Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07615/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 November 2013	**On 26 November 2013**
Prepared 18 November 2013	

Before

UPPER TRIBUNAL JUDGE O'CONNOR
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

SI MOHAMMED OUASSASSI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Howorth, Irving & Co solicitors
For the Respondent: Mr Jack, Senior Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Morocco born 28 August 1984. He entered the United Kingdom on 14 January 2012 as a visitor with leave conferred until 30 May 2012. It is said that after his arrival he met and formed a relationship with Ms El-Khaldi, a Moroccan national with leave to remain as a refugee until 2 December 2015. He married Ms El-Khaldi on 12 March 2012, less than two months after his arrival United Kingdom. On 16 May 2012 the appellant applied for variation of his leave to enter in order that he may remain here with his wife.

2. The Secretary of State refused this application in a decision dated the 21 January 2013, and at the same time made a decision to remove the appellant from the United Kingdom pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006. In so far as the Immigration Rules are concerned with the Secretary of State

considered the application under paragraph 284 of those Rules but concluded that the appellant could not meet a number of the requirements set out therein; i.e. (i) the appellant's wife was not present and settled in United Kingdom, (ii) the appellant had not produced the required English language test certificate and (iii) the appellant had entered the United Kingdom in a category which did not allow him to switch into paragraph 284 leave [this being as a consequence of the length of the leave he had been granted]. The Secretary of State further concluded that the appellant failed to meet the requirements of paragraph 276 ADE of the Rules.

3. The appellant appealed to the First-tier Tribunal. This appeal was heard by First-tier Tribunal Judge Zahed on 2 July 2013 and dismissed on all grounds in a determination promulgated on 8 August 2013. It is pertinent to observe at this stage that the appellant and his wife had a child born of their relationship on 14 July 2013. Whilst the First-tier Tribunal judge was aware, at the date of the hearing before him, that the birth of the child was imminent he was not subsequently informed of the fact or date of the birth.

4. At the hearing before the First-tier Tribunal the Home Office Presenting Officer quite properly withdrew the decision to remove the appellant, thus leaving only the decision to refuse to vary the appellant's leave as the decision under appeal.

5. When coming to his conclusions the First-tier Tribunal Judge swiftly dealt with the Immigration Rules, providing ostensibly the same reasons for dismissing the appeal on this ground as had been given by the Secretary of State in the decision under appeal. Although the grounds of appeal to the Upper Tribunal take issue with such findings, permission to appeal was not granted to pursue these grounds and in any event Ms Howorth properly accepted before the Upper Tribunal that the appellant could not meet the requirements of the Immigration Rules.

6. Turning to the First-tier Tribunal's consideration of Article 8 ECHR outwith the Immigration Rules, having properly directing himself to the decision in Razgar [2004] UKHL 27 the First-tier Tribunal Judge concluded as follows:

> "11. The appellant is married to his wife who is expecting a baby in the first week of July this year. I find that there is a family life. I find that article 8 is engaged in this case. I find that I can answer questions 3 and 4 in the affirmative and go on to decide on proportionality.
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> 12. The higher courts have stated that in deciding proportionality under article 8 I am to take account of the importance the respondent gives to factors under article 8 within the Immigration Rules. The respondent has stated, within the immigration rules themselves as well as Appendix FM EX1, that entering the UK as a visitor and being granted 6 months leave makes a person is illegible (sic) to seek to remain in the UK through marriage. I give substantial weight to this criterion that a person should apply for leave to remain as a spouse if a person enters the UK as a visitor and marries a person in the UK.
>
> 13. The appellant has given evidence that he cannot leave his wife and unborn child whilst he makes an application for entry clearance. I note that his wife's sister and her

> family live in the UK. I find that there is no reason why the appellant cannot return to Morocco to seek entry clearance to return as his wife's spouse. I find that during that period the appellant's wife can rely on her sister and be in touch with the appellant through the telephone and Skype. I also take into account that the appellant has not passed the English language requirement. I find that the interference in their family life is proportionate to the legitimate aim of effective immigration control. I dismiss the appellant's human rights appeal."

