IAC-PE-AW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43644/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd May 2015	**On 15th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR STANLEY JOSHUA OWURAKU KUDOLO
(ANONYMITY NOT RETAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Otchie of Counsel
For the Respondent: Mr Kandola

DECISION AND REASONS

Introduction

1. The Appellant born on 3rd July 1968 is a citizen of Ghana. The Appellant who was present was represented by Mr Otchie of Counsel. The Respondent was represented by Mr Kandola a Home Office Presenting Officer.

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Substantive Issues under Appeal

2. The Appellant had entered the United Kingdom on 18th December 2001 as a visitor and remained unlawfully thereafter. He was encountered by immigration officials on 29th September 2013 and served with a notice of his liability for removal. On 2nd October 2013 he applied for leave to remain in the United Kingdom under Article 8 of the ECHR. That application was refused by the Respondent on 8th October 2013. The Appellant had appealed that decision and his appeal was heard by First-tier Tribunal Judge Mailer sitting at Richmond on 15th September 2014. The judge had dismissed the Appellant's appeal under both the Immigration Rules and on human rights grounds. Permission to appeal was sought and permission granted by First-tier Tribunal Judge Simpson on 2nd April 2015. It was said that it was surprising that the judge did not appear to have made any findings as to whether the relationship between a British national and the Appellant was genuine and subsisting and whether it amounted to a durable relationship. It was said that disclosed an arguable error. Directions were issued for the matter to be heard by the Upper Tribunal firstly to decide whether an error of law had been made or not and the matter comes before me in accordance with those directions.

Submissions on Behalf of the Appellant

3. It was firstly said that the **Chikwamba** principle applied in this case and the judge had failed to deal with that matter. Secondly it was said that the Appellant had made application under EX.1 and there are had been no finding by the judge in terms of insurmountable obstacles or whether this was a durable relationship.

Submissions on Behalf of the Respondent

4. It was firstly submitted that **Chikwamba** could no longer survive the 2014 Act in particular given the appalling immigration history of this Appellant. It was submitted the judge had looked at the question of insurmountable obstacles.

5. At the conclusion I reserved my decision to consider the submissions made. I now provide that decision with my reasons.

Decision and Reasons

6. The Appellant had entered the United Kingdom as a visitor in 2001 and had remained thereafter unlawfully. He came to light when found by immigration officials in September 2013 and only then made application to remain under Article 8 of the ECHR.

7. The judge had provided in considerable detail the evidence of the Appellant at paragraphs 16 to 61. He was clearly aware of all the salient features in this case. He had also at paragraphs 4 to 15 set out in detail the Respondent's position within the refusal letter and at paragraphs 63 to

85 again provided in detail the submissions made on behalf of both parties.

8. The judge had looked at the case briefly under the Immigration Rules and had confined that examination to paragraph 95 when he had said "Even assuming that the provisions of EX.1 apply I do not find for the reasons set out below in the Article 8 assessment that there are insurmountable obstacles to family life continuing with Miss Douglas-Squire in Ghana". Thereafter at paragraphs 96 to 133 he dealt with the position under Article 8. That is hardly surprising given the Appellant's case was brought under Article 8 of the ECHR.

9. Permission granting appeal expresses surprise that the judge did not make findings as to whether the Appellant and Miss Douglas-Squire were in a durable relationship. Whilst it is true the judge does not say explicitly one way or the other whether they are in a durable relationship, a proper and careful reading of the determination as a whole plainly demonstrated that the judge accepted the evidence provided by the Appellant and his partner as to their relationship, found that they were in a durable relationship and much of his consideration under Article 8 of the ECHR was predicated on the basis that the Appellant could make application from Ghana for entry clearance to the UK to continue that relationship.

10. Paragraph 4 of the Respondent's letter opposing the appeal dated 16th April 2015, acknowledged that a reading of the determination as a whole revealed that family life was accepted as being genuine and subsisting. I agree with that proper concession.

11. On the basis of the judge's findings that there was indeed a genuine and subsisting durable relationship it was necessary for him to firstly consider whether the Appellant fell within the terms of the Immigration Rules prior to seeing whether it was necessary to consider Article 8 outside of the Rules.

12. The Respondent had considered this aspect of the Appellant's case at paragraph 6 of the refusal letter. The Respondent had referred to examining R-LTRP, S-LTR, E-LTRP and D-LTRP. The Respondent concluded the Appellant failed to meet:

    R-LTRP.1.1(d) because he failed in turn to meet:

    (i) E-LTRP.2.1 and

    (ii) E-LTRP.2.2.

13. That was because the Appellant was unlawfully in the UK, was an immigration offender and had been served with a notice under IS151A for removal as an overstayer.

14. Those findings that the Appellant did not meet certain eligibility requirements were not challenged. In looking at paragraph EX.1, EX.1(a)

did not apply as there were no children in this case. In terms of EX.1(b) that is not a standalone paragraph. At paragraph 95 the judge made no definitive finding on whether EX.1 applied but put it in terms of "even assuming EX.1 applies". To fall for consideration under EX.1 the Appellant must meet the requirements of R-LTRP.1.1(d). That means:

(i) He must not fall for refusal under S-LTR.

(ii) He meets the requirements of E-LTRP.1.2 to 1.12 and E-LTRP.2.1 and

(iii) Paragraph EX.1 applies.

15. In this case the Appellant did not meet the requirements of E-LTRP.2.1 and accordingly EX.1(b) did not apply to the Appellant's case. Had it done so it could be said the judge had erred in his assessment of EX.1(b) in that he had only looked at insurmountable obstacles to family life continuing with a partner outside of the UK on a temporary basis of perhaps three months or so. It would seem logical that when looking at indefinite leave to remain under the Immigration Rules a reference in EX.1(b) to insurmountable obstacles to the continuation of family life would suggest that in contemplation is the permanent or long-term removal of the applicant out of the UK and whether that would present insurmountable obstacles.

16. The judge had considered Article 8 of the ECHR outside of the Rules. He had concluded that it was not disproportionate to remove the Appellant because essentially the Appellant could return to Ghana to make an application which would take perhaps two to three months and Miss Douglas-Squire could either accompany him for that period of if she remained in the UK the period of separation was not significant. He gave clear and detailed reasons for those conclusions.

17. It is said his decision essentially breaches the principle in **Chikwamba**. That case was a very fact specific case although the principle stated therein is adopted with frequency in many applications. The case of **Thakral [2015] UKUT 00096** noted that the **Chikwamba** principal is only engaged if in the terms of paragraph 30(a) of **Hyatt** the Respondent has refused the application in question on the procedural ground that the policy requires that the applicant should have made the application from his home State.

18. Paragraph 30(a) of **Hyatt** states:

> "Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home State may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8 particularly where children are adversely affected."

19. Further paragraph 30(b) states:

> "Where Article 8 is engaged it will be a disproportionate interference with family or private life to enforce such a policy unless there is a sensible reason for so doing."

20. Paragraph 30(c) stated inter alia:

> "Whether it is sensible to enforce that policy will necessarily be fact sensitive."

21. The Respondent had not refused the Appellant's case on policy grounds only. The Respondent had considered in detail the Appellant's case within the Immigration Rules and outside of the Rules under Article 8 of the ECHR and had provided substantial reasons for refusal that were not connected to policy. The Respondent's decision therefore did not fall within the **Chikwamba** principle (see paragraph 11 **Thakral** **[2015]**).

22. In terms of the judge's decision it could be argued that having accepted a durable relationship existed and other features explicitly or implicitly accepted his decision that removal should take place was in terms of maintenance of policy only and therefore could bring the case within the **Chikwamba** principle. Even if that was the position this judge provided an informed and balanced exposition of matters at paragraphs 111 to 132. He had also taken account in his Article 8 ECHR assessment Section 117B of the 2002 Act (which he was bound to so do). That statutory consideration postdates the decision in both **Chikwamba** and **Thakral**.

23. As indicated above **Chikwamba** itself was very fact specific and sensitive. **Hyatt** **[2012]** is not a proposition for stating that it would always be disproportionate to remove where policy alone applies. It refers to the presence of "sensible reasons" and "necessarily fact sensitive". That case is referred to and adopted in **Thakral** **[2015]**.

24. It cannot be said that the judge's assessment of Article 8 of the ECHR even assuming a **Chikwamba** principle applied because of his other positive findings meant that his findings and conclusions were unreasonable or not open to him. There were no children involved in this case. He had given careful and proper consideration to all material facts and was entitled to reach the conclusion that he did and such conclusion could not be said to either disclose material errors of law or be outwith the bounds of reasonableness.

Decision

25. There was no material error of law made by the judge in this case and I uphold the decision of the First-tier Tribunal.

26. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Lever