Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34040/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5th September 2014	**On 29th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS DIVINE CHARITY ROMERO
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Ahmed, Counsel
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of the Philippines born on 17th May 1989. The Appellant first arrived in the United Kingdom on 10th April 2012 with leave to enter as a visitor

valid to 2nd October 2012. On 7th July 2012 the Appellant applied for leave to remain in the UK. The Appellant's appeal was refused by the Secretary of State by Notice of Refusal letter dated 2nd September 2013. That refusal was based on the contention that the Appellant could not meet the provisions of the Immigration Rules and that there were no exceptional circumstances consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights. The Appellant's application was to enter the UK under the partner route relying on her relationship with Terence Samuel Bruce.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Maxwell sitting at Hatton Cross on 23rd June 2014. In a determination promulgated on 30th June 2014 the Appellant's appeal was dismissed under the Immigration Rules and on human rights grounds.

3. On 4th July 2014 Grounds of Appeal were lodged to the Upper Tribunal. On 16th July 2014 First-tier Tribunal Judge Grant-Hutchison granted permission to appeal. The judge noted that the application to the Secretary of State had been for an extension of stay as a person settled and present in the UK and that it was submitted that the judge had arguably erred in law by (a) failing to consider that in terms of Appendix FM-SE the Sponsor's state pension can be taken into account for the purposes of meeting the financial requirements test and (b) in making adequate findings in connection with the Sponsor's health conditions.

4. On 29th July 2014 the Secretary of State responded to the Grounds of Appeal under Rule 24. The response opposed the Appellant's appeal noting that the First-tier Tribunal Judge properly considered Article 8 having regard to the Appellant's husband's health and that the judge properly took into account that the Appellant could not succeed under the Rules prior to July 2012. The Rule 24 response contended that the judge had given adequate reasons for the findings made and that there was no material error of law in the determination.

5. It is on that basis that the appeal comes before me. The Appellant is represented by her instructed Counsel Ms Ahmed. The Secretary of State appears by her Home Office Presenting Officer Ms Everett.

Relevant Documents

6. I am referred in this appeal, albeit initially, that the issue before me is to whether or not there is a material error of law in the decision of the First-tier Tribunal Judge and in particular to the extremely helpful skeleton argument provided by Counsel and to the very detailed relevant bundle (at least relevant to whether the decision should be remade if I find a material error of law) extending to some 143 pages and including additional witness statements dated 27th August 2014 both from the Appellant and from her Sponsor, Mr Bruce.

Submissions/Discussions and Relevant Accepted Facts

7. The Secretary of State does not dispute the relationship between Mr Bruce and the Appellant. It is noted and the Secretary of State does not challenge that originally the parties planned to get married on 20th September 2012 but were unable to do so because the Appellant's passport was retained by the Home Office. However it is accepted that they live together and that they are engaged to be married.

8. Ms Ahmed submits the First-tier Tribunal Judge was wrong to have claimed that the Sponsor's state pension cannot be used towards meeting the financial requirements because Appendix FM-SE accepts this as earnings and consequently he has erred in law. Ms Everett acknowledges that there is an error herein by the First-tier Tribunal Judge but comments that the question remains as to whether that error is material. Ms Ahmed responds that the Sponsor's salaried employment and pension combined together meet the income threshold of £18,600 therefore the judge has materially erred in law. Further she submits that at paragraph 21 of the First-tier Tribunal Judge's determination he did not consider adequately the significance of *Chikwamba v SSHD [2008] UKHL 40* which she submits makes plain that in appeals where the only matter weighing on the Respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the Immigration Rules from abroad, that legitimate objective will usually be outweighed by factors resting on the Appellant's side of the balance. She submits that both the First-tier Tribunal Judge and the Secretary of State failed to consider that the Appellant can succeed under the Immigration Rules, namely Appendix FM, and that the First-tier Tribunal Judge was more concerned whether the removal of both the Appellant and the Sponsor was proportionate rather than consider whether the Appellant can succeed under the Immigration Rules which Ms Ahmed submits that it is clear that she does. In stating this Ms Ahmed is clearly in direct contradiction with the suggestion at paragraph 6 of the First-tier Tribunal Judge's determination that it was purportedly conceded by the representative before the First-tier Tribunal (and Ms Ahmed was not the representative) that the Appellant could only rely on Article 8 and not pursue her claim under the Rules. Unfortunately the Home Office Presenting Officer's notes do not assist Ms Everett in being able to comment on that scenario.