7. Upper Tribunal Judge Chalkley granted the appellant permission to appeal against the First-tier Tribunal's decision on 11 September 2013:

> "I can see that it is properly arguable that the judge may have erred by failing to consider and apply Hyatt (Pakistan) [2012] EWCA Civ 1054. On this aspect only of the second ground to the First-Tier Tribunal, I grant permission. The other challenges do not identify any properly arguable material errors of law."

8. Thus the matter came before us.

9. At the hearing Ms Howorth did make an application to re-open those grounds upon which permission had been refused, concentrating for the most part on the underlying ground that the First-tier Tribunal had erred in failing to properly apply the *ratio* of the Court of Appeal's judgment in Hyatt. To that end Ms Howorth carefully took us through the judgment of Lord Justice Elias, drawing particular attention to the summary given therein to the effect of relevant decisions in this area, starting with the opinion of their Lordships House in Chikwamba [2008] UKHL 40.

10. Having done so Ms Howorth submitted that the case law demonstrated that it would only be in exceptional circumstances that an applicant should be required to leave the United Kingdom simply in order to make an entry clearance application. Consequently, she submitted, the First-tier Tribunal's failure to pay regard to this line of authority must be an error that was capable of affecting the outcome of the determination.

11. It was then submitted that the First-tier Tribunal had erred by failing to take into account matters material to its consideration, such as (i) the length of time the appellant is likely to be outside of the United Kingdom pursuing his entry clearance application and (ii) the fact that the appellant does not meet the requirements of the Immigration Rules and thus that there is a real possibility that he would not be granted entry clearance. Ms Howorth further asserted that on the facts of the instant appeal, and particularly given that the appellant does not have a poor immigration history, no sensible reason had been advanced for requiring the appellant to leave the United Kingdom to make an entry clearance application.

12. Ms Howorth finally noted that a child of the relationship had been born after the hearing before the First-tier Tribunal but prior to the promulgation of the determination. She consequently submitted that the First-tier Tribunal had erred in failing to have regard to the child's best interests when coming to its conclusions.

13. In response Mr Jack drew our attention to paragraph 51 the Court of Appeal's decision in Hyatt, submitting that the First-tier Tribunal judge had been correct to treat the fact of the appellant's precarious immigration status at the time of marrying his now wife and conceiving a child, as a weighty matter.

14. As to the decision in Hyatt, Mr Jack submitted that (i) the principles derived therefrom are not applicable to the instant case because the decision to require the appellant to make an application for entry clearance was not based on policy but on the fact that the appellant did not meet a number of the requirements laid down in the Immigration Rules.

15. Mr Jack finally submitted that the conclusions of the First-tier Tribunal were open to it for the reasons it gives.

16. We gave our decision at the end of the hearing, concluding that First-tier Tribunal's determination does not contain an error of law requiring it to be set aside. We now give our reasons for coming to this conclusion.

17. We turn first to the ground which formed the substance of the grant of permission; the claimed failure of the First-tier Tribunal to properly apply the *ratio* of the opinions of their Lordships House in Chikwamba and Court of Appeal's decision in Hyatt.

18. In Chikwamba their Lordships House considered the interplay between Article 8 and the Secretary of State's policy, expressed through Immigration Rules, that those seeking leave to enter or remain on the basis of marriage or other relationships should obtain entry clearance, by applying for it whilst they are outside the United Kingdom. The uncertainty as to the extent of the decision in Chikwamba was addressed by the Court of Appeal in Hyatt.

19. The following passages are taken from the judgment of Elias LJ in Hyatt:-

> "11. Lord Brown accepted that the maintenance and enforcement of immigration control was a legitimate aim. However, he was unpersuaded by the argument, accepted by Laws LJ in *Mahmood*, that others required to apply from abroad would feel it unfair if persons like the appellant who also fell within the policy were permitted to have their cases determined without first returning home. Consistency of treatment was not such a virtue that it dictated an unthinking enforcement of the policy. Lord Brown identified a different justification for the policy (paras 41-42):
>
> > "Is not the real rationale for the policy perhaps the rather different one of deterring people from coming to this country in the first place without having obtained entry clearance and to do so by subjecting those who do come to the very substantial disruption of their lives involved in returning them abroad?

