Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04491/2015

THE IMMIGRATION ACTS

Heard at Field House
On 18 May 2017

Decision & Reasons Promulgated
On 9 June 2017

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUMANAN KURUKULASINGHAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Miss A Holmes, Senior Home Office Presenting Officer
For the Respondent: Ms K Tobin, Counsel instructed by Polpitiya Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing an appeal by the respondent, hereinafter "the claimant", against the decision of the Secretary of State on 6 August 2015 refusing him leave to remain on human rights grounds.

2. At the risk of oversimplification and by way of introduction only, the First-tier Tribunal allowed the appeal with reference to Article 8 of the European Convention on Human Rights because he was satisfied that the claimant had married in the United Kingdom and would probably satisfy the requirements of the Rules for admission as a husband if he

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chose to return to his country of nationality and make an application. It is the Secretary of State's contention that the judge's approach was entirely wrong and the appeal should have been dismissed.

3. I begin by considering exactly what the First-tier Tribunal decided.

4. The claimant first entered the United Kingdom as a student in 2011 with leave to remain until April 2013. He applied unsuccessfully to extend that leave and his appeal against refusal was dismissed on 7 March 2014.

5. It was the Secretary of State's case that the claimant had used deception when he had applied to extend his leave. He had relied on a TOEIC certificate from the Educational Testing Services which had been cancelled because the test organisers were satisfied that it had been obtained fraudulently using a proxy test taker.

6. The Secretary of State refused the application for leave to remain on human rights grounds in part because the claimant had obtained the test certificate fraudulently. According to the Secretary of State the claimant had been deceitful and, therefore, his presence in the United Kingdom was not conducive to the public good.

7. The Secretary of State also considered the claimant's case under paragraph 276ADE of the Immigration Rules and found there were no "very significant obstacles" to his integration in Sri Lanka. However the Secretary of State accepted that the claimant and his wife had a genuine and subsisting relationship.

8. The claimant insisted that he had not been dishonest when he had obtained his ETS language certificate. The First-tier Tribunal, rightly, noted that it was for the Secretary of State to prove the facts relied on to support that contention and having heard the claimant give evidence about how he attended the test centre and conducted himself there the judge was not satisfied that he had obtained the test certificate improperly and resolved that dispute in the claimant's favour. Importantly, that decision has not been the subject of any challenge.

9. The judge noted that the Secretary of State's reasons for finding the claimant unsuitable for leave had been answered. However there were still two concerns.

10. The first was that the claimant relied on his wife's income and his wife did not earn sufficient money. At the date of decision it was clear that her earnings did not match or exceed the sum of £18,600.

11. Time had passed between the application and the hearing and at the date of hearing there was evidence that the claimant's wife was in regular work and was earning a monthly sum that grossed out to approximately £18,720 in a year but there was no P60 to show that that was her annual earnings.

12. The judge said at paragraph 40:

> "Suffice it to say that I make no findings of fact as to what the wife's current earnings are but it would seem that at the date of application she did not meet the financial requirements of Appendix FM. That is not to say that she does not do so now."

13. It was also noted that the claimant had not got proof of his competence in the use of the English language. Whilst the judge accepted that it had not been shown that the

Appellant had obtained the certificate dishonestly the certificate had been cancelled and therefore was not proof of his competence.

14. The judge then directed himself that the claimant did not meet the requirements of Appendix FM "unless EX.1 applies".

15. The judge was satisfied that the claimant is in a genuine and subsisting relationship with a British citizen and he went on to ask himself if there were "insurmountable obstacles to family life continuing in Sri Lanka."

16. The judge accepted that the claimant's wife feared returning to Sri Lanka. She is the daughter of someone who had suffered persecution there and was recognised as a refugee. She would also lose her job and family ties in the United Kingdom would be disrupted if she chose to leave.

17. The claimant's wife did not allege that she risked persecution. She had no political profile. She would be returning as a British citizen living with her husband to the country where she had lived until 2006. The judge said:

> "While I fully understand that she has serious misgivings about returning to Sri Lanka I cannot find that she would be at risk because of her relationship to her father or that she would encounter very serious hardship with him if she returned. In short I do not find that EX.1 can be relied upon."

18. The judge also found that there would be no obstacles to the claimant's integration into Sri Lanka. His parents live there and could accommodate him.

