IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26708/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 February 2016	**On 8 April 2016**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FARAI TAWANDA MOYO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms N Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Mr J Chipperfield, Counsel

DECISION AND REASONS

1. The Secretary of State is the appellant in this case. She has been granted permission to appeal the decision of First-tier Tribunal Judge Lucas allowing the appeal of the respondent against her decision made on 12 June 2014 to give directions for his

removal under Section 10 of the Immigration and Asylum Act 1999 and to refuse to grant him leave to remain under the Human Rights Act 1998. For ease of reference I shall continue to refer to Mr Farai Moyo as the appellant in this decision.

2. The judge stated that the refusal grounds in this case were narrow and were contained within the refusal letter dated 12 June 2014. It was accepted by the Secretary of State that the appellant meets the requirements of LTR and Appendix FM of the Immigration Rules. With regard to family life it was also accepted that there were no grounds for refusing the appellant on suitability grounds. It was also accepted that the appellant meets the requirements of E-LTRP1.2-7 in that he is in a settled relationship with Kirsantha Ventakachellam, a UK citizen who is present and settled in the UK and they have been living together in a relationship akin to marriage for at least two years.

3. With regard to EX.1 it was stated that the appellant entered into their relationship with Kirsantha Ventakachellam when his status was precarious. It was also noted that he could not meet the requirements of paragraph 276ADE. He is 33 and entered the UK on 19 June 2004. It was not accepted that he has lost all of his social and cultural ties to South Africa.

4. The judge stated that the case for the appellant was set out in the skeleton argument dated 3 August 2015. It was noted that the appellant met his partner in 2005 while they were both students and have been cohabiting since 12 February 2007. The partner of the appellant works for Barclays Bank and earns in excess of £20,000 per annum.

5. The judge went noted that the appellant meets the requirements of Appendix FM as a partner. He also meets the requirements of Appendix FM with regard to suitability. The only component of Appendix FM that he does not meet is the immigration status requirement set out in E-LTRP2.2 and said in paragraph 6

> *"In short, the only obstacle to a grant of leave to remain as a partner is the fact that Mr Moyo made his application from within the UK".*

6. The judge recorded that Mr Bonavero the appellant's representative, agreed that this *"technical"* issue within the relevant Immigration Rules must also be considered outside of them. Mr. Bonavero relied upon the principles set out in the well-known and guiding decisions in **Chikwamba [2008] UKHL 40**. At paragraph 10 of the skeleton argument it is stated:

> *"Requiring [the appellant] to leave his partner to travel to a country he has not lived in for over ten years, all in pursuit of a successful grant of entry clearance, makes little sense. The couple are established here in the UK and it is obvious from [his partner's] work in the UK that she cannot simply relocate to South Africa to accompany [the appellant] to South Africa to make his entry clearance application".*

7. The judge then said as follows:

> 8. *"On behalf of the respondent, Ms Murphy agreed with the above analysis. She stated that she had taken instructions from a caseworker with regard to this case and had been instructed to request this Tribunal set aside the reasoning of Chikwamba and dismiss this appeal. She made no further submissions.*
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> 9. *Under these circumstances, it is not necessary to recite the extensive evidence that has been submitted in two bundles by the appellant in this case. The facts are accepted and the only live issue as between the appellant and the respondent is whether it is reasonable to expect the former to return to South Africa to apply for entry clearance. By agreement, this was the only issue in this appeal".*
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> 17. *The Tribunal does not feel able to do so in all the circumstances of this case. The disruption caused by requiring the appellant to return to South Africa to make an almost inevitable successful application to return to the UK is indeed false logic. It is certainly disproportionate and in the view of this Tribunal, not in any public interest. The Tribunal concludes therefore that the removal of this appellant is a disproportionate interference with the (accepted family life of this appellant within the UK.*

8. Mr. Chipperfield submitted that the judge did not err in law his application of **Chikwamba** and that his decision was sustainable. I disagreed. I preferred the submissions made by Ms Willocks-Briscoe in reliance on the grounds. The circumstances in **Chikwamba** were unusual in that there were insurmountable obstacles to the applicant's family life continuing in Zimbabwe. I find that the judge failed to consider whether the appellant could return with his partner to live in South Africa or whether there were any insurmountable obstacles to the appellant returning to South Africa for a temporary period to make an application for entry clearance, which would have included consideration as to whether there would be a significant interference in their family life in the temporary period of separation. The judge failed to take into account that the decision was made under section 10 of the Immigration and Asylum Act 1999 and so this was an appellant who had no lawful basis of stay in the UK. Consequently, I find that the judge wrongly applied *Chikwamba* and failed to grapple with the issue that was before him. For this reason I allow the Secretary of State's appeal. I set aside the judge's decision.

9. In remaking the decision I asked the appellant to tell the court why he could not return to South Africa to make an application for entry clearance to join his partner in the United Kingdom, if his family life with his partner could not continue in South Africa.

10. The appellant said he would need to sustain himself. He has distant family whom he has not made contact with since he came to the UK in 2004. In view of the length of time he has been away from South Africa, he will be viewed as a foreigner. Finding work will be an obstacle. His partner will not be able to sustain him in South Africa and sustain their household here in the UK.

11. Following questions from Mr Chipperfield, the appellant said that his mother and sister live in the UK. They will not be able to support him because they will be running two households. In South Africa he has his maternal grandmother, aunts and uncles. He has not spoken to them for over ten years. There was nothing stopping him from contacting them but it would appear that the contact would be because he needed help. Furthermore since his maternal grandfather died there has been a dispute over the property he left behind.

12. Following questions from Ms Willocks-Briscoe, the appellant confirmed that he holds a South African passport and is a South African national. He confirmed that he would be entitled to all the benefits that accrue to a South African national. He submitted that he is a Zulu speaker and that if he was in a different environment, he would be viewed as a foreigner and that would affect his job prospects.

13. Mr. Chipperfield submitted that the appellant would face severe financial difficulties on his return to South Africa. In any event he would succeed if he made an application for entry clearance. The temporary disruption would not benefit anyone and therefore there is no public interest in his removal.

14. Ms Willocks-Briscoe submitted that in submitted that the appellant's entry clearance application would succeed failed to take account of the requirements in Appendix FM of the Immigration Rules. The case was based on whether it would be disproportionate for the appellant to return to South Africa to make an entry clearance application. The appellant claimed that either his partner nor his mother and sister could support him but there was no evidence that they would not be able to. There was no evidence why he could not re-establish contact with the family in South Africa to provide him with financial support and accommodation. There was no evidence that he could not obtain employment. He was in the UK as a student and had no legitimate expectation that he could remain permanently. She relied on **R (on the application of Chen) (Appendix FM – Chikwamba-temporary separation-proportionality)IJR [2015] UKUT 00189 (IAC)** in which it was held that where there are no children, it is more unlikely that the applicant will be able to show a breach of Article 8. An applicant must show significant interference.

15. I was not persuaded by the appellant's evidence that he would face severe financial difficulties if he had to return to South Africa for a temporary period in order to make an entry clearance application. His evidence did not amount to a significant interference in his family life. His evidence that his partner and mother and sister would not be able to financially support him while he was in South Africa was not supported by any evidence from them. He said his family in South Africa would view his contact with suspicion because he had not contacted them since 2004; yet he did not say that they would not offer their support if asked to do so.

16. The decision of the Upper Tribunal in **R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015]**

UKUT 00189 (IAC) is pertinent to this case. In its headnote (i) the Tribunal held as follows:

> *(i) "Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to rejoin family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case law concerning Chikwamba v SSHD [2008] UKHL 40.*
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> *(ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das) v SSHD [2011] EWHC 20070 (admin)).*"

17. On the evidence put forward by the appellant, I find that there would be no significant interference with the family life he has established with his partner were he to return to South Africa on a temporary separation to make an entry clearance application. By the time they started their relationship the appellant's status in the United Kingdom was precarious. Indeed his last leave to remain as a student expired on 30 September 2005. Two applications for leave to remain on human rights grounds made on 1 July 2009 was refused on 26 March 2011 without a right of appeal and a further application made on 20 March 2013 was also refused without a right of appeal. He was then granted a right of appeal against the decision that was made on 12 June 2014. Therefore whilst the appellant satisfies the suitability requirements and E-LTRP1.2-7, that was not sufficient to allow the appeal on the basis of **Chikwamba**. The appellant and his partner have no children. He would be returning to South Africa where he is a national. It would be a temporary separation. Objections such as lack of a job and being in an area outside of the Zulu community do not in my view amount to very significant obstacles.

18. Accordingly I dismiss Mr. Moyo's appeal.

Signed Date

Upper Tribunal Judge Eshun