



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/47485/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 6<sup>th</sup> January 2016

Decision & Reasons Promulgated  
On 21<sup>st</sup> January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MUHAMMAD FAISAL NADEEM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Hashmi, Counsel; Nasim & Co Solicitors

For the Respondent: Mr D Clarke, Senior Presenting Officer

**DECISION AND REASONS**

1. For ease of comprehension, the parties are referred to by their appellate status and positions before the First-tier Tribunal.
2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Shiner allowing the Appellant's appeal against the Secretary of State's decision to remove him under Article 8 ECHR.
3. The First-tier Tribunal promulgated its decision allowing the Appellant's appeal against the Respondent's decision on 1 July 2015.

4. The Respondent appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Colyer on all grounds. The grounds upon which permission was granted may be summarised as follows:
  - (i) It is arguable that the judge erred in considering Article 8 ECHR without first considering Appendix FM EX.1,
  - (ii) It is arguable that the judge erred in failing to apply section 117B of the Nationality, Immigration and Asylum Act 2002,
  - (iii) It is arguable that the judge erred in failing to give adequate reasons for his findings on insurmountable obstacles at §37,
  - (iv) It is arguable that the judge erred in failing to identify compelling circumstances to consider matters outwith the Rules,
  - (v) It is arguable that the judge erred in relying upon *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 in light of *Thakral, R (on the application of) v Secretary of State for the Home Department* IJR [2015] UKUT 00096 (IAC).
5. It is of note that a Clerk to the Upper Tribunal issued Directions to parties and the Appellant on 2 December 2015 indicating that the original file is incomplete and that any material upon which the Respondent seeks to rely should not be assumed to be on file. As it came to pass, the file was incomplete and contained neither the Respondent's Bundle nor the Appellant's Bundle from the First-tier Tribunal. I indicated this situation to the parties at the start of the hearing and neither sought an adjournment owing to this hindrance.

#### **Error of Law**

6. I find that there was an error of law in the decision such that it should be set aside. My reasons for so finding follow shortly.
7. Turning to the Respondent's first ground, I find that the judge failed to consider the Immigration Rules in relation to EX.1. Pursuant to *Sabir (Appendix FM - EX.1 not free standing) (Pakistan)* [2014] UKUT 63 (IAC), EX.1 is not freestanding, but given that the Appellant failed to meet the financial criteria, this failure would not have precluded him from benefitting from an EX.1 consideration. However, this failure may have been immaterial given that the judge reaches a conclusion on insurmountable obstacles at §37 in the Appellant's favour outwith the Immigration Rules.
8. Concerning ground two, I find that the judge's assessment of section 117B confirms that section was taken into account. The application of that legislation features consideration of positive matters in favour of the Appellant. Whilst it would have been prudent of the judge to affirm his grasp of the public interest outwith the Rules, it was not necessarily fatal to the consideration of this issue. What matters is substance, not form (see *Dube (ss.117A-117D)* [2015] UKUT 90 (IAC)).
9. However, turning to ground three, I am *just* satisfied that the judge has failed to give adequate reasons for his findings in relation to insurmountable obstacles at §37. This

is because the consideration beforehand touches upon relevant matters at §34 before turning to section 117B at §25 and section 55 and the child's interests at §36. Whilst those points are all valid ones, the conclusion reached at §37 is vague and it is unclear why the judge finds that insurmountable obstacles exist in this particular scenario and what precisely those insurmountable obstacles are.

10. In relation to grounds 4 and 5, I am not required to deal with them, however I should say that I do not find them to have merit. The lack of compelling circumstances being identified explicitly is not a test that Tribunal judges must discharge before going on to consider Article 8 ECHR outwith the Rules. What is required is that there is a matter which has not been considered within the Rules for whatever reason, which therefore requires consideration so that the assessment of Article 8 ECHR is not incompatible with section 6 of the Human Rights Act 1998 for permitting an omission in consideration of that Article. In relation to the *Chikwamba* point, *Chikwamba* still features for consideration outwith the Rules, as the Court of Appeal appeared to follow in *Agyarko & Ors, R (on the application of) v Secretary of State for the Home Department* [2015] EWCA Civ .
11. Before I conclude, I should remark that I was unable to go on and consider the matter for myself because the parties had not provided me with copies of the bundles of evidence available to the First-tier Tribunal. As an illustration of this hindrance, I was unable to assess for myself whether the judge's findings at §32 demonstrated that the financial threshold was met against *Chikwamba* as I did not have sight of the 12 months' bank statements and matching payslips that Ms Hashmi stated were before the First-tier Tribunal. Further to discussion with the parties, it also transpired that the judge may have been wrong to conclude that the Appellant did not meet the Rules given paragraph 1(m) of Appendix FM-SE; however as Mr Clarke pointed out, as there was no cross-appeal, that matter was not open to me to assess but remained an issue that the Appellant was open to raise before the Tribunal at a future hearing.
12. In the light of the above findings, I set aside the decision and findings of the judge.

### **Decision**

13. The appeal to the Upper Tribunal is allowed.
14. The decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal, to be heard by a differently constituted bench.

Signed

Date

Deputy Upper Tribunal Judge Saini