none of which apply in this case. We are unable to proceed with your application."

3. The appellant appealed this decision to the First-tier Tribunal and, by way of a determination promulgated on 4 November 2013, First-tier Tribunal Judge Hopkins dismissed the appeal on all grounds. On 11 March 2014 Upper Tribunal Judge Perkins granted the appellant permission to appeal and thus the matter came before me, initially on the 9 April 2014.

Error of Law

4. At the outset of the aforementioned hearing Miss Holmes properly accepted that the First-tier Tribunal had erred in law by failing to undertake a substantive consideration of the Article 8 ECHR ground relied upon by the appellant.

5. As to the issue of whether the appellant is entitled to a Certificate of Entitlement, it is clear this revolves around the application and relevance of section 7 of the British Nationality Act 1948 - a provision which the First-tier Tribunal failed to give any consideration to. As a consequence, Ms Holmes also accepted that the First-tier Tribunal's determination of this issue was also flawed by legal error.

6. For the above reasons I found that the First-tier Tribunal's determination contained an error on a point of law capable of affecting the outcome of the appeal and I set it aside. The hearing of the appeal was subsequently adjourned.

7. Unfortunately, in the period that followed there were substantial difficulties in finding a date for the further hearing which was convenient

to both myself and the parties' representatives. Regrettably this could not be achieved until 28 May 2015. This delay did though have the positive consequence of enabling the parties to obtain further evidence in relation to their respective cases, all of which has been of significant assistance to me in coming to the conclusions set out below.

Remaking of decision under appeal

Dramatis Personae

8. In order to properly set the submissions in context I shall first identify the *dramatis personae* as well as the facts which are not in dispute.

9. The appellant's paternal grandfather, Mr Allen Vogel, was born in the United Kingdom on 5 July 1940. He married Ms Eileen Vogel on 4 April 1964 - Ms Vogel also being born in the United Kingdom, on 11 April 1944. Both of the appellant's paternal grandparents are therefore British nationals by birth.

10. They lived together in South Africa where their son, the appellant's father Mr Allan Seton Vogel, was born on 11 July 1965. At the time of his birth the appellant's father was a citizen of the United Kingdom and Colonies by descent by operation of Section 5(1) of the British Nationality Act 1948. On 25 June 1969 the appellant's father's birth was registered at the British Consulate in Johannesburg. It is the purpose, effect and consequence of this registration that forms the core of the appellant's claim to be a British citizen.

11. The appellant's parents married in South Africa on 15 July 1989 and the appellant was born in that country on 1 December 1989.

Entitlement to a Right of Abode

Summary of Submissions

12. No disrespect in meant in summarising the parties' submissions in the terms that I do below. Both parties made comprehensive and well-structured submissions of some complexity but they can be resolved down to the following points.

13. Mr Burnett submits that the registration of the appellant's father's birth at the British Consulate in Johannesburg on 25 June 1969 was a registration falling within the confines of Section 7 of the British Nationality Act 1948. The consequence of such registration, it is said, was that the appellant's father became a CUKC *"otherwise than by descent"* as of its date. Prior to this, the appellant's father had been a CUKC *"by descent"* as a consequence of the operation of section 5 of the 1948 Act.

14. It is said that the appellant's father was, therefore, a British citizen *"otherwise than by descent"* as of the date of the appellant's birth. As a consequence the appellant, having been born outside the United Kingdom

after the coming into force of the 1981 Act, is also a British citizen by operation of section 2(1)(a) of that Act.

15. Miss Holmes disputes little of the above analysis save that she does not accept (1) that the appellant's father has been registered pursuant to Section 7 of the 1948 Act or, (2) if he was so registered that such registration had the effect of altering his status from a CUKC *"by descent"* to a CUKC *"otherwise than by descent"*. Consequently, it is said that he became a British Citizen *"by descent"* upon commencement of the British Nationality Act 1981 and, in such circumstances, the appellant is not a British citizen – as to which see section 2(1) of the 1981 Act.

