IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006267

First-tier Tribunal No: HU/57115/2021
IA/16420/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 18 August 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

LINDA AMOFA
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. P. Shea, Counsel instructed by Solicitors' Inn Limited
For the Respondent: Mrs. R. Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 8 August 2023

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Parkes, (the "Judge"), dated 4 November 2022, in which he dismissed the Appellant's appeal on human rights grounds. The Appellant is a national of Ghana who applied for further leave to remain based on her family life under Article 8.

2. Permission to appeal was granted by First-tier Tribunal Judge Chinweze on 30 December 2022 as follows:

> "The grounds assert that the Judge erred in concluding that the public interest in the appellant's removal outweighed her right to a family life under Article 8 of the ECHR. According to the grounds the appellant met the requirements of Appendix FM of the Rules and had a five-month-old daughter with her settled husband.
>
> The appellant clearly did not meet the immigration requirement of the rules, but in relation to the exception in EX.1. (b) of Appendix FM the judge found that the appellant could return to Ghana with her husband and child in order to make an application to enter the UK, thus the appellant's temporary removal would not constitute a breach of her Article 8 right to a private life.
>
> It is arguable that the judge did not adequately deal with the loss of the sponsor's employment that removal as a family unit would entail and whether the financial eligibility requirements of the Rules would be met in such circumstances. Further the best interests of the appellant's child are not referred to at all in the decision. It may be that the judge considered that the child was young enough to cope with the removal and that it was in their best interests to remain with both parents, but these reasons are not set out in the determination nor is there any reference to the circumstances of the appellant's child. It is arguable that the judge failed to give adequate reasons for dismissing the appellant's appeal against the refusal decision."

The hearing

3. The Appellant attended the hearing. I heard brief submissions from Mr. Shea and Mrs. Arif.

4. At the hearing I stated that I found the decision involved the making of a material error of law. I set the decision aside. I heard submissions on the remaking, and reserved my decision.

Error of law

5. I find that the Judge failed to carry out a proportionality assessment, and has therefore failed to consider the Appellant's circumstances as a whole, with particular reference to Chikwamba and the best interests of the Appellant's daughter under section 55 of the 2009 Act.

6. While the Judge referred to the Chikwamba principle at [4], he failed then to take it into account. At [4] he states:

> "Guidance on the position where an individual can meet the requirements of the Immigration Rules in an out of country application is given in Chikwamba [2005] EWCA Civ 1779. It is clear that fact a person will succeed in an out of country application is a factor to be considered along with the surrounding features of the Appellant's case, Kaur [2018] EWCA Civ 1423 and Younas (section 117B(6)(b); Chikwamba; Zambrano) Pakistan [2020] UKUT 129 (IAC)."

7. As submitted by Mrs. Arif, this point is not determinative. However, while the Judge appears to recognise that the "fact a person will succeed in an out of country application is a factor to be considered along with the surrounding features" he has failed to carry out any such consideration.

8. At [11] the Judge states:

> "The Appellant cannot meet the Immigration Rules by virtue of her immigration status, it is accepted that all the other requirements are met."

9. The Judge has accepted that all of the requirements are met bar the immigration status requirement. He then proceeds to consider whether paragraph EX.1(b) of the immigration rules is met. He finds that it is not, which has not been challenged. However, he does not then proceed to carry out a proportionality assessment with reference to the case of Razgar [2004] UKHL 27, which is where the Chikwamba point would fall to be considered. As he has stated at [4], the fact that the Appellant would meet the requirements for entry clearance is a factor to be considered, but he has not considered it. I find that this is a material error of law.

10. A proportionality assessment must contain a consideration of any child's best interests under section 55. However, there is no such consideration in the decision. Mrs. Arif submitted that proportionality and best interests had been considered at [17] but I find that this is not the case.

11. At [16] the Judge states, when considering whether the Appellant could make an application for entry clearance, "Either all 3 travel to Ghana which would cause difficulties for the Appellant's husband with his work and possibly undermine his ability to meet the financial requirements". This sentence is incomplete. It appears that the Judge considers the "or" option at [17], to which I will turn below. However, at [16], while recognising the problems which would be caused were the Sponsor to accompany the Appellant, the Judge has failed to consider the impact of these.

12. Paragraph [17] states:

> "No family spends all of the time together and temporary separations are a fact of life. The Appellant and their daughter could go with separation from the husband or the Appellant could travel alone, the Appellant travelling alone is undesirable given the age of their child. Given the age of the Appellant's daughter, and I bear in mind the observations in Younas, her main focus is her main care, her mother and there would be no disruption there. There would be no significant interference with any rights she has a British Citizen given her age and time spent in Ghana would be temporary."

13. The Judge appears to accept that the Appellant's daughter would return with the Appellant, given the finding that "the Appellant travelling alone is undesirable given the age of their child". However there is no reference at all either to section 55 or to "best interests", let alone a full best interests' assessment. There is no consideration of the daughter's best interests and the separation from her father. The Judge has stated that any separation would be temporary, but how long an application from Ghana would take is not clear, and the Judge has failed to take into account that it could be a number of months. He has failed to carry out a balancing exercise taking into account the separation of the family against the public interest in maintaining immigration control.

14. I find that the Judge has failed to carry out a proportionality assessment with reference to the case of Razgar and the five steps set out there. He has failed to consider the Chikwamba point, while referring to it at the start of his decision as a factor to be considered. It cannot be said that [17] contains a proportionality assessment or a consideration of the child's best interests. I find that these are material errors of law.