> Now I would certainly not say that such an objective is in itself necessarily objectionable. Sometimes, I accept, it will be reasonable and proportionate to take that course….."

12. He then identified situations where the enforcement of the policy would be appropriate, such as where a claimant's immigration history was poor, as in *Ekinci*. He also identified factors which might have a bearing on whether the policy should be implemented. For example, it would be relevant that an applicant who had arrived illegally had good reason to do so, such as where he has a genuine asylum claim; in an Article 8 family claim the prospective length and degree of disruption involved in requiring the applicant to return would be material; and it would be legitimate to enforce the policy where the entry clearance officer abroad was better placed to investigate the claim.

13. Moreover, Lord Brown emphasised that the routine dismissal of Article 8 cases on this basis was not consistent with a proper respect for Article 8 rights, and nor did it make sense in administrative terms (para 44):

> "I am far from suggesting that the Secretary of State *should* 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. Besides the considerations already mentioned, it should be borne in mind that the 1999 Act introduced one-stop appeals. The article 8 policy instruction is not easily reconcilable with the new streamlined approach. Where a single appeal combines (as often it does) claims both for asylum and for leave to remain under article 3 or article 8, the appellate authorities would necessarily have to dispose substantively of the asylum and article 3 claims. Suppose that these fail. Should the article 8 claim then be dismissed so that it can be advanced abroad, with the prospect of a later, second section 65 appeal if the claim fails before the ECO (with the disadvantage of the appellant then being out of the country)? Better surely that in most cases the article 8 claim be decided once and for all at the initial stage. If it is well-founded, leave should be granted. If not, it should be refused."

…

18. It may at first blush seem odd that Article 8 rights may be infringed by an unjustified insistence that the applicant should return home to make the application, even though a subsequent decision to refuse the application on the merits will not. The reason is that once there is an interference with family or private life, the decision maker must justify that interference. Where what is relied upon is an insistence on complying with formal procedures that may be insufficient to justify even a temporary disruption to family life. By contrast, a full consideration of the merits may readily identify features which justify a refusal to grant leave to remain.

…

> 26. … *Chikwamba* provides that at least where Article 8 is engaged, the decision maker should not, absent some good reason, fail to engage with the merits and dismiss the claim on the ground that the application should be made from abroad."

20. Having considered a number of Court of Appeal authorities concerned with the application of Chikwamba, Elias LJ summarised the principles to be derived from them as follows:-

> "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.
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> 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.
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> 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.
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> 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.
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> e) It will be a very 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.
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> 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*.
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> g) Although the cases do not say this in terms, in my judgment 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."

21. The First-tier Tribunal did not direct itself the decisions in Chikwamba and Hyatt; nevertheless we do not accept that its decision offends the *ratio* of either and consequently we do not accept Ms Howorth's submission that the First-tier Tribunal's determination contains an error of law in this respect which ought to lead us to set such determination aside.

22. It is clear from paragraphs 12 and 13 of Judge Zahed's determination that he did not form a concluded view on the substantive merits of the appellant's Article 8 claim but instead found that this was a case in which there was justification for requiring the appellant to make his application from Morocco. It is for this reason that a number of the claimed errors identified in the appellant's application for permission to appeal, but upon which permission was refused, do not bite.

23. Neither the opinions of the House in Chikwamba, nor the decision of the Court of Appeal in Hyatt, seek to set out a legal threshold as to when it would be appropriate, in any given case, to require an applicant to make an application from outside the United Kingdom; rather each alludes to an expectation that in cases whether the only matter weighing in the respondent's side of the balance is the public policy of requiring a person to apply under the Rules from abroad, that legitimate objective will usually be outweighed by factor's resting on the appellant's side of the balance.

24. In the instant appeal Judge Zahed identified a number of features of the appellant's circumstances relevant to the consideration of the substantive merits and also to the question of whether it was legitimate to require the appellant to make his application from Morocco. First, that as a person who was last admitted with a grant of six months leave to enter as a visitor has no expectation that he would be eligible to meet the requirements of the Immigration Rules relating to marriage; second, the appellant has not demonstrated he has the required English language skills; third, that during the period of separation, whilst the appellant is out of the United Kingdom, the appellant's wife can rely on her sister for support and fourth, during the period of physical separation contact can be maintained by the appellant via Skype and telephone.

