Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20038/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 11 September 2015 **On 2 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR WEI SHEN KHOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Buley of Counsel
For the Respondent: Mr Geoff Harrison, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING NO ERROR OF LAW

Introduction

1. The appellant is a Malaysian national born on 23 February 1993. He appeals against the decision of First-tier Tribunal Morris (the Immigration Judge) who, on 23 February 2015, decided to dismiss his appeal against the respondent's decision that the appellant did not qualify either under the Immigration Rules or on the grounds that, independent of the Rules, he had established a private or family life in the UK. On 22 April 2015 Designated First-tier Tribunal Judge Zucker decided that there was an arguable error of law in the decision of the FTT because the judge

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appeared to hold that the case of **Chikwamba** had been "vitiated" by the provisions of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Judge Zucker cited the more recent case of **Chen [2015] UKUT 00189** as he thought that showed the Immigration Judge's view of **Chikwamba** had, arguably, been incorrect.

Background

2. The appellant came to the UK on 17 August 2011 with entry clearance as a Tier 4 General Student valid from 17 August 2011 until 23 September 2013. On 31 August 2013 he applied for indefinite leave (ILR) which was rejected on 2 December 2013. The application which gave rise to the appeal before the Immigration Judge was made on 14 January 2014.

3. The respondent set out her reasons for refusal in a letter dated 15 April 2014. The application was considered under paragraph 298(ii) of the Immigration Rules which deals with leave to enter or remain with a view to settlement under paragraph 302 or Appendix FM. The respondent also considered the appellant's right to a family or private life in the UK and also considered her duty regarding the welfare of children under Section 55 of the Borders, Citizenship and Immigration Act 2009. This was specifically by reference to paragraph 276ADE, which deals with private life, and Appendix FM, which deals with family life. It was noted that to establish a private life in the UK the appellant must have been living continuously here for at least twenty years or, if he is under the age of 18, for seven years discounting any period of imprisonment. Given that the appellant entered the UK on 17 August 2011 it seemed to the appellant that he could not satisfy these requirements. The appellant had resided the majority of his life in Malaysia and it was not accepted by the respondent that he had severed all ties, social, cultural and family, with that country. The application was therefore refused under paragraph 276CE with reference to paragraph 276ADE. Although the appellant does not seem to have raised this in his application for leave to remain, a further point related to his relationship with the sponsor (his mother), whom he claimed had supported him for over twenty years (see question 3.7). It seems that the appellant's mother married a British national called Howard Iverson in Malaysia in April 2004. The family had moved to the UK in July 2011. They currently reside in Devon.

4. It seems (see paragraph 5 of the skeleton argument before this Tribunal) that the family originally believed that the appellant could apply for ILR as an adult dependent of Mrs Iverson but this subsequently transpired to be incorrect.

The Appeal Proceedings

5. The appeal to the First-tier Tribunal took the point that family life was enjoyed between the appellant and his sponsor and step-father. Therefore, the interference with his human rights was of sufficient gravity to engage Article 8 of the European Convention on Human Rights (ECHR). Having regard to the case law the interference was not proportionate and

did not strike a fair balance between the rights to the respect for family life and the public interest in enforcing immigration control.

6. Both parties were represented before the Immigration Judge and it was argued on behalf of the appellant that it would be wrong to penalise the appellant for the mistaken belief of his family that he was entitled to ILR. Secondly, that it was disproportionate to remove him and finally that it would be unreasonable having regard to his need to finish his course of study as a student. It appeared that his leave having expired prevented an application "in-country" for such a visa and that he would need to return to Malaysia.

7. Having assessed his private life the Immigration Judge did not consider that there would be consequences of such gravity to potentially engage Article 8. She also had regard to the provisions in the 2002 Act in Sections 117B-D and considered that the respondent had considered the numerous factors at play but reached a correct balance that the public interest did outweigh the appellant's own interest in continuing family life with the sponsor and his step-father. She referred to **Chikwamba** in paragraph 32 but considered that requiring the appellant to make an application from abroad was in the public interest but in any event the amendments introduced by Sections 117A-D of the 2002 Act were, on the particular facts, determinative of the public interest. The public interest outweighed the appellant's private interest in a private or family life.

8. The appellant appealed that decision by lengthy grounds of appeal dated 4 March 2015. They take the additional point that the Immigration Judge failed adequately to take into account the appellant's family life and the holding that **Chikwamba** had been "overruled" by the sections of the 2002 Act referred to was wrong in law.

9. Judge Zucker, whilst not refusing permission on any of the grounds, appears to have thought that it was the third ground (the **Chikwamba** point) that was the most arguable of the three.

10. At the hearing before me Mr Buley whilst not abandoning it, did not effectively pursue the second ground but did pursue both grounds 1 and 3.

11. The respondent submitted a response under Rule 24 on 30 April 2015. She stated that it was accepted that the appellant did not meet the requirements of the Immigration Rules. The judge had made positive findings on behalf of the appellant but weighed them up against factors which permitted the appellant's return to Malaysia. The judge had been entitled to find that it was not disproportionate in all the circumstances to remove the appellant from the UK. The appellant could make an appropriate entry clearance application if he wished to do so.

12. I heard oral submissions by both representatives which are summarised in the Tribunal file. Although they were lengthy, essentially, Mr Buley said, the Immigration Judge had been wrong to find that the interference with private life had been justified and had failed to answer the question: was

there a family life in the UK with which interference was justified? I was then referred to a series of cases. Mr Buley helpfully provided these in a ring binder file with an index.

13. I was referred to the case of **Nazim** **[2014] UKUT 00025**.

14. Paragraph 29 of that case states that an immigrant must take the Immigration Rules as he finds them at the time he makes his application and not in the state they were in when he first sought admission to the UK. However, it was pointed out that **Nazim** did not deal with the issue of family life.

15. Mr Buley's main points were under ground 3. He stated that it was not reasonable to require his client to return to Malaysia and it was wrong for the Immigration Judge to consider that the Immigration Rules, as amended by Section 117 of the 2002 Act, had overruled **Chikwamba**. I was then referred to the case of **Chen** before the Upper Tribunal. In that case the Judge Gill found that where an application for entry clearance from abroad was required it was necessary for the respondent to show that the temporary interference with family life was justified. The burden rested on the decision maker to consider the facts and on the facts of that case the appellant did not have a claim outside the Immigration Rules. Nothing in Section 117B of the 2002 Act overruled **Chikwamba** and **Chen** stated that **Chikwamba** remained good law, subject to qualifications. The judge had not dealt adequately with the obstacles to return if the appellant did go back to Malaysia to make an application for entry clearance there.

16. Mr Harrison simply relied on the Rule 24 response and stated that the appellant had not applied to stay in the UK as a student and the application for indefinite leave to remain was bound to fail as he could not fulfil the criteria for such a claim .The Immigration Judge sympathised with the appellant but this did not justify him in interfering with the respondent's decision, which was in accordance with the Immigration Rules.

17. Mr Buley said by way of reply that he accepted that his client had not qualified under the Immigration Rules but that the Immigration Judge had failed to embark on the correct analysis required under the ECHR. He did say he may have reached a different conclusion. Mr Buley argued that he may have done so if he had properly analysed the appeal. I was invited in the circumstances to interfere with the decision.

18. At the end of the hearing I reserved my decision as to whether or not there was a material error of law and if so what steps should be taken to remedy that.

Discussion

19. The appellant is presently 22, having been born on 23 February 1993. Therefore, there is a minor error in the decision of the FTT at paragraph 24(iii) as Mr Harrison acknowledged.

20. The appellant has been studying in the UK since 2011, having been admitted as a Tier 4 General Student. However, on 31 August 2013 he applied for indefinite leave to remain. It appears that the appellant was made aware that a Tier 4 General Student visa could not be used as a “route to settlement.” Nevertheless, the application before the respondent which triggered the appeal to the FTT was an application made on 14 January 2014 for ILR as the child of a settled person. This too was not a correct application to make and it was eventually refused on 15 April 2014. The substance of the refusal was set out in a letter dated 15 April 2014 which triggered removal directions on 28 April 2014. However, even though the appellant had not applied on the basis of his private or family life being unlawfully interfered with, the respondent considered his application under both Appendix FM of the Immigration Rules and paragraph 276ADE but found not to meet any of the requirements of those Rules. The case was presented before the Immigration Judge solely on the basis that the appellant qualified under Article 8 of the European Convention on Human Rights (the ECHR) because he claimed that his relationship with his mother and step-father, who had moved to the UK in 2011, would be unlawfully interfered with if he were returned to Malaysia, where he had spent most of his life. As I understand it, this was an application outside the Rules.

21. It was conceded before me, as it had been before the FTT, that the appellant could not succeed under the Immigration Rules. An attempt to revive such a claim is contained in ground 2 of the grounds of appeal in the sense that an attempt was made to argue that paragraph 320(7B) required the respondent to take into account that the appellant would not be able to make an application for entry clearance for at least a year. However, this ground was not thought to have much merit by Judge Zucker and Mr Buley, sensibly, did not pursue it before me.

22. The purpose of the ECHR is to protect fundamental rights and freedoms not to protect lifestyle choices or facilitate long-term settlement into the UK. Substantial policy considerations must be taken into account by the respondent when applications are made by students, and others, who are admitted to the UK on a temporary basis but subsequently seek to remain here permanently. The circumstances must be exceptional before such an application will succeed. The decision maker is expected to apply sufficient flexibility to allow exceptions where they are justified.

23. The grounds pursued by Mr Buley were as follows:

- Ground 1 – it is argued that the Immigration Judge did not sufficiently consider the extent of the family life the appellant had formed in the UK and ask whether the interference with that family life was justified under Article 8.
- Ground 3 – by which the appellant sought to argue that the Immigration Judge failed to apply the case of **Chikwamba** and

erroneously appeared to have considered it to have been altered by Sections 117A-117D of the 2002 Act.

24. I will consider each of these grounds in turn.

Ground 1 – family life

25. It is argued that the Immigration Judge did not apply the same rigour to the issue of family life that she applied to private life. The two issues are closely related and I do not accept this criticism of the Immigration Judge. Plainly her findings in relation to private life were closely allied to those in relation to family life. It is notable that she found the appellant to have established family life in the UK with his mother and step-father in a close and emotional relationship. She also found the appellant to be financially dependent on the older generation. The appellant had a close relationship with other siblings living in the UK and abroad. The Immigration Judge gave careful consideration to the extensive case law on Article 8 including the case of **Nazim**, which, as I was reminded, is a case relating to private rather than family life. Mr Buley alleges that the Immigration Judge failed to consider the proportionality of removal but I find that the Immigration Judge fully considered this issue at paragraph 27 of her determination where she made a "careful and informed evaluation" as she was required to. In addition, I do not necessarily accept that the considerations in paragraph 29 relating to private life may be put in a separate compartment for they are, as I have stated, closely related. The Immigration Judge fully accepted that the appellant's family life did not automatically end at the age of 18, that he had a close relationship with his mother and step-father but that it was a proportionate and necessary decision having regard to the public interest considerations in the case. It is noteworthy that the appellant is a well-qualified individual in his 20s who is relatively financially secure having regard, in part, to the financial assistance of his mother and step-father.

Ground 2 – The Chikwamba Point

26. Judge Zucker read the decision of the FTT as saying that **Chikwamba** had been "vitiated by the provisions of Section 117B of the 2002 Act." With respect to Judge Zucker I do not necessarily read the decision of the FTT in the same way. Paragraph 32 of the decision simply states that wider considerations in relation to the need for effective immigration control must be considered and that Sections 117A-D of the 2002 Act reinforce that. The Immigration Judge clearly found the decision to be proportionate and that was a conclusion she was entitled to come to.

27. Insofar as the Immigration Judge did suggest that **Chikwamba** had been "overruled" or "vitiated" by the sections of the 2002 Act that were amended in 2014, she would not have been correct to do so. However the case of **Chikwamba** was very different on its facts from those here. There were, "harsh and unpalatable" consequences of removal to Zimbabwe, which at that time was not considered safe by the Secretary of State leading to him suspending removals to that country. The consequences of

requiring the appellant to return to Zimbabwe and make an application for entry clearance in order to continue the family life she had formed in the UK were not considered justified in the name of the maintenance and enforcement of effective immigration control. As Lord Brown emphasised, Immigration Rules are not to be applied rigidly and inflexibly. The respondent was required to have regard to the appellant's circumstances including the extent to which there were difficulties in return to the country of origin and the level of security in that country.

28. The **Chikwamba** argument can apply to a wide variety of cases including cases where the appellant could not apply from abroad and succeed because he would not qualify under the Immigration Rules for entry clearance into the UK. However, as the House of Lords emphasised in **Chikwamba** in most cases the Entry Clearance Officer abroad is better qualified to determine whether the Rules were satisfied than a court or tribunal in the UK. In this case I have found no evidence that the appellant could not apply from Malaysia to come to the UK as a student and no evidence was placed before the Tribunal that there would be any lengthy delay in doing so. The Immigration Judge was entitled to find, as she appears to have done, that the appellant could make an application and return as a student through proper channels. No evidence appears to have been placed before her as to any significant obstacles in doing so. She was therefore entitled to conclude that in a case where the appellant plainly failed to meet the exceptionality requirements of the Rules for family or private life in the UK, he could, nevertheless, apply from abroad to re-enter the UK as a student. Were he to do so, he would be able to resume his family life.

29. Mr Buley also argued that the case of **Chen** **[2015] UKUT 00189** had qualified the case of **Chikwamba** and I accept that. Essentially, where an application from abroad would be granted and there is a significant interference with a family life formed in the UK the weight to attach to the need for effective immigration control tends to be reduced as it would not serve any valuable purpose. However, this particularly applies where there are children (see paragraph 39 of **Chen**). The need for a clear decision which considers all the individual circumstances of the case is obvious but it is by no means clear from **Chen** that there is any error in the approach adopted by the Immigration Judge.

Conclusions

30. The decision of the FTT appears well-reasoned and thorough. It took fully into account the unusual circumstances of this case but the conclusion that the appellant did not qualify exceptionally outside the Immigration Rules was one the Immigration Judge was entitled to come to. The appellant has not taken issue with the FTT's conclusion in relation to private life but has asserted that the issue of proportionality of the decision on family life was not adequately reasoned or considered. In my view it was properly reasoned and fully considered. I agree with the respondent that the appellant could have returned to Malaysia and that

this would not amount to a disproportionate interference with his human rights.

Notice of Decision

The decision of the First-tier Tribunal does not contain any material error of law and the decision to dismiss the appeal against the respondent's refusal for further leave to remain is dismissed. Accordingly, the respondent's decision stands.

There is no challenge against the failure of the FTT to make an anonymity direction or a fee award.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Hanbury