IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04692/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 March 2016	**On 6 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDREW MUGERWA MUKASA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: Ms N Mallick, Counsel, instructed by Rose Samuel Odele & Partners

DECISION AND REASONS

1. The Appellant in this case is the Secretary of State for the Home Department who sought and was granted permission to appeal against a

decision of Judge of the First-tier Tribunal Rowlands who in a Decision and Reasons promulgated on 25 August 2015 allowed the appeal by the Respondent, who I shall refer to as the Claimant.

2. The Claimant is a citizen of Uganda born on 7 February 1979. He came to the United Kingdom on 3 May 2000 with a student visa valid for six months. It would appear that he then overstayed until on 27 June 2014, when he applied for leave to remain on the basis of his family and private life. This was initially refused without the right of appeal but eventually on 13 January 2015 he was provided with the right of in-country appeal.

3. The basis of his application is that he had formed a genuine and subsisting relationship with a British citizen who was pregnant with his child. The judge heard evidence from the Claimant and his partner, Miss Smith. He accepted the credibility of their evidence and noted at [14] that the Respondent had in the refusal letter accepted that the Claimant and his partner had a genuine and subsisting relationship and that the only issue arising was whether there are insurmountable obstacles which would prevent them returning together Uganda. This is an accurate reflection of the content of the Secretary of State's refusal letter. At [17] of the refusal letter, the Secretary of State cites paragraph EX1B of Appendix FM of the Immigration Rules which provides

> "The applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen settled in the UK or in the UK with refugee legal humanitarian protection and there are insurmountable obstacles to family life with that partner continuing outside the UK."

4. Paragraph EX2 defines insurmountable obstacles as very significant difficulties which will be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

5. The Secretary of State's position at [18] of the refusal letter provides:

> "It is considered that your client does not meet the requirements above because it is not accepted that there are insurmountable obstacles that would prevent your client returning to Uganda with his partner. It is accepted that the change in culture may be a factor in your client's partner integrating into society in Uganda. However a significant degree of hardship does not amount to an insurmountable obstacle."

The Judge's findings

6. In allowing the appeal, the judge took into account at [15] the fact that the Claimant's partner had suffered problems in childhood, in particular, she had been the victim of abuse over a long period of time and was still

helped to a great extent by her sister and her mother. Moving to Uganda would inevitably mean the loss of day-to-day contact with them which the judge accepted would have a significant affect on her mental state.

7. He also noted at [16] that the Claimant's partner was in employment in the UK, is unlikely to get work of any kind in Uganda and he accepted her concerns as to the heath of her unborn child by giving birth and living in Uganda, and the difficulties they may have in having a second child given the problems in conceiving the child with whom she was currently pregnant. He was satisfied that this constituted, on a cumulative basis, insurmountable obstacles.

8. The judge at [17] went on to allow the appeal in respect of the Immigration Rules and then stated: "I must also reach the conclusion that it would be an unlawful interference with his family life under Article 8, as it is not in accordance with the law".

Grounds of appeal

9. The Secretary of State sought permission to appeal on 4 September 2015 on three grounds. Firstly, that the judge had given weight to an immaterial matter i.e. the pregnancy of the Claimant's partner. Part of that ground asserts that the judge failed to explain why the Claimant could not return to Uganda in order to make an entry clearance application and referred to the cases of R (on the application of Chen) v Secretary of State IJR [2015] UKUT 00189 (IAC).

10. Secondly, that the judge failed to give adequate reasons on material matters. In particular that in allowing the case with regard to Article 8, he had failed to consider the public interest inherent in such consideration and, thirdly, that the judge had given weight to immaterial matters and that was the relationship between the Claimant's partner and her sister which it was asserted did not impact on whether the Claimant could return to Uganda.

11. Permission to appeal was granted on 1 February 2016 by First-tier Tribunal Judge Colyer, essentially on the basis that the points raised by the Secretary of State in the grounds of appeal were arguable.

