Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00467/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19 July 2017

Decision & Reasons Promulgated
On 10 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

J O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity:

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. This direction has been made in order to protect the Appellant from serious harm, having regard to the interests of justice and the principle of proportionality.

Representation:

For the Appellant: Mr D O'Callaghan, Counsel, instructed by Barnes Harrild & Dyer Solicitors
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

© CROWN COPYRIGHT 2017

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge James (the judge), promulgated on 17 October 2016, in which she dismissed the Appellant's appeal. That appeal had been against the Respondent's decision of 26 May 2015, refusing a human rights claim made on 24 April 2015. The application had been based upon the Appellant's marriage to a British citizen husband. An issue of the Appellant's claimed bisexuality had been raised in the application. The Respondent refused the application, noting the Appellant's poor immigration history of prolonged overstaying and the absence of any insurmountable obstacles in the way of family life being enjoyed outside the United Kingdom (presumably in Nigeria). There were said to be no exceptional circumstances in the case.

The judge's decision

2. The judge sets out the basis of the Appellant's case at paragraphs 11 to 15. At paragraph 17 she begins by stating, "The main issue I have to decide is whether the Appellant is bisexual or not". Thereafter the judge makes a number of adverse credibility findings in respect of this issue and concludes that the Appellant was not in fact bisexual. The assertion that she was is said by the judge to have been a fabrication.

3. At paragraphs 25 onwards the judge considers various other issues relating to Article 8. At paragraph 25 she notes the acceptance by the Respondent that the Appellant and her husband were in a genuine subsisting relationship. She also notes that the husband's financial circumstances were not challenged. He had £37,000 in his business account in July 2016 and in excess of over £50,000 as an operating profit in respect of his IT business. There was no issue in respect of the Appellant's ability to meet the English language requirements of Appendix FM. At paragraph 28 the judge states:

> "... she does not meet the time criteria under the Immigration Rules and is an overstayer, so is required to return to her home country and make a proper application to regularise her entry and stay in the UK as a spouse."

4. Paragraph 29 reads as follows:

> "The husband's work is in IT, which is a global business remotely accessible, and he also has an employee who can undertake work for him on occasion if not part or full time. The husband also has dual nationality and a Nigerian passport, so he is able to take visits to Nigeria to see his wife. He confirmed in his oral evidence he visited Nigeria in 2015 and 2016, thus undertakes regular trips there, including to his extended family members (thus contradicting the facts made in his letters and witness statement and undermining his credibility). Thus he can retain links to her (sic) wife through visits, and also modern means of communication not least through his own IT consultancy

business. The Appellant is able to apply for a visit visa, as well as a spouse visa upon her return to Nigeria."

5. Paragraphs 30 and 31 read:

> "30. I have no evidence that it would take a significant period of time or that there would be any problems with the Appellant making a timely application for a visa upon her return to Nigeria.
>
> 31. It was accepted during submissions that the Appellant lacked entry clearance so did not meet the spousal visa rules. It was accepted the Appellant had been illegally presented (sic) in the UK since 2004 and that she had overstayed in 2003 in breach of her visit visa conditions."

6. In paragraphs 32 and 33 the judge finds that the Appellant had family members both in the United Kingdom and back in Nigeria. At paragraph 34 the judge cites two cases relating to the principles set out in Chikwamba (namely Hayat [2011] UKUT 00444 (IAC) (although of course this case went up to the Court of Appeal and it is the court's judgment which should be considered: see [2012] EWCA Civ 1054) and R (on the application of Chen) [2015] UKUT 189 (IAC)). In all the circumstances, the judge finds that the Respondent's decision was proportionate and the appeal was duly dismissed.

The grounds of appeal and grant of permission

7. The grounds of appeal submitted for consideration by the First-tier Tribunal were settled by Counsel who had appeared before the judge. These grounds allege that there had been procedural unfairness by the judge in relation to the bisexuality issue and that the judge had erred in respect of a consideration of other Article 8 related issues. Permission was refused by First-tier Tribunal Judge Baker. The Appellant herself then drafted grounds to the Upper Tribunal. Soon after these were lodged, Counsel (who had appeared before the judge) settled separate grounds of appeal. These grounds essentially followed what had been asserted in those lodged with the First-tier Tribunal. It appears as though the second set of grounds were not put before the relevant Upper Tribunal Judge when the application for permission to appeal was considered. Upper Tribunal Judge Pitt refused permission with regards to the Appellant's own grounds. Following correspondence from the Appellant's solicitors, Judge Pitt's decision was set aside by Upper Tribunal Judge Coker. By a decision dated 1 June 2017, Judge Coker granted permission with reference to the second set of grounds.

The hearing before me

8. At the outset of the hearing Mr O'Callaghan confirmed that the grounds of appeal drafted by previous Counsel included a Statement of Truth at the end. This effectively constituted a witness statement asserting that the matters set out in the grounds were factually accurate. Mr O'Callaghan acknowledged that a separate

witness statement may have been an ideal way of presenting the evidence in support of the procedural unfairness issue.

9. I informed both representatives that as far as I could see the Upper Tribunal had not asked the judge for her comments on the procedural unfairness issue.

10. The issue can be summarised as follows. It is said on the Appellant's behalf that the judge had confirmed at the outset of the hearing that she would not be considering the issue of the claimed bisexuality because the Appellant had failed to make a protection claim. In light of this, it is said, it was unfair of the judge then to consider the issue in detail and make adverse credibility findings without specific points being raised at the hearing in any way. What is said by the Appellant (more specifically by previous Counsel) is certainly contrary to the clear statement made by the judge at the beginning of paragraph 17 (mentioned earlier in my decision). Having regard to the Record of Proceedings on file it appears to me as though the issue of sexuality was raised, albeit briefly, in cross-examination of the Appellant. There is reference to this issue in submissions by the Presenting Officer as well, although there is nothing to say that this aspect of the claim was expressly disputed.

11. Initially, I was of the view that the comments of the judge should be obtained before I could fairly make a decision upon this ground of appeal. However, on instructions, Mr O'Callaghan confirmed to me that he was withdrawing ground 1. In light of this I reach no conclusion on the allegation of procedural unfairness. Mr O'Callaghan relied solely on ground 2.

12. There were two elements to the Appellant's submissions. The first is that the judge erred in her consideration of whether there were insurmountable obstacles to the Appellant's husband going to live in Nigeria permanently. The husband had provided oral evidence that an important part of his work involved being on-site in the United Kingdom; in other words, he was required to be at a particular location himself when undertaking his consultancy work. Mr O'Callaghan submitted that the judge failed to deal with this evidence in paragraph 29. The husband's evidence had been unchallenged, and this being the case, going to live in Nigeria would have undermined the viability of the husband's business. This would have constituted (at least arguably) an insurmountable obstacle. Mr O'Callaghan submitted that maintaining a family life by way of visits to and from the United Kingdom was clearly an inadequate basis for dismissing a human rights appeal.

13. The second limb of Mr O'Callaghan's argument related to the Chikwamba principle. He noted what the Supreme Court said about this issue in Agyarko [2017] UKSC 11, at paragraph 51), a judgment which of course postdates the judge's decision, but nonetheless represents a statement of the law as it had been at all material times. Mr O'Callaghan pointed out that the judge, notwithstanding her adverse credibility findings in relation to the bisexuality issue, had found that there was a genuine and subsisting relationship, that the husband's finances were well in excess of the minimum income threshold, that there was adequate accommodation, and that the Appellant could meet the English language requirements. The only factor counting

against the Appellant was her lack of status. It was submitted that these accepted factors had not been considered in the context of the Chikwamba principle. The reference to relevant case law in paragraph 24 was brief and did not come with any real engagement or reasons.

14. Mr Nath submitted that paragraph 29 represented an adequate assessment of the insurmountable obstacles issue. He suggested that the judge was concluding that the husband could continue with his work if he lived full-time in Nigeria, or that he could live in the United Kingdom and visit his wife in Nigeria regularly, or that the Appellant should go and make an entry clearance application. Mr Nath sought to distinguish the Chikwamba case from the present case by submitting that this Appellant had been an overstayer for a very significant period of time.

15. In reply Mr O'Callaghan submitted that taking holidays in Nigeria was not the same as working or attempting to work there on a full-time basis. He submitted that unlawful status in the United Kingdom did not rule out application of the Chikwamba principle.

16. Both representatives were agreed that if I were to find that there were material errors of law in the judge's decision I should re-make the decision on the evidence before me. Having taken further instructions Mr O'Callaghan confirmed that in any re-make decision he was not relying upon the bisexuality issue. He asked me to consider the rest of the evidence before me in the round.

17. Having taken a short break to consider matters and read additional paperwork, Mr Nath confirmed to me that the reference by the Appellant's husband to being "on-site" for the purposes of his IT business did mean that he was required to be in the United Kingdom. Mr Nath confirmed that he was not challenging the husband's evidence in this respect.

18. At the end of the hearing I reserved my decision.

Decision on error of law

19. I conclude that there are material errors of law in the judge's decision. My reasons for this conclusion are as follows.

20. First, having regard to the judge's Record of Proceedings and a note of hearing by previous Counsel (provided to myself and Mr Nath by Mr O'Callaghan) it is clear that the Appellant's husband did in fact state in oral evidence that he was required to be on-site as part of his IT consultancy business. I am satisfied that this particular aspect of his evidence was not challenged before the judge. I am persuaded by Mr O'Callaghan's submissions that the judge has failed to engage with this important aspect of the evidence. Whilst the point may have been only somewhat briefly touched upon in evidence, it nonetheless represented a material consideration as to whether the husband's successful business could continue to be viable if he were to go and live in Nigeria. The requirement for him to be on-site in the United Kingdom would, on the face of it, make a permanent relocation to Nigeria extremely

problematic. The fact that he may have undertaken some visits to Nigeria over the course of time is not the same as living there permanently, or indeed spending prolonged periods of time away. In my view the judge has failed to grapple with this point. There is no clear reference to it in paragraph 29. There is no reasoning on the part of the judge to indicate that the employee could take the place of the husband in respect of on-site requirements. I am satisfied that there is a material error of law in this respect. It is material because the viability of the husband's business was capable of supporting a conclusion that there were insurmountable obstacles to life in Nigeria, and because other substantive requirements of Appendix FM were found by the judge to be satisfied.

21. Second, it is by no means clear to me that the judge was in fact concluding that family life could be adequately maintained simply through visits by the Appellant to her husband in the United Kingdom or *vice versa*. If this was her conclusion, it is unsustainable. Such a state of affairs has never been relied upon by the Respondent as an appropriate method of maintaining a genuine and subsisting relationship between husband and wife. Such a conclusion would not be supported by either the contents of Article 8 related Rules or case law.

22. Third, there is then the entry clearance issue. It is of course the case that the Appellant was an overstayer and had been so for a considerable period of time. This was always going to count against her, and the judge was entitled to take this into account. However, the absence of prior entry clearance as a spouse and/or the unlawful status would not in and of itself mean that an Article 8 claim made within the United Kingdom would be bound to fail. That is the underlying basis of the principle outlined in Chikwamba, as followed and confirmed in Hayat in the Court of Appeal and most recently by the Supreme Court in Agyarko. What is said in the case of Chen must be read in light of binding authority from the Court of Appeal and the Supreme Court.

