



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006209
First-tier Tribunal No:
HU/58086/2021
IA/17740/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 October 2023

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

COLEEN CHIKUSE
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Pipe, Counsel instructed by BHB Law
For the Respondent: Mrs. R. Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 5 October 2023

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Watson (the Judge), promulgated following a hearing at Birmingham on 12 September 2022, in which the Judge dismissed the appellant's appeal against the refusal of her application for leave to remain in the United Kingdom on human rights grounds. The application, on the basis of family and private life, was made on 29 July 2020 and refused in a decision dated 2 December 2021.
2. We make an observation, no more at this stage, that in proofreading the determination the Judge may care to delete the additional text "Error: Reference source not found" appearing for example in the first line of [1], [13]. We do not

find that the inclusion of this text materially impacts our decision in relation to the merits of the challenge to the determination.

3. The appellant is a citizen of Malawi born on 17 June 1974 who arrived in the UK on 15 January 2003 using a different name. She was denied leave to enter and claimed asylum which was refused. The appellant was removed from the UK and return to Malawi on 3 January 2006.
4. The appellant re-entered the UK lawfully using her current name with entry clearance as a student on 8 September 2007, valid to 1 January 2010. An application for leave to remain was made as the spouse of her sponsor, Mr Hindley, which was refused on 7 April 2016; as were further submissions made in 2017 and 2019.
5. The Judge's findings are set out from [13] of the decision under challenge. The Judge finds that the appellant employed deception in relation to her identity when entering the UK in 2003 [14]. She accepts the appellant has been in the UK for a period of 15 years and has not returned to Malawi during that period [15]. The Judge finds the appellant has been in the UK unlawfully since her visa expired on 1 January 2010. The period of lawful leave was only two years and three months with the remainder being unlawful [16].
6. The appellant met her husband, Mr Hindley, in 2008, and they remain in a genuine relationship which had existed to the date of the hearing for 14 years. They married on 21 January 2011 [17]. The appellant has no severe disabilities or significant medical conditions which prevent her from looking after herself or from working. She would not suffer from any particular overwhelming hardship due to a medical condition if returned to Malawi [18].
7. The appellant's husband has no particular medical problems which mean he cannot look after himself without his wife. He is retired, receives a pension, and receives money from his father and family as recompense for his and the appellant's help given in caring for his father who is 96 years of age and in poor health. The appellant and her husband are not reliant on UK benefits. The appellant's husband has savings amounting to £30,000 [19].
8. Mr Hindley's father is in supported accommodation where he is safe. He is not dependent upon the appellant for his health and safety. He will not be destitute whatever the outcome of the appeal. There are other family members including Mr Hindley's sister who lives relatively near and deals with his finances and his power of attorney. The sister will be able to visit and look after practical matters involving her father. The appellant's presence in the UK is not necessary for Mr Hindley's father to have a reasonable standard of living. Alternative arrangements can be made for the care of Mr Hindley's father at a later date in any event. A social worker's report commissioned by the appellant's representatives relates to a time when Mr Hindley's father's wife was still alive (dated July 2020). This refers to Mr Hindley's father requiring help with medication, cooking, cleaning, and being taken out for social activities. The report indicates that his complex needs will be overseen by the various agencies such as social services and the NHS. Nothing in the report or other evidence shows that adequate care would not be available to Mr Hindley's father if the appellant were not in the UK [20].

9. The appellant has a son in the UK who has a child. The Judge did not place great weight upon the letter from this person as there were no other identity documents relating to the author. The Judge finds it hard to reconcile what is known about the appellant's immigration history and the claims made in the letter. The Judge placed little weight upon any family life claimed with a person named as Fred Malanga as a reason why the appellant could not go to Malawi or why the decision is unduly harsh [21].
10. Mr Hindley has a brother who has OCD. Medical records were provided to support claims relating to the brother being a reason why Mr Hindley could not leave the UK to live with his wife abroad. The Judge finds the presence of Mr Hindley's brother in the UK is not a barrier to either the appellant or Mr Hindley leaving the UK [22].
11. The Judge finds the appellant has no meaningful ties to anyone in Malawi now, but does not find she has lost all knowledge of her homeland or that she has shown she would be in danger of destitution or mistreatment there. Mr Hindley confirmed that, while he would not want to go to Malawi himself, he would send financial support to the appellant and would not abandon her if she were removed to Malawi. The Judge finds this to be an honest acknowledgement of the reality of the couple's situation [23].
12. The Judge finds there are no insurmountable obstacles arising from the evidence, individually or cumulatively, to prevent the appellant's return to Malawi [24 - 26]. She finds that the appellant has not shown that she faces very significant obstacles to integration into Malawi on return [29]. Neither has she shown insurmountable obstacles to family life with her husband continuing in Malawi [30].
13. Having weighed up the competing interests when considering whether the decision is disproportionate, the Judge finds that the case did not involve a disproportionate interference with the appellant's private or family life or that of any other person involved [33 - 43].
14. The appellant sought permission to appeal. The grounds refer to the central issue in the appeal being the existence of insurmountable obstacles pursuant to EX.1(b) Appendix FM and Article 8 outside the rules/GEN.3.2.
15. The grounds assert, in summary:
 - (a) The Judge made a material mistakes of fact amounting to an error of law/failure to consider the evidence, in finding that the appellant had used deceit on entry, that she had left Malawi in 2003 and presumably left her son there, that she did not know how old the appellant's son was, and that her relationship started when she was in the UK unlawfully.
 - (b) the Judge failed to consider material evidence, in particular there were two reports from an Independent Social Worker but the Judge failed to consider the addendum report which supported the assertion that the appellant's father-in-law would be at risk of neglect, harm and death, and that paid care would not meet his emotional and psychological needs. This vitiates the Judge's consideration of EX.1(b) and Article 8 outside of the rules.

(c) the Judge made a material misdirection of law in failing to properly consider the cumulative matters relied on, and failed to consider EX.1(b) in a practical and realistic sense.

(d) the Judge made a material misdirection of law in relation to sections 117B(4) and 117B(5) of the 2002 Act.

(e) the Judge made a material misdirection of law in failing to properly consider the 'Chikwamba argument' raised at the hearing.

16. Permission to appeal was granted by another judge the First-tier Tribunal of 15 December 2022 on the basis the grounds are arguable.

17. There is no Rule 24 reply from the Secretary of State.

Discussion and analysis

18. At the hearing, having expressed our preliminary view that the grounds of appeal were made out, and that the decision involved the making of material errors of law, Mrs. Arif stated that she conceded on behalf of the respondent that the decision involved the making of a material error of law. In particular she referred to the failure of the Judge to consider the Social Worker's addendum report. Given this concession, our discussion of the grounds will not be overly long.

19. The first ground asserts that the Judge made mistakes of fact/ failed to consider the evidence. We find that this is made out having considered the Judge's findings which are contrary to the evidence before her. Of particular relevance are the findings that the appellant used deceit on entry, and that her relationship began when she was in the UK unlawfully. We find that these are material to the Judge's overall decision.

20. The second ground relates to the failure to consider the social worker's addendum report. We agree that this vitiates the Judge's consideration of paragraph EX.1(b), as well as Article 8 outside the rules. In the second report the expert concluded that the appellant's father-in-law would be at risk of neglect, harm and death. She concluded that paid care would not meet his emotional and psychological needs as readily as the support arrangements which were in place. This is clearly relevant to consideration of Article 8, both within the immigration rules under paragraph EX.1(b), and outside the immigration rules. We find that the failure to consider the social worker's addendum report is a material error of law.

21. In relation to the consideration of paragraph EX.1(b), as asserted in the third ground, the Judge failed to consider the circumstances cumulatively. The Judge states at [30]:

"I find that I am not shown that there are insurmountable obstacles to family life with her husband in Malawi. He has made his decision plain that he does not want to go there with her. That is a decision for the couple to make. It is not an insurmountable obstacle to family life outside the UK. If it were it would drive the proverbial coach and horses through the Rules as any partner could simply say 'I am not going abroad' for an appellant to claim the right to remain in the UK. She does not satisfy the Immigration Rules on the basis of her Private or Family life under EX2."

22. The Judge has focused on one issue, the fact that the appellant's husband did not intend to move to Malawi. Putting on one side the fact that she has not considered the social worker's addendum report, she has failed to consider the appellant's circumstances in the round. We find that this narrow approach to paragraph EX.1(b) amounts to a material error.

23. The grounds assert that the Judge made a second misdirection of law with reference to section 117B(4) and 117B(5) of the 2002 Act. She states at [38]:

"I am directed not to give weight to a relationship that starts when the appellant has temporary or unlawful status."

24. Despite the fact that she has set out section 117B(4) and 117B(5) in full at [33] of her decision, this statement at [38] does not correctly reflect the law. Section 117B(5) applies only to private life, not to the weight to be given to a relationship. In relation to section 117B(4), as set out above, the Judge has made a material error when finding that the relationship started when the appellant was in the UK unlawfully.

25. Finally, we find that the Judge erred when she stated that it was not her position to consider Chikwamba [2008] UKHL 40. At [41] she states:

"I also find that if she leaves the UK and applies for entry from abroad that her application may be successful but it is not my position to consider this. She can be supported by her husband whilst making such an application. I am told by both representatives that there is a delay due to a covid backlog and to processing Ukrainian applications and that it is likely to be 6 months before a decision on her visa is made."

26. The grounds cite the case of Younas (section 117B(6)(b); Chikwamba; Zambrano) Pakistan [2020] UKUT 129 (IAC) at [94] which provides:

"The second question is whether an application for entry clearance from abroad will be granted. If the appellant will not be granted entry clearance the Chikwamba principle is not relevant. A tribunal must determine this for itself based on the evidence before it, the burden being on the appellant: see Chen at 39."

27. We find that the Judge has materially erred by failing to consider the Chikwamba argument. Further, she has set out the parties' agreed position that there was a delay in processing applications and it would be six months before a decision was made, but has failed to give any consideration to the impact of this period of separation. This is especially relevant given the evidence in the social worker's addendum report, which she has failed to consider, that the appellant's husband would suffer a mental health crisis if he were suddenly to lose the appellant.

28. We find that the decision is vitiated by the above errors of law. We set the decision aside. Given the failure to consider the evidence, no findings can be preserved.

29. In relation to the onward progress of the appeal, Mr. Pipe submitted that circumstances had now changed as the appellant's father-in-law had died. Given this, and the fact the Judge had failed to consider the evidence properly, he submitted that it would be appropriate for the appeal to be remitted to the

First-tier Tribunal to be reheard. Taking into account the case of Begum [2023] UKUT 46 (IAC), and the exceptions set out in 7(2)(a) and 7(2)(b) of the Practice Statement, we considered that it is appropriate in these circumstances for the appeal to be remitted to the First-tier Tribunal to be reheard de novo.

Notice of Decision

30. The decision of the First-tier Tribunal involves the making of material errors of law.
31. We set the decision aside. No findings are preserved.
32. The appeal is remitted to the First-tier Tribunal to be reheard.
33. The appeal is not to be listed before Judge Watson or Judge Parkes.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
9 October 2023