



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

Appeal Number: HU/11119/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 22nd February 2018**

**Decision & Reasons
Promulgated
On 6th March 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**MARY KAWANGUZI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Smith of Counsel, instructed by the Legal Rights Partnership

For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Asjad promulgated on 15 June 2017 in which the Appellant's appeal against the Respondent's decision to refuse her application for leave to remain as a partner dated 11 April 2016 was dismissed.
2. The Appellant is a national of Uganda, born on 3 April 1959, who first entered the United Kingdom on 15 June 2002 as a dependent of her

husband, who was then in the United Kingdom with valid leave to remain as a student. The Appellant was granted further periods of leave to remain in line with her husband as his dependent until 30 January 2012. An application was made prior to the expiry of that period of leave to remain which was rejected as invalid for failure to pay a fee and two further applications for leave to remain outside of the Immigration Rules were refused without a right of appeal on 19 March 2013 and 20 March 2014. On 3 November 2015, the Appellant applied for leave to remain in the United Kingdom as the partner of her husband, who had been granted indefinite leave to remain in 2011 and subsequently became a British Citizen.

3. The Respondent refused the application on 11 April 2016 on the basis that the Appellant was unable to meet the requirements of Appendix FM as a spouse as she did not have any extant leave to remain at that time. Their application was considered under paragraph EX.1 of Appendix FM in the alternative, but refused as the Respondent considered that there were no insurmountable obstacles to family life between the Appellant and her husband continuing in Uganda. The application was also refused under paragraph 276ADE of the Immigration Rules on the basis that the Appellant had not resided in the United Kingdom for a sufficient period of time and that there would be no very significant obstacles to her reintegration into Uganda given that she had previously resided there for 43 years and would have retained knowledge of life, language and culture there. In addition, she had two sons settled in Uganda. The Respondent also considered whether there were any exceptional circumstances, including the Appellant's husband's health problems and a psychologist report as well as the claimed lack of employment opportunities in Uganda; but concluded that medical treatment was available if needed in Uganda and the Appellant and her husband had sufficient qualifications and work experience to enable them to gain employment.
4. Judge Asjad dismissed the appeal in a decision promulgated on 15 June 2017 on human rights grounds. The decision included findings that the Appellant and her husband were both working full-time and that her husband was fit to work: in these circumstances it was unlikely that the Appellant was his full-time carer. It was also found that there was no credible reason why the Appellant's family in Uganda would not be able to assist her on return to Uganda, nor that neither the Appellant nor her husband could find suitable work in Uganda where they had lived for 24 years and where healthcare was available. Judge Asjad considered the psychology reports before her but gave them only minimal weight because the first report was from 2014 when the Appellant's husband's health was much worse and the update to the report in 2017 was further to a telephone consultation during which she did not consider that the psychologist had been given all of the new necessary information to conduct a proper assessment. Overall, Judge Asjad found that there were no insurmountable obstacles to family life continuing outside of the United Kingdom, in Uganda, and no very significant hurdles to private life continuing. Although the Appellant was financially independent and was

able to speak English, these were neutral factors when conducting the balancing exercise and there was public interest in this case in ensuring effective immigration control. In all of the circumstances, it was found that the decision was proportionate to the public interest in ensuring effective immigration control.

The appeal

5. The Appellant appeals on four grounds. First, that Judge Asjad made a number of factual errors which amounted to errors of law in reaching her decision. The first was a misunderstanding of the Appellant's case, she did not say that her husband was not fit to work at all but simply that he was not fit to continue in employment as a teacher because of the problems he was having with his voice. The second, in finding that the Appellant was working in the United Kingdom at the time of the hearing, when she had in fact only previously worked when permitted to do so. Secondly, that Judge Asjad erred in failing to place appropriate weight on the psychological report and made presumptions on the information given to the psychologist by the Appellant which were reached without proper foundation or assessment. Thirdly, before the First-tier Tribunal, the Appellant relied upon the House of Lords decision in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 which was not dealt with at all by the Judge. Finally, in any event, Judge Asjad failed to conduct a proper balancing exercise for the purposes of determining proportionality of the decision under Article 8 of the European Convention on Human Rights. It was also generally included within the grounds of appeal that there was a lack of care in a very short determination.
6. Permission to appeal was granted by Judge Scott-Baker on 13 December 2017 on all grounds.
7. At the hearing, Counsel for the Appellant relied upon the grounds of appeal as originally submitted. In relation to the first ground, it was stated that the factual errors in relation to the Appellant's employment and her husband's fitness to work were material because they formed part of the adverse credibility findings against the Appellant. When asked whether in any event the fact that the Appellant's husband was working more than full-time was inconsistent with the claim that the Appellant was his full-time carer, such that the finding on that point would stand unaffected anyway, it was submitted that it was never the Appellant's case that she was his full-time carer, merely that she provides daily care and support for her husband.
8. In relation to the second ground of appeal, in paragraph 8 of the decision of Judge Asjad, details about the psychological report were not recorded accurately, for example the dates were wrong and on the face of the report it was clear that the psychologist was aware that the Appellant's husband was working and the Appellant was not herself permitted to work, which shows, contrary to the finding Judge Asjad about information given to the psychologist, he was appropriately informed about the situation. As

such the reasons given for attaching only minimal weight to the report was contrary to the evidence. This was further material because of the inference that neither the Appellant nor her husband had been honest to the tribunal or to the psychologist.

9. In relation to the third and fourth grounds of appeal, it was submitted that nothing in the determination showed that a proper balancing exercise had been conducted for the purposes Article 8. In particular, the Judge had made no reference to the appropriate tests or relevant case law; had quoted from an unidentified case and set out no clear assessment of whether or not the Appellant met the requirements of the Immigration Rules. It was the Appellant's case that she met all of the substantive requirements of Appendix FM for a grant of leave to remain as a partner, save for a current lack of leave to remain and as such relied on the decision in Chikwamba (as recently endorsed as a matter of principle in the Supreme Court's decision in Agyarko v Secretary of State for the Home Department [2017] UKSC 11) to show that her removal would be a disproportionate interference with the right to respect for her private and family life. Counsel for the Appellant submitted that the decision in Chikwamba had been accepted as a general principle when assessing proportionality in Article 8 claims and is not confined cases where an application has been refused merely because it is been considered by the Respondent to be proportionate for a person to return apply for entry clearance from abroad. It is relevant to the public interest and its expression in the Immigration Rules.
10. It was further submitted that there was no express consideration of the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002, including that the Appellant spoke English, that she had been lawfully resident for nearly 10 years, that she had had no recourse to public funds, that she had previously worked in the United Kingdom and owned her own home here. The Appellant's claim that she had only inadvertently become an overstayer due to a problem with a previous application and her representatives not paying the applicable fee had also not been taken into account.
11. The Home Office Presenting Officer submitted that Judge Asjad had adequately considered whether the Appellant met the requirements of the Immigration Rules, finding for the reasons given in paragraph 7 that she did not and although the reasons were brief they were adequate.
12. In relation to the Chikwamba point, the first issue is whether the Appellant had established that entry clearance would be granted to her as a partner, the second question is then whether temporary interference with family life would be justified whether it would be a disproportionate interference. Although it was accepted that there was some evidence of employment income of the Appellant's husband, it was clear that this was insufficient to show that all of the requirements of the Immigration Rules would be met, not least because the specified evidence in Appendix FM-SE was not before the First-tier Tribunal. In these circumstances, any failure to

consider the Chikwamba point was immaterial as the Appellant had not got past the first point of consideration. In any event the burden is on the Appellant to show that the interference would be disproportionate and there was insufficient material before the First-tier Tribunal to identify this in the present appeal.

13. In relation to Article 8, again it was submitted that although the reasons given for the findings on this point were brief, they were adequate.
14. The Home Office Presenting Officer did not dispute the two claimed errors of fact but in all the circumstances of the appeal question whether they could have materially affected the outcome.

Findings and reasons

15. The errors of fact identified by the Appellant in the first ground of appeal have not been disputed by the Respondent and I find that two errors of fact were made in this case which amount to errors of law. First, the finding that it was the Appellant's case that her husband was not fit to work when the evidence was that he was working and only unable to carry on specific employment as a teacher due to problems with his voice. Secondly, the finding that the Appellant was employed at the date of the hearing when there was no evidence before the First-tier Tribunal to support that finding, only oral evidence that she had worked in the past.
16. These errors are material as they were used to make adverse credibility findings against the Appellant (as the findings were considered to be contrary to her claim before the First-tier Tribunal) and were used as the basis for the further findings made in paragraph 8 that the Appellant had deliberately not given full information to the psychologist for his report about her husband's employment in particular. In any event, that finding was also directly against the evidence on the face of the first psychologist report which referred to the couple's then employment situation. This finding in paragraph 8 then formed at least a significant part, if not the only reason why only minimal weight was attached to the psychologist's report. Those factual errors also lead through into an error of law as per the second ground of appeal, that insufficient weight was given to the psychologist's report as the reasons for minimal weight being given to it were not supported by the evidence before the First-tier Tribunal.
17. As to the third and fourth grounds of appeal which were argued together at the hearing, I find that the Appellant did raise the Chikwamba point which Judge Asjad failed to make any reference to or deal with at all in her decision, which amounts to an error of law. The findings in this case dealing with the issues of whether the Appellant meets the requirements of the Immigration Rules (either under paragraph EX.1 of Appendix FM or would meet the requirements for a grant of entry clearance as a partner) as well as the Article 8 assessment and balancing exercise are essentially contained in just two paragraphs of the decision and to some extent show

a lack of care, for example, by failing to include the case reference for the quote at the end of paragraph 7.

18. The Judge does not expressly set out any of the applicable law, either the requirements of the Immigration Rules, case law or the statutory considerations in section 117B of the Nationality, Immigration and Asylum Act 2002, but has shown by the language used and factors considered that the majority of these points were in fact considered. For example, paragraph 7 sets out relevant factors and findings to the question of whether there are insurmountable obstacles to family life continuing in Uganda (relevant to the requirements of paragraph EX.1 of Appendix FM of the Immigration Rules) and whether there would be very significant hurdles to her reintegration if removed to Uganda (the test under paragraph 276ADE(1)(vi) of the Immigration Rules in respect of private life). Those same tests are considered further in paragraph 8 where more detailed consideration is given to the Appellant's husband's physical and mental health, but where it was noted that there was a lack of evidence of any current medical treatment for mental illness, no need for full-time care and as already found in paragraph 7, health care is available in Uganda as is family support. Albeit brief, these are clear findings that the requirements of the Immigration Rules have not been met by the Appellant although it still questionable whether they are adequate or sustainable in all of the circumstances and taking into account the errors set out above.
19. In terms of the balancing exercise for the purposes of Article 8, Judge Asjad does expressly take into account the factors in section 117B(1), (2) and (3) of the Nationality, Immigration and Asylum Act 2002 when concluding that the decision was not a disproportionate interference with the right to respect for private and family life. However, there is no express consideration of the wider factors relied upon by the Appellant in relation to Article 8 as set out in the skeleton argument before the First-tier Tribunal. Whilst I do not therefore find that all of the Appellant's criticisms of the reasoning and findings in this case have been made out, many are.
20. The issue for me is whether the errors identified above were material to the outcome of the appeal. The Respondent submitted that they were not, particularly as there was a lack of evidence before the First-tier Tribunal as to the Appellant's ability to meet the requirements for a grant of entry clearance to the United Kingdom as a spouse of a person settled here such that she would not get past the first hurdle in relying on the decision in Chikwamba. There is some force in that submission given that there was only limited evidence before the First-tier Tribunal of the Appellant's husband's employment and no clear submission as to her ability to meet the requirements for entry clearance.
21. If each error identified above is taken in isolation, it is possible that none would individually be material to the outcome in this appeal. However, given the errors of fact which were not disputed; the lack of weight given

to the psychologist report for a factual reason which is not sustainable; the complete failure to consider the Chikwamba point at all, and the very brief findings on Article 8; this is a case in which it can not be said with sufficient certainty that the outcome of the appeal would inevitably have been the same even if those errors did not occur. When reading the decision as a whole, I find that there are a number of errors of law (including errors of fact which amount to errors of law) which, at least cumulatively, were material to the outcome of the appeal and as such it is necessary to set aside the decision of Judge Asjad.

22. In the event of a material error of law being found, the parties agreed that the appeal should be remitted to the First-tier Tribunal for a de novo hearing.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

The appeal is remitted to the First-tier Tribunal (Birmingham hearing centre) for a de novo hearing before any Judge except Judge Asjad.

No anonymity direction is made.

Signed



Date

1st March 2018

Upper Tribunal Judge Jackson