IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33818/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th October 2015	**On 24th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SHALVA KHECHUASHVILI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan (Senior Home Office Presenting Officer)
For the Respondent: Mr G Davison (Counsel)

DECISION AND REASONS

1. The respondent is a citizen of Georgia. His appeal against a decision to refuse him leave to enter the United Kingdom, made on 14th August 2014, was allowed by First-tier Tribunal Judge Fowell ("the judge"), in a decision promulgated on 14th January 2015.

2. The judge concluded that guidance given by the House of Lords in Chikwamba [2008] UKHL 40 fell to be applied. The Secretary of State found that the respondent's removal to Georgia was a proportionate response and that he might apply for entry clearance to return to the

United Kingdom to continue family life with his wife and daughter. The judge found that this would entail a period of delay, which he described as an "unknown factor". One aspect was the time it would take for the Home Office to consider and decide the respondent's wife's application for indefinite leave to remain. Another was the time it would take before the respondent would be in a position to apply for entry clearance from abroad and the further delay while his application was considered by the overseas post. The judge assessed the likely delay as "several further months". He found that the prospect of "perhaps six months' separation from his family" and the impact on his young daughter, three years old, to be "no small matter". There would also be financial difficulties in relation to child care arrangements in the United Kingdom. The judge concluded that the respondent's removal to Georgia would be a disproportionate response and allowed the appeal on human rights grounds.

3. The Secretary of State applied for permission, contending that the judge erred in his approach to the Article 8 assessment. First, he gave no consideration to the amendments to the 2002 Act introduced by the Immigration Act 2014, in assessing the proportionality of the adverse decision. Relevant matters included the respondent's unlawful status in the United Kingdom when his relationship with his wife was established. He was an overstayer at the time. Subsequently, having been refused entry clearance, the respondent entered the United Kingdom unlawfully. The judge failed to consider that there were no apparent obstacles to the respondent's wife and daughter relocating to Georgia or Kazakhstan, the country of her nationality, to continue family life there. Moreover, there was no evidence supporting the judge's assumption that an entry clearance application from abroad, made by the respondent, would take several months. Similarly, there was no evidence showing that his wife and child would be unable to cope during the temporary separation that an application from abroad would cause.

4. Moreover, the judge moved to an Article 8 assessment outside the immigration rules ("the rules") without first considering whether there were compelling circumstances in the case not properly recognised under them.

5. Permission to appeal was granted on 24th February 2015. In a Rule 24 response, it was contended on the respondent's behalf that the decision to allow the appeal was sustainable. The judge set out and was fully aware of the respondent's immigration history. The Secretary of State made the decision to refuse leave to enter notwithstanding the fact that the respondent met the suitability requirements of the rules. The Chikwamba principle was still good law and the judge did not err in taking it into account in the Article 8 assessment. The grounds revealed a disagreement with the outcome but no material error of law. Events had moved on and the respondent's wife now had indefinite leave to remain. The Secretary of State's decision letter showed that the sole reason for refusing leave to enter was the lack of such leave at the time the decision

was made. The couple's daughter had an outstanding application for registration as a British citizen.

Submissions on Error of Law

6. Mr Tufan said that reliance was placed upon the grounds. An important authority was Singh and Khalid [2015] EWCA Civ 74. A freestanding Article 8 assessment required compelling circumstances to be shown, not fully recognised or catered for under the rules. The judge had not taken this guidance into account. Even if the judge were entitled to make an Article 8 assessment outside the rules, he was required to consider the factors set out in section 117B of the 2002 Act, introduced by the 2014 Act. The respondent's immigration status was precarious, as was that of his partner, at the time their relationship was established and developed. It appeared that she now had indefinite leave. The judge also failed to consider or assess whether family life might be continued in Georgia or Kazakhstan.

