IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07649/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 December 2019	**On 9 January 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

AMADOU KOLLEY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Walsh, Counsel instructed by Universe Solicitors
For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Gambia born on 7 June 1985 who entered the UK in June 2007 with leave as a work permit holder until 31 July 2007. Thereafter he remained in the UK unlawfully.

2. In 2010 he commenced a relationship with his wife, who is a naturalised British citizen originally from the Philippines ("the sponsor").

3. On 7 February 2014 the appellant was convicted of possessing an ID document with intent and imprisoned for six months.

4. The appellant and sponsor married on 15 November 2018. The sponsor has two adult children from a previous relationship.

5. The appellant applied for leave to remain on the basis of his family life in the UK with the sponsor.

6. The respondent rejected the application. Four reasons were given as to why the appellant did not meet the requirements for leave to remain as a partner under Appendix FM of the Immigration Rules. Firstly, because of the criminal offence committed in 2014 the appellant fell for refusal on grounds of suitability under paragraph SLTR.1.6 of Appendix FM. Secondly, the Immigration status requirements under ELTRP2.2 were not met because he had been in the UK unlawfully since 31 July 2007. Thirdly, although the appellant submitted documentary evidence indicating that his wife's income exceeded the threshold in paragraph ELTRP, not all of the documents required under Appendix FM – SE had been provided and consequently the respondent was unable to properly assess the sponsor's income. Fourthly, it was not accepted that there would be insurmountable obstacles to the relationship continuing outside of the UK for the purposes of paragraph EX.1.

7. The respondent also stated that no evidence had been submitted that would establish exceptional circumstances rendering refusal a breach of Article 8 because there would be unjustifiably harsh consequences.

8. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Sills ("the judge"). In a decision promulgated on 30 July 2019 the judge dismissed the appeal. The appellant is now appealing against that decision.

9. The judge considered whether the appellant could satisfy the requirements of the Immigration Rules. He found that the appellant's conviction in 2014 was spent and that his conduct, character and associations did not make it undesirable for him to be allowed to remain in the UK. He therefore concluded that the appellant did not fall foul of SLTR.1.6.

10. With respect to the financial eligibility requirements, the judge found that although the sponsor earned over the minimum income requirement of £18,600 at the relevant time, some of the specified evidence required was not provided.

11. The judge considered whether there would be insurmountable obstacles to the appellant's relationship with the sponsor continuing outside the UK. He found that there would be no such obstacles in either Gambia or the Philippines.

12. Having concluded that the appellant was unable to meet the requirements of the Immigration Rules the judge turned to consider the appeal outside the Rules. The

judge accepted that the appellant has a family life with the sponsor and that, having resided in the UK for over twelve years, he has developed a private life as well. However, he found that removal of the appellant would not be disproportionate. In respect of the argument that it would be disproportionate to expect the appellant to leave the UK solely in order to make an entry clearance application, the judge stated at paragraph 19:

> "I do not accept that it would be unreasonable to require the Sponsor to either leave the UK with the Appellant, or for the couple to separate while the appellant left the UK to apply for entry clearance, given that the couple began the relationship when the appellant was unlawfully in the UK. I do not accept that the principles from Chikwamba [2008] UKHL 40 case apply to the Appellant. The Appellant cannot meet the requirements of the Rules from within the UK. He would not be separated from any British child or child with long residence with whom he has a parental relationship, and no such child would be required to leave the UK with him. The public interest in requiring individuals to comply with the requirements of the Immigration Rules is plain. As set out above, I consider the Sponsor's children, who are both now adults, would be able to remain in the UK or move to the Philippines with or without the Sponsor and the Appellant without facing any significant difficulties and so they are not significantly affected by this decision."

13. The grounds of appeal submit that the judge fell into error by failing to find, in accordance with the judgment of the House of Lords in *Chikwamba* [2008] UKHL 40, that removal would be disproportionate under article 8(2) ECHR given that the appellant would be certain to succeed in an entry clearance application from outside the UK.

14. Mr Walsh drew attention to paragraph 44 of *Chikwamba* where it is stated:

> "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."

15. Mr Walsh submitted that the language used in *Chikwamba* is clear and that it was inconsistent with *Chikwamba* to not allow the appeal. He maintained that the judge did not provide any justification as to why it would be proportionate for the appellant to be required to leave the UK simply to make an application that would inevitably succeed.

16. *Chikwamba* does not remove the need, in order to succeed under article 8 on the basis that temporary removal would be disproportionate because a grant of entry clearance would be inevitable, for an appellant to establish that temporary removal will cause a substantial interference with his family life. See ***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) at [39] and [42]. The headnote to *Chen* explains:

> There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning *Chikwamba v SSHD* [2008] UKHL 40.

17. The appellant has not put forward any evidence, or advanced a case, to show that he (or the sponsor) would face hardship or difficulty if required to leave the UK temporarily in order to apply for entry clearance. There was no evidence of any child who would be affected by the appellant's temporary removal; or of any care or other important responsibility in the UK that would be negatively impacted. There was no evidence that there would be a particularly long wait for the application to be dealt with in Gambia or that the appellant would face any difficulties finding (or funding) accommodation whilst the application is pending. Nor was there any evidence indicating that the appellant's temporary removal would have a negative impact on his (or the sponsor's) health. Moreover, the appellant and sponsor would be able to choose whether the sponsor would join him in Gambia for some or all of the time the application was pending. There was no evidence to show that the sponsor would be unable to obtain leave from work for this purpose, or that she could not join the appellant during holiday periods.

18. As the appellant has not adduced evidence to show that temporary separation will interfere with his family life, there was no basis upon which the judge could find that his temporary removal would breach article 8 ECHR. The judge was therefore entitled to find that temporary separation in order to make an application from outside the UK would not be disproportionate under article 8 ECHR even if such an application would be certain to succeed.

Notice of Decision

The appeal is dismissed.

The decision of the First-tier Tribunal does not contain a material error of law and is not set aside.

Signed

Upper Tribunal Judge Sheridan 3 January 2020