Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28423/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
on 19th August 2013	**On 20th August 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

EYRAM YAO DOE GOMEZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Davies of Kings Court Chambers
For the Respondent: Mr Spence – Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Hague promulgated on 6th March 2013 following a hearing at Bradford on 19th February 2013 in which he dismissed the appellant's appeal against the refusal of his application for leave to remain in the United Kingdom under the provisions of paragraph 276B of the Immigration Rules and Article 8 ECHR.

2. Permission to appeal was granted and the matter comes before me for the purposes of an Initial hearing. Following discussions with the advocates it was agreed that the challenge to the Judge's decision under the Immigration Rules must fail, as that challenge is reliant upon a policy which although dated prior

to the date of the application resulting in the immigration decision under appeal only applies to applications made after the application date, meaning it has no relevance to these proceedings. I do find however there is clear legal error in the decision to dismiss the appeal under Article 8 ECHR for the following reasons:

i. Although the Judge correctly identified that it was necessary to address the questions set out in Razgar, which is a correct legal self-direction, and reminded himself that it was necessary to consider whether there will be interference with family or private life of such severity so as to engage Article 8, he fails to deal with the private life aspects of the appellant's case when the appellant has been in the United Kingdom for over ten years.

ii. The Judge considered the evidence of Emma Thompson, the appellant's partner, and found that family life recognised by Article 8 (1) existed [11]. He then went on to state that notwithstanding this, it was reasonable to expect the appellant to return home to make an application as it was "not the purpose of Article 8 to evade potential difficulties in the provision of required levels maintenance." There is no finding in relation to what application the appellant will be expected to make, based upon his relationship with Emma Thompson, and no analysis of the relevant case law to be found in Chikwamba (FC) v SSHD 2008 UKHL 40 and Secretary of State for the Home Department v Hayat; Secretary of State for the Home Department v Treebhowan (Mauritius) [2012] EWCA Civ 1054 when considering the proportionality of the decision.

iii. In finding that because Ms Thompson has transportable employment skills and a husband and in-laws who could introduce her to Ghanaian life, that it was reasonable to expect her to go live with the appellant in Ghana [13] without giving proper consideration to all the competing factors including the fact Ms Thompson is a British national with family in the United Kingdom and where she has lived all her life.

3. I find as a result Judge Hague erred in relation to his consideration of Article 8 and that such legal errors are material to the decision to dismiss the appeal. I set aside the determination although the findings under the Immigration Rules shall be preserved findings. Submissions were invited from the parties in relation to the remaking of the decision.

Discussion

4. The appellant was born on the 31st December 1981 and is a national of Ghana. His immigration history shows he entered the United Kingdom lawfully on 27th January 2002 as a student. His leave was periodically extended until the 31st May 2009. On 30th May 2009 he made an 'in time' application for leave to remain as a Tier 4 Student under the Points-Based System which was refused on 14th September 2009. On 30th November 2009 he applied for leave to remain as a Tier 1 (Post-Study Work) Migrant which was also refused. He appealed that decision but withdrew his appeal and made a further application on 15th June 2010 which was granted until 15 June 2012. On 25th May 2012 he applied for indefinite leave to remain on the basis of long residence (lawful).

5. It was found he could not meet the requirements of 276B on the basis of the need to have ten years continuous lawful residence in the United Kingdom, as his immigration history showed there were periods during the ten years relied upon during which the appellant had no lawful leave to remain. Judge Hague found the break was for a period of 33 days.

6. It is clear that during this time the appellant has established himself in the United Kingdom. He also met Emma Thompson in 2011. In August 2011 they signed a joint tenancy although she could not find work in Leeds and so lived with her mother during the week and spent three to four days with the appellant at their flat in Leeds.

7. In relation to the question whether it is proportionate to expect the appellant to return to Ghana to make an application to re-enter the United Kingdom I have considered the relevant case law. In Chikwamba (FC) v SSHD 2008 UKHL 40 the House of Lords said that in deciding whether the general policy of requiring people such as the Appellant to return to apply for entry in accordance with the rules of this country was legitimate and proportionate in a particular case, it was necessary to consider what the benefits of the policy were. Whilst acknowledging the deterrent effect of the policy the House of Lords queried the underlying basis of the policy in other respects and made it clear that the policy should not be applied in a rigid, Kafka-esque manner. The House of Lords went on to say that it would be "comparatively rarely, certainly in family cases involving children" that an Article 8 case should be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad.

8. In MA (Pakistan) v SSHD (2009) EWCA Civ 953 Sullivan LJ said that view in Chikwamba that "return should be insisted upon simply in order to secure formal compliance with entry clearance rules 'only comparatively rarely' is not confined to cases where children are involved. Whilst the suggested approach in Chikwamba certainly applies in such cases, it also applies in family cases more generally." In Hayat (nature of Chikwamba principle) Pakistan [2011]

UKUT 00444 (IAC) the Tribunal confirmed that the Chikwamba principle is not confined to cases where children are involved or where the person with whom the appellant is seeking to remain has settled status in the United Kingdom

9. In Secretary of State for the Home Department v Hayat; Secretary of State for the Home Department v Treebhowan (Mauritius) [2012] EWCA Civ 1054 the Court of Appeal outlined the following guidance as to the effect of Chikwamba and the subsequent decision of the Court of Appeal in TG (Central African Republic) [2008] EWCA Civ 997 and SZ (Zimbabwe) [2009] EWCA Civ 590 and MA (Pakistan) in which it had been considered:

(i) Where an applicant who did not have lawful entry clearance pursued a claim under Article 8, a dismissal of the claim on the procedural ground that the policy required that the applicant should have made the application from his home state might, but not necessarily would, constitute a disruption of family or private life sufficient to engage Article 8, particularly where children were adversely affected;

(ii) Where Article 8 was engaged, it would be a disproportionate interference with family or private life to enforce such a policy unless there was a sensible reason for doing so;

(iii) Whether it was sensible to enforce that policy would necessarily be fact sensitive, and potentially relevant factors included the prospective length and degree of disruption of family life and whether other members of the family were settled in the UK;

(iv) Where Article 8 was engaged and there was no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant had no lawful entry clearance;

(v) Nothing in Chikwamba was intended to alter the way the courts should approach substantive Article 8 issues as laid down in seminal cases as **Razgar and Huang**;

(vi) If the Secretary of State had no sensible reason for requiring the application to be made from the home state, the fact that he had failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise (para 30).

10. In the reasons for refusal letter the Secretary of State refused to grant the appellant leave under paragraphs A277C and Appendix FM of the Immigration Rules as it was claimed he provided no evidence that he is in a subsisting

relationship with a British citizen or that he was the parent of a child, or a child with seven years continuous residence in the United Kingdom. The application was also considered under paragraph 276 ADE of the new Rules and it was found he could not succeed in relation to his private life either, although it is noted the application was made on 5th May 2012 before the coming into force of the new rules on 9th July 2012.

11. In relation to Article 8 ECHR, there appears there was no separate consideration of this in the reasons for refusal letter and therefore the respondent has failed to provide sufficient evidence to establish any sensible reason for requiring the appellant to return to Ghana solely for the purposes of making an application to return to allow him to continue to live with Ms Thompson in the United Kingdom.

12. In relation to the First-tier Judge's comments regarding the maintenance provisions of the Rules, these have recently been considered by Mr Justice Blake sitting in the High Court in the case of MM and Others v SSHD [2013] EWHC 1900 (Admin) where a number of issues were highlighted in the judgment regarding the maintenance requirements when an individual is seeking to bring a spouse into the United Kingdom and restrictions which Mr Justice Blake considered relevant to the proportionality of a decision. It is not suggested that if the appellant remains there is likely to be a need for the parties to be reliant on the public purse and so the economic needs of the United Kingdom, which is commonly relied upon when referring to the reason why there needs to be strong immigration control, is not established in this case.

13. If it was reasonable to expect Ms Thompson to go to Ghana, where family life could continue, that may be enough to allow the respondent to succeed as the private life elements in themselves will not be determinative. The case law establishes that it needs to be proved that it is reasonable in all the circumstances. I do not find it proved on the facts of this appeal that this is so. I accepted the appellant and Ms Thompson have an established relationship sufficient to amount to protected family life. The finding by Judge Hague to this effect [11] is not challenged by the Secretary of State. Ms Thompson has been born and brought up in the United Kingdom, is a British national, and clearly has an established family and private life here, including with her own mother who as a result of recent events became depressed and suicidal and for whom Ms Thompson provides emotional support. She is also supportive of her brother to whom she provides money for his children and who she helps care for. Ms Thompson clearly has established family ties and it is necessary to consider the Article 8 rights of the other family members as part of the proportionality exercise- see Beoku-Betts v SSHD [2008] UKHL 39. I find it not proved that it is reasonable to expect Ms Thompson who has undergone training to enable her to work in care management in the United Kingdom, to abandon her choice of career and related education that will be of benefit not only to herself but also to the community in general, to go to a country of which she has no knowledge.

She has devoted her studies to achieving this specific aim. She is also a British citizen entitled to the benefits that such status confers upon her. In all the circumstances it has not been proved to be reasonable to expect Ms Thompson to leave the United Kingdom to go to live in Ghana.

14. This is therefore a family splitting case. I am not satisfied when all the evidence is considered that the respondent has discharged the burden of proof upon her to the required standard to show that the appellant's removal from the United Kingdom, for the purposes of making a fresh application to enable him to return, is proportionate. I therefore the allowed the appeal under Article 8 ECHR.

Decision

15. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order as there was no application for anonymity and no basis making such an order has been established.

Signed…….
Upper Tribunal Judge Hanson

Dated the 19th August 2013