Remaking

15. I have considered the Appellant's appeal under Article 8 in accordance with the case of Razgar. I find that the Appellant, Sponsor and their daughter have a family life sufficient to engage the operation of Article 8. I find that the decision would interfere with this family life. I find that the Appellant has been in the United Kingdom since July 2017 and has built up a private life during this time sufficient to engage the operation of Article 8. I find that the decision would interfere with her private life.

16. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

17. In assessing the public interest I have taken into account section 19 of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. It was accepted by the Respondent in her decision that the Appellant met the requirements of Appendix FM for leave as a spouse, except that she did not meet the eligibility immigration status requirement. This remains the case as at the date of the hearing before me.

18. The Appellant's employment letter confirms that she was employed as a Senior Carer/ Team Leader. This a job listed on the shortage occupations list. The Respondent is actively seeking to encourage applications for entry clearance from individuals who have the ability to undertake work which the Appellant is already qualified to do. I find that this is a factor which reduces the weight to be given to the public interest in maintaining effective immigration control.

19. The Appellant speaks English (section 117B(2)). The Respondent accepted that the financial requirements of the immigration rules were met and I find that the Appellant and Sponsor are financially independent (section 117B(3)). In addition to the Sponsor's employment as a surveyor with Railtrack working on HS2 I find that, prior to her leave being curtailed, the Appellant was working as a Senior Carer. She was working full time and was financially independent. I find that she would be able to find employment were she to have permission to work.

20. Section 117B(4) provides that little weight should be given to a relationship established when a person is here unlawfully. I find that the Appellant came to the United Kingdom on a spouse visa. That relationship broke down in September 2020. When the Appellant contacted the Respondent to inform her of a change of circumstances in March 2021 she was informed that her ex-spouse's leave had been curtailed and that therefore she had not had any leave since July 2019. On learning this the Appellant immediately informed her employer and her employment was terminated. While I accept that she did not inform the Respondent as soon as her relationship had broken down, I find that she did not

intentionally work illegally as was submitted by Mrs. Arif. This is shown by the fact that she informed her employer as soon as she was informed by the Respondent that her leave had been curtailed. She stated in her witness statement that she was told by the Respondent that a letter informing her of the curtailment decision was sent on 2 May 2019, but she said that she had never received this letter. "Had I received the letter dated 02 May 2019 I could have varied my leave to remain in the UK."

21. I accept that the relationship started in October 2020 which is after the Appellant's leave had been curtailed. While she was not aware of this at the time, the relationship began prior to her informing the Respondent of a change of circumstances. However, there are other factors in the Appellant's case to which I attach more weight. In relation to private life, sections 117B(4) and (5) provide that little weight should be given to a private life established when an Appellant was here unlawfully or when she had precarious leave.

22. In relation to section 117B(6), the Appellant's daughter had not been born when the application was made. The Respondent consented to the new matter of a British child being considered by the Tribunal in her undated Review. The Appellant's daughter is a British citizen and is therefore for a qualifying child. I have carefully considered the position of the Appellant's daughter and whether it is reasonable to expect her to leave the United Kingdom in all the circumstances. I have taken into account section 55 of the 2009 Act. Her best interests must be a primary concern in accordance with the case of ZH (Tanzania) [2011] UKSC 4.

23. I find that it is in the best interests of a child to remain with both parents. The Appellant's daughter was born in May 2022. She is one year old. Given her young age, the focus of her attention is with her parents and not outwith the family unit. I find that separation from either parent is not in her best interests. Rather, it is in her best interests to remain with both of her parents. Given that she is a British citizen and entitled to the benefits which flow from that, I find it is in her best interests to remain in the United Kingdom, although given her young age, of greater importance is that she remains with both of her parents.

24. Were the Appellant to leave the United Kingdom and return to Ghana in order to make an entry clearance application, she would either have to be separated from her daughter who remained in the United Kingdom with her father, or her daughter would have to go to Ghana and be separated from her father. In considering whether either of these options are reasonable, I take into account that is accepted that the Appellant meets all of the requirements of the immigration rules bar the immigration status requirement. I take into account that, were the Sponsor to accompany his wife and child in order to avoid this separation, given that it could take a number of months for the application to be decided, he would lose his employment in the United Kingdom, and with that his ability to sponsor the Appellant.

25. I find, taking into account all of the evidence, that the best interests of the Appellant's daughter outweigh the public interest in maintaining effective immigration control. There is no public interest in making the Appellant leave the United Kingdom and return to Ghana in order to make an entry clearance application which might take many months. It would entail the needless separation of the family. In so finding, I am not treating Chikwamba as determinative but have considered the circumstances of the family as a whole. It is not simply a matter of temporarily separating two adults, but involves the

separation of a British citizen child from one of her parents. At this early formative stage of her life that is not in her best interests. In circumstances where all of the other requirements of the immigration rules are met, I find that it is disproportionate to separate the Appellant's daughter from either of her parents, and that this outweighs the public interest in maintaining effective immigration control.

26. Taking all of the above into account I find that the rights of the Appellant, Sponsor and their daughter outweigh the weight to be given to the public interest in maintaining effective immigration control. I find that the Appellant has shown on the balance of probabilities that the decision is a breach of her rights, and those the Sponsor and their daughter, to a family life under Article 8 ECHR.

Notice of Decision

27. The decision of the First-tier Tribunal involves the making of material errors of law and I set the decision aside.

28. I remake the decision allowing the Appellant's appeal on human rights grounds, Article 8.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
10 August 2023