9. Ms Everett submits the case is distinguishable from *Chikwamba* regarding the Appellant's intention in coming to this country and submits that the reasons have not been made out and therefore it is appropriate for her to reapply and that it would be necessary for the Appellant to show to any Entry Clearance Officer that she could now meet the Immigration Rules.

10. Ms Ahmed's response is to point out that had the judge applied *Chikwamba* there would have been a different outcome.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. 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

13. It is difficult to reconcile the concession that the appeal only proceeds under Article 8 allegedly made at paragraph 6 of the determination with paragraph 15 where there is clear reference to argument as to whether or not the Appellant does or does not satisfy the requirement of the Immigration Rules. Further and importantly at paragraph 21 of the determination the judge concludes that the Appellant's state pension cannot be taken into account when meeting the requirements of Appendix FM. That is wrong and is an error of law. It is also material and would have affected the manner in which the argument pursuant to *Chikwamba* was put. To that extent I therefore find there is a material error of law and set aside the decision of the First-tier Tribunal and proceed to remake the decision.

Submissions

14. Ms Everett submits that this is a case of proportionality and it is necessary for it to be demonstrated in a very specific way what the Sponsor earns and it is not just good enough to say how much that is. Ms Ahmed refers me to Section 3.61 which sets out the financial requirements necessary through adequate maintenance and points out that these requirements were before the Secretary of State and that the Sponsor's

income covers the period 2013 to 2014 and therefore they constitute the specified evidence that was required. She further submits that if the Appellant's pensions along with his income from employment are calculated it will be shown that he has totals of earnings in 2013 of £26,345.89 and all earnings in 2014 of £27,182.92. She points out that quite simply the Appellant meets the financial requirements and that it is therefore appropriate to follow the basic principles in *Chikwamba* and to allow the appeal.

15. Ms Everett whilst not challenging the financial position still maintains the Secretary of State's position that the case can be distinguished from *Chikwamba*.

Findings

16. Appendix FM-SE of the Immigration Rules Section 10(e) sets out the permissible pension and evidence allowed under the Immigration Rules. The Respondent's policy guidance entitled Immigration Directorate Instructions Family Members under Appendix FM and Appendix Armed Forces of the Immigration Rules, Appendix FM Section FM 1.7 sets out the financial requirements for a pension to be included. Paragraph 8.1.1 states,

> "8.1.1 The gross annual income from any State (UK Basic State Pension and Additional or Second State Pension, HM Forces Pension or foreign) or private pension received by the applicant's partner or the applicant can be counted towards the financial requirement.
>
> 8.1.2 The annual pension income may be counted where the pension has become a source of income at least 28 days prior to the application.
>
> 8.1.3 The source can be combined with income from Category A: salaried and non-salaried employment, part (1) of Category B: salaried and non-salaried employment, Category C: non-employment income and Category D: cash savings in order to meet the financial requirement.
>
> 8.1.4 The gross amount of any State or private pension received by the applicant's partner, or the applicant in the twelve months prior to the date of application can be combined with part (2) of Category B: salaried and non-salaried employment."

17. It is consequently clear that pension and employment earnings can be combined together to meet the financial requirement and that when that is done the figures stipulated above represent not only the financial position of the Sponsor but also the amount of money that he was entitled to rely upon for meeting the requirements financially under the Immigration Rules and it is clear that he meets those requirements. Thereafter it is necessary to analyse whether it is proportionate for the Appellant to leave the UK and apply for entry clearance knowing that the financial requirement is met. I agree with the analysis given of such a scenario to *Chikwamba*

as set out by Ms Ahmed and whilst appreciating that the Secretary of State seeks to distinguish it that was based on the false premise that originally the appellant did not meet the financial requirements. On the basis that she did and applying correctly the principles set out in *Chickwamba* the appeal is consequently remade and allowed under the Immigration Rules.

Decision

18. The decision of the First-tier Tribunal contained a material error of law. That decision is set aside and the decision is remade allowing the appeal under the Immigration Rules.

19. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris