Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21724/2016

THE IMMIGRATION ACTS

Heard at: Manchester CJC
On: 9 April 2018

Decision & Reasons Promulgated
On: 17 April 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

LUQMAN [L]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Reyaz, Rasools Law
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Farrelly promulgated on 22 May 2017, in which his appeal against the respondent's decision to refuse his human rights claim dated 13 September 2016, was dismissed.

Background

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2. The appellant, a citizen of Pakistan, entered the UK as a student in 2011 with leave valid until 16 January 2016. The Respondent contends that his leave was curtailed effective from 22 November 2014, and he thereafter overstayed.

3. The appellant married Mrs [L] ('the sponsor'), a British Citizen in January 2016. She has two adult children from a previous relationship, the younger of which, [J], then aged 19, continued to reside with his mother as at the date of hearing. The appellant sought to remain in the UK on the basis of his relationship with the sponsor.

Appeal proceedings

4. The First-tier Tribunal found that the sponsor could return to Pakistan with the appellant or alternatively she could support his application for entry clearance, and in the circumstances the appellant's removal would not constitute a disproportionate breach of Article 8.

5. In grounds of appeal it was argued on behalf of the appellant that the First-tier Tribunal erred in law, inter alia, in: (i) making factual mistakes on material matters; (ii) failing to apply the principle derived from Chikwamba v SSHD [2008] UKHL 40 as approved of in Agyarko v SSHD [2017] UKSC 11. When granting permission to appeal First-tier Tribunal Judge Chamberlain considered both these grounds to be arguable.

Hearing

6. Mr Reyaz relied upon the grounds of appeal. He placed particular emphasis on the mistake of fact regarding [J]'s age. He was born in 1997 and not 1987 as set out at [2].

7. Mr Bates acknowledged that the decision contains unfortunate typographical errors but invited me to find that the First-tier Tribunal would have inevitably reached the same decision, even if aware of [J]'s true age and circumstances.

8. After hearing from both representatives, I reserved my decision, which I now provide with reasons.

Error of law discussion

[J]

9. In my judgment, the First-tier Tribunal made a number of concerning obvious errors in its decision: the recording of the sponsor's name and [J]'s date of birth at [2] are both incorrect; the recording of the

date that the sponsor was discharged from hospital at [10] is also incorrect; the reference to “robust working” at [13] must also be an error; the First-tier Tribunal states at [27] that “she” has close family “there”, when the sponsor’s close family are all in the UK; the reference to Qatar at [28] is also erroneous.

10. The most important error by some distance is the failure to get [J]’s age correct. At the relevant time, he was 19 and not 29. In addition, the First-tier Tribunal states that the children are adults “*leading independent lives*” at [27] but offers no reasons for this finding. Such a finding is inconsistent with the letter written by [J], available to the First-tier Tribunal in the appellant’s bundle. This states that he continued to live with his mother at home and they have become particularly close and reliant upon each other after her hospitalisation in 2014 as a result of an overdose.

11. There was evidence to support particular mutual dependence between [J] and the sponsor, as well as between the sponsor and her mother in the form of letters. These supported the appellant’s claim that when all the circumstances are viewed cumulatively they could not enjoy family life in Pakistan, because there would be insurmountable obstacles in place, preventing the sponsor from doing so. This is an argument with prima facie merit in the circumstances of this case. The sponsor has never been to Pakistan and does not speak the language. She has been an independent working mother in the UK for an extended period of time, and is likely to face cultural, linguistic and religious obstacles in adapting to life in Pakistan and finding employment in a field commensurate with her skills and experience. She has had significant health problems in the recent past and is particularly close to [J] and her mother, who have assisted her to overcome difficulties. The First-tier Tribunal has erred in law in leaving the latter factor out of account in assessing proportionality for the purposes of Article 8.

Chikwamba

12. Mr Bates submitted that even if there are insurmountable obstacles in this particular case, there would only be a temporary separation, as the First-tier Tribunal found that the appellant could make an application for entry clearance. This is a case in which the appellant is likely to meet all the requirements of the Immigration Rules if he returned to Pakistan to apply for entry clearance: the relationship was accepted to be genuine and subsisting and the financial requirements can be met because of the sponsor’s stable employment. In Agyarko the Supreme Court summarised the impact of Chikwamba in this way:

> "If, on the other hand, an applicant – even if residing in the UK unlawfully – was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. This point is illustrated by the decision in *Chikwamba v SSHD*."

13. In these circumstances, and notwithstanding any difference in the factual scenario in Chikwamba, the First-tier Tribunal was obliged to identify why the public interest supported removal in this particular case. The First-tier Tribunal referred to the circumstances under which the relationship developed. The appellant was undoubtedly in the UK unlawfully at the time (whether or not he was served with his curtailment decision, his student visa had expired or was about to expire) but the First-tier Tribunal had to consider and identify the public interest applicable even where the appellant was residing in the UK unlawfully and why this outweighed the interference with this particular family life on a temporary basis. The First-tier Tribunal erred in law in failing to do so.

Disposal

14. For these reasons, I find that the First-tier Tribunal's decision discloses errors of law capable of affecting the outcome of the appeal, and I set it aside.

15. Both representatives agreed that the decision should be remade by the First-tier Tribunal. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement*, the fundamental error of fact identified, and the nature and extent of the factual findings required in remaking the decision, and conclude that it is necessary for this appeal to be remitted to the First-tier Tribunal to be determined afresh by a judge other than Judge Farrelly.

Decision

16. The decision of the First-tier Tribunal involved the making of an error of law. Its decision cannot stand and is set aside.

17. The appeal shall be remade by First-tier Tribunal on a de novo basis.

Signed: Ms Melanie Plimmer
Judge of the Upper Tribunal

Dated: 16 April 2018