



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case Nos: UI-2022-006701
First-tier Tribunal No:
HU/58167/2021
IA/17878/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR RUPESH KUMAR
(NO ANONYMITY ORDER MADE)

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma, Counsel instructed by Connaught Law Solicitors

For the Respondent: Ms H. Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 26 June 2024

DECISION AND REASONS

1. The Appellant is a national of India, born on 29.8.86. He arrived in the UK as a visitor on 10 June 2009 and thereafter overstayed. On 1 December 2017, he made a private/family life application, which was refused in a decision dated 31 October 2018. On 25 April 2019 he married Ms Navjot Kaur Sahi, a British citizen born on 19.10.90. However, his application for leave to remain was refused and following an appeal hearing on 2 September 2019, Judge Flynn accepted the marriage was genuine and subsisting at [53] and that

family life was established but the appeal was dismissed in a decision and reasons dated 10 July 2020.

2. On 28 August 2020 the Appellant made a further LTR partner application which was refused on 6 December 2021. He appealed against this decision and his appeal came before FtTJ Phull for hearing on 7 September 2022. In a decision and reasons dated 29 November 2022 the decision was promulgated dismissing the appeal.
3. On 13 December 2022 an in time application for permission to appeal was made on the basis that the FtTJ failed to observe and implement the covid 19 rules present at date of application and failed to apply the judgment in *Chikwamba* [2008] UKHL 40. In particular, the judge failed to consider the exceptional assurance concession in force prior to 31.8.20 which permitted the Appellant to apply for leave from inside the UK.
4. On 28 December 2022, permission to appeal was granted by FtTJ Singer on the basis that it was arguable that the Judge did not properly apply the principles in *Chikwamba (op cit)*.
5. A rule 24 response was lodged on 10 January 2023 which provides that the Covid guidance is clear that it applied to those whose leave expired between 24.1.2020 and 31.8.2020, whereas the Appellant was an overstayer since December 2009 and therefore the concession did not apply to him

Hearing

6. At the hearing before the Upper Tribunal Ms Gilmour sought to rely upon the rule 24 response dated 10 January 2023, which argued that the covid assurance was inapplicable to the Appellant since he had been an overstayer since 2009.
7. In relation to ground 2 of the grounds of appeal and the *Chikwamba* point, Ms Gilmour submitted that the Judge gave cogent reasons for requiring that the Appellant make an application for entry clearance: see [21]-[30]. In her submission, relying upon [106] - [114] of the judgment in *Alam* [2023] EWCA Civ 30 three matters should be borne in mind when considering *Chikwamba* principles. In particular, *Alam* makes clear that *Chikwamba* does not state any rule of law that would bind a tribunal now if an appellant had no right to be in the UK on the basis of article 8 rights. The Appellant's appeal falls squarely within that remit. The Court of Appeal in *Alam* recognises that it could be proportionate in some cases for the SSHD to insist on removal and that *Chikwamba* is only relevant on the narrow procedural ground that he has to return and a full article 8 analysis is necessary.

8. Ms Gilmour submitted that this is not a case which falls within the narrow ambit of *Chikwamba*. The SSHD's position in this case is that the partner could relocate to India with him as could run her business there. Ms Gilmour acknowledged that the judge took quite a lot into consideration at [25]-[30] and the requirements of EX1 of Appendix FM of the Rules were not met.
9. In his submissions, Mr Sharma stated that ones only get to EX1 if the immigration status point is relevant so far as it plays into *Chikwamba* which relates to the success of an overseas application, where immigration status would not be relevant if the Rules are met. The position now ought to be that the relationship is as set out at [14] by Judge Phull and other points had been resolved beforehand. The point in relation to the impact of *Chikwamba* was raised by the Appellant in the skeleton argument before the FtT and so these arguments were before the Judge but not addressed. Therefore, the Judge fell into error in failing to consider and resolve a key issue in the case.

Decision and reasons

10. Judge Phull made the following material findings: that the Appellant and sponsor are married and cohabiting [12]; the relationship is genuine and subsisting [14], [15]; there was a paucity of evidence of the sponsor's responsibilities towards her mother [19]; the sponsor could potentially continue to earn an income working remotely from India in her IT consultancy business [20] and that on balance given the paucity of evidence the Appellant does not satisfy the stringent test to satisfy there are insurmountable obstacles to family life with the sponsor continuing in India and therefore EX1 not met [21].
11. The grounds of appeal correctly point out that the only issue ultimately was the Appellant's ability to meet the immigration status requirement of Appendix FM of the Rules. I find that the rule 24 and Ms Gilmour are correct in their interpretation of the Home Office *Coronavirus Concession* and that it is inapplicable to this Appellant's case because he was already a long term overstayer, not someone whose leave was due to expire during the period of time or who was facing a "*short period without leave*" when he was unable to leave the UK or travel due to the coronavirus pandemic. That much is clear from the policy itself which provides *inter alia*: "*Ordinarily, there is no flexibility for you to exercise discretion in allowing the lawful immigration status and continuous residence eligibility requirements to be met. However, you may exercise discretion to allow an applicant to start, stay on (extend - apply for further leave) or complete a route to settlement despite them being in the UK as a visitor or with leave of six-months or less, in-country or overseas for a short period without leave, where it is shown that they were not*

able to travel or apply due to COVID-19 between March and 31 August 2020.”

