IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24625/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2nd December 2014	**On 30th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR LOVEMORE GLADMORE CHINEMBIRI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L Youssefian (LR)
For the Respondent: Mr P Armstrong (HOPO)

DETERMINATION AND REASONS

1. This was an appeal against the determination of First-tier Tribunal Judge R R Hopkins promulgated on 15th September 2014, following a hearing at Birmingham on 27th August 2014. In the determination the judge allowed the appeal of Lovemore Gladmore Chinembiri. The Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Zimbabwe who was born on 17th January 1956 and he is a male. He appeals against the decision dated 1st April 2014 to serve him with removal directions.

The Appellant's Claim

3. The Appellant's claim is based upon his relationship with his wife and three children in the UK. He initially entered the UK on 18th January 1999 as a visitor. He subsequently applied for further leave to remain. He embarked upon a course of study at the University of Luton from February 2000. In July 1999 his wife and children came to join him from Zimbabwe. On 2nd November 1999 the Appellant was granted leave to remain until 31st October 2000. In July 2000 he and his wife purchased their current home. The Appellant was then granted further leave until 21st October 2001. He began studying for a masters degree in business administration at Napier University in Edinburgh. In 2007, his wife and children applied for leave to remain under what was then the "seven year child concession". They were granted indefinite leave to remain.

4. The Appellant, however, was not included in this application. He appears to have been under the impression that he already had an outstanding application before the Home Office and he had to rate the outcome of this. In the meantime he began working as a supply teacher in mathematics and business studies. In 2010 he became suspicious about the delay in finding out about his status. He made further enquiries.

5. On 1st April 2014 the Respondent Secretary of State served the Appellant with notice of liability to removal. The Appellant's claim was assessed both under paragraph 276ADE of the Rules and Article 8 of the ECHR. The Respondent concluded that the Appellant did not meet the requirements of paragraph 276ADE. Consideration was given in the refusal letter as to whether there were exceptional circumstances. It was concluded that there was insufficient evidence to justify a departure from the Rules. This was despite the fact that the Appellant was not known to have any criminal convictions or to have engaged in activities or developed associations that are not conducive to the public good.

The Judge's Findings

6. The judge came to five firm conclusions. First, the judge held that there were insurmountable obstacles to the family life of the Appellant continuing outside the UK in Zimbabwe. There were practical difficulties. They had no home there. Second, there would be the difficulty of the Appellant obtaining employment in Zimbabwe. The Appellant had a teaching qualification but it was "unclear that he is very employable" (paragraph 26). Third, the Appellant and his wife owned their own home in the UK and have a mortgage statement, and are making monthly payments. The house would have to be sold if they had to relocate. It was

unclear that there was a very substantial equity such that they would be able to re-establish themselves in Zimbabwe. Fourth, the children were now adults, and two of them were at university, and they live in the family home during the holidays, and the Appellant's wife, who has indefinite leave to remain, cannot realistically abandon the property in the UK as it is her children's family home (paragraph 27). The judge also went on to hold that the Appellant has no strong ties to Zimbabwe (paragraph 29). He applied the Rule in **Chikwamba** and held that it was unnecessary and disproportionate for the Appellant to leave the UK in order to make an application to come back in again (paragraph 30). The appeal was allowed.

Grounds of Application

7. In this matter there is a appeal both by the Respondent Secretary of State and a cross-appeal by the Appellant. The appeal by the Respondent Secretary of State is to the effect that the judge materially misdirected himself in finding that there were insurmountable obstacles to the Appellant's family life continuing outside the United Kingdom. Further the judge failed to direct himself to paragraph EX.2 of the Immigration Rules. Any difficulty that the Appellant and his partner encountered outside the United Kingdom was not as to amount to "very significant difficulties". The Appellant's partner is a Zimbabwean national and "returned to Zimbabwe with the Appellant." On 29th October 2014 permission to appeal was given to the Respondent Secretary of State. The cross-appeal by the Appellant, however, which is out of time, is to the effect that the judge failed to give sufficient regard to the "**Chikwamba** principle" because he reasoned incorrectly when he said that, "there is a reason in this case why requiring the Appellant to leave the UK and apply for entry clearance from abroad might be proportionate: he is in the UK illegally". However, the "**Chikwamba** argument" is necessarily engaged when the Appellant is illegally in the United Kingdom. This is what the case of **Chikwamba** was about. On 1st December 2014, permission to appeal was granted to the Appellant as well.

8. At the outset of the hearing, Mr Youssefian, appearing on behalf of the Appellant, submitted that there would be no need for this Tribunal to consider the cross-appeal if no error was found in the learned judge's determination, consequent upon the appeal of the Respondent Home Secretary being first heard, in which event the Appellant would adopt the learned judge's determinations.

9. At the hearing before me of 2nd December 2014, Mr Armstrong, appearing on behalf of the Respondent, submitted that they would rely upon the Grounds of Appeal. It was submitted that there was a material misdirection. The judge had not explained how there were "insurmountable obstacles" in this case. The Appellant was an overstayer. The history was set out at paragraph 6 of the determination. He had been in the UK for thirteen years. He had never qualified for leave to remain. His position had always been precarious. He would have no legitimate

expectation to remain here. Yet, he had worked in the UK illegally. Following the case of **Gulshan** I should consider whether there were "exceptional circumstances" here. There were none. Accordingly, the determination was flawed. The judge had given inadequate reasons.

10. For his part, Mr Youssefian submitted that, as far as the Appellant's cross-appeal was concerned, the judge had erred (at paragraph 33) in stating that the Appellant could not benefit from the rule in **Chikwamba**, because he had been in the UK illegally, but this was incorrect as a matter of law, because **Chikwamba** applied in precisely this sort of situation. This was a misdirection in law. Second, as far as the appeal of the Respondent Secretary of State was concerned, the judge had rightly had regard to the fact that the balance of proportionality considerations in respect to Article 8 fell in favour of the Appellant, given that his wife and children had indefinite leave to remain in the UK, and he would have to separate himself from them to go and live in Zimbabwe, or to make an application from there, before he could enter the UK.

11. Furthermore, as the Appellant's Rule 24 response makes clear, the judge had considered this and had properly considered that the word "insurmountable obstacles" is to do with the practical possibilities of relocation. The decision taken against the Appellant was taken on 22nd May 2014, and therefore before the new Rules on 28th July 2014, apply to the new definition in **Odelola [200] UKHL 25**, such that it was unnecessary to have regard to EX.2 of the Immigration Rules.

No Error of Law

12. I am satisfied that the making of the decision by the judge did not involve the making of an error of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. I accept that the reference (at paragraph 33) to the way in which the rule in **Chikwamba** operates, is incorrect, because to put it in these terms is to precisely elevate the Rule 2A "dogma" in the way rejected by the House of Lords. However, I do not find this to be a material error, such that the determination should be set aside, when the determination is considered as a whole, given the effect it has, of allowing the appeal.

13. The decision against the Appellant was made on 22nd May 2014 and this was prior to the coming into effect of the new Rules on 28th July 2014. The judge had to consider the significance of "insurmountable obstacles" but did do so in a way that is clearly evident. He found that there would be sufficient practical difficulties in both the Appellant and his wife removing themselves from the United Kingdom to Zimbabwe. He allowed for the possibility that "the lack of accommodation might be overcome, at least in the short term, as it may be possible to find a temporary place to live pending more permanent arrangements" (paragraph 26). This shows that the judge was sufficiently aware of the practical possibilities facing the Appellant if he were to return to Zimbabwe.

14. However, on the other hand, the judge was not satisfied on the evidence before him, that the Appellant would be able to obtain employment (paragraph 26). The greatest difficulty, however, in the mind of the judge, was with respect to the ownership of the home by the Appellant and his wife. This was a home in which their children had lived, and returned to during the holidays, and it had a mortgage, with no substantial equity, and the judge was satisfied that, "the Appellant's wife cannot realistically abandon the property in the UK as it is her children's family home as well as hers. They cannot reasonably be expected to abandon their studies in order to go to live in Zimbabwe" (paragraph 27). The judge then concluded that there were insurmountable obstacles to family life continuing outside the UK (paragraph 28).

15. Insofar as the Rule in **Chikwamba** is to be applied to these facts (see paragraph 30) it would suggest precisely that this was the kind of case where the Appellant, who only did not apply for leave to remain with the rest of his family because he had an outstanding application before the Home Office, it would be disproportionate to require the Appellant to leave the country just as in order to make an application to re-enter.

16. It is significant that the judge had evidence before him that a letter dated 18th August 2014 from the Grange Tuition Ltd stated that he would be a candidate for a full-time position as a mathematics tutor if he remained in the UK (see paragraph 16). Accordingly, there is no error of law in the determination.

Decision

17. There is no material error of law in the original judge's decision. The determination shall stand.

18. No anonymity order is made.

Signed — Dated

Deputy Upper Tribunal Judge Juss — 29th December 2014