Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-000364
HU/04721/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 15 June 2022	**on 7 September 2022**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

AMISHKUMAR VINODKUMAR PATEL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms S. Anzani, instructed by Eagle Solicitors
For the respondent: Mr S. Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 12 March 2020 to refuse a human rights claim.

2. First-Tier Tribunal Judge Zahed ('the judge') dismissed the appeal in a decision promulgated on 25 August 2021. The judge noted that the appellant overstayed a visit visa and remained without leave for over 12 years. He met and married his wife at a time when he was remaining in the UK illegally. The couple had several failed attempts at IVF and were waiting for a new appointment. The appellant's wife had spent 2-3 months

in India with her mother as recently as 2017. A previous immigration judge had found that there were no insurmountable obstacles to the couple continuing their family life in India. Judge Zahed concluded that there was no significant new evidence to depart from that finding. The appellant did not meet the requirements of paragraph EX.1 of Appendix FM. The judge also concluded that the appellant would not face 'very significant obstacles' to integration in India for the purpose of paragraph 276ADE(1)(vi) of the immigration rules. He had spent the first 26 years of his life there and was likely to still have connections in India. The judge went on to conduct an overall balancing exercise under Article 8 but concluded that removal would be proportionate.

3. The appellant applied for permission to appeal to the Upper Tribunal on the following grounds:

   (i) The judge erred in finding that there was no material change in circumstances since Judge Obhi heard an appeal in 2017 [20]. The appellant produced evidence to show that his wife now met the £18,600 threshold for earnings.

   (ii) The judge failed to make findings on a material issue. It was argued on behalf of the appellant that the *Chikwamba* principle applied, but no findings were made in relation to this point.

Decision and reasons

4. To put the appellant's arguments relating to errors of law into context it may be helpful to outline a summary of his immigration history and the legal framework that was relevant to this appeal.

5. The appellant entered the UK on 22 December 2006 with entry clearance as a visitor. He overstayed the visa and had remained in the UK without lawful leave for over 14 years by the date of the First-tier Tribunal hearing. Since 2008 the appellant has made repeated human rights applications, which were all refused.

6. It is not clear from the written evidence when and how the appellant's relationship with his wife came about. Their witness statements are not particularly detailed and are written in English that is grammatically inaccurate. However, the information contained in those statements suggests that the appellant might have known his wife before he came to the UK or at least since shortly after his arrival. Their relationship was developed at a time when they should have known that the appellant's immigration status was precarious and there could be no expectation that their family life could continue in the UK.

7. The immigration rules are the mechanism for applying for leave to enter and remain in the UK. For the purpose of an assessment under Article 8 of the European Convention, the immigration rules reflect where the respondent considers a fair balance will be struck between the right to family life and the maintenance of an effective system of immigration

control. If a person does not meet the requirements of the immigration rules it will normally be proportionate to expect them to leave the UK. It is a well understood principle of human rights law that a state is under no obligation to respect a couple's preferred country of residence. In other words, just because a couple might prefer to live in the UK does not necessarily mean that they have a 'right' to do so under human rights law.

8. Appendix FM makes provision for entry and residence of a person based on their family life with a partner who is British citizen or present and settled in the UK. The appellant did not meet the requirements of those rules. First, he did not meet the eligibility requirement relating to 'Immigration Status'. Paragraph E-LTRP.2.1 of Appendix FM makes clear that a person does not meet the requirement if they only have leave to enter as a visitor or are remaining in the UK in breach of immigration laws. There are valid public policy reasons for this requirement, which is designed to discourage people from circumventing the immigration rules relating to entry clearance for family life as a partner by entering as visitors and/or to discourage those remaining unlawfully in the UK from entering relationships in the UK solely to regularise their status.

9. The immigration rules recognise that even if a person is remaining in the UK in breach of immigration laws there may be circumstances when leave to remain should still be granted. If a person does not meet the Immigration Status requirement they can rely on paragraph EX.1 of Appendix FM if they can show that there are 'insurmountable obstacles' to their family life continuing outside the UK. This is a stringent test. Paragraph EX.1 might also apply in specified circumstances when a person fails to meet some other requirements of the immigration rules. For the purpose of this appeal, it might be relevant to note that if a person does not meet the 'Financial Requirements' of Appendix FM it is also possible to rely on paragraph EX.1. Paragraph GEN.3.2 of the immigration rules provides that if a person does not meet the requirements of Appendix FM leave would only be granted in exceptional circumstances where refusal would result in 'unjustifiably harsh consequences' for the applicant or another person affected by the decision.

10. The appellant has made several applications for leave to remain based on his relationship with his partner. They have all been refused. Because of his unlawful immigration status the appellant could only satisfy the requirements for leave to remain if he could show that he met the requirement of paragraph EX.1 of the immigration rules or if there were other compelling circumstances that might show that his removal would amount to a disproportionate breach of his right to family life.

11. In 2017 First-tier Tribunal Judge Obhi found that there were no insurmountable obstacles to the couple continuing their family life outside the UK. The appellant's wife was born and brought up in India and still had family connections there. The judge concluded that there were no other compelling circumstances that might render removal in consequence of the decision disproportionate.