Legal Framework

16. It is prudent at this stage to set out the relevant legislative framework in some detail.

17. Sections 2 and 14 of the British Nationality Act 1981 read as follows:

> "2. **Acquisition by Descent**
>
> (1) A person born outside the United Kingdom and the qualifying territories after commencement shall be a British citizen if at the time of the birth his father or mother –
>
> (a) Is a British citizen otherwise than by descent ...
>
> 14. **Meaning of British Citizen (by descent).**
>
> (1) For the purposes of this Act a British citizen is a British citizen 'by descent' if and only if –
>
> (a) ....
>
> (b) Subject to Subsection (2), he is a person born outside the United Kingdom before commencement who became a British citizen at commencement and immediately before commencement:
>
> (i) Was a citizen of the United Kingdom and Colonies by virtue of s. 5 of the 1948 Act (citizenship by descent) …."

18. Turning to the British Nationality Act 1948 - sections 5 and 7 read:

> "5. **Citizenship by Descent**
>
> (1) Subject to the provisions of this section, a person born after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by descent if his father is a citizen of the United Kingdom and Colonies at the time of birth.
>
> (2) Provided that if the father of such a person is a citizen of the United Kingdom and Colonies by descent only, that person shall not be a citizen of the United Kingdom and Colonies by virtue of this section unless –
>
> (a) …

(b) That person's birth having occurred in a place in a foreign country other than a place such as is mentioned in the last forgoing paragraph, the birth is registered at a United Kingdom Consulate within one year of its occurrence, or, with the permission of the Secretary of State, later; or…

7. **Registration of Minors**

(1) The Secretary of State may cause the minor child of any citizen of the United Kingdom and Colonies to be registered as a citizen of the United Kingdom and Colonies upon application made in the prescribed manner by a parent or guardian of the child.

(2) The Secretary of State may, in such special circumstances as he thinks fit, cause any minor to be registered as a citizen of the United Kingdom and Colonies."

19. Moving on to the regulations relevant to my consideration. I turn first to the British Nationality Regulations 1948 (Number 2721/1948). Paragraph 3 of these Regulations reads as follows:

"3. An application for the registration of a minor child of a citizen of the United Kingdom and Colonies as a citizen thereof made under subsection (1) of section 7 of the Act shall be made in writing and shall include the following particulars, that is to say:-

(a) A statement whether the applicant is a parent or guardian of the child and, if he is a guardian, how he became a guardian;

(b) A statement showing that a parent of the child is, or if deceased was, a citizen of the United Kingdom and Colonies;

(c) A statement of the reasons for which it is desired that the child should be registered as a citizen of the United Kingdom and Colonies."

20. Paragraph 5(3) of the same Regulations states:

"5(3)An application made in accordance with Regulation 3 of these Regulations shall be made to the authorities specified in the last foregoing paragraph, so however that references therein to the place of residence of the applicant shall be construed as references to the place of residence of the minor child in respect of whom the application is made."

21. Regulation 19(1) reads:-

"19(1) Subject to the provisions of this Regulation, the fee specified in the Seventh Schedule hereto may in the United Kingdom be taken shall be applied in the manner set out in the said Schedule."

22. I finally turn to the Registration of Births and Deaths (Consular Offices) Regulations, 1948 (Number 2837/1948). The following regulations are of relevance:

"2. For every consular district there shall be kept –

(a) A consular register of births, in the form A set out in the Schedule to these Regulations, for recording the births of citizens of the

United Kingdom and Colonies born in the district on or after 1 January 1949, and also, in cases falling within Regulation 13 of these Regulations, the birth of certain citizens of the United Kingdom and Colonies born outside the district…;

7. Subject to the provisions of the two next succeeding Regulations, where the birth or death of a citizen of the United Kingdom and Colonies, or of a British subject without citizenship, is reported, either orally or in writing, to a consular officer as having occurred within his district at any time during the seven years immediately preceding, the officer shall register the birth or death if he is satisfied as to the nationality of the child or the deceased person and as to the other facts of the case….

19. (1) A certified copy of an entry in a counsellor register of births or deaths shall be issued by the consular officer on request and on payment of the prescribed fee ….

21. The fees to be charged in respect of entry in consular registers of births and deaths and in respect of certified copies of entries in such registers shall be such fees as may from time to time be prescribed under the Consular Salaries and Fees Act 1891."

Discussion and conclusions

23. The first question I must determine is whether the appellant's father was registered pursuant to section 7 of the 1948 Act. The burden of proof is on the appellant to the balance of probabilities.

24. In a witness statement drawn by the appellant's paternal grandmother on 24 April 2014, and adopted at the hearing without being the subject of cross-examination, the following is said:

> "On the 11th of July 1965 our first child, Allan Seton Vogel was born. On the 15th of May 1967 our second son, Andrew David Vogel was born.
>
> At this stage of our lives we were not sure if we were going to remain in South Africa and whilst we were renewing our British passports we were advised by the British Consulate to register our children as British Nationals as this would ensure their nationality. We were told to do this as South Africa was no longer part of the Commonwealth.
>
> The reason for doing this was that if the country should become politically unstable then we would be entitled to leave the country with our children knowing that they were British and without the need of obtaining permission from the South African government.
>
> My husband was not earning much at this time and it was expensive to register them. We had to save up for a few years to get both my sons registered. This is why they were not registered at the time of their births.
>
> We had a daughter, Sharon Leslie Vogel on 26th February 1971 and we had her registered too."

25. The only relevant documentation produced by the appellant on this issue is what is described in the index to the appellant's bundle as a *"copy birth certificate of the appellant's father"*. In addition to identifying the

appellant's father's name and date of birth, this document records the birth as having taken place *"within the district of the British Consul-General at Johannesburg"* – with the date of registration being recorded thereon as 25 June 1969.

26. The notice at the end of this document reads:

> "I, Douglas Aubrey Herridge, Her Britannic Majesty's Vice Consul at Johannesburg, do hereby certify that this is a true copy of the entry of the birth of Allan Seton Vogel, No. 73, in the register book of births kept at this Consulate – General"

27. Mr Burnett's primary submission is that this registration of 25 June 1969 is a registration for the purposes of section 7 of the 1948 Act. I do not accept that this is so.

28. I do not accept Mr Burnett's submission that the birth certificate referred to in paragraphs 25 and 26 above supports in any way the assertion that such registration was a registration of the purposes of section 7 of the 1948 Act. This certificate makes no reference to section 7 of the 1948 Act on its face, nor does it make reference to the registration of the appellant's father as a CUKC. It does, however, specifically refer to the entry of the appellant's father's birth in the "*register book of births".*

29. Contrary to that commended by Mr Burnett, the registration of a birth at a Consulate and registration of a minor as a CUKC pursuant to section 7 of the 1948 Act are not one and the same thing. Had this been Parliament's intention then it is difficult to understand why the language used in section 7 and that used in section 5(1)(b) is the not the same – the latter specifically referring the fact of the *"birth"* being registered – unlike in section 7 in which reference is made to registration as a CUKC.

30. This conclusion is further supported by the existence and terms of both the British Nationality Regulations 1948 and The Registration of Births and Deaths (Consular Offices) Regulations 1948.

31. The two sets of Regulations were both made in December 1948. Regulation 2 of the latter requires every consular district to keep a register recording the fact of births of CUKC's born in its district. By regulation 7 therein such a birth can be reported orally or in writing, and if so reported the birth must be registered if the relevant official is satisfied as to the nationality of the child and *"other facts of the case".*

32. The procedure for registration of a minor as a CUKC under the British Nationality Regulations 1948 is, however, markedly different and much more prescriptive – as one would have expected given the terms of section 7 of the 1948 Act. There must be an 'application' for registration, unlike under the Registration of Births and Deaths Regulations pursuant to which the registering official can act upon receipt of an oral 'report' of a birth of a relevant person. Furthermore, an application made under British Nationality Regulations 1948 must be made in writing and must be

accompanied a statement identifying (i) whether the applicant is a parent or guardian of the minor child being registered, (ii) whether such person is a CUKC and (iii) why it is desired the minor child be registered; whereas a registration of a birth contains no such requirements for the production of specified information.

33. Looking at the structure and content of the 1948 Act and the aforementioned two sets of 1948 Regulations it is clear in my conclusion that the registration of a birth with a consular office is not of itself a registration under section 7 of the 1948 Act.

34. Having come to this conclusion I now turn on facts of the instant case to determine whether it has been demonstrated that the appellant's father was registered pursuant to section 7 of the 1948 Act. I conclude that it has not been demonstrated that he was.

35. As set out earlier, I do not accept that the 'birth certificate' showing registration of the appellant's father in the book of births at the Consulate in Johannesburg on 25 June 1969 demonstrates there has been a registration for the purposes of section 7 of the 1948 Act. Whilst the appellant's grandmother provides unchallenged evidence of her recollection of the events in this regard from the late 1960's, and specifically asserts that she and her husband were advised to register their children's births as 'British Nationals' – this evidence lacks detail. There is no evidence, for example, as to the process that was undertaken to register the appellant's father, whether this was done orally or in writing or whether the application was accompanied by a statement of the type required by British Nationality Regulations 1948.

36. There is also no evidence that the appellant's grandmother undertook more than one registration process on behalf of her son (the appellant's father). I observe in this regard that the timing of the registration of the appellant's father's birth with the Consulate, as identified on the birth certificate, accords with the timeline for the registration referred to in the appellant's grandmother's statement.

37. Whilst the appellant's grandmother cannot be criticised in any way for the lack of detail in her evidence, given that the she is being asked to recall events which took place over 50 years ago, the burden of proof nevertheless lies on the appellant. Having considered all of the evidence before me I am not satisfied that the appellant has demonstrated to the balance of probabilities that her father was registered as a CUKC pursuant to section 7 of the 1948 Act.

38. Consequently, I conclude that the appellant's father became a British citizen *"by descent"* upon commencement of the 1981 Act and also had such status at the time of the appellant's birth. The appellant, being born outside the UK, did not therefore acquire British citizenship from her father at birth.

39. Accordingly, the appellant's appeal against the decision refusing her a Certificate of Entitlement to a Right of Abode is dismissed.

Article 8 ECHR – Decision and Conclusions

40. Both parties are in agreement that I should also consider whether the Respondent's decision leads to a breach of Article 8 ECHR - such decision leaving the appellant without lawful authority to remain in the UK and thereby requiring her to leave the country with immediate effect.

41. Mr Burnett properly did not assert that the appellant meets the requirements of the Immigration Rules relating to family and private life i.e. paragraph 276ADE or Appendix FM to the Rules. She clearly does not.

42. I therefore turn to consider Article 8 ECHR outwith the confines of the Rules. There have been numerous judicial pronouncements relating to the task that the Secretary of State and the Tribunal must undertake when considering such issue – the most recent statements by the Court of Appeal being found in Singh v The Secretary of State for the Home Department, Khalid v The Secretary of State for the Home Department [2015] EWCA Civ 74; PG (USA) v The Secretary of State for the Home Department [2015] EWCA Civ 118 and Secretary of State for the Home Department v SS (Congo) and Others [2015] EWCA Civ 387. I have taken into account and applied the *ratio* of these decisions to my considerations.

43. In summary, a failure to meet the requirements of the Immigration Rules is a weighty factor in determining an Article 8 claim outside the Rules, such weight being particularly significant where the Rules provide a *"complete code"* or where *"any gap between the Rules and what Article 8 requires is comparatively narrow"*; this being because such a claim will already have been addressed to a significant extent when rejecting it under the Rules. Where there are matters that are substantial and which could play no, or no significant, part in the consideration under the Rules, then a full assessment will be required in which they are balanced against all other relevant considerations including the very weighty public interest in effective immigration control.

44. Moving to the relevant circumstances of the appellant's claim. I take the following factual matrix from the First-tier Tribunal's determination:

> "(8) In 1999 the Appellant's parents divorced. In 2002 the Appellant's father moved to the UK. He was able to do so by reason of his British citizenship…
>
> (9) The Appellant remained in South Africa with her sister and mother. She and her sister used to come to the UK from time to time to visit their father.
>
> (10) The Appellant's mother was concerned about the level of crime in South Africa and so decided it was best for her and her daughters to relocate to the UK. Initially Kelly [the Appellant's sister] came on her own, so that she could go to school in Wendover, Buckinghamshire. This was in August 2007.

> (11) The Appellant and her mother came in May 2008. The Appellant's mother obtained a passport for the journey, as she has British citizenship through her father, who was born in the UK…
>
> (12) The Appellant came with her South African passport…It shows she arrived on 28th May 2008 and was given leave to enter for six months. She says this was as a visitor. Her leave to remain has never been extended…
>
> (13) Efforts were then made to enable the Appellant and her sister to acquire British citizenship. Her sister, who was under the age of 18, was able to register as a British citizen…
>
> (14) But things did not go smoothly for the Appellant. She was over the age of 18, so could not register as a British citizen under section 3 of the British Nationality Act 1981, as her sister had done. After twice being sent the incorrect forms, she was advised that she should apply as a dependent relative of a British citizen under paragraph 317 of the Immigration Rules. On 15 July 2010 this application was refused because it was considered that she was not living alone outside the UK in the most exceptional compassionate circumstances. The refusal was not accompanied by any decision to remove her from the UK, so she did not have a right of appeal…
>
> (16) Whilst she has been in the UK, the Appellant has been studying. Initially she studied at Amersham and Wycombe College for a foundation degree in Art and Design. Then she followed a course at Bournemouth University, which resulted in her obtaining a degree in Animation Production.
>
> (17) In 2009 whilst at Bournemouth University, she met her boyfriend…who was on the same course. They have continued to be together since. He is a British citizen, who was born in the UK…
>
> (18) The Appellant lives with her father in…Milton Keynes. Her boyfriend lives in…Milton Keynes with his parents. The Appellant's mother lives…in the Aylesbury area. The Appellant's sister lives in Aylesbury. The appellant's grandmother, Eileen Vogel, also lives in Aylesbury. All these persons are British citizens. The Appellant's only close relative in South Africa is her grandmother on her mother's side. She is in a care home so she could not support the Appellant there…
>
> (20) …[the Appellant] is not currently able to take up any employment because of her lack of immigration status. The bundle shows copies of emails showing interest in her work in the animation field. In the meantime she is occupying herself by doing voluntary work at charity shops…"

45. The appellant has now given further evidence to the effect that since the hearing before the First-tier Tribunal her long-term relationship has ended. She now lives with her mother, having moved in with her last year. She was previously living with her father as was detailed in the First-tier Tribunal's determination. The appellant's mother supports her financially and the appellant visits her father weekly or fortnightly. I accept this evidence as truthful.

46. On the evidence before me I accept Ms Holmes submission that the appellant has not established that she has a family life with anyone in the United Kingdom. In coming to this conclusion I have directed myself to, and applied, the judicial learning set out in paragraphs 48 to 72 of the

Upper Tribunal's decision in Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC).

47. Whilst the appellant is currently living with her mother and is financially dependent upon her because of her inability to work, there is no particularised evidence of any emotional ties or bonds between them over and above those one would normally expect to see between an adult child and that child's parent. It is also relevant that the appellant was previously living separately from her mother, both during the time she was living with her father and, more significantly, during the years she spent living in Bournemouth whilst at university. Looking at all the evidence in the round, which on this issue is limited, I do not accept that the appellant has demonstrated that she has a family life for the purposes of Article 8 ECHR with anyone in the United Kingdom.

48. Clearly, the appellant has established a significant private life in the UK since her arrival here in 2008, during which time she has studied extensively and undertaken charity work. Her relationships with her numerous family members in the UK, including her parents and siblings, also form a significant part of her private life here.

49. I find that requiring the appellant to leave the United Kingdom would interfere with her private life here and that such interference would be of sufficient severity so as to engage Article 8.

50. Given my findings above rejecting the appellant's claim that she is entitled to a right of abode in the UK, there can be no dispute that requiring her to leave would be in accordance with the law (in the wider sense given to this phrase when the ECHR is under consideration), and would be in pursuance of a legitimate aim.

51. The final issue before me is that of proportionality.

52. From 28 July 2014, as a consequence of the introduction of sections 117A-117D of the Nationality Immigration and Asylum Act 2002, I am required to take into account a number of specified considerations. In doing so in this case I observe that the appellant can speak English fluently. Furthermore, I accept, given the appellant's qualifications and the 'interest' that has been shown by potential employers in her skill set – that it is unlikely that she would be a burden on the taxpayer if she remained here. She has also integrated into society in the UK, and would be further integrated if she were given leave to remain.

53. By section 117B(5) I am required to give little weight to private life established by a person at a time that such person's immigration status is precarious. The appellant's status in the UK has at all times been precarious, given that her continued presence here has, at all times, either been unlawful or dependent on obtaining a further grant of leave (See AM (s117B) Malawi [2015] UKUT 0260 (IAC)). I therefore attach little weight to the private life she has established during this period.

54. The appellant can gain no benefit from section 117B(6), as she has no qualifying partner or child.

55. Mr Burnett placed significant reliance on the application of the 'principles' laid down by their Lordships House in Chikwamba v SSHD [2008] UKHL 40. He submitted that the appellant meets all of the requirements of paragraph 186 of the Immigration Rules, save that she does not hold entry clearance for entry in such capacity (paragraph 186(vi)). There is, he asserted, no sensible reason to require the appellant to return to South Africa simply in order for her to make an application for entry clearance, which would be bound to succeed. Such an approach would, he submitted, be disproportionate given the appellant's circumstances and ties to the UK, her lack of ties to South Africa and the precarious security situation there.