23. Fourth, notwithstanding her adverse findings in respect of the bisexuality issue, the judge has made certain favourable findings in relation to compliance with Appendix FM: namely the genuineness of the relationship, the financial circumstances, accommodation, and the English language requirements. The sole factor which the judge has in effect relied upon to support her conclusion that the Appellant should go and make an entry clearance application is the lack of status in this country. With due respect to the judge, I agree with Mr O'Callaghan's submissions that the findings relating to the satisfaction of substantive requirements of the Article 8-related Rules (namely Appendix FM) was highly relevant to a consideration of whether the Chikwamba principle applied in this case. To my mind, I cannot see an engagement with these material factors in the context of a consideration of the Chikwamba issue. Although case law is cited in paragraph 34, there is no detailed reasoning attached thereto. I also note, as mentioned previously, that the Hayat case cited referred to the Upper Tribunal's decision and not that judgment of the Court of Appeal. In all the circumstances I consider that there has been a failure to take relevant matters into account or an error in approach when considering a material issue, namely that of the Chikwamba principle.

24. For the above reasons I set aside the judge's decision.

Re-making the decision

25. In light of the representatives' views, as set out previously, I now re-make the decision on the basis of the evidence before me. This includes the Respondent's original appeal bundle, the Appellant's original bundle (indexed and paginated 1-195), and the supplementary bundle (indexed and paginated 1-31).

26. As noted previously, the Appellant is not relying upon the bisexuality issue. For his part Mr Nath has accepted the husband's evidence in relation to his own business and has not sought to challenge any other relevant aspect of the evidence before me.

27. I make the following findings of fact. I find that the Appellant's marriage to her husband is and always has been genuine and subsisting. They intend to live together permanently in the United Kingdom. I find that the Appellant's husband runs an IT consultancy business, and that this is successful. I find that his income is way in excess of the minimum threshold of £18,600 a year. There has never been any suggestion that he is unable to satisfy the requirements of Appendix FM in this regard, and with reference to Appendix FM-SE I find that this is the case. Even if he could not satisfy the particular requirements of Appendix FM-SE, he nonetheless has an income significantly greater than that required by the Rules. I find that the Appellant is and would be adequately accommodated in the United Kingdom. I find that she meets the English language requirements as set out in the Rules.

28. I find that the Appellant's husband is required to be on-site in the United Kingdom in respect of significant elements of his IT consultancy business. His evidence to this effect goes unchallenged, and in any event it is a wholly plausible state of affairs. I appreciate that in a world of the internet and global communications some work can be conducted remotely, as it were. However, the need for people to be *in situ* remains common-place. I accept that if the husband were required to go and live in Nigeria permanently, there is a very significant risk that his successful business would diminish or fail. This is a very significant factor in my view, particularly as he has created the business from scratch and is conducting it in the United Kingdom as a British national (in other words a person who has and always has had every right to establish a business here). I find that the husband has visited Nigeria in the past and would be able to visit in the future. However, I am satisfied that this could only involve relatively short holiday visits. He would not be able to reside there long-term without damage to his business occurring, as stated previously. I accept that he has an employee, but also accept that this is not a partner in the business and is not a substitute for the husband's presence in the United Kingdom when required. I find that the Appellant has family both in the United Kingdom and in Nigeria. I find that the Appellant and her husband have been seeking fertility treatment in respect of having a child. This has been an ongoing issue in their lives, as indicated in the reliable evidence before me.

Conclusions

29. I conclude that the Appellant succeeds in her human rights appeal.

30. Although I have found that she meets the substantive requirements of Appendix FM, she cannot qualify under the five-year partner route because of her status in the United Kingdom. E-LTRPT.3.2.(b) applies: the Appellant has been in breach of immigration laws for a period in excess of 28 days. However, this provision does permit the Appellant to potentially succeed under the ten-year partner route if EX.1. applies. The relevant part of EX.1. reads as follows:-

> "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 leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK".

31. EX.2. reads as follows:-

> "For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the very significant difficulties which would 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".