12. In this appeal, First-tier Tribunal Judge Zahed directed himself to the correct principles outlined in the case of *Devaseelan v SSHD* [2002] UKIAT 702, which states that a previous judicial decision should be the starting point for consideration. He concluded that there had been no change in circumstances apart from further IVF treatment in 2019, which unfortunately had been unsuccessful.

13. The first ground of appeal argues that the judge erred in failing to consider the fact that there had been a change in circumstance relating to the income earned by the appellant's wife. In 2017 she did not meet the required level of earnings of £18,600 required in the immigration rules. At the date of the hearing before Judge Zahed, the evidence showed that she was earning the required income.

14. I accept that Judge Zahed did not make any findings in relation to this issue. However, I set out the structure of the immigration rules to explain why this failure does not amount to an error of law that would have made any material difference to the outcome of the appeal.

15. Even if the appellant's wife now met the Financial Requirements, it made no difference to the question of whether the appellant met the requirements of the immigration rules. He still could not meet the Immigration Status requirement and could only rely on paragraph EX.1 or other compelling circumstances that might render the removal in consequence of the decision disproportionate. The fact that the appellant's wife now earned over £18,600 was not material to the relevant legal question, which was whether there were insurmountable obstacles to the couple continuing their family life outside the UK. It was open to Judge Zahed to note that there was no evidence of significant new circumstances that might justify departing from Judge Obhi's finding relating to paragraph EX.1. The evidence appeared to indicate that the couple paid privately for IVF treatment in 2018 and 2019. There was nothing in the evidence to suggest that they could not pursue further rounds of IVF treatment in India.

16. Ms Anzani argued that the question of whether the appellant now met the Financial Requirements of the immigration rules was relevant to the overall balancing exercise under Article 8 and/or the *Chikwamba* point argued in the second ground.

17. It is trite that there is no principle of near miss when a person does not meet the requirements of the immigration rules. As explained above, it mattered not if the Financial Requirements were met because the appellant could still only rely on paragraph EX.1. The fact that the appellant might have met the Financial Requirements was not a factor that would be given any significant weight in the balancing exercise when the appellant did not otherwise meet the requirements of the immigration rules. The evidence did not disclose any compelling factors that might render his removal in consequence of the decision disproportionate. For these reasons, I conclude that the first ground of appeal does not disclose

an error of law that would have made any material difference to the outcome of the appeal.

18. The second ground of appeal argues that the judge failed to consider the arguments relating to the principles first outlined in the case of *Chikwamba v SSHD* [2008] UKHL 40. Ms Anzani also referred to a series of subsequent cases including *R (Agyarko) v SSHD* [2017] UKSC 11, *R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR* [2015] UKUT 00189 and *Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 00129. Mr Kotas referred to the decision in *R (on the application of Kaur) v SSHD* [2018] EWCA Civ 1423.

19. It is important to note the development of the *Chikwamba* principle and its limitations. The facts of the case in *Chikwamba* were stark. Mrs Chikwamba was a Zimbabwean national who was married to a Zimbabwean refugee. The political and humanitarian situation in Zimbabwe at the relevant time was such that there had been a moratorium on removals to Zimbabwe for a period of two years. Because her husband was recognised as having a well-founded fear of persecution in Zimbabwe there were insurmountable obstacles to the couple continuing their family life there. The question was whether it would be proportionate to expect Mrs Chikwamba to return to Zimbabwe for a temporary period to apply for entry clearance. It was recognised that she was likely to succeed in an application for entry clearance. She was also likely to face harsh conditions in Zimbabwe for several months while waiting for the application to be processed and would be separated from their daughter. In those circumstances it was found that there was no public interest in requiring her to leave the UK to apply for entry clearance.

20. In subsequent cases the courts have made clear that the principle does not apply simply because a person can show that they are likely to meet the requirements for entry clearance. The assessment still forms part of the balancing exercising under Article 8 of the European Convention. In particular, the question of whether a person should be required to leave to apply for entry clearance from abroad forms part of the public interest in maintaining an effective system of immigration control.

21. In *Chen* the Upper Tribunal found that a person would need to show that they would meet the requirements for entry clearance to be granted and that temporary separation to return to apply for entry clearance would interfere with their family life in such a significant way that it would be disproportionate to require them to return to apply through the proper channels.

22. In the more recent case of *Younas* the Upper Tribunal reviewed the case law relating to the *Chikwamba* principle and concluded that three questions need to be considered. First, whether temporary removal would interfere with a person’s right to family life in a sufficiently grave way to engage the operation of Article 8(1). Second, whether an application for

entry clearance from abroad would be granted. The burden of proof was on the appellant. Third, whether there is a public interest in requiring a person to leave to apply for entry clearance from abroad, and if so, what weight should be placed on that public interest consideration.

