Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10303/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2017	**On 24 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR PETER OGHENEKPAROBOR ERIVONA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Harding, Counsel, instructed by J McCarthy Solicitors
For the Respondent: Ms Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a citizen of Nigeria who appeals the decision of the First-tier Tribunal, promulgated on 2 March 2017, to dismiss the appellant's appeal against the respondent's refusal on 22 October 2015 to grant further leave to remain on human rights grounds.

2. The appellant appeals with permission on the following grounds:

   (1) that the judge erred on the **Chikwamba v SSHD [2008] 1 WLR 1402**;

(2) that the judge erred in his approach to insurmountable obstacles.

Error of Law Discussion

3. Mr Harding in his submissions helpfully summarised the existing case law in relation to **Chikwamba** and submitted that the judge failed to adequately address this at [38] and [48] of the decision and reasons, including in finding at [48] that he was not persuaded by the **Chikwamba** point as there are "no children of the marriage and the appellant has broken the immigration law quite egregiously". Mr Harding submitted that the **Chikwamba** point only arose when someone was in the UK illegally and **Chikwamba** therefore was predicated on the law being broken.

4. At paragraphs 25 and 26 of **Chikwamba** the House of Lords set out the approach and at paragraph 44 Lord Brown found that it would be comparatively rare, certainly in family cases involving children, that it would be proportionate for the appellant to apply from abroad. It was on this basis that he submitted that the judge had misdirected himself. However I am not satisfied that there is any error disclosed in the judge taking into consideration that this was a case that did not involve children as a relevant factor as to why **Chikwamba** would not apply.

5. Mr Harding relied on the case of **Treebhowan; Hayat v SSHD [2012] EWCA Civ 1054** which concluded at paragraph 30(a) that the relevant principles in applying **Chikwamba** included as follows:

> "Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of a claim on procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family and private life sufficient to engage Article 8, particularly where children are adversely affected.
>
> Again, I am of the view that this highlights that the judge made no error in taking into consideration that there were no children in this case.

6. At 30(b) of **Hayat:**

> "Where Article 8 is engaged it will be a disproportionate interference with family and private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so."

30(c) goes on to find that:

> "whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in **Chikwamba**. They will include the prospective length and degree of disruption of family life and where other members of the family are settled in the UK.

30 (d):

> "Where Article 8 is engaged there is no sensible reason for enforcing the policy the decision maker should determine the Article 8 claim on its substantive merits,

> having regard to all material factors notwithstanding the applicant has no lawful entry clearance".

7. Mr Harding further relied on **Agyarko v Secretary of State for the Home Department [2017] UKSC 11.** Paragraph 51 of **Agyarko** endorsed the **Chikwamba** approach as follows:

> "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**".

8. Mr Harding submitted that the question of certainty has not been adequately resolved. He submitted that if we assumed certain means every real prospect of success it was his submission that this is what the Supreme Court had in mind.

9. In the case of **Ali v Secretary of State for the Home Department [2016] UKSC 60** at paragraph 34 again the approach in **Chikwamba** was endorsed as follows:

> "For example where a person was residing in the UK unlawfully at the time when the relationship was formed but would have been permitted to reside here lawfully if an application was made from outside the UK, the latter point should be taken into account. That example illustrates how the distinction between settled migrants and aliens residing in the host country unlawfully may be, in some situations, of limited practical importance when translated into the context of the UK immigration law: see for example **Chikwamba v SSHD [2008] 1 WLR 1402**".

10. Mr Harding also relied on the Upper Tribunal case of **R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM Chikwamba-temporary separation – proportionality) IJR [2015] UKUT 189 (IAC)** which concluded (as summarised in the head note) as follows:

> "…
>
> There may be cases where there are no insurmountable obstacles to family life being enjoyed outside the UK but where a 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 Secretary of State for the Home Department [2008] UKHL 40**".

11. Mr Harding relied in particular on paragraph 29, where it was accepted that the Court of Appeal did not suggest at paragraph 30(a) of **Hyatt** that **Chikwamba** was an exceptional case on its facts, as opposed to being an example of one of those very rare cases where it was appropriate for the Court of Appeal to make substantive Article 8 decision itself instead of remitting the case back to the Tribunal

12. Mr Harding submitted that **Chen** was somewhat opaque as to whether **Chikwamba** applies if it is not certain that entry clearance will be granted and it was his submission that this was a case where it would; the appellant's wife was earning £38,000 at the time of the First-tier Tribunal decision and was earning more now and it was accepted that the relationship was genuine and subsisting. Looking at [48] of the decision and reasons it was submitted that the judge had misdirected himself in relation to the lack of children of the relationship and took into account that the appellant had breached the law whereas it was submitted he did not properly apply the **Chen** approach.