32. I conclude that there are insurmountable obstacles in this case. If family life is to be enjoyed to any meaningful extent outside of the United Kingdom, the Appellant's husband would in effect have to move to Nigeria and reside there permanently. On this scenario, as I have found previously, it is more likely than not that his IT business will suffer irreparable damage, and may very well fail. His livelihood built up over time and in the secure setting of the country of his nationality would be likely to fall away. I conclude that there would be no way of avoiding this danger if the husband were living in Nigeria full-time because that danger would arise from him not being in the United Kingdom, contrary to the requirement of being on-site. Even if this could be overcome in some way, there would be very serious hardship to the husband, namely, the loss of his business or the significant diminution thereof, and the resulting economic and emotional toll this would incur.

33. In light of the foregoing, EX.1. is satisfied and the Appellant succeeds in her appeal.

34. Alternatively, if the problems faced by the husband did not constitute insurmountable obstacles, I nonetheless conclude that the Appellant succeeds. The principle enunciated in Chikwamba has been reaffirmed recently by the Supreme Court in Agyarko. At paragraph 51 the Court stated:

> "Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control

> might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department."*

35. I direct myself that the principle may not constitute a hard-and-fast rule of law, and each case of course depends on its facts.

36. On the facts found in the present case, the Appellant meets all of the substantive requirements of Appendix FM in relation to genuine relationship, financial support, accommodation, and English language requirements. These are crucial elements of the overarching public interest in maintaining effective immigration control. The factor that has prevented her from satisfying the five-year partner route under Appendix FM is that relating to her lack of status. The significant overstaying is relevant, but it is not in and of itself fatal to the Appellant's argument on this issue.

37. Additional matters which I have taken account of include the general uncertainties surrounding the timeframe for the making of, and decision upon, an entry clearance application from Nigeria, together with the potential disruption of fertility treatment in the United Kingdom (which has been privately financed).

38. Notwithstanding the comments made in paragraph 41-42 of Chen, on the facts as I have found them to be I cannot see what could be sensibly achieved by requiring the Appellant to go back to Nigeria and make an entry clearance application. In addition to such a course of action having the potential to disrupt the fertility treatment, there is also the fact that the substantive provisions of the Rules (as they represent what the public interest requires from those seeking to remain in the United Kingdom) have been met. The overstaying is not to be condoned, but nor is to be regarded as a means of punishing her, as it were. All things considered and weighed up, the balance in this particular case falls in favour of the Appellant.

Anonymity

39. I have decided to make a direction in this case. Although the Appellant's claim to be bisexual was rejected by the First-tier Tribunal, it remains a fact that she made that assertion and it has been cited and considered within my decision. If members of the Appellant's family or others connected thereto were to have knowledge of this aspect of her case, there is a real risk of consequential serious harm to her.

Notice of Decision

The decision of the First-tier Tribunal contained material errors of law.

I set aside the First-tier Tribunal's decision.

I re-make the decision by allowing the Appellant's appeal.

The Respondent's refusal of the Appellant's human rights claim breaches her Article 8 rights and is therefore unlawful under Section 6 of the Human Rights Act 1998.

An anonymity direction is made.

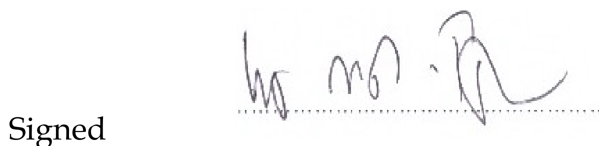
Signed Date: 7 August 2017

Deputy Upper Tribunal Judge Norton-Taylor

<u>TO THE RESPONDENT</u>

<u>FEE AWARD</u>

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. The Appellant has won her appeal. However, she put forward a protection-related element of her case which the judge found to be incredible, the grounds of appeal have been refined only at the last minute, and the other matters have required adjudication.



Signed Date: 7 August 2017

Deputy Upper Tribunal Judge Norton-Taylor