19. The judge expressly directed his attention to Section 117B of the Nationality, Immigration and Asylum Act 2002. This Act establishes by statute that certain things *are* in the public interest. These include the maintenance of effective immigration control and immigrants speaking the English language and being financially independent so that they can integrate into society and are not burdensome to the taxpayer. The same Section also prescribes that "little weight" should be given to a private life or a relationship formed with a qualifying partner at a time when a person is in the United Kingdom unlawfully. It further prescribes that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. It then makes provisions for appellants who have children which are clearly not relevant here.

20. The judge then found that the claimant speaks English. This finding was based on the fact that he had undertaken a college course in the English language and gave his evidence in English. The judge said "It seems likely that he would pass the language test".

21. The judge found the claimant was not financially independent because he was not able to work but he is an intelligent young man who would get work when he could. The judge found that the claimant had never been in the United Kingdom unlawfully. He had always been the beneficiary of leave even if it was only leave extended by his making an application.

22. The judge then considered the financial requirements and the English language certificate. As evidence had been provided to show the wife does earn in excess of £18,600 the judge found that there was no reason why an out of country application could not succeed. The judge said, at paragraph 57:

> "On a balance of probability [the claimant] should have no difficulty in obtaining a valid language certificate. In addition I take into account that [the Presenting Officer] made no attempts to suggest that the requirements of Appendix FM were not met."

23. The judge found the claimant had established that an out of country application made by him in by Sri Lanka would probably succeed and therefore the weight to be attached to the requirement that he should return to Sri Lanka to make an out of country application reduced.

24. He allowed the appeal.

25. The respondent's grounds rely on case law.

26. Particularly they refer to **Jeunesse v Netherlands [2014] ECHR 1036** where the Court said at paragraph 108:

> "Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the Host State would from the outset be precarious. It is the Court's well established case law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 …"

27. That case was in the minds of the Tribunal when it decided the case of **Rajendran (section 117B – family life) [2016] UKUT 00138 (IAC)**. There the Tribunal confirmed that although not a point considered in Section 117B the wording of that Section did not mean a court or Tribunal should disregard the fact that a person's family life was developed when that person's status was precarious. Even though Section 117B did not require that "family life" established when a person's immigration status was precarious should be given little weight the fact that family life was established in such circumstances was something to consider. It appears that the jurisprudence of European Court of Human Rights is less generous to an applicant than is United Kingdom statue law but as the considerations by required by the Act are not intended to be exhaustive or restrictive the considerations recognised by the Court of Human Rights have to be considered.

28. The Secretary of State also relied on the decision of **R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)**.

29. At Paragraph 39 in **Chen** the Upper Tribunal makes clear that cases where human rights prevent the Secretary of State requiring a person to remove from the United Kingdom to apply to return are not limited to cases involving children. However I reject as plainly wrong the Secretary of State's contention that the Judge erred by "placing a positive value under the public interest consideration on appellant's intention". This criticism is a reference to paragraph 55 of the Decision and Reasons where the judge found that the claimant was not presently financially independent but could become so. The Judge's accepted that the claimant was dependent on his wife and therefore was not presently independent. His point was that the wife's earnings were sufficient and, as he was conducting an article 8 balancing exercise rather than asking himself if certain defined criteria were met, the judge gave some positive weight to the claimant's prospects. I see nothing wrong in that. This assessment was independent of the finding that the claimant would probably meet the rules and is not inconsistent with his finding that the claimant

could be maintained without recourse to public funds at the date of decision. That he was employable is a modest positive factor because it goes to the prospects of integration which is in the public good. It is unlikely that the prospects of getting work could, of itself, justify a decision to allow an appeal but that is not what has happened here.

30. Nevertheless I can see considerable merit in the Secretary of State's case. The claimant is somebody who is not entitled under the Rules to remain in the United Kingdom. The Rules require him to leave the United Kingdom and make an application to return as a spouse if that is what he wishes to do. It is likely, but not certain, that he would satisfy the requirements of the Rules but at the date of the Secretary of State's decision and the First-tier Tribunal's decision it appears that he did not. He did not have the necessary certificate and there was no proof that his wife had been earning money for long enough to show an annual income in excess of or matching the required amount. Further, as the Tribunal made clear in **Chen**, it is for the claimant to make out his case that the temporary separation that could be expected in the event of his leaving and making an application to return would be a disproportionate interference with protected rights. This is something that has not been addressed.

