Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/15505/2019 (V)**

THE IMMIGRATION ACTS

Heard at : Field House
On : 30 March 2021

Decision & Reasons Promulgated
On: 07 April 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

GENEVIEVE BIRAGO

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Tampuri of Tamsons Legal Services
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana, born on 13 May 1985. She appeals, with permission, against the decision of the First-tier Tribunal dismissing her human rights appeal.

2. The appellant entered the United Kingdom on 14 December 2012 with leave to enter as a visitor, valid until 15 May 2013, and thereafter remained without leave. She commenced a relationship with her spouse, Gavin John Stamper, in 2014. They started living together in August 2014 and they were married in a proxy marriage which took place in Accra on 22 June 2018. Prior to their marriage, on 2 May 2017, the appellant made an application for

leave to remain on the basis of her family and private life, but the application was refused and certified as clearly unfounded on 15 December 2017 and permission was refused to judicially review that decision. The appellant then made a further application on 28 November 2018, subsequent to the marriage, but that was rejected under paragraph 353 of the immigration rules as further submissions not amounting to a fresh claim.

3. On 20 July 2019 the appellant sought a reconsideration of the decision on the basis that there had been a significant change of circumstances in view of her marriage to a British citizen. It was submitted that she had no family to return to in Ghana and that she had an established family and private life in the UK. There would be insurmountable obstacles to her family life continuing in Ghana.

4. The respondent, in a decision dated 5 September 2019, treated the submissions as a fresh Article 8 claim, but refused the claim on the basis that the appellant had not demonstrated any insurmountable obstacles to her family life continuing in Ghana, or very significant obstacles to integration in Ghana or compelling circumstances outside the rules. The respondent took account of the appellant's claim that she was HIV positive and was on medication, but noted that treatment was available in Ghana and did not consider that that the high threshold for making out an Article 3 claim had been met.

5. The appellant appealed against that decision and her appeal was heard by First-tier Tribunal Judge Abebrese on 8 November 2019. The appellant and sponsor gave oral evidence before the judge. The case put to the judge was that the sponsor's mother was entirely reliant on him for her care and that he could not, therefore, leave the UK. Further, the sponsor had a mortgage in the UK and he would not be able to pay it if he had to move to Ghana as he would not be able to find employment there. In addition, the appellant was pregnant and HIV positive. The judge considered that EX.1 of Appendix FM did not apply as the appellant had failed to demonstrate insurmountable obstacles to family life continuing in Ghana. The sponsor appeared not to have done much research about living in Ghana. The appellant's medical condition would not lead to a breach of Article 3 or 8 as she could access medical treatment in Ghana. The appellant would be able to obtain employment in Ghana and the sponsor was self-employed. There was also the option of the appellant making a fresh entry clearance application to re-join her husband in the UK. There was no evidence that the appellant was not fit to travel as a result of being pregnant. The judge dismissed the appeal.

6. The appellant sought permission to appeal the decision on the basis that the judge had erred in his proportionality assessment by failing to address the impact of removal and other relevant factors such as the fact that the appellant had no family in Ghana and failing to make any significant findings on the fact that the sponsor had serious financial commitments in the UK which would be compromised by having to relocate to Ghana. Further, the grounds asserted that the judge failed to make any reference to or findings on the case of Chikwamba v Secretary of State for the Home Department [2005] EWCA Civ 1779 and whether it was proportionate to require the appellant to make an entry clearance application from Ghana.

7. Permission was refused in the First-tier Tribunal, but was granted on 18 November 2020 by Upper Tribunal Judge Kamara on a renewed application, on the following basis:

> "It is arguable that there was a failure to engage with the *Chikwamba* arguments made on the appellant's behalf which are relevant given that her husband may be unable to satisfy the financial requirements. It is further arguable that there was a failure to assess the appellant's circumstances holistically given that she was both HIV positive and pregnant at the time of the hearing."

8. In a Rule 24 response dated 3 December 2020, Mr Bates for the respondent submitted that it was unclear what Chikwamba arguments were made by the appellant and that Chikwamba style considerations were irrelevant where it was unclear whether the full requirements of Appendix FM-SE were satisfied. Reliance was placed on the case of Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 in submitting that Chikwamba was not applicable in this case. The Rule 24 response pointed out that permission had been granted on a matter not raised in the grounds, namely the appellant's HIV status, and there was no reason why the appellant's pregnancy would be an insurmountable obstacle to family life continuing in Ghana. The judge had taken all relevant facts into account when making his proportionality assessment and the grounds did not disclose any error of law by the judge.