Hearing

12. At the hearing before me, Mr Clarke appeared for the Home Office and Ms Mallick on behalf of the Claimant. Mr Clarke argued that the test under EX1 of Appendix FM of the Rules encompassed the making of an entry clearance application and that has to be considered as part of a consideration of that test. He submitted that there was no insurmountable obstacle to family life continuing if the Claimant had to return to Uganda and apply for entry clearance. He submitted correctly that at [17] the judge had essentially conflated his consideration of the Immigration Rules and Article 8 and had failed to apply the correct test. He submitted that

family life would not cease if the Claimant had to go abroad for a short time in order to make an entry clearance application and EX1 was specific to family life between the Claimant and his partner and the reference to his partner's sister was an immaterial factor which had been taken into account.

13. In response Miss Mallick submitted that the case of Chen did not assist. She submitted that the judge at [14] had looked at insurmountable obstacles both objectively and subjectively and the judge had considered all the relevant circumstances including the inability of the Claimant's partner to obtain work in Uganda and the importance of the relationship between the Claimant's partner and her mother and sister. She submitted it was not necessary for the judge to consider whether or not the Claimant could make an entry clearance application as this was not a requirement of the Rules. She submitted even if she was wrong about that and it was relevant for the judge to have considered entry clearance, the Claimant's partner was pregnant at that time. The child had now been born and it was unreasonable for the Respondent to expect the Claimant to go to Uganda to make an entry clearance application. She submitted the judge would have come to the same conclusion based on his findings of fact and if there was an error it was not material.

14. In response Mr Clarke said that the interpretation of EX1 encompasses a long term interpretation of family life and includes the requirement to apply for entry clearance.

15. I asked the parties to comment on the judgment of the House of Lords in Chikwamba [2008] UKHL 40 and whether this was consistent with Mr Clarke's interpretation of paragraph EX1 of the Rules. Mr Clarke responded that Chikwamba was not determinative of EX1. Miss Mallick essentially repeated her previous submission.

Decision

16. I find no material error of law in the decision of First-tier Tribunal Judge Rowlands to allow the appeal under the Immigration Rules. I do not accept that paragraph EX1 requires a judge to consider whether or not an application for entry clearance must be made by an applicant. I also note that nowhere in the refusal letter does the Respondent address the effect of Chikwamba [2008] UKHL 40 and the requirement to apply for entry clearance and given that this was simply not raised by the Respondent, it was not incumbent upon the judge to deal with the point: see the judgment of Mr Justice Nicol in R on the application of Thakral IJR [2015] UKUT 00096 (IAC).

17. It is clear from EX2 that the definition of insurmountable obstacles in EX1B has a number of potential meanings *viz* very significant difficulties which will be faced by the applicant or their partner in continuing family life together outside the UK, which could not be overcome, or would entail very serious hardship for the applicant or their partner. I further note that

in her refusal letter at [18] the Respondent acknowledged that the Claimant's partner would face "a significant degree of hardship" but contended that this did not amount to "insurmountable obstacles."

18. It is further clear, in my view, that what EX1 is envisaging is the couple relocating to another country rather than a temporary separation, in the sense that the applicant has to leave and make an entry clearance application. Moreover, to read Mr Clarke's interpretation into EX1 would not fulfil the purpose of this part of the Immigration Rules, which is to legitimise and grant leave to overstayers who fulfil the requirements of those Rules and thus comply with the stated intention of the Rules and the Secretary of State's obligations under Article 8 of the European Convention on Human Rights.

19. I find that it was incumbent upon First tier Tribunal Judge Rowlands to consider the impact upon the Claimant's partner if she had to go and live permanently in Uganda with the Claimant. He did so in that he found that a number of factors relating to her particular circumstances would constitute insurmountable obstacles, for the reasons that he sets out at [15] and [16] of his decision, summarised at [6]-[7] above. On the basis of these findings of fact, I find that he was justified in concluding that there were insurmountable obstacles to family life continuing outside the United Kingdom. It is the case that the judge did not give consideration to the public interest set out in section 117B of the NIAA 2002 in relation to consideration of Article 8 outside the Rules. However, I find that this is not a material error, given the Judge's decision to allow the appeal under the Rules, for reasons which are justifiable and which I uphold.

20. The Secretary of State's appeal is dismissed, with the effect that the decision of First tier Tribunal Judge Rowlands to allow the appeal under the Immigration Rules is upheld.

21. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Chapman