23. I accept that the judge did not address the arguments relating to the *Chikwamba* principle made in the appellant's skeleton argument. However, those arguments were limited to the following general statements:

> '26. … Given the couple's issues surrounding fertility treatment and the impact of Covid-19 pandemic in India, even temporary separation to enable the appellant to make an application for entry clearance would be a disproportionate interference with the couple's family life in this instance.
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> 27. The appellant contends that he would succeed in any application from outside the United Kingdom. Unlike the situation before Judge Obhi, the appellant has evidenced his wife's ability to meet the £18,600 threshold through her earnings... Given the individual and particular circumstances of his case, including the Covid-19 situation in India, there is no public interest in removing him from the UK in order to make an entry clearance application from abroad... '

24. Neither the appellant's witness statement nor that of his wife dealt with the issue of temporary separation. They only discussed the difficulties that they might face if he returned to India on a long-term basis. His wife said that she was settled in the UK and would be depressed if the appellant had to return to India. She expressed her continued desire to have a baby. There was no mention in either statement of the Covid-19 pandemic or any explanation as to how it might render temporary return disproportionate. The appellant's bundle did not contain any background evidence relating to India or the impact of the pandemic there.

25. Both the appellant and his wife are likely to have family members in India who might be able to provide support. The judge had noted that the appellant's wife returned to India for several months in 2017 to support her mother. There was nothing in the evidence to indicate that she could not return to India with the appellant on a temporary basis while he applied for entry clearance if they did not want to be separated. There was nothing in the evidence to indicate that the appellant's wife would face any significant difficulties if she decided to remain in the UK without him for a temporary period.

26. The burden of proof is on the appellant to show that the judge might have failed to consider material evidence. There is nothing in the judge's summary of the evidence given at the hearing to suggest that the appellant or his wife were asked any questions about the impact of temporary separation [13]-[18]. No note of the proceedings has been produced in this appeal to show that the issue was canvassed in oral evidence.

27. At the date of the First-tier Tribunal hearing on 07 July 2021 the evidence indicated that it had been two years since their last round of IVF treatment. There was no evidence to show that they were currently receiving treatment. The highest that the evidence went was to show that they planned to seek further treatment. In those circumstances it is difficult to see how the vague and unparticularised assertion made in the skeleton argument about fertility issues could have made any material difference to any assessment relating to temporary separation.

28. Beyond the general assertion that the appellant's wife now earned an income that would meet the £18,600 threshold the skeleton argument did not particularise how or why the appellant would meet all the other requirements of the immigration rules for entry as a partner contained in Appendix FM. Appendix FM-SE requires specified evidence of income, including bank statements. Although the appellant's bundle included payslips and letters from his wife's employers, it did not contain any bank statements. Appendix FM also requires an English language test certificate. The EMD test certificate contained in the appellant's bundle was awarded on 24 February 2011. The test must have been taken no more than two years before the date of the application. EMD does not appear to be on the list of approved English language test providers for the purpose of an entry clearance application.

29. I have set out the evidence before the First-tier Tribunal in detail, not only to provide the appellant with an analysis of that evidence, which was lacking from the First-tier Tribunal decision, but to explain why any argument based on the *Chikwamba* principle was bound to fail in front of any properly directed immigration judge.

30. First, the appellant failed to produce any evidence to show why temporary separation to apply for entry clearance would interfere with his family life in any significant way. There was no evidence to show that his wife could not travel with him for a few months if they did not want to be separated. There was no evidence to show that she would face any significant difficulties if she decided to remain in the UK while he returned for a temporary period. In the absence of current treatment, there was nothing in their desire to pursue further IVF treatment in future that might impact on his ability to return for a temporary period. Nor was there any evidence to explain how or why the Covid-19 pandemic would prevent the appellant from returning to India for a temporary period.

31. Second, the assertion that he would meet the requirements for entry clearance was generalised and unsupported by the necessary evidence.

32. Third, it is important to note the context in which the public interest considerations contained in the current immigration rules should be considered. *Chikwamba* was decided in 2008, well before the scheme of Appendix FM was introduced through major changes made to the immigration rules in 2012. Appendix FM deliberately excludes a person who has remained in breach of immigration laws from qualifying for leave

to remain as a partner unless they can show that they meet the requirements of paragraph EX.1 or there are other exceptional circumstances that might show that there would be unjustifiably harsh consequences if they were to be removed.

33. I have already explained why the judge's findings relating to paragraph EX.1 did not involve the making of an error of law. It is in the public interest in maintaining an effective system of immigration control to require a person who has remained unlawfully for such a long period of time to return to apply for entry clearance through the proper channels. It is understandable that the appellant and his wife would prefer not to be separated for a temporary period, but there was nothing in the limited evidence before the First-tier Tribunal to indicate that there were any compelling circumstances that might render temporary separation disproportionate.

34. I conclude that the judge's failure to make findings relating to the *Chikwamba* arguments would not have made any material difference to the appeal because no properly directed judge could have allowed the appeal on the limited evidence produced.

35. For the reasons given above, I conclude that the First-tier Tribunal decision did not involve the making of a material error of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

Signed M. Canavan Date 25 July 2022
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email