

Chikwamba applied in childless families' cases

The Court of Appeal recently passed a very important decision called **MA (Pakistan) [2009] EWCA Civ 953**. It related to the application of the **Chikwamba** principles in childless families.

Chikwamba is the seminal decision by the House of Lords in which it was decided that it was no longer necessary to force immigrants that are in the UK illegally to return to their country to apply for entry clearance in order to rejoin their families. It replaced what was known as the 'insurmountable obstacles test' and substituted it with the 'reasonableness' test.

In simple terms, this means that the Home Office must now not look at what obstacles may exist before requiring a person to return to their country to apply for entry, but must simply consider whether it is reasonable to require this in the particular circumstances of the case.

In **MA (Pakistan)**, the appellant was a Pakistani student who was married to a British national. When his student visa was cancelled because he was no longer able to study, he appealed to the Tribunal.

The Home Office accepted that there was a family life. But they wrote MA a letter that said;

"If you wish to enjoy your family life in the United Kingdom then it is open to you to return to Pakistan temporarily to apply for the appropriate entry clearance to join your spouse here. Alternatively there would appear to be nothing to prevent you and your spouse from enjoying your family life in Pakistan."

MA appealed the cancellation of his student visa but his appeal was dismissed by the Tribunal. He applied for reconsideration on the basis that his Article 8 claim had not been considered. This was also dismissed, and the matter eventually came before the Court of Appeal as an application for permission to appeal.

3 Lord Justices in the Court of Appeal agreed that there were errors of law in the decision of the court for the following reasons;

- Chikwamba was not to be confined to cases where children are involved;
- Chikwamba certainly applies where there are children involved, but also in other family cases;
- The real test in such cases is whether there is any sensible reason to require removal.

MA therefore reinforces what we already know; that where children are involved, Article 8 is very likely to succeed.

But further to this obvious position, MA confirms that the courts are now open to persuasion and that there is increasingly greater scope to argue **Chikwamba** in a variety of situations. This is because the concept of family by nature requires a case by case assessment.

Ultimately, it requires imaginative lawyering and resourcefulness to persuade a court why it is not reasonable to require removal in a particular case. This is because in spite of these progressive decisions that have come out of the courts, the courts themselves have accepted that sometimes it will be reasonable and proportionate to dismiss an Article 8 claim on the basis that entry clearance should be sought from abroad.

Anyone who thinks that their immigration status may be affected by this opinion should seek professional legal advice. At Genesis Law Associates, we specialise in all areas of immigration, asylum and nationality law.