IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000212

First-tier Tribunal No: HU/57582/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 May 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Prabath Samantha Kumara Kapurubandarage
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr A. Swain, Counsel instructed by Chancery Solicitors
For the Respondent: Ms S. Rushforth, Senior Home Office Presenting Officer

Heard at Field House on 19 April 2023

DECISION AND REASONS

1. The issue in these proceedings is whether the First-tier Tribunal made an error of law by failing expressly to consider a matter raised in an appellant's initial grounds of appeal to the First-tier Tribunal, in circumstances where that issue (i) was not identified by the appellant in the "schedule of issues" in his subsequent appeal skeleton argument; and (ii) was not otherwise pursued by the appellant (either orally or in writing) at the hearing before the First-tier Tribunal. The submissions which the judge is said to have failed to consider were based on the line of authority that is sometimes said to have emanated from *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 ("the Chikwamba submissions").

2. For the reasons set out below, on the facts of these proceedings, the answer to that question is no, and this appeal is dismissed.

Factual background

3. By a decision dated 27 December 2022, First-tier Tribunal Judge Gribble ("the judge") dismissed an appeal brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") by the appellant, a citizen of Sri Lanka born in 1983, against a decision of the Secretary of State dated 20 November 2021 to refuse his human rights claim. He now appeals to this tribunal with the permission of First-tier Tribunal Judge Lodato.

4. The appellant entered the UK as the Tier 4 dependent spouse of a student in October 2010, and his leave was extended to 26 June 2014 in that capacity. The relationship broke down and the appellant subsequently remarried Bethmage Anula ("the sponsor"), a naturalised British citizen of Sri Lankan descent on 4 March 2020. Following the expiry of his original leave as a Tier 4 dependent, the appellant made eight applications as an extended family member under the Immigration (European Economic Area) Regulations 2016. All were refused.

5. By an application dated 22 January 2020, the appellant made a human rights claim to the Secretary of State on the basis of his relationship with the sponsor. He claimed to the Secretary of State that his family circumstances had changed such that he would not be able to return to Sri Lanka with the sponsor. Their lives were in the UK. Life in Sri Lanka would be too difficult.

6. In her decision refusing the application, the Secretary of State accepted that the appellant's relationship with the sponsor was genuine and subsisting, and that he met the financial and English language requirements of the rules. However, because he did not meet the immigration status requirement, his application had to be considered under paragraph EX. 1 of Appendix FM to the Immigration Rules. As to that issue, the Secretary of State was not satisfied that there would be "insurmountable obstacles" to the relationship between the appellant and the sponsor continuing in Sri Lanka. He did not meet the private life provisions of the rules in his own capacity, and nor were there any exceptional circumstances.

7. The appellant appealed to the First-tier Tribunal. In the *Grounds of appeal* section of the 'appeal details' form on the CCD online system, the appellant (or his representatives) stated the following:

> "The decision is unlawful under section 6 of the Human Rights Act 1998."

8. In response to the question, "*Are there any new reasons your client wishes to remain in the UK or any new grounds on which they should be permitted to stay?*", the appellant's solicitors wrote "Yes". Under the heading, "*Explain these new matters and their relevance to the appeal*", the solicitors manually entered the heading "grounds of appeal", followed by 21 paragraphs summarising the parties, the issues, the reasons for refusal, a "schedule of issues", grounds of appