Upper Tribunal
(Immigration and Asylum Chamber)

Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **On 29 September 2011**	**Determination Promulgated** ……

Before

LORD MENZIES
UPPER TRIBUNAL JUDGE P R LANE

Between

KHIZAR HAYAT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Chaudhry, Solicitor, instructed by A M Law Associates
For the Respondent: Mr R Hopkin, Senior Home Office Presenting Officer

The significance of Chikwamba v SSHD [2008] UKHL 40 is to make it plain that, in appeals where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the immigration rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the

balance. The Chikwamba principle is not confined to cases where children are involved or where the person with whom the appellant is seeking to remain has settled status in the United Kingdom.

DETERMINATION AND REASONS

1. The appellant, a citizen of Pakistan born on 12 November 1984, entered the United Kingdom on 23 January 2007, with entry clearance as a student. Within the currency of his leave the appellant applied for a variation, as a Tier 1 Post-Study Worker until 3 October 2010. Before the end of that period of leave, he applied for a variation, as the partner of a female citizen of Pakistan, who had arrived in the United Kingdom in October 2009 with leave as a student. The appellant and his partner had been living together in a relationship since November 2009. The parties applied for a certificate of approval for marriage and were, in fact, married on 14 October 2010.

2. The respondent refused the appellant's application because she considered that the appellant failed to show that he satisfied the requirements of paragraph 319C of the Immigration Rules for leave to remain as the Partner of a Relevant Points Based System migrant. By reason of paragraph 319C(h), an applicant applying for such leave to remain "must have, or have last been granted, leave:

    (i) as the Partner of a Relevant Points Based System migrant,

    (ii) as the spouse or civil partner, unmarried or same-sex partner of a person with leave under another category of these Rules who has since been granted, or is, at the same time, being granted leave to remain as a Relevant Point Based System migrant …"

3. As has already been indicated, the appellant's last grant of leave was under Tier 1 and it is, in fact, common ground between the parties that the appellant cannot satisfy the Immigration Rules. However, at the hearing before the First-tier Tribunal, which followed the appellant's appeal against the respondent's decision to refuse him leave, his representative advanced the ground that it would be a disproportionate interference with the appellant's Article 8 rights to require him to leave the United Kingdom, pursuant to the refusal to vary leave to remain.

4. Immigration Judge Herlihy heard oral evidence from the appellant and his wife, which was not subject to challenge by the respondent (since no Presenting Officer was present) and was not the subject of any adverse credibility finding by the Immigration Judge. As well as confirming the history to which we have just made reference, the appellant's wife told the Immigration Judge that their respective families had not consented to the marriage and that the wife no longer spoke with her family. The appellant's family were said to be "no longer living"; but, once the wife had finished her course, "they will return to Pakistan as her husband has his own home there" (paragraph 6.6 of the determination). It is necessary to note at this point that the appellant's wife is studying for a ACCA qualification and that,

although one of the courses relating to this was due to end in November 2011, she has subsequently been granted a variation of leave to remain until 31 May 2014, in order to complete the ACCA qualification.

5. The appellant and his wife also told the Immigration Judge that he had "done everything" for his wife "such as picking her up from college, doing the shopping and giving her moral support and that they depend upon one another very much and it would be very hard for her to be alone in the United Kingdom. [The wife] says that she has no other relatives in the United Kingdom" (paragraph 6.5). The appellant's written statement described him as "supporting my wife psychologically and [I] have been encouraging her to study. We have become heavily dependent on each other, and find it unthinkable to live apart" (paragraph 9).

6. Applying the five-stage test set out by the House of Lords in Razgar [2004] UKHL 27, the Immigration Judge concluded that it would not be a disproportionate interference with the rights of the appellant and his wife to require the appellant to leave the United Kingdom. The Immigration Judge noted that in MM (Tier 1 PSW; Art 8; "private life") Zimbabwe [2009] UKAIT 00037, it was held that a student in the United Kingdom on a temporary basis had no expectation of a right to remain in order to further social ties and relationships, where the criteria of the Points-Based System were not met and that the character of an individual's private life was by its very nature of the type which could be formed elsewhere, albeit through different social ties. Although the Court of Appeal in OA (Nigeria) [2008] EWCA Civ 82 had held that the Asylum and Immigration Tribunal had been entitled to conclude that a student's Article 8 rights would be violated if she were removed from the United Kingdom in the middle of an academic year, the Tribunal in MM concluded that the prospects for bringing "a right to study case within Article 8 are bleak". In this regard, the Tribunal in MM noted the judgment of Laws LJ in LL (China) [2009] EWCA Civ 617, that "the appellant has on the facts effectively no Article 8 case unless her desire to complete the ACCA course of itself provides her with one, but I do not see that Article 8 can fulfil that function, at least on the facts of this case".

7. The Immigration Judge observed that in CDS (PBS: "available": Article 8) Brazil [2010] UKUT 000305 (IAC), the Upper Tribunal held that Article 8 did not give an Immigration Judge a freestanding liberty to depart from the Immigration Rules and it was unlikely that a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes. On the other hand, a person already admitted to follow a course may have built up a private life that deserved respect and the public interest in removal before the end of the course might be reduced where there were ample financial resources available.

8. At paragraph 9.7, the Immigration Judge in the present case rightly reminded herself of the fact that, in the light of the judgments in Beoku-Betts [2008] UKHL 39, she had to consider not only the Article 8 rights of the appellant but also those of others with whom his family life was enjoyed.

9. At paragraph 9.8, the Immigration Judge concluded that the appellant's family life with his wife "can continue in Pakistan although I acknowledge that the appellant's wife will not wish to return whilst her course is ongoing". The Immigration Judge, however, also considered an alternative scenario:-

> "I do not find that there are any obstacles preventing the appellant's wife remaining in the United Kingdom to conclude her studies whilst the appellant returns to Pakistan for a short period of time until she returns to join him or whilst the appellant seeks entry clearance to return to the United Kingdom to join her. I have also taken into account Chikwamba v SSHD [2008] UKHL **40** and appreciate that it is not necessarily unlawful to require an appellant who relied on a human rights ground to return to their country of origin to make an application for entry clearance. The rationale behind the Home Office policy of routinely requiring appellants to apply from abroad was to deter others from entering without entry clearance. This could be a legitimate objective and in certain cases could be the right course of action, but only when relevant considerations in the particular case made it so. In an Article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be a highly relevant factor in the assessment of proportionality".

10. The Immigration Judge's conclusion on the proportionality issue was as follows:-

> "9.9 I find that the appellant and his wife have only been in the United Kingdom on a temporary basis and they could have had no expectation of a right to remain in order to further their family life, ties and relationships. Unlike the applicant in Chikwamba the appellant is not seeking leave to settle in the United Kingdom as a spouse and I find that the decision is proportionate in that it serves a public end. I find that the decision of the respondent is not sufficiently serious to amount to a breach of rights of the appellant under Article 8".

11. Accordingly, the Immigration Judge dismissed the appeal, both under the Immigration Rules and on human rights grounds. Permission to appeal against the determination of the Immigration Judge was sought on two grounds. The second of those related to an alleged failure on the part of the Immigration Judge to consider a policy, described as the "recently published 'casework instructions' dated 7 August 2008", in which the Secretary of State gave guidance to caseworkers on the assessment of proportionality in the light of Chikwamba. Since this document's existence, let alone relevance, was not mentioned in the grounds of appeal to the First-tier Tribunal or in the submissions and written materials submitted by the appellant in connection with the hearing, ground 2 was and is hopeless. At the hearing on 29 September Mr Chaudhry, accordingly, wisely confined himself to ground 1.

12. The essence of this ground is that the Immigration Judge, in effect, failed properly to distinguish the judgments of the House of Lords in Chikwamba and, accordingly, failed properly to undertake the proportionality balancing exercise.

13. In order to understand this criticism, it is necessary to remind ourselves of what the House of Lords decided in Chikwamba. The appellant in that case was a female Zimbabwean, who had unsuccessfully sought asylum in the United Kingdom and, whilst here, had married a Zimbabwean national, who had been granted refugee status. The couple had a daughter, aged 4 at the date of the House of Lords hearings.

14. The question for the House of Lords was whether it would be a disproportionate interference with the appellant's Article 8 rights to expect her to return to Zimbabwe, there to make an application in accordance with the Immigration Rules for entry into the United Kingdom as the spouse of a person present and settled here. The House of Lords held unanimously that it would be a violation of the appellant's Article 8 rights to require her to leave the United Kingdom. Lord Brown gave the leading judgment, of which the following extracts are relevant:-

> "40. As we have seen, there is reference in some of the cases to jumping the queue, not having 'to wait in the entry clearance queue like everyone else.' It is not suggested, of course, that others are thereby put back in the queue and thus delayed in obtaining entry clearance. On the contrary, the very fact that those within the policy do *not* apply for entry clearance shortens rather than lengthens the queue. What *is* suggested, however, is that it is unfair to steal a march on those in the entry clearance queue by gaining entry to the UK by other means and then taking the opportunity to marry someone settled here and remain on that basis. But is it really to be said that others would feel a sense of unfairness unless those like the appellant are required to make their claims to remain from abroad?
>
> 41 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?
>
> 42. 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. Indeed, *Ekinci* still seems to me just such a case, the appellant's immigration history was appalling and he was being required to travel no further than to Germany and to wait for no longer than a month for a decision on his application. Other obviously relevant considerations will be whether, for example, the applicant has arrived in this country illegally (say, concealed in the back of a lorry) for good reason or ill. To advance a genuine asylum claim would, of course, be a good reason. To enrol as a student would not. Also relevant would be for how long the Secretary of State has delayed in dealing with the case – see in this regard *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41. In an article 8 family case the prospective length and degree of family disruption involved in going abroad for any entry clearance certificate will always be highly relevant. And there may be good reason to apply the policy if the ECO abroad is better placed than the immigration authorities here to investigate the claim, perhaps as to the genuineness of a marriage or a relationship claimed between family members, less good reason if the policy may ultimately result in a second section 65 appeal here with the appellant abroad and unable therefore to give live evidence.

……

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.

45. Your Lordships have been made aware too of recent changes to the immigration rules which appear to involve substantial mandatory periods of exclusion following refusal of entry clearance or leave to enter in respect of those who have entered illegally or overstayed. Inevitably these changes will have an impact on the future application of the policy in article 8 family cases.

46. Let me now return to the facts of the present case. This appellant came to the UK to seek asylum, met an old friend from Zimbabwe, married him and had a child. He is now settled here as a refugee and cannot return. No one apparently doubts that, in the longer term, this family will have to be allowed to live together here. Is it really to be said that effective immigration control requires that the appellant and her child must first travel back (perhaps at the taxpayer's expense) to Zimbabwe, a country to which the enforced return of failed asylum-seekers remained suspended for more than two years after the appellant's marriage and where conditions are "harsh and unpalatable", and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the UK to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer."

15. In TG (Central African Republic) [2008] EWCA Civ 997, decided less that three weeks after the judgments in Chikwamba had been handed down, the Court of Appeal assessed the significance of the House of Lords' judgments. In TG, the appellant's partner was HIV positive and it was accepted she could not be expected to move to the Central African Republic. The couple also had a child. It was submitted that, in the light of Chikwamba, the appellant's appeal should be allowed outright, as opposed to being remitted to the AIT.

16. Keene LJ rejected that submission:-

> "These are fact-sensitive issues and inevitably there are factual difficulties between this case and Chikwamba, not all to this appellant's advantage. For example, just to take

two matters, Mrs Chikwamba had married at a time when removals to Zimbabwe were suspended. This appellant, during some of the time when he has been living with his partner in this country, seems to have disappeared from the official radar screen for a period of something around two years. Such matters as the immigration history of the appellant are clearly relevant, as Lord Brown indicated himself at paragraph 42. Then Mrs Chikwamba, it was accepted, could not realistically leave her child behind in order to seek entry clearance from Zimbabwe, so in that case there would have been an impact on the child who had a right to remain in the United Kingdom. It has not been said that the appellant's son could not be left in this country with his mother during any such time. So there is a difference there. … No fact-finding Tribunal has yet applied its mind properly to the issue of proportionality with the correct legal principles in mind, and it ought to be allowed to do so" (paragraph 3).

17. Buxton LJ agreed, concluding that:-

> "… I by no means find it self-evident that the facts of this case are so clearly either similar to, or more favourable to the appellant than, those in Chikwamba so that we are obliged – that is what the test must be – to follow the course taken in Chikwamba itself of simply quashing the order for removal. … It is quite clear that a very strong consideration in Chikwamba was the fact that it was the wife who was to be removed from the country, inevitably in the companionship of her 4 year old child. … that factor alone would in my view prevent this court from taking the course urged on it by Mr Lams".

18. Although it is clear from the judgments in TG that one of the reasons for the Court's reluctance to decide for itself on the issue of proportionality was the principle of leaving that task to a specialist fact-finding tribunal, it would not have done so if the principle in Chikwamba had, in truth, been such as to operate with unwavering force, regardless of the circumstances of the particular case.

19. The applicability of the Chikwamba principle again came before the Court of Appeal in MA (Pakistan) [2009] EWCA Civ 953. In that case, an Immigration Judge had to consider whether it would be disproportionate to expect the appellant to return to Pakistan, in order to make an entry clearance application to rejoin his wife in the United Kingdom. Although presented with Chikwamba, the Immigration Judge did not consider the approach urged by the House of Lords in that case.

20. At [7] Sullivan LJ said:-

> "I realise that Lord Brown referred to Article 8 cases involving children and that there are no children involved in this case, but the view that return should be insisted upon simply in order to secure formal compliance with entry clearance rules 'only comparatively rarely' is not confined to cases where children are involved. While the suggested approach in Chikwamba 'certainly' applies in such cases, it also applies to family cases more generally. Depending on the facts of the case, it may apply with more or less force. But there is no suggestion in this determination that the Immigration Judge took the Chikwamba approach into account at all."

21. With these observations in mind, we have concluded that paragraph 9.9 of the determination in the present appeal is legally flawed. In particular, the Immigration Judge was wrong to conclude that the Chikwamba principle could be rendered inapplicable to the facts of the case before her, on the basis that the appellant "is not seeking leave to settle in the United Kingdom as a spouse". More generally, there is no indication in paragraph 9.9 that the Immigration Judge brought to bear those factors arising from the evidence she had heard, which fell to be weighed on the appellant's side of the scales; in particular, the degree of practical and emotional support supplied by the appellant to his wife and the wife's lack of any family in the United Kingdom.

22. We accordingly set aside the determination of the Immigration Judge and proceeded to re-make the decision in the appellant's appeal. Mr Hopkin made no challenge to the veracity of the evidence given to the Immigration Judge, which we accordingly adopt. Mr Hopkin, for the respondent, acknowledged that the issue in re-making the appeal was whether the decision to remove was a disproportionate interference with the Article 8 rights of the appellant and his wife. In addressing that question, we have had regard to all the relevant evidence. We have also had regard to the entitlement of the respondent to make Immigration Rules, such as paragraph 319C, which restrict the circumstances in which a person who has secured leave to enter the United Kingdom in one capacity may obtain a variation of that leave in another capacity. Allied to this is the legitimacy of the consequence of such Immigration Rules, whereby those failing to meet their requirements may legitimately be required to leave the United Kingdom, if only to make an application to enter this country in accordance with the Rules.

23. The significance of Chikwamba, however, is to make plain that, where the only matter weighing on 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 factors resting on the appellant's side of the balance.

24. Viewed correctly, the Chikwamba principle does not, accordingly, automatically trump anything on the State's side, such as a poor immigration history. Conversely, the principle cannot be simply "switched off" on mechanistic grounds, such as because children are not involved, or that (as here) the appellant is not seeking to remain with a spouse who is settled in the United Kingdom.

25. Like the absence of children, that last factor *may* be one which diminishes the force of the principle; but whether it will do so depends upon an assessment of the facts. For example, if the position disclosed by the evidence had been that the appellant's wife was due to finish her studies only a few weeks after the date of the hearing, and was intending to return to her country of origin, and the evidence was such that she did not need the appellant to be present with her while she finished her studies and prepared to leave, then the Chikwamba principle would have had nothing to add to the appellant's case. The actual facts of the present case, however, were very different. As we have already seen, the appellant's wife had the best part of a year to

go before the end of her first tranche of the ACCA course. She has now been given leave to remain until 2014 in order to complete that course. There is no suggestion that her practical and emotional need for her husband to be with her has diminished in any respect.

26. The fact that the presence in the United Kingdom of the appellant's wife depends upon her status here as a student, and only on that, has to be acknowledged in undertaking the balancing exercise. However, as we have indicated, that fact alone does not negate the Chikwamba principle. She is entitled to remain and study here until 2014. In practice, if the appellant were to be removed, it is highly likely that she would be without his help and support for a very substantial proportion of that time. The evidence is that she needs the appellant's help and support. She has committed no breach of the Immigration Rules. Nor has the appellant. There is a likelihood that, if the appellant were removed, his wife will find she is unable to continue her studies, thus negating the rationale of requiring him to go back to Pakistan to make an entry clearance application.

27. In short, on a proper analysis of the facts, the principle in Chikwamba points plainly to the factors in favour of the appellant outweighing the single factor relied on by the respondent.

Decision

28. The determination contained an error of law and we set it aside. We re-make the decision in this appeal by allowing it on human rights grounds.

Signed

Date

Upper Tribunal Judge P R Lane
Immigration and Asylum Chamber