IN THE UPPER TRIBUNAL

R (on the application of Thakral) v The Secretary of State for the Home Department IJR [2015] UKUT 00096 (IAC)

Heard at Field House
On 20th January 2015

Before

THE HON. MR JUSTICE NICOL

Between

GURPREET KAUR THAKRAL

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Rowena Moffatt instructed by Duncan Lewis, solicitors
For the Respondent: Katherine Apps instructed by Treasury Solicitor

The Chikwamba v SSHD [2008] UKHL 40 [2008] 1 WLR 1420 principle is only engaged if, in the terms of [30] (a) of SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054, the SSHD has refused the application in question "on the procedural ground that the policy requires that the applicant should have made the application from his home state".

JUDGMENT

1. This is an application for judicial review of the decision of the Secretary of State for the Home Department ('SSHD') to refuse the Applicant's application for leave to remain in the UK as the spouse of Rajvinder Thakral, a British Citizen settled in the UK. The SSHD's refusal was given on 9th December 2013. The Claim Form was lodged on 6th March 2014. Permission to apply for judicial review was granted by Upper Tribunal Judge Perkins on 4th June 2014.

© CROWN COPYRIGHT 2015

2. The Applicant does not dispute that the SSHD was entitled to refuse her application under the relevant Immigration Rule (Appendix FM) since she had been present without leave to remain in the UK for more than 28 days (see E-LTRP 2.2(b)) and the SSHD had concluded that there were not insurmountable obstacles to the Applicant enjoying family life with her husband in India (and so the Applicant could not fulfil Ex.1(b)). Nonetheless, she submits that the SSHD's refusal was in breach of Article 8 of the European Convention on Human Rights and unlawful for one or both of the following reasons:

    a. The SSHD failed to consider the application of the principle in *Chikwamba v SSHD* [2008] UKHL 40 [2008] 1 WLR 1420 to her application to remain in the UK.

    b. The SSHD's assessment that the refusal of the application for leave to remain was a proportionate interference with the Applicant's family life was flawed.

3. The Applicant was born in India on 5th December 1982. She is an Indian national. While still in India in September 2009 she married her first husband, Mr Chana, who was a British Citizen. She was granted an entry clearance to come to the UK as Mr Chana's wife and she was given leave to enter in that capacity on 13th September 2009 until 27th November 2011. Her marriage to Mr Chana broke down. She separated from him and divorce proceedings began. She formed a relationship with Mr Thakral. He had previously been married but had obtained a divorce in 2007. On 13th October 2011 she applied to the SSHD for leave to remain in the UK on the basis of her rights under Article 8. She relied in particular on her relationship with Mr Thakral. The SSHD refused her application on 25th January 2012. She had a right of appeal to the First-Tier Tribunal which she exercised. The appeal was dismissed by First-Tier Tribunal Judge Eban on 24th April 2012. She was granted permission to appeal to the Upper Tribunal, but that appeal was dismissed on 23rd August 2012.

4. On 22nd September 2012, the Applicant's divorce from Mr Chana became absolute. She married Mr Thakral on 20th October 2012. She applied for leave to remain in the UK on the basis of her marriage to him on 3rd August 2013. She relied on both the Immigration Rules and Article 8.

5. The SSHD refused that application, as I have said, on 9th December 2013. Since there is no challenge to the legality of the refusal under the Immigration Rules, there is no need to say more about that. The decision letter also said, "It has also been considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the ECHR, might warrant consideration by the Secretary of State of a grant of leave to remain in the UK outside the requirements of the Immigration Rules. It has been decided that they do not."

6. In her application to the SSHD the Applicant had referred to the stigma which divorced women faced in India. The decision letter referred to a decision of the Refugee Review Tribunal (it is not clear from the papers before me in which country the RRT was sitting) on 31st July 2013 which had noted that there was not a

real risk or chance that a divorcee would be subjected to serious or significant harm. The SSHD said that if the Applicant thought otherwise, she should make an application for asylum or humanitarian protection in the proper form.