25. In our conclusion these were all relevant and cogent matters justifying the conclusion that Article 8 would not be infringed by requiring the appellant to return to Morocco and make an entry clearance application. To that list could also be added, although this was not a point taken by Judge Zahed, the fact that at the time the relationship started, of the subsequent marriage and of the birth of the child, the appellant had a precarious immigration status, it being within his knowledge that leave was conferred on him only until 30 May 2012.

26. In summary we do not accept that the First-tier Tribunal's decision offends the ratio of the decisions in Chikwamba and Hyatt and neither do we accept that the conclusion reached by the tribunal was perverse.

27. We next deal with the submission that the First-tier Tribunal erred in failing to consider the prospects of any application for entry clearance made by the appellant; it being said that such prospects were poor and thus the consequences of requiring the appellant to leave the country are very much more severe than those taken into account by the First-tier Tribunal.

28. We reject this submission. First, this was not amongst the pleaded grounds, even those upon which permission was refused, and neither was a formal, or indeed an

informal, application made to amend the grounds to include within them this point. It cannot be right that by simply making a submission at a hearing before the Upper Tribunal a legally represented applicant can be taken to have impliedly made an application to amend her grounds. Further, no explanation has been brought forward as to why this ground was only raised for the first time at such a late stage of the proceedings; indeed it did not even feature in the skeleton argument produced by Ms Howorth on the morning of the hearing. We therefore do not admit this ground for consideration. We come to the same conclusion in relation to the assertion that the First-tier Tribunal erred in failing to identify the length of time the appellant would be out of the country whilst making his entry clearance application.

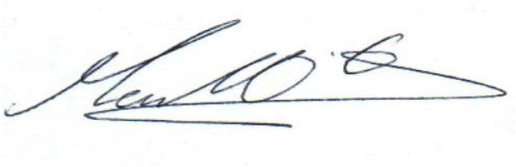
29. In any event both grounds are entirely misplaced. As to the former, the Court of Appeal conclude in SB (Bangladesh) v SSHD [2007] EWCA Civ 28 that an Article 8 claim of a person resisting removal is not made weaker by strong prospects of success in a subsequent application for entry clearance; nor is it made stronger by weak prospects in such an application. It found that it would be proper for the Tribunal to exclude the prospects of success altogether when assessing the proportionality of removal. Such rationale was confirmed by the Court of Appeal shortly thereafter in HC (Jamaica) v SSHD [2008] EWCA Civ 371, and once again in SZ (Zimbabwe) [2009] EWCA 590. As to the latter ground, there was not one iota of evidence brought forward by the appellant as to the length of time he might be out of the country whilst making his entry clearance application.

30. Turning to the final point, upon which permission was refused but on which, without making any further application, Mr Howorth, nevertheless chose to make submissions i.e. that the Judge would have been aware that the birth of the appellant's child was imminent and consequently he erred in not specifically considering the best interests of the child within his determination; we find that the judge's failure to do consider the best interests of the child is not an error capable of affecting the outcome of the appeal.

31. The evidence before the First-tier Tribunal was sparse on all issues, but particularly so on the impact that requiring the appellant the United Kingdom and make an entry clearance application would have on his wife and child. It is to be recalled that the appellant's child was born after the date of hearing but prior to the date the First-tier Tribunal promulgated its determination. There was no evidence before the First-tier Tribunal as to any adverse consequences the appellant's wife and/or child may suffer, whether physical or emotional, as a consequence of the appellant being required to leave the UK and make an application for entry clearance. It is plain the appellant's child, at only a few weeks old, would have no outlook on life himself. In our conclusion given the paucity of evidence before him, the judge dealt with this issue adequately by concluding that the appellant's wife's sister could provide support for the appellant's wife whilst the appellant is making his entry clearance application and that contact can be maintained during such period by way of Skype and telephone.

32. In our judgment the First-tier Tribunal's determination does not contain an error of law requiring it to be set aside, and consequently the determination remains standing.

Signed:



Upper Tribunal Judge O'Connor Dated: 18 November 2013