



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/35430/2013

THE IMMIGRATION ACTS

Heard at Newport

On 29TH July 2014

Determination

Promulgated

On 5th August 2014

Before

UPPER TRIBUNAL JUDGE POOLE

Between

**CONOR MICHAEL O'MALLEY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Richard Clarke, Counsel

For the Respondent: Mr Erwin Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a male citizen of Canada born 7 November 1985. He appealed against the decision by the respondent to refuse his application for leave to remain as the partner of a British citizen.
2. The appellant appealed that decision and his appeal was heard before Judge of the First-Tier Tribunal Woolley sitting at Newport on 13 March

2014. Each party was represented at that hearing. Judge Woolley dismissed the appellant's appeal under the Rules and under Article 8 ECHR in a determination dated 15 March 2014.

3. In summary the judge found (via a concession made by the appellant's counsel) that the appellant could not succeed under the Rules. The judge went on to consider Article 8 and in particular the case of **Chickwamba v Secretary of State for the Home Department [2008] UKHL 40**, but came to the view that would not be unreasonable for the appellant to return to Canada to reapply for leave to enter.
4. The appellant sought leave to appeal that decision. In granting leave to appeal a Designated Judge said this:

“1. First-Tier Tribunal Judge CJ Woolley dismissed the appellant's appeal brought on grounds including human rights grounds against the decision of the respondent to refuse to vary his leave to remain in the United Kingdom.

2. The grounds submit that the judge's approach to Article 8 ECHR was flawed. In particular it is submitted that the judge mis-applied the guidance in **Chickwamba**. Whilst the judge appears to have been very thorough in the analysis of the law, the determination arguably reads as if the judge accepted that by the date of the hearing the appellant met all the requirements of the rules. IN those circumstances it is arguable that the judge erred, though insofar as it may be relevant to consider whether any application made from overseas would inevitably have succeeded, the concession made by the appellant's solicitors in their covering letter of 1 April 2014 to the effect that the appellant would no longer meet the financial requirements may also be a relevant consideration”.

5. Hence the matter came before me sitting in the Upper Tribunal.
6. Mr Clarke referred to a skeleton argument that he had lodged in advance of the hearing. He adopted that document. This submitted that Judge Woolley had materially erred in his determination in the way that the “**Chickwamba** principle” had been applied. It had been the contention of the appellant at the hearing before Judge Woolley that “if another application was to be made tomorrow that application would be bound to succeed assuming the evidence is satisfied of the 2 years living together”. Whilst not commenting on that contention the judge had made findings that indirectly supported that contention. In failing to accept that overall position the judge had erred in law.
7. Mr Clarke's skeleton argument refers in particular to paragraph 31 of Judge Woolley's determination, wherein he apparently separates consideration of **Chickwamba** from a substantive proportionality analysis conducted under Article 8 ECHR, thus effectively treating **Chickwamba** as a preliminary issue to that analysis. Mr Clarke argued

that such an approach is erroneous, especially in the light of Judge Woolley's findings which should have meant that the earlier submission made that a repeat application was bound to succeed should have been accepted. The judge had failed to take these findings into the question of proportionality.

8. Mr Clarke's oral submissions to me sought to amplify certain of the points set out in the skeleton argument. The judge had been clearly aware of **Chickwamba** and the judge was wrong to find that the appellant could return to Canada to make a fresh application and this would only result in "limited interruption" of his relationship with his partner, but in fact it would be more than a limited interference.
9. Mr Richards referred to paragraph 25 of Judge Woolley's determination. He pointed out that the judge had correctly applied **Gulshan** and **Nagre**. He had found that there were compelling circumstances to consider the appellant's situation outside the Immigration Rules and he quite properly agreed with Mr Clarke that the judge's then treatment of **Chickwamba** was flawed. Mr Richards accepted a material error and conceded that clearly at the date of the hearing before Judge Woolley the findings he made indicated that the appellant then satisfied the Immigration Rules and that any fresh application would be successful.

Decision

10. Having considered those matters set out above and having noted in particular the skeleton argument and submission of Mr Clarke, together with Mr Richards comment, I conclude that there was a material error of law contained within Judge Woolley's determination. For the reasons advanced by Mr Clarke (and accepted by Mr Richards) the judge's treatment of what Mr Clarke describes as the "**Chickwamba** principle" was flawed.
11. The judge had properly come to the conclusion that via **Gulshan** he could look at the Article 8 considerations outside the Rules. He made findings that indicated a successful further application and that if he had properly considered **Chickwamba** the appeal should have been allowed under Article 8.
12. For these reasons I set aside the decision of Judge Woolley in respect of Article 8 ECHR and remake that decision allowing the appellant's appeal.
13. No application was made for an anonymity direction and accordingly I do not make one.

Signed

Date 4/8/14

Upper Tribunal Judge Poole