



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12159/2017

THE IMMIGRATION ACTS

Heard at Liverpool
On 17th July 2018

Decision & Reasons Promulgated
On 15th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS NELIA KUDRIAVCHENKO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Salam, Solicitor

For the Respondent: Mrs M Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the Ukraine born on 2 April 1962. The Appellant had been granted entry clearance as a spouse of Mr Maycock on 5th January 2013 valid to 27th May 2014. The Appellant applied thereafter as the spouse of a settled person on 6th May 2014 and was granted leave to remain until 6th December 2016. A further application for leave to remain was made thereafter and this was refused by the Secretary of State by Notice of Refusal dated 3rd October 2017. That application had been made on the basis of the Appellant's family life with her partner Mr Maycock.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Durance on 29th March 2018. In a decision and reasons promulgated on 27th March 2018 the Appellant's appeal was dismissed.
3. On 11th April 2018 Grounds of Appeal were lodged to the Upper Tribunal. Those Grounds of Appeal noted the basis of the application, namely that the Appellant was a Ukrainian national aged 56 who had come to the UK on 5th January 2014 as the fiancé of a British national and after marriage switched into the spouse route on 6th June 2014. It was noted that the couple met all the requirements of Appendix FM but though they had savings of more than £65,000 this was not for the full six months. The Sponsor had had earnings in the last twelve months of far more than the £18,600 required but he had resigned from the directorship of his employer company and they decided to rely on the savings. As the leave was expiring before the savings could reach the required six month mark, an application had been made under the ten-year route for the time being, hoping to change it to the five-year route after the six months had been finished. They submitted a statement of additional reasons on 6th June 2017 but the application had been refused on 3rd October 2017 on the sole ground there were no insurmountable obstacles for the Appellant going back to the Ukraine and applying again for entry clearance. It was submitted that the Immigration Judge had erred in law for being content that though the Appellant met all the requirements of the rules for the extension of her leave she should be required to leave the UK and make a fresh application from the Ukraine and that such a step was not disproportionate. It was contended that the Immigration Judge in dismissing the guidance given in such cases under *Chikwamba v SSHD [2008] UKHL 40* erred by referring to the authority of *R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 11089 (IAC)* which did not remotely support the Immigration Judge's proposition.
4. On 24th May 2018 First-tier Tribunal Judge Parker granted permission to appeal. Judge Parker noted that the Home Office Presenting Officer had agreed at the hearing that the financial requirements were met, and that it was argued that the judge had erred at paragraph 8 of the decision by failing to allow the appeal on this basis and that he erred in his approach to Appendix FM; insurmountable obstacles (*Chikwamba*), erred in failing to give weight to the Appellant's ability to meet the Immigration Rules (*Mostafa [2015] UKUT 112*), took no account of the delay in applying for entry clearance and failed to properly consider Article 8.
5. Judge Parker indicated that the decision of the First-tier Tribunal Judge made no reference to the variation dated 6th June 2007 to the application originally made on 2nd December 2016 and that there was no record in the decision that the judge and the Home Office agreed that the financial requirements were met as alleged in the grounds and that this was a dispute of fact that he was unable to resolve. He considered that the judge had arguably erred in failing to undertake any substantive consideration in the decision of whether the Immigration Rules including the financial requirement E-LTRP.3.1 – were met, which should precede any finding that EX-1 applies. In the event that the Appellant was able to meet the requirements of the Rules, EX-1 would not fall for consideration and this would taint the decision on human rights grounds. He

further noted that the judge had purported to rely upon *Chikwamba* but had made reference to the need to avoid “queue jumping” at paragraph 21 which was an approach which met with disapproval in *Chikwamba*. The judge had made no reference to the public interest factors in Section 117B when considering human rights and as a result there were a number of arguable errors of law in the decision.

6. On 11th July 2018 the Secretary of State responded to the Grounds of Appeal under Rule 24 submitting that the First-tier Tribunal Judge had made clear findings on all aspects of the appeal, that the Appellant had not met the requirements of the Immigration Rules at the date of application or at the date of hearing and that the judge had concluded that a brief separation in these circumstances would not be disproportionate and the finding that was open to him on the evidence.
7. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by instructed solicitor Mr Salam. Mr Salam is very familiar with this matter. He appeared before the First-tier Tribunal and he is the author of the Grounds of Appeal. The Secretary of State appears by her Home Office Presenting Officer, Mrs Aboni.

Submissions/Discussion

8. Mr Salam submits that the Rule 24 response does not help the Secretary of State, and whilst the Secretary of State suggests that the Appellant should return, it had previously been agreed that the Appellant met the Rules and there was consequently no reason to go behind that and make the finding that the judge did. Mrs Aboni says that the judge directed himself appropriately and by the time of the hearing, whilst it may be accepted that the Appellant met the financial requirements it was open to the judge to make the decision that he did. Mr Salam submits that being required to return and make an application out of country is a matter usually reserved to people who have overstayed and that the Secretary of State actually invited the Appellant to make an application in country and there would be no point in doing so. In any event he submits that it would be inappropriate as the Appellant has what is known as 3(c) leave. He submits the only basis would be for the making of a statement pursuant to Section 120 and that is what has been done.
9. Mrs Aboni responds by stating that the Section 120 statement has been adequately considered by the judge at paragraph 7 of the decision and that fresh evidence is not relevant to the decision as the application is under the ten-year rule and consequently there is no material error. Mr Salam counters by stating that Section 120 statements is exactly for cases of this nature and that the appeal must succeed and therefore he asks me to find firstly that there are errors of law and secondly to go on to remake the decision allowing the appeal.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account

immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

12. The First-tier Tribunal Judge had before him the Appellant's statement under Section 120 whereby it was argued that the Appellant now met the financial requirements under Appendix FM. I am advised that this scenario in regard to the financial position of the Appellant was accepted by the First-tier Tribunal Judge and is not at this stage challenged by Mrs Aboni. I therefore take it that the Appellant meets the requirements of the Rules. However Judge Durance refused to take this into consideration noting that the sole refusal by the Secretary of State was that the Appellant could return to the Ukraine and lodge a fresh application there. That does not sit comfortably with the law nor the view expressed quite properly by Judge Parker when granting permission. The judge erred in failing to undertake any substantive consideration in the decision of whether the Rules were met which should precede any findings that EX-1 applies. As a result, the decision on human rights grounds is tainted and I find an error of law and set aside the decision.

The Remaking of the Decision

13. *Mostafa [2015] UKUT 112* is authority for saying that in the case of appeals brought against refusal of entry clearance under Article 8 ECHR a claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal but is capable of being a weighty, though not determinative, factor in deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. This was an Appellant who belatedly met the Immigration Rules and who is not an overstayer. In all the circumstances following the authoritative guidelines provided, this is a case that would not be proportionate to remove the Appellant solely for the purpose of making what would be destined to be a successful reapplication from the

Ukraine, and it could not be considered that this would constitute a case of queue jumping if that were the appropriate test to apply. This Appellant meets the Rules, and consequently EX-1 does not fall to be considered. For all the above reasons I remake the decision allowing the Appellant's appeal.

Decision

The decision of the First-tier Tribunal Judge contained a material error of law and is set aside. I go on to remake the decision allowing the appeal.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris