



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/00170/2015

THE IMMIGRATION ACTS

**Heard at Glasgow
on 7 December 2015**

**Decision & Reasons
Promulgated
On 4 January 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

SUZATA THAPA

Appellant

Respondent

Representation:

Appellant present: No legal representative

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The parties are as above, but to avoid confusion the rest of the determination refers to the appellant as the SSHD and to the respondent (who was the appellant in the First-tier Tribunal) as the claimant.
2. The claimant applied on 31 October 2014 for further leave to remain as the partner of a Tier 2 Migrant under the Points Based System (PBS). The SSHD refused that application on 22 December 2014 and required the claimant to state any additional grounds under section 120 of the 2002 Act.
3. The claimant appealed to the First-tier Tribunal. Her grounds of appeal say that in her “unique circumstances” the decision is “contrary to the

provisions of the European Convention of Human Rights Act". No particulars are given, and the rest of her grounds are rather vague. The section of the appeal form calling for a statement of additional grounds "including any reasons relating to the ECHR" is left blank.

4. Judge J C Grant-Hutchison allowed the claimant's appeal by determination promulgated on 8 July 2015.
5. The SSHD appeals to the Upper Tribunal on the following grounds:

Material misdirection in law

1. It is clear from the determination that the [claimant] cannot succeed under PBS Rules and that she will not succeed under this category if she applied for entry clearance in this category.
2. The FTTJ therefore considers whether or not the [claimant] would succeed under the Appendix FM route (paragraph 20). It is unclear how she has concluded that the [claimant] would meet the requirements of Appendix FM, particularly Appendix FM-SE, when the relevant documents (payslips, bank statements, employer's letter) were not before the court. SSHD v SS (Congo) & Ors [2015] EWCA Civ 387 sets out the importance of the evidence Rules:

- 5.1 *In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.*
- 5.2 *This is for 2 principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.*
- 5.3 *Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the costs of administration within reasonable bounds, application of standard rules is an important means of minimising the risk of arbitrary differences in treatment of cases arising across the wide range of officials, tribunals and courts which administer the system of immigration controls. IN this regard, the evidence Rules (like the substantive Rules) serve as a safeguard in relation to rights of applicants and family members under Article 14 to equal treatment within the scope of Article 8: compare AJ (Angola), above, at [40] and Huang, above at [16]. ("There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; ... the need to discourage fraud, deception and deliberate breaches of the law; and so on ..."). Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence other than applicants would expect to receive under the Rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the Secretary of State's assessment of*

*the evidential requirements needed to ensure prompt and fair application of the substantive Rules: compare *Stec v United Kingdom*, cited at paragraph [15] above. Again, if an applicant says that they should be given more preferential treatment with respect to evidence than the Rules allow for, and more individualised consideration of their case, good reason should be put forward to justify that.*

3. It is further submitted that the FTTJ has incorrectly considered the Chikwamba principle because firstly it is submitted that the Rules could not be met at the date of hearing and secondly there was no significant interference with family life by temporary removal. See R (On the application of Chen) v Secretary of State for the Home Department (Appendix FM – *Chikwamba* – temporary separation – proportionality) IJR [2015] UKUT 00189 [39]. *In my judgment, 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.*
4. At paragraph 21, the FTTJ considers that the [claimant's] parents may not give her consent, so she may not be able to return, however there has been no consideration in relation to whether the [claimant] would need to return to her parents and the fact that she could stay elsewhere whilst seeking entry clearance.

...

6. The claimant was not represented, but with her were her partner Mr T B Khasiya and a Mr Dinesh, who described himself as a “Mackenzie friend” or as a colleague and friend of the couple. He confirmed that he was not being paid. I permitted him to assist the claimant and to address the tribunal. The following points were advanced on her side. Her case might have succeeded under the rules, although it appeared to have been conceded by her representative in the First-tier Tribunal that she could not, and although that had not been put forward by way of response to the grant of leave. The judge was right to conclude that the financial circumstances met the requirements of the rules. There were good reasons why her case should be allowed without insisting on any requirement to leave the UK. It would not be right to expect her to separate from her partner, even temporarily, or to return to Nepal in the aftermath of the earthquakes.
7. I reserved my determination.
8. On the authority cited in the grounds, the judge would have had to be satisfied by admissible evidence that not only financial limits but the documentary requirements of the rules were met. There was no evidence before the tribunal to justify the conclusion at paragraph 20 that “for all intents and purposes the appellant would meet the rules ... under Appendix FM.” That is enough to establish that the determination must be set aside.
9. The grounds point out that the claimant need not return to her parents. Mr Matthews said that the determination ignores several other obvious alternatives. She need not return to Nepal at all. She might apply from

India, her partner's home country. Even more conveniently, she has the option of applying without leaving the UK, under provisions which disregard overstaying of 28 days or less for such purposes. There was no reason why it might be disproportionate to expect her to make an application from within the UK; or to apply from abroad, if she had to; or for family life to be carried on in India or Nepal, if matters reached that stage.

10. The claimant alleged vaguely that her appeal might have succeeded under the rules as a tier 2 dependant partner but she did not construct that case in any intelligible detail, she conceded to the contrary in the First-tier Tribunal, and she did not advance the issue as required in response to the grant of permission. I am unable to reach any conclusion in her favour by reference to those rules.
11. I am satisfied by the grounds and by the submissions for the SSHD that the determination must be **set aside** for legal error and that the outcome must be reversed.
12. The claimant's appeal, as originally brought to the First-tier Tribunal, is **dismissed** both under the rules and on human rights grounds.
13. No anonymity order has been requested or made.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

18 December 2015
Upper Tribunal Judge Macleman