7. A further relevant recent authority was Agyarko [2015] EWCA Civ 440. This case gave important guidance on the insurmountable obstacles issue. At the time of the application for leave, the respondent's partner did not have settled status. The respondent's immigration history was poor. Having failed in his application for entry clearance, he entered the United Kingdom unlawfully. These matters were relevant to the Article 8 assessment but the judge did not consider them. Instead, he took into account and applied Chikwamba but this authority dated from before the major changes to the introduced in July 2012 and July 2014. The Court of Appeal commented on Chikwamba, in Agyarko, particularly at paragraphs 27 to 31 of the judgment and recent guidance on the correct approach now appeared in the judgment in Chen [2015] UKUT 00189 (IAC). The onus was on the respondent to show why a period of temporary separation, while he sought entry clearance from abroad, was disproportionate.

8. The judge's finding that an application for entry clearance would entail a delay of several months was unsustainable. Mr Tufan handed up an illustrative printout from the gov.uk website showing that entry clearance cases in Tbilisi are likely to be completed within 30 days of application. The judge erred in making his finding in the absence of relevant evidence.

9. Mr Davison said that the judge clearly found at paragraph 44 of the decision that there was an unknown factor consisting of the delay and may have relied on his judicial experience. The key issue in this part of the case was the judge's assessment of the position in the light of Chikwamba and Hayat. The potential delay was a material factor. The judge also had clearly in mind the respondent's adverse immigration history. This was noted at paragraph 12(a) of the decision. In making the adverse decision giving rise to the appeal, the Secretary of State had not drawn an adverse inference from this factor but found instead that the respondent met the suitability requirements of the rules.

10. So far as section 117B of the 2002 Act was concerned, the judge set out the background clearly, for example at paragraph 25(a) of the decision. The overall conclusion was sustainable as he clearly had the parties' cases in mind, albeit that there was no express reference to section 117B. The judge could not be criticised for failing to expressly refer to Agyarko as judgment was given some months after the decision was promulgated.

11. In giving weight to the prospect of delay and separation of the family members, the judge may well have taken into account an earlier delay of some three and a half to four years, caused by erroneous decision making on the Secretary of State's part.

12. As at the date of the hearing before the First-tier Tribunal, the application for indefinite leave by the respondent's partner was not resolved. A clear submission was made that the appropriate course was that he should be given leave on a discretionary basis, in line with her. Seen in this light, the fact that his partner did not have indefinite leave may in fact have strengthened the respondent's case. Accepting that the judge had not clarified this aspect, this nonetheless fortified the conclusion that the appeal fell to be allowed on human rights grounds. The Secretary of State's grounds did not seek to challenge this part of the case. Paragraph 36 of the decision recorded the submission made on the respondent's behalf.

13. In reply, Mr Tufan said that the judge made no findings on the submission that the respondent should be given discretionary leave and so there was no substance or merit in drawing attention to the absence of a challenge in the Secretary of State's grounds.

Conclusion on Error of Law

14. The Secretary of State gave reasons for the decision to refuse the respondent leave to enter in a detailed letter dated 13 August 2015. The application was considered under the rules and, in particular, Appendix FM and paragraph 276ADE to 276DH. As Mr Davidson submitted, paragraph 9 of that letter shows that although the Secretary of State was aware of the respondent's adverse immigration history, a finding was made that he met the suitability requirements in relation to limited leave to remain as a partner. That was not, of course, the end of the matter. The eligibility requirements of the rules were then considered. These requirements were not met, the respondent's partner being a national of Kazakhstan with only limited leave as a Tier 2 (General) Migrant, subject to continuing employment. Eligibility on the basis of family life as a parent was then considered but, in the light of his daughter's age and nationality and the fact that the respondent did not fall within the definition of a parent, and taking into account the prominent role in the child's upbringing taken by her mother, the requirements of the rules in this context were also not met. It followed that the respondent could not meet the requirements of EX.1 of Appendix FM.

15. The Secretary of State also concluded that the private life requirements of the rules in paragraph 276ADE were not met and the decision letter shows that the best interests of the respondent's daughter were taken into account. There was a further assessment of whether there were exceptional circumstances which might warrant leave outside the rules. Again, following detailed consideration of the case, the Secretary of State concluded that exceptional circumstances were not shown.