31. In her statement dated 26 September 2016 the claimant's wife said that she was concerned about the claimant's safety and she was concerned that she and her husband would be separated for a considerable period if he left to make an application. She refers to no objective evidence to justify these expressed concerns. The claimant addressed the point at paragraph 5 in his witness statement dated 26 September 2016 (page 2 in the bundle) and said that he expected they would be separated for about three months. I see no reason to doubt that time estimate and I accept it.

32. I do not see how the judge could possibly have concluded, had he considered the point, that the separation would be excessive. It is understandable that a husband and wife want to live together but the claimant contemplated separation for about three months and the claimant's wife could continue to live with her parents. It is very hard to see anything particularly burdensome about a separation for the purpose of applying in the required way. No such case has been made out except by an unjustified assertion of excessive delay.

33. Ms Tobin referred me to the decision of the Supreme Court in **R (on the application of Agyarko) v SSHD [2017] UKSC 11** and particularly to paragraph 51 where Lord Reed said:

> "Whether the applicant is in the United Kingdom unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of the immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the pubic interest in his or her removal will generally be very considerable. If, on the other hand, an applicant – even if residing in the United Kingdom 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*."

34. The decision in **Chikwamba** is reported at **[2008] UKHL 40**. It must be emphasised the claimant in that case was a citizen of Zimbabwe and the mother of a small child. Her removal for the purposes of making an application to return would have involved

considerable disruption in the life of the child either by reason of the appellant taking the child to the economically difficult country of Zimbabwe without the father or leaving the father to look after the child in the United Kingdom while the mother made an application. Lord Scott of Foscote was particularly perturbed and wanted to emphasise the judgment of the court by adding his own short judgment in which he was very critical of the Secretary of State. He said that the justification for the policy was that it was policy. He said "This is elevating policy to dogma. Kafka would have enjoyed it." Lord Scott clearly would not. If I might respectfully say so, I understand that. The Secretary of State's policy does not have the weight of statute. Applying immigration rules very often (in fact almost always) interferes with a person's private and family life but very often the proposed interference is lawful and proportionate. The decision in **Chikwamba** is a sharp reminder not to lose sight of the harm that enforcing immigration policy can to do human relationships and to remember that is might not be justified.

35. However, **Chikwamba** is not to be understood as a general licence to rewrite the requirements of the Immigration Rules or to determine that every example of following them strictly would be a disproportionate interference in a person's private and family life.

36. There are obvious policy considerations that require consistency in enforcing the Rules. It is not fair to applicants who would like to remain in the United Kingdom with their partners but who choose to return to their country of nationality and make an application in accordance with the Rules even though they find that disagreeable and inconvenient to see that people who ignore the Rules are indulged. Further, having clear rules simplifies the decision-making process and encourages predictable outcomes. These things are clearly desirable for the sake of good administration. This present case is not a case where the separation would involve the sort of difficulties that existed in **Chikwamba**.

37. If I had had to decide the appeal I would not have allowed it.

38. I have to decide if the First-tier Tribunal was entitled to reach the conclusion that it did. I have decided that it was not. I see two problems. Firstly the First-tier Tribunal did not appreciate that the proper consideration of Article 8 in accordance with established jurisprudence shows that the claimant having established a private and family life when he was not entitled to remain in the United Kingdom as a telling and significant point in determining the article 8 balancing exercise. This jurisprudence should not be ignored even though it is not elevated to a statutory consideration under section 117B. It is impossible not to have considerable sympathy for a judge who appeared to be trying very hard to follow the Act but as was made plain in **Rajendran** even though not mentioned in the statute the fact that family life was established when the immigration status was precarious is a relevant factor that should be considered. It was not.

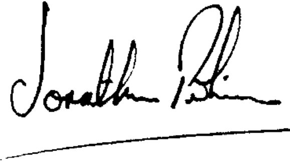
39. Secondly I find the First-tier Tribunal Judge overemphasised the effect of **Chikwamba** which was not intended to overrule policy but to remind decision makers that sometimes policy is not sufficient reason to justify interference and in those circumstances the Tribunal and courts should not be reluctant to allow appeals. In my judgment this is not such as case. The factors that would make application of policy oppressive or otherwise wrong do not exist here.

40. It follows therefore that I set aside the decision of the First-tier Tribunal it erred it law and I substitute a decision dismissing the claimant's appeal against the decision of the Secretary of State.

Notice of Decision

The Secretary of State's appeal is allowed. I set aside the decision of the First-tier Tribunal and I substitute a decision dismissing the claimant's appeal against the Secretary of State's decision.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 6 June 2017