Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05560/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th November 2019	**On 6th December 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

KUKAKWASHE MAHAKA
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O Ngwuocha, Solicitors with Carl Martin Solicitors
For the Respondent: Ms I Vigiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Young-Harry promulgated on 24 July 2019, in which the Appellant's appeal against the decision to refuse her human rights application dated 10 October 2018 was dismissed.

2. The Appellant is a national of Zimbabwe, born on 15 August 1973, who first arrived in the United Kingdom as a visitor in 2002. She was subsequently granted leave to remain as a student until 30 April 2007. The Appellant has not had leave to remain in the United Kingdom since

that date, with a human rights application being refused in September 2009, an application being rejected in June 2012 and her latest application on human rights grounds dated 28 February 2018 being refused on 10 October 2018.

3. The Respondent refused the latest application the basis that although it was accepted that the Appellant was in a genuine relationship with a British citizen, she could not meet the immigration requirements in Appendix FM of the Immigration Rules and it was not accepted that she met the requirements of paragraph EX.1 because there were no insurmountable obstacles to family life being continued outside of the United Kingdom. In particular, there was healthcare available for both the Appellant and her partner's conditions. The Appellant did not have any dependent children and could not meet the requirements of paragraph 276ADE of the Immigration Rules. The Respondent did not consider that there were any exceptional circumstances to warrant a grant of leave to remain and the Appellant's medical conditions did not reach the high threshold in Article 3 of the European Convention on Human Rights for a grant of leave to remain on that basis.

4. Judge Young-Harry dismissed the appeal in a decision promulgated on 24 July 2019 on human rights grounds. In summary, the First-tier Tribunal found that the Appellant could not meet the requirements for a grant of leave to remain under Appendix FM of the Immigration Rules, specifically she could not meet the immigration requirements and also could not meet paragraph EX.1 because there were no insurmountable obstacles to family life continuing outside of the United Kingdom. The First-tier Tribunal went on to consider the proportionality of the Appellant's removal for the purposes of Article 8 of the European Convention on Human Rights and concluded that it would not be a disproportionate interference with her right to respect for private and family life. The First-tier Tribunal noted that the Appellant's partner would support an entry clearance application and that she could return temporarily to do so, with a temporary separation being proportionate, or perhaps no interference at all if her partner accompanies her.

The appeal

5. The Appellant appeals on two grounds. First, that the First-tier Tribunal materially erred in law in concluding that the Appellant did not meet the requirements of the Immigration Rules, specifically that there was a failure to consider paragraph EX.1 of Appendix FM. Secondly, that the First-tier Tribunal materially erred in law in considering that a successful entry clearance application would mean that removal would be proportionate, whereas in fact that diminishes the public interest in removal.

6. At the oral hearing, on behalf of the Appellant, Mr Ngwuacha relied on the written grounds of appeal. In relation to paragraph EX.1 of Appendix FM, it was submitted that there was a failure by the First-tier Tribunal to refer to the definition set out in paragraph EX.2 and a failure to consider

the Appellant's partner's position separate to the Appellant's circumstances.

7. It was further submitted that there was sufficient evidence of insurmountable obstacles to family life continuing outside of the United Kingdom before the First-tier Tribunal, namely the medical conditions of the Appellant and her partner and the written evidence of her partner that it would be inconceivable for him to relocate given his family in the United Kingdom. There was however no challenge to the findings that medical treatment would be available in Zimbabwe and in any event, there was no evidence in support of the claim that it would not be available before the First-tier Tribunal, the only evidence on this confirmed that medication was available. Overall, it was suggested that the First-tier Tribunal had failed to consider all of the factors in combination, a requirement confirmed by the Court of Appeal in the case of Lal v Secretary of State for the Home Department [2019] EWCA Civ 1925.

8. On the second ground of appeal, it was submitted on behalf of the Appellant that the approach of the First-tier Tribunal is contrary to the decision in Agyarko v Secretary of State for the Home Department [2017] UKSC 11 wherein it was confirmed, further to the principle in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40, that a likely successful application for entry clearance would reduce the public interest in removal.

9. On behalf of the Respondent, it was submitted that there was no error of law on the first ground of appeal given that the First-tier Tribunal expressly considered the medical issues of both the Appellant and her partner and came to a conclusion that was open to it on the evidence in paragraph 21 that there were no insurmountable obstacles to family life being considered abroad. Taking the evidence at its highest and in combination, the matters raised by the Appellant and her partner could not possibly meet the stringent test set out in paragraph EX.1 of Appendix FM as these are all factors which could be overcome and which would not in any event entail any serious hardship.

10. In relation to the second ground of appeal, it was submitted that the First-tier Tribunal made adequate findings on the issue of proportionality. First there was no clear finding that all of the requirements of the Immigration Rules would be met for a grant of entry clearance, the First-tier Tribunal only going so far in paragraph 24 of the decision and stating that it 'seems the financial requirements are met'. Secondly, in paragraph 26 of the decision, the First-tier Tribunal find that this is not a rare or exceptional case as on the facts of Chikwamba, there are no children involved and as such it would be reasonable for an application for entry clearance to be made. Thirdly, the First-tier Tribunal should also have considered the factors in section 117B of the Nationality, Immigration and Asylum Act 2002, with little weight to be attached to family life given that the relationship commenced at a time when the Applicant had no lawful leave to remain in the United Kingdom. Overall on the facts, it was open

to the First-tier Tribunal to find that there was no disproportionate interference with the right to respect for private and family life in this case.