13. It was also submitted it was incorrect of the permission judge to conclude that the **Chikwamba** point was irrelevant as it was not shown that there were insurmountable obstacles to family life, as the Upper Tribunal specifically found in Chen, that there may be cases where there are no insurmountable obstacles where a temporary separation may still be disproportionate.

14. It was also submitted that when considering very serious hardship that the judge ought to have considered how far the appellant's family would fall in that this was a family where the appellant's partner owned her own home and was earning £38,000 plus bonuses at the time of the decision and her career was improving and indeed it was now £50,000. She would not be able to pay her mortgage and would lose her home and on an objective analysis it was submitted would establish that this was disproportionate. Mr Harding also submitted that the judge should have considered a balance sheet approach including in relation to the appellant's health whereas at [37] the judge only looked at a small part of the evidence when considering there were no insurmountable obstacles. It was submitted the judge did not take into account all the factors including the appellant's partner losing her job and her house.

Error of Law Decision

15. I am not satisfied that any error of law has been disclosed. Although, as summarised above, Mr Harding submitted in some considerable, detail that there was an error in the manner in which the judge dealt with **Chikwamba** including in taking into account the appellant's illegality and that they did not have children as I have already indicated there was no error in taking into account the issue of children.

16. Even if the judge erred in relying on the appellant's poor immigration history and not citing all the factors including the potential delay in entry clearance, such is not material. I am not satisfied that it has been shown that this is a case where there was any degree of certainty that entry clearance would be granted, were the appellant to return to Nigeria and apply for entry clearance. Although Mr Harding submitted that **Chen** was opaque on this point, at paragraph 39 the Upper Tribunal found that:

> "... if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced".

17. Although Mr Harding referred to level of the sponsor's salary, it cannot be said that it was shown before the First-tier Tribunal (or indeed before me) that an entry clearance application 'would be granted'. I am also of the view that the additional test 'there would be significant interference with family life by temporary removal' was further not satisfied. Whilst **Chen** confirms that there were circumstances where a return to seek entry clearance may be disproportionate, even if there are no insurmountable obstacles, it was not shown that this was such a case. There was no error in finding that **Chikwamba** did not assist this appellant. It must be implicit in that finding, given the earlier conclusions of the Tribunal, that the lack of insurmountable obstacles was a relevant factor.

18. There is therefore no material error in the judge's consideration and the conclusion that was ultimately reached. The lack of anything approaching certainty, albeit that the appellant's partner earns above the income threshold; that is not the only factor to be considered, in relation to any prospective entry clearance is fatal to the **Chikwamba** point. Similarly the lack of adequate evidence before the First-tier tribunal that a temporary separation would result in a significant interference with family life supports the conclusion that any error of approach by the First-tier Tribunal could not be said to be material.

19. In relation to insurmountable obstacles, although the judge did not specifically cite each and every element that he had taken into consideration, neither was he required to do so. A fair reading of the decision indicates that the judge had in mind all the evidence, including the circumstances of the appellant's partner and that she had never been to Nigeria. The judge carefully noted the appellant's case and set out the evidence of both parties including their witness statements and oral evidence.

20. The judge specifically noted, at [37], that the appellant's wife "has a degree as a marketing expert and that is a very portable skill. It is very well paid". It is evident therefore that the judge was aware of the salary that the appellant's wife was earning and there was no error in finding that there would not be insurmountable obstacles including in taking into consideration that both parties would have an opportunity to obtain work including that the appellant could obtain legal work in Nigeria whereas he could not in the UK. It was the judge's findings that this could give them a higher standard of living than they currently enjoy in the UK.

21. The judge provided adequate reasons for the conclusions reached and it cannot be said that there was any irrationality in those reasons. The fact that the judge erroneously dismissed the appeal under the Immigration Rules as well as on Human Rights grounds, where the appellant only had a right of appeal on Human Rights grounds is not a material error and such was not pursued before me. I am not satisfied that any error has been disclosed.

22. The decision of the First-tier Tribunal did not disclose an error of law such that it should be set aside and shall stand.

No anonymity direction was sought or is made.

Signed Date: 12 January 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and no fee award is made.

Signed Date: 12 January 2018

Deputy Upper Tribunal Judge Hutchinson