12. I find no merit in this ground of appeal.

13. It was further contended that in the alternative, it was for the FTTJ to consider *Chikwamba v SSHD* [2008] UKHL 40, where the Appellant’s ability to qualify outside of the rules should have been considered. Whilst permission to appeal was granted on this basis, since that time the judgment of the Court of Appeal in *Alam* [2023] EWCA Civ 30 was handed down, the relevant paragraphs of which provide as follows:

“106. In *Chikwamba*, the Secretary of State met a very strong article 8 case by relying on an inappropriately inflexible policy. The decision does not in my view decide any wider point than that that defence failed. There are three other matters that should be borne in mind when it is cited nowadays.

i. The case law on article 8 in immigration cases has developed significantly since Chikwamba was decided.

ii. It was decided before the enactment of Part 5A of the 2002 Act. Section 117B(4)(b) now requires courts and tribunals to have 'regard in particular' to the 'consideration' that 'little weight' should be given to a relationship which is formed with a qualifying partner when the applicant is in the United Kingdom unlawfully.

iii. When Chikwamba was decided there was no provision in the Rules which dealt with article 8 claims within, or outside, the Rules. By contrast, by the time of the decisions which are the subject of these appeals, Appendix FM dealt with such claims. Paragraph EX.1 of Appendix FM provided an exception to the requirements of Appendix FM in article 8 cases if the applicant had a relationship with a qualifying partner and there were 'insurmountable obstacles' to family life abroad.

107. Those three points mean that *Chikwamba* does not state any general rule of law which would bind a court or tribunal now in its approach to all cases in which an applicant who has no right to be in the United Kingdom applies to stay here on the basis of his article 8 rights. In my judgment, *Chikwamba* decides that, on the facts of that appellant's case, it was disproportionate for the Secretary of State to insist on her policy that an applicant should leave the United Kingdom and apply for entry clearance from Zimbabwe...

110. The core of the reasoning in *Hayat* is that *Chikwamba* is only relevant when an application for leave is refused on the narrow procedural ground that the applicant must leave and apply for entry clearance, and that, even then, a full analysis of the article 8 claim

is necessary. If there are other factors which tell against the article 8 claim, they must be given weight, and may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance. I consider that, in the light of the later approach of the Supreme Court to these issues, the approach in Hayat is correct. A fortiori, if the application for leave to remain is not refused on that narrow procedural ground, a full analysis of all the features of the article 8 claim is always necessary...

112. *The two present appeals, subject to A1's ground 2, are both cases in which neither appellant's application could succeed under the Rules, to which courts must give great weight. The finding that there are no insurmountable obstacles to family life abroad is a further powerful factor militating against the article 8 claims, as is the finding that the relationships were formed when each appellant was in the United Kingdom unlawfully. The relevant tribunal in each case was obliged to take both those factors into account, entitled to decide that the public interest in immigration removal outweighed the appellants' weak article 8 claims, and to hold that removal would therefore be proportionate. Neither the F-tT in A1's case nor the UT in A2's case erred in law in its approach to Chikwamba.*

113. *Moreover, the Secretary of State did not refuse leave in either case on the ground that the appellant should leave the United Kingdom and apply for entry clearance. I accept Mr Hansen's submission, based on Hayat, that Chikwamba is only relevant if the Secretary of State refuses an application on the narrow procedural ground that the appellant should be required to apply for entry clearance from abroad. It does not apply here, because the Secretary of State did not so decide. Chikwamba is irrelevant to these appeals. I also reject the appellants' submission that the UT determination in Younas was wrong; in Younas and in Thakral, the UT's approach was correct.*

114. *Rhuppiah does not help the appellants. Even if there is some flexibility in section 117B and section 117B(4)(b), there is, on the findings which the tribunals were entitled to make, no exceptional positive feature of the claim of either appellant which could enable it to succeed. There is, moreover, in each case (and subject to ground 2 in A1's case), a further negative factor, that is, that family life could continue abroad."*

14. I find in light of the judgment in *Alam* that there is no material error of law in the decision and reasons of the First tier Tribunal Judge. She was entitled to find in light of the "paucity of evidence" that the Sponsor had responsibilities towards her mother in the United Kingdom and that she could run her IT business from India. The judge correctly directed herself with regard to *Razgar* [2007] UKHL 27 at [24] and took into consideration the statutory public interest considerations set out in section 117B NIAA 2002. No

challenge has been made to the proportionality of her decision. Whilst I accept that the judge did not consider the effect of *Chikwamba* as part of her decision and reasons and even if this was an error of law, it is immaterial in light of the judgment in *Alam* at [110] following *Hayat* [2012] EWCA Civ 1054 and the judge's finding at [30] that it would not be disproportionate for the Appellant to return to India to seek entry clearance.

Notice of Decision

15. There are no material errors of law in the decision and reasons of First tier Tribunal Judge Phull and her decision is upheld.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

Immigration & Asylum Chamber

15 July 2024