



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/45256/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 4 February 2016**

**Decision & Reasons
Promulgated
On 29 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**LINA WU
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Staunton, Home Office Presenting Officer
For the Respondent: Miss J Bond, Counsel

DECISION AND REASONS

Introduction

1. The appellant is a national of The People's Republic of China. She was born on 20 May 1988.
2. The appellant before the Upper Tribunal is Secretary of State for the Home Department, who I will continue to refer to as “the respondent”, her

designation before the First Tier Tribunal (FTT) despite the reversal of roles before the Upper Tribunal.

3. The appellant first came to the UK on 17 October 2011 as the partner of a points-based migrant with leave to remain until 12 April 2014. The appellant's husband has been present in the UK since September 2007 and, having been granted work permit visas in the past, was granted indefinite leave to remain on 9 April 2013. The appellant applied for leave to remain as his spouse (spouse of a Tier 2 Migrant) on 10 April 2014. The respondent decided to reject her application on 27 October 2014 because the English language certificate provided was not by a provider approved by the Secretary of State as specified in Appendix O of the Immigration Rules. The appellant subsequently appealed that refusal to the FTT.
4. The appellant's appeal came before First-tier Tribunal Judge I Ross (the Immigration Judge), who decided that although the appellant had not satisfied the requirements of the Immigration Rules, as the respondent had correctly found, she nevertheless qualified under Article 8 of the European Convention on Human Rights on Human Rights (ECHR), on the basis that she had formed a family relationship with Mr Wu and the respondent's decision would unlawfully interfere with that relationship. The requirements for maintenance of effective immigration control and the public interest generally were insufficiently weighty considerations to justify refusal of her application. It was accepted that the appellant was in a subsisting relationship with a person settled here. The respondent accepted that the appellant had an "exemplary" immigration history and that she met all the other requirements of the Immigration Rules, beside the English language test requirement. Therefore, the public interest in effective immigration control did not outweigh other considerations. Accordingly, the appeal was allowed by the Immigration Judge outside the Immigration Rules.

The Upper Tribunal Proceedings

5. The respondent appealed the decision of the FTT to the Upper Tribunal by notice of appeal dated 18 June 2015. In her grounds, the respondent states that the Immigration Judge had failed to give adequate reasons for finding that the respondent's decision was disproportionate. Rule 284(ix) (a) required the appellant to produce an English language certificate from an approved provider. The Immigration Judge had materially misdirected himself on the law by describing this as a "bureaucratic hurdle" to be satisfied. Mr Staunton said it amounted to a failure on the part of the appellant to satisfy the substantive requirements of the Immigration Rules. The **Chikwamba [2008] UKHL 40** principle had no application here, because it was accepted that the appellant would not be able to meet the entry clearance requirements if she applied for entry clearance from abroad.
6. I can find no evidence that the appellant provided a response under Rule 24 of the 2008 Immigration and Asylum Chamber (Procedure) Rules.

7. Judge of the First-tier Tribunal Fisher initially declined to give permission to appeal, indicating that the Immigration Judge had not “applied” **Chikwamba** but, in any event, he had given adequate reasons for his assessment of proportionality and the respondent had not shown that there was any arguable error of law in the Immigration Judge’s reasoning.
8. The respondent renewed her application before the Upper Tribunal on 21 September 2015, stating that the fact that the appellant could satisfy different English language requirements (the principal ground of appeal) from those which she was required to satisfy did not itself make the decision “disproportionate”. The respondent relied on **SS (Congo) [2015] EWCA Civ 387** and in particular the judgment of Richards LJ at paragraph 33 of that decision. An oral hearing was requested.

The Hearing

9. At the hearing I heard submissions from both representatives. At the end of the hearing I reserved my decision as to whether there was a material error of law.
10. On behalf of the respondent it was submitted that there were two essential grounds:
 - (i) that there was a lack of adequate reasons to support the finding that the decision was disproportionate;
 - (ii) that **Chikwamba** did not apply
11. The appellant failed to meet the requirements of the Rules because of her failure to fulfil the English language requirements. Her application was not likely to succeed if it was made again. **SS (Congo)** provided that there must be the most compelling circumstances to support a claim for the grant of leave to remain outside the Immigration Rules and in particular the requirements of Appendix FM, which dealt with family life under those Rules, had to be met. The formulation was not as strict as “exceptionality” or “very compelling reasons” but appropriate weight had to be given to the “focussed consideration of public interest factors” expressed by the “Secretary of State’s formulation of the new Rules in Appendix FM”. He went on to say that the formulation in the case of **Nagre** at paragraph 29 had survived the scrutiny of the Court of Appeal in the case of **Haleemudeen** at paragraph 44, per Beatson LJ.
12. Mr Staunton submitted that there were no reasons why the appellant could not return to China and continue her family life there with Mr Wu.
13. The appellant, on the other hand, considered that the case was a “near miss” type case. It was submitted that the leading case of **Razgar [2004] UKHL 27** provided the answer. The Immigration Judge had applied the principles in that case “through the lens” of **Chikwamba**. However, the college at which the appellant had obtained her qualification (a company trading under the name of ‘Gatehouse Awards Limited’) did not meet the

requirements of the rules (specifically, paragraph ELTRP.4.2). It was submitted nevertheless that the appellant had sufficient skill in the English language to fulfil the respondent's requirements, albeit that she did not have the required test.

14. I was then referred to paragraph 319E of the Immigration Rules (page 865 in Phelan's Immigration Law Handbook) which provides a number of requirements for indefinite leave to remain as the partner of a points-based migrant. It was submitted that most of these requirements had been met and the appellant had come close to complying with all the requirements of the rule. In the circumstances it was disproportionate to dismiss her application. The respondent's appeal should therefore be dismissed.
15. At the end of the hearing I reserved my decision as to whether there was a material error of law and, if so, what steps should be taken to remedy that error.

Discussion

16. The Immigration Judge apparently took a common-sense view of the matter. On the face of it, if the appellant returned to China to make an application for entry clearance, she would be likely to qualify. However, the position is more complex than that.
17. With respect to the Immigration Judge, it is not clear why he concluded that it would be "unduly harsh on both the appellant and her husband" for the respondent to require the appellant to return to China to make a proper application for entry clearance. As the respondent pointed out, in her revised grounds dated 21 September 2015 the fact that the appellant "may" be able to satisfy different English language requirements of Rule 284 did not mean she met the requirements of Appendix FM. The respondent's insistence that the appellant should be required to comply with the same requirements as other applicants does not strike the Tribunal as an unreasonable position to take.
18. The need to keep the appellant and her husband together is a weighty factor but it appears the respondent fully considered this when she made her decision. This did not make the family life which the appellant had formed in the UK a factor which outweighed the need to maintain effective immigration control in the wider public interest. This public interest includes such factors as the need to foster greater integration between immigrant groups and the indigenous population. The facts of this case do not appear either "exceptional" or "compelling".
19. It has not been established that the appellant would necessarily meet the requirements of the Immigration Rules if she applied from abroad and thus, I agree with the respondent, the **Chikwamba** principle has no application.

20. In the circumstances, there being no children to the relationship, the fact that the appellant has established an enduring relationship with a person present and settled in the UK does not outweigh the public interest in effective immigration control and it was not in accordance with the law as presently interpreted for the Immigration Judge to conclude that the respondent's decision was disproportionate.

Conclusion

21. For understandable reasons the Immigration Judge decided the appeal in the appellant's favour. I am satisfied that the Immigration Judge did not apply the law as discussed in **SS (Congo)** and in the circumstances I will allow the respondent's appeal.

Notice of Decision

22. The appeal against the decision of the First-tier Tribunal is allowed. I substitute my decision which is to dismiss the refusal of further leave to remain.

No anonymity direction is made.

Fee award

As this appeal has been successful I set aside the fee award and make no fee award before this tribunal.

Signed

Date

Deputy Upper Tribunal Judge Hanbury