Findings and reasons

11. I find no error of law on the first ground of appeal, which is wholly misconceived on any reading of the decision of the First-tier Tribunal. It is not necessary for the First-tier Tribunal to have quoted paragraph EX.1 or EX.2 in its decision in circumstances where there is clear and express reference to the correct test of insurmountable obstacles to family life continuing on return to Zimbabwe, correctly applied to the facts available to the First-tier Tribunal in relation both to the Appellant's own circumstances and that of her partner. The primary reason relied upon by both for remaining in the United Kingdom was their medical conditions, however it was found that medical treatment was available in Zimbabwe for both. In addition, the Appellant has family in and nearby Zimbabwe who can assist her on return and no other insurmountable obstacles or very significant obstacles to reintegration had been identified or relied upon by the Appellant.

12. In any event, on any view, the very limited evidence before the First-tier Tribunal could not rationally or legitimately satisfy the stringent test in paragraph EX.1 of Appendix FM even if all factors relied upon were taken cumulatively and in combination. The height of the Appellant's case was based on medical conditions, for which treatment was found to be available in Zimbabwe and the Appellant's partner's brief statement of ties to the United Kingdom which contained almost no detail and did not specifically identify any adverse consequences or serious hardship in relocating with the Appellant to Zimbabwe. The First-tier Tribunal was bound to conclude on the evidence that there were no insurmountable obstacles and that the Appellant could not satisfy the requirements of the Immigration Rules for a grant of leave to remain.

13. I find no material error of law on the second ground of appeal in relation to the balancing exercise undertaken for the purposes of Article 8 of the European Convention on Human Rights for the following reasons.

14. The Appellant specifically relies on paragraph 51 of the Supreme Court's decision in Agyarko to the effect that if an applicant, even if residing in the UK unlawfully, was otherwise certain to be granted leave to enter, at least if an application was made from outside the UK, then there might be no public interest in his or her removal and submits that the First-tier Tribunal effectively applies the opposite by increasing the public interest because of the Appellant's poor immigration history.

15. However, on the facts of this case and the very limited evidence before the First-tier Tribunal, the possibility that there may be no public interest in the Appellant's removal even though she is here unlawfully could not on any legitimate basis assist the Appellant. This is because there is no clear finding by the First-tier Tribunal that an application for entry clearance was

certain to be granted. At its highest the Appellant's relationship is accepted and the Tribunal only go so far as saying that it seems that the financial requirements were met. However, there was no evidence before the First-tier Tribunal of the financial circumstances of the Appellant or her Appellant's partner and no acceptance by the Respondent that the financial requirements were met. This cannot of amount to an application found to be certain of being granted.

16. In any event, although as noted in R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC), that it would be comparatively rarely, certainly family cases involving children, that an Article 8 case should be dismissed on the basis it would be proportionate and more appropriate for an individual to apply for leave from abroad, in all cases it will be for the individual to place before the Secretary of State (or in this case, the First-tier Tribunal) evidence that such temporary separation will interfere disproportionately with protected rights.

17. Further, as confirmed by the Court of Appeal in Kaur v Secretary of State for the Home Department [2018] EWCA Civ 1423 (at paragraphs 43 to 45), the facts in Chikwamba were striking and the application of the principle does not trump all public interest matters, including, for example a poor immigration history. Even in cases where an applicant was certain to be granted leave to enter, there *might* be no public interest in removing the applicant. What is required is a fact-specific assessment in each case, the principle will only apply in a very clear case and even then, will not necessarily result in a grant of leave to remain. On the facts and evidence before the First-tier Tribunal, which did not include any evidence at all of the impact of a temporary separation if the Appellant were to return to Zimbabwe and make an entry clearance application (and to the contrary found that it was possible that the Appellant's partner could return with her), this is not a case in which Chikwamba could in any event have assisted the Appellant.

18. In these circumstances, the fact that the First-tier Tribunal did not consider reducing the public interest in the maintenance of immigration control, was of no material impact on the decision given that the Appellant could not benefit from the principle in Chikwamba in any event. Further, even if the public interest in the maintenance of immigration control had been reduced in this way, that would have to be balanced against the requirement that little weight should be given to the Appellant's relationship formed with a qualifying partner established at a time when the person is in the United Kingdom unlawfully in accordance with section 117B(4) of the Nationality, Immigration and Asylum Act 2002; which the First-tier Tribunal failed to do in the present appeal. Therefore, in any event, the reduction of interest on both sides of scales in the proportionality balancing exercise was likely to have no material difference to the conclusion that the Appellant's removal was proportionate, with the same outcome of the appeal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed Date 29th November 2019

Upper Tribunal Judge Jackson