9. The matter then came before me for a remote hearing conducted through Skype for Business. The parties made submissions. Mr Tampuri submitted that the judge had failed to make a proper proportionality assessment and had failed to follow the principles in Chikwamba and Razgar, R (on the Application of) v. Sectretary of State for the Home Department [2004] UKHL 27. The judge had criticised the appellant for overstaying but had failed to consider the problems she would face in Ghana. Ms Everett relied on the Rule 24 response and submitted that there was little she could add as it was very thorough and comprehensive.

Discussion and conclusions

10. I entirely agree with Ms Everett that the Rule 24 response fully and properly addresses all the matters raised in the appellant's grounds. It seems to me that both the grounds, and indeed the appellant's actual claim, have little merit. The judge clearly followed the proper steps when considering the appellant's Article 8 claim, firstly by considering whether the requirements of the immigration rules in Appendix FM and paragraph 276ADE(1) were met on family and private life grounds and then considering whether there were compelling or exceptional circumstances outside the rules.

11. Contrary to the assertions made in the grounds, the judge undertook a full and proper assessment of the circumstances of the appellant and sponsor in the UK and Ghana and the extent of their ties to both countries. The judge gave full consideration to the sponsor's commitments in the UK and to the couple's concerns about the difficulties they would face in relocating to Ghana, taking account of the appellant's medical condition and the treatment she was receiving in the UK and her pregnancy. He provided clear and cogent reasons as to why the appellant and sponsor had not demonstrated 'insurmountable

obstacles' to family life continuing in Ghana and why there would be no 'very significant obstacles' to the appellant's integration in Ghana. For the reasons properly given, the judge was fully entitled to conclude that paragraph EX.1 of Appendix FM did not apply and that the requirements in paragraph 276ADE(1) were not met. The judge then considered all of those matters when assessing proportionality outside the immigration rules and he took account of the relevant public interest factors in section 117B of the Nationality, Immigration and asylum Act 2002, as he was required to do.

12. At the end of [20] the judge concluded that the appellant had the option of making a fresh entry clearance application and it was in that regard that the grounds rely on the principles in Chikwamba and criticise the judge for having failed to engage with the matter. I agree with the respondent, in the Rule 24 response, that it is unclear what Chikwamba arguments were actually made on behalf of the appellant. Mr Tampuri referred to his skeleton argument before the judge in that respect. However, the fact that the case was mentioned before the judge was not, without more, sufficient to show that the principles in the case applied, when they clearly did not. The judge was not directed to evidence which showed that the entry clearance requirements would be satisfied by the appellant if an application was made and, in any event, the respondent properly relies on the case of Younas which provides a full response to the appellant's case on that basis.

13. As the Upper Tribunal stated in Younas, the Court of Appeal, when interpreting Chikwamba, made it clear that the case did not stand for the proposition that it was sufficient, in order to resist removal under Article 8, for an appellant to show that he or she would succeed in an entry clearance application. The Tribunal stated as follows:

> "90. *Chikwamba* pre-dates Part 5A of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"), which was inserted by the Immigration Act 2014. Section 117A(2) of the 2002 Act provides that a court or tribunal, when considering "the public interest question," must have regard to the considerations listed in section 117B (and 117C in cases concerning the deportation of foreign criminals, which is not relevant to this appeal). The "public interest question" is defined as "the question of whether an interference with a person's right to respect for private and family life is justified under article 8(2)". There is no exception in Part 5A of the 2002 Act (or elsewhere) for cases in which an appellant, following removal, will succeed in an application for entry clearance. Accordingly, an appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the 2002 Act including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on *Chikwamba* does not obviate the need to do this."

14. That was precisely what the judge was addressing at [18] of his decision when he responded to the points raised by the appellant in the skeleton argument in relation to Chikwamba. He was perfectly entitled to take the appellant's lengthy period of overstaying into account, when considering the public interest.

15. Accordingly I find no merit in the grounds. The judge followed the correct approach when considering the appellant's Article 8 claim in line with the relevant Article 8

jurisprudence. He undertook a full and comprehensive proportionality assessment and provided clear and cogently reasoned findings. He was fully entitled to reach the decision that he did and he made no errors of law.

DECISION

16. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed: *S Kebede*
Upper Tribunal Judge Kebede Dated: 30 March 2021