16. Mr Tufan correctly pointed to recent authority, including Singh and Khalid, which emphasises that a freestanding Article 8 assessment outside the rules is not a step to be taken routinely or in every case. Compelling circumstances are required to be shown. Even if such an assessment is required, the rules retain their importance when weighing the competing interests, because the extent of a failure to meet them informs the assessment of the weight to be given to the public interest.

17. With great respect to the judge, and accepting that the particular guidance given in Agyarko was not available at the time the decision was made, there is no reflection of this approach in the decision.

18. The judge carefully summarised the two cases, in paragraphs 12(a) and 25 for example. Consideration of what the judge described as the applicable law was largely focussed on EB (Kosovo) [2008] UKHL 41 and Chikwamba and the decision shows that the judge disengaged altogether from the rules, perhaps because of the respondent's failure to meet the relevant requirements. In weighing the competing interests, he gave very substantial weight to the prospect of delay, should the respondent make an entry clearance application from abroad. However, the decision contains no findings regarding compelling circumstances and nothing explaining why an Article 8 assessment outside the rules was, in fact, required. I do not accept Mr Davison's submission that the summary of the parties' cases earlier in the decision is sufficient to show that the Article 8 assessment outside the rules was properly justified and adequately reasoned.

19. Moreover, the decision contains nothing at all in relation to the public interest considerations contained in section 117B of the 2002 Act. Regard must be had to them when assessing whether interference with a person's right to respect for private and family life is justified under Article 8(2). The decision contains no assessment of the relevant factors bearing on the respondent's case, as tending to strengthen or weaken it.

20. So far as Agyarko is concerned, although the judge could not have been aware of it, the guidance given in that case is important, notwithstanding the fact that the Secretary of State did not expressly consider whether or not there were insurmountable obstacles to family life continuing abroad. What Agyarko shows is that the broad principles set out in Chikwamba require refinement in the light of the very substantial changes to the rules introduced in July 2012 and July 2014. At paragraph 31 of the judgment, for example, the Court of Appeal held that it would be necessary to

establish exceptional circumstances in any case involving "precarious family life", where Chikwamba is relied upon as showing that leave should be granted outside the rules, even though it could not be said that there were insurmountable obstacles to family life continuing abroad. In the light of the limited leave the respondent's wife had when the entry clearance application was made and at the date of hearing, and taking into account the respondent's poor immigration history, this is a "precarious family life" case. So far as the judge's finding at paragraph 44 of the decision is concerned, there was no supporting evidence showing that the period of separation might be as long as successive periods of several months.

21. The net result is that there was no certain foundation for the conclusion that the respondent's removal would amount to a disproportionate response.

22. The decision of the First-tier Tribunal is set aside and will be remade. In a discussion regarding the appropriate venue, Mr Davison said that the family now live in the far south west and so the decision should be remade in the First-tier Tribunal at Newport, the closest hearing centre. The respondent's wife's indefinite leave and the application for British citizenship made on behalf of their daughter were new factors. The adverse decision was largely based on the absence of status on her part and insurmountable obstacles were not expressly raised and so the decision letter might need updating. Mr Tufan said that the decision should be remade in the Upper Tribunal. There was no apparent need to revisit the decision letter.

23. Having given the matter careful thought, I conclude that the decision should be remade at the Newport hearing centre, with up-to-date evidence being available to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal is set aside and shall be remade in the First-tier Tribunal, at Newport, by a judge other than First-tier tribunal Judge Fowell.

Anonymity

There has been no application for anonymity and I make no direction on this occasion.

Signed Date

Deputy Upper Tribunal Judge R C Campbell

TO THE RESPONDENT
FEE AWARD

The decision of the First-tier Tribunal having been set aside, whether a fee award should made or not will be considered by the First-tier Tribunal when the decision is remade.

Signed Date

Deputy Upper Tribunal Judge R C Campbell