The Chikwamba *ground*

7. In *Chikwamba* the Appellant was a Zimbabwean woman whose asylum application had been refused but who (at the relevant time) the SSHD acknowledged he could not remove to Zimbabwe. She married a Zimbabwean refugee and argued that her removal would be contrary to Article 8. The SSHD refused her application and she appealed. The Immigration Appeal Tribunal dismissed the appeal on the basis that she should return to Zimbabwe and apply for entry clearance from there as her husband's spouse. The House of Lords held that this approach to Article 8 was unlawful. The leading speech was given by Lord Brown.

8. He rejected the Appellant's wider argument that such an application could *never* be dismissed on the basis that the person concerned ought properly to leave the country and apply for entry clearance from abroad (see [34]). The narrower ground was that it may be disproportionate to require the applicant to adopt such a course. Lord Brown approved this narrower basis for allowing the appeal. It might sometimes be permissible for the SSHD to rely on such a reason for refusing an in-country application. He said, at [44]:

> "I am far from suggesting that the Secretary of State *should* [Lord Brown's emphasis] routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. "

9. Ms Chikwamba herself had had a baby after the Secretary of State's refusal. However, it has subsequently been established that the reasoning in *Chikwamba* is not restricted to Article 8 cases involving children. In *SSHD v Hayat (Pakistan)* [2012] EWCA Civ 1054 Elias LJ summarised the principles at [30]:

> "a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the 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 or private life sufficient to engage Article 8, particularly where children are adversely affected.
>
> b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.
>
> c) 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 whether other members of the family are settled in the UK.
>
> d) Where Article 8 is engaged and 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 that the applicant has no lawful entry clearance.

e) It will be a rare case where it is appropriate for the Court of Appeal, having concluded that a lower tribunal has disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. *Chikwamba* was such an exceptional case. Logically the court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question.

f) Nothing in *Chikwamba* was intended to alter the way the courts should approach substantive Article 8 issues as laid down in such well known cases as *Razgar* and *Huang*.

g) Although the cases do not say this in terms, in my judgement if the Secretary of State has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise."

10. In her skeleton argument for the Applicant, Ms Moffatt made reference to Part 5A of the Nationality, Immigration and Asylum Act 2002. This was added by the Immigration Act 2014 as from 28th July 2014. It was unnecessary for Ms Moffatt to do so. Ms Apps for the SSHD did not refer to it. She was right not to do so. On this application for judicial review, my task is to consider whether the SSHD's decision was wrong in law. The "law" against which her decision is to be measured is that which applied when she took it i.e. on 9th December 2013. The Immigration Act 2014 had not by then been passed.

11. In my judgement, though, Ms Apps did identify the fundamental problem with this first ground for seeking judicial review. The *Chikwamba* principle is only engaged if, in the terms of paragraph [30] (a) of *Hayat,* the SSHD has refused the application in question "on the procedural ground that the policy requires that the applicant should have made the application from his home state". That is not what occurred in this case. The Applicant's application for leave to remain was *not* refused on the basis that she lacked a requisite entry clearance or that she was barred from making the application while she was still in the UK. On the contrary, the SSHD considered the substance of the application both under the Immigration Rules and in terms of Article 8.

12. Ms Apps appropriately referred me to *R (Ganesabalan) v SSHD* [2014] EWHC 2712 (Admin) where, at [46] – [47] Michael Fordham QC, sitting as a Deputy Judge of the High Court, dismissed a *Chikwamba* argument on the same basis. Ms Moffatt submitted that the Deputy Judge's view on this issue was *obiter dicta*. I disagree. The Claimant in that case succeeded on other grounds. The SSHD in that case had not considered whether the application could succeed on Article 8 grounds even though it could not succeed under the Rules and it was not inevitable that the application would have been refused had it been considered on that alternative basis. So the Claimant won. However, the grounds for seeking judicial review and the Claimant's skeleton argument had also advanced the *Chikwamba* argument. That aspect was rejected since the application had not been disposed of by the SSHD on a procedural basis, but had been considered in substance. The disposal of that

argument was therefore an integral part of the Deputy Judge's reasoning. Of course, whether it was *ratio* or *obiter* I am not bound by his decision. It is, though, a line of reasoning which is persuasive.

13. In *R (Sikhosana) v SSHD* [2014] EWHC 4312 (Admin) Mr Michael Kent QC, also sitting as a Deputy Judge of the High Court, recorded that the Claimant in that case had also initially pleaded a *Chikwamba* point. However, that had not been pursued. The Deputy Judge agreed that was the wiser course. He said at [7], "this is not a case where the only reason why leave was refused was because a temporary interference with Article 8 rights while he returned to his home country to make an entry clearance application would not in itself be a disproportionate interference. On the contrary the conclusion here was that a permanent exclusion would not amount to a disproportionate interference with his Article 8 rights." I accept that this comment carries somewhat less weight because it was not the product of adversarial argument, nonetheless it carried the Deputy Judge's endorsement.

14. Ms Moffatt submitted that in substance the SSHD has refused the application because the Applicant is here in the UK and is not applying from abroad. She argued that the cover letter with the application had gone through in detail the requirements for a spouse under the Rules. They had been pitched in terms of the requirements that had to be fulfilled for a spouse-applicant who was present in the UK, but it was clear from the information which was provided that, had this been an application from abroad, the application would have been successful. In practical terms, therefore (even if not in form) the application had been refused because of the presence of the Applicant in the UK. She submits that it was incumbent on the SSHD to consider whether the application would have been successful but for her presence in the UK. Since, if that was the case, it would be disproportionate to require the Applicant to return to India and make her application for entry clearance from there.

15. Ms Apps did not accept that the SSHD had agreed that the Applicant would have satisfied all the requirements for a spouse had her application been for entry clearance from India. The SSHD had not been asked to consider the application in those terms. At times in her submissions Ms Apps said that the SSHD was not required to consider *Chikwamba* unless the matter was positively raised by the applicant. Put in that bald way, it seems to me that there was force in Ms Moffatt's response that the SSHD's obligation to consider the proportionality of an interference with an applicant's family or private life is not dependent on the applicant specifically invoking the name of a case in the House of Lords. But, in truth, it seems to me that Ms Apps was not making the simplistic submission that an applicant had to incant the name *Chikwamba* before the SSHD's duty was engaged. Rather, she was saying that there was no obligation on the SSHD to consider the Applicant's application on the hypothetical alternative that it was made from abroad. At the very least, there could be no such obligation in absence of a request to the SSHD to take this course. If this is a proper understanding of Ms Apps' position, then I agree with it. Although the cover letter with the Applicant's application for leave to remain did refer to the difficulties which she would face if she returned to India, it did not ask the SSHD to decide whether she would (in those circumstances) have been entitled to an entry clearance as a spouse. I agree

that such a request would be a necessary condition before the SSHD could be under a duty to decide such a question. It is not necessary for me to decide whether the SSHD would then be obliged to consider this hypothetical alternative even if she was asked to do so.

16. For all of these reasons I reject the ground for seeking judicial review based on *Chikwamba.*

Flawed approach to Article 8 proportionality?

17. Ms Moffatt argued that the SSHD had failed to consider the position of Mr Thakral's mother. The cover letter which was sent with the application said: "Our client's mother-in-law has also become very close to the client and would not be able to cope without her continuous support. Our client shares an excellent relationship with her mother-in-law and she provides support for her as she is unwell and has suffered from 2 micro strokes in the last 12 months."

18. She also argued that the SSHD had misunderstood the point which was also made in the cover letter about the stigma which attached to divorced women in India. The Applicant was not seeking asylum on this ground, but relying on it as a further basis for saying that it would be disproportionate interference with her family and private life to reject her application for further leave to remain.

19. As to the first point, Ms Moffatt accepted that I could take into account the letter which the SSHD had written on 24th January 2014 to the Applicant's solicitors' letter before action. The SSHD had said, amongst other things, "You have not provided any evidence of the health problems and obligations in relation to your client's mother in law that would require the full time presence of both your client's partner and your client."

20. The SSHD was entitled to take the position which she did regarding the Applicant's mother-in-law. The SSHD did not ignore the Applicant's comments in relation to the position of divorced women in India. She did not consider that this, or the other matters on which the Applicant relied, constituted good reasons why the applicant should be granted leave to remain in the UK despite her status as an overstayer and the public interest in enforcing immigration laws. I do not consider there was any error of law in the SSHD's decision that refusal of the application was a proportionate interference with the family lives of the Applicant and her husband.

Conclusion

21. The application for judicial review is dismissed.

Signed Date

Mr Justice Nicol