56. In Secretary of State for the Home Department v Treebhowan; Hayat v Secretary of State for the Home Department [2012] EWCA Civ 1054], Elias LJ gave consideration both to the opinions in Chikwamba and number of subsequent decisions of the Court of Appeal - summarising the judicial learning to be derived therefrom in the following terms:

> "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."

57. In the more recent decision of the Court of Appeal in Agyarko & Ors v SSHD [2015] EWCA Civ 440, Sales LJ – with the agreement of Longmore and Gloster LJJ said as follows:

> "[31] In *Chikwamba*, the House of Lords found that there would be a violation of Article 8 if the applicant for leave to remain in that case were removed from the United Kingdom and forced to make an out-of-country application for leave to enter which would clearly be successful, in circumstances where the interference with her family life with her husband associated with the removal could not be said to serve any good purpose. It is possible to envisage a *Chikwamba* type case arising in which Article 8 might require that leave to remain be granted outside the Rules, even though it could not be said that there were insurmountable obstacles to the applicant and their spouse or partner continuing their family life overseas. But in a case involving precarious family life, it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion."

58. Mr Burnett submits that the Applicant is bound to succeed in an application for entry clearance made pursuant paragraph 186 of the Immigration Rules and asserts that this fact alone, or in combination with the appellant's circumstances in the UK, the precarious security situation in South Africa and the lengthy delays by the Secretary of State in dealing with the appellant's claims, makes it disproportionate to require her to leave the UK and make an entry clearance application.

59. I do accept this is so, even if I proceed on the basis, as commended by Mr Burnett, that the Applicant is bound to succeed in any entry clearance application she makes.

60. Whilst I accept that the appellant's grandmother has recently suffered a very traumatic incident in South Africa, as the appellant and her family have in the past, I do not accept the evidence before me discloses that the 'security situation' there is such that it should form a matter of any significant weight in my Article 8 considerations. Neither do I accept that any significant weight should be attached to the purported delays by the Secretary of State in relation to her dealings the appellant. The appellant is not, and has never been, entitled to a right of abode in the UK - as the Secretary of State has repeatedly identified.

61. I attach little weight to the private life that the appellant has established in the UK whilst she has lived here unlawfully and I have found that she does

not have a family life in the UK – although, even had I concluded that the appellant does have a family life here this would not have led me to come to a different conclusion on the Article 8 ground.

62. Neither the opinions of their Lordship's House in Chikwamba, nor the decision of the Court of Appeal in Treebhowan and Hayat, seek to set out a legal threshold as to when it would be appropriate, in any given case, to require an applicant to make an application from outside the United Kingdom; rather, each alludes to an expectation that in cases where the only matter weighing in the respondent's side of the balance is the public policy of requiring a person to apply under the Rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance.

63. In the instant appeal the public policy of requiring a person to apply under the Immigration Rules from abroad is not the only matter weighing in the respondent's side of the balance. The appellant has remained unlawfully in the United Kingdom for a lengthy period of time, albeit for most of that time pursuing applications for leave or British citizenship.

64. There is a significant public interest in refusing permission to remain to those persons, such as the appellant, who fail to establish a right to remain under the Immigration Rules and, looking at the evidence before me as a whole, I find that it is clearly proportionate to require this appellant to return to her homeland for a temporary period in order to make an application to return to the UK – if that is what she chooses to do. The public interest in instant case is ample justification for requiring her to undertake this course of action.

65. I also find, having taken all relevant factors into account and in particular given the significant weight to be attached to the public interest identified above, that it is proportionate to require the appellant to return to her homeland permanently; this being despite her lack of family members there, and the connections that she now has to the UK. Contrary to appellant's assertions, the evidence does not disclose that she has no real prospect of obtaining employment in South Africa – indeed there is no country information at all placed before me in this regard, and I see no reason why she can integrate back into South African society upon her return.

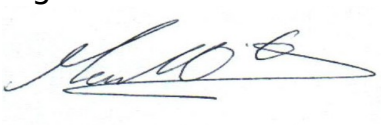
66. For these reasons I dismiss the appellant's appeal brought on Article 8 ECHR grounds.

Notice of Decision

The appeal is dismissed on all grounds

No anonymity direction is made.

Signed:



Upper Tribunal Judge O’Connor
Date: 10 July 2015