IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002283
First-tier Tribunal No: HU/51283/2021
IA/06528/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Fred Felix Zalimba
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr H Broachwalla, legal representative
For the Respondent: Ms S Rushforth, Senior Presenting Officer

Heard remotely by video at Field House on 7 March 2023

DECISION AND REASONS

1. The appellant, a citizen of Malawi, seeks to appeal the decision of the First-tier Tribunal (Judge Ficklin) dismissing his appeal against the respondent's decision of 6.4.21 to refuse his application for Leave to Remain (LTR) as an unmarried partner of a British citizen under Appendix FM of the Immigration Rules.

2. In summary, the grounds assert: (i) not applying the Chikwamba v SSHD [2008] UKHL 40 principle; (ii) made findings not open to the Tribunal where the respondent did not attend the hearing and there was no cross-examination of the appellant; (iii) failed to take into account all material evidence; and (iv) conflated the tests within and without the Immigration Rules and failed to carry out a proportionality balancing exercise.

3. Permission was granted by the First-tier Tribunal (Judge Grey) in a decision dated 17.5.22, the judge considering it arguable that the First-tier Tribunal "failed to conduct a full balancing exercise in respect of the Article 8 proportionality assessment; and failed to make distinct findings in respect of and distinguish between the tests in relation to insurmountable obstacles to family life continuing

in Malawi (under Appendix FM of the Immigration Rules); very significant obstacles to integration in Malawi (under paragraph 276ADE9i)(vi) of the Immigration Rules); and whether removing the appellant is proportionate and not in breach of his article 8 ECHR rights."

4. In respect of the first ground, Mr Broachwalla frankly accepted that in the light of the recent clarification by the Court of Appeal in Alam [2023] EWCA Civ 30, this ground has limited traction. Alam held that *"Chikwamba is only relevant when an application for leave is refused on the narrow procedural ground that the applicant must leave and apply for entry clearance, and that, even then, a full analysis of the article 8 claim is necessary,"* and, *"Chikwamba does not state any general rule of law which would bind a court or tribunal now in its approach to all cases in which an applicant who has no right to be in the United Kingdom applies to stay here on the basis of his article 8 rights."* In the circumstances, this ground cannot succeed on the facts of this case.

5. I am satisfied that the judge was perfectly entitled to conclude that this was not a Chikwamba case, for the cogent reasons set out in the decision. I am also satisfied that the judge was correct not to second-guess the outcome of any English language test, despite have had the opportunity to note the appellant's fluency in *spoken* English during the hearing. Arguments as to whether the appellant could have obtained access to his passport (said to be held by the respondent) in order to renew it to be able to provide satisfactory identity documentation for the purpose of such a test are ill-founded as the appellant never asked the respondent for assistance with this issue; it was not demonstrated that the respondent would not have assisted. On the facts, the finding at [48] that the appellant failed to demonstrate that an entry clearance application would have succeeded was open to the Tribunal and no error of law is disclosed by this ground.

6. In respect of the second ground, the fact that there was no attendance on behalf of the respondent and, therefore, no cross-examination of the appellant does not prevent the judge from making the findings complained of. Simply because the appellant's evidence was unchallenged does not bind the judge to accept that evidence. The judge was entitled to assess the whole of the evidence including that of the appellant and was not obliged to put obvious concerns or points to him before making adverse findings. The judge was entitled to note that there was no medical evidence in support of the claim of mental health issues that would cause either very significant obstacles to integration or very serious hardship on return to Malawi, or result in harsh consequences such as to make removal disproportionate. Similarly, it was open to the judge to note that there was no evidence that the appellant could not call on family support on return to Malawi.

7. Neither was it necessary for the judge to address every issue of evidence or summarise the evidence considered. It is clear from the decision that findings were made after consideration of the evidence in the round. As the Court of Appeal explained in VW (Sri Lanka) [2013] EWCA Civ 522 at [12], "Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact."

8. Mr Broachwalla made his submissions on grounds 3 and 4 together, as they overlapped, suggesting that the judge conflated or confused the various tests within and without the Immigration Rules as to very significant obstacles or very serious hardship and failed to conduct the article 8 proportionality balancing exercise. Having carefully considered the decision, I am not satisfied that there was any conflation or confusion between the different tests. At first blush, however, it would appear that the judge made no article 8 proportionality balancing exercise, as the grounds suggest. However, Ms Rushforth took me to various parts of the decision to point out that the judge's particular approach was to consider the tests under the Rules and in relation to article 8 proportionality in respect of each issue raised in turn during the appeal; an approach which may have been prompted by the application of the Devaseelan principle to facts found in the earlier decision of Judge Herwald.

9. In relation to article 8, clearly, the judge did address s117B (at [31] of the decision) which directly relates to the article proportionality balancing exercise. At [35] the judge correctly applied GEN 3.2 of the Immigration Rules which is in effect the proportionality balancing exercise. It is obvious that the judge had article 8 and the proportionality balancing exercise in mind throughout consideration of the evidence and the issues raised.

10. As an example, of the judge's approach [38] of the decision it can be seen that the claim to family life has been addressed in the context of the relationship developed whilst the appellant's immigration status was precarious and the desire to have fertility treatment. However, the judge explains that it would need to be shown that deprivation of this opportunity in the UK would have unjustifiably harsh consequences to be disproportionate. The judge went on to address the medical evidence, and at [41] onwards the alleged difficulties of returning to Malawi.

11. Although one might expect to see article 8 addressed separately, with a balance-sheet approach of factors for and against, I am satisfied that the approach actually adopted by the First-tier Tribunal does adequately address article 8 private and family life rights. Adopting a different viewpoint, it is difficult to see any particular factors that have not been properly considered and taken into account in the impugned decision, or how the absence of a balance-sheet approach in a separate section of the decision could or would make any material difference to the outcome of the appeal. In effect, the grounds attempt to pick apart the decision on technical or formulaic grounds rather than on the substance of the decision considered as a whole.

12. For the reasons summarised above, I am satisfied that all relevant issues were addressed by the First-tier Tribunal in a carefully considered and well-reasoned decision and that no material error in the making of the decision of the First-tier Tribunal is disclosed.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands as made.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal

Immigration and Asylum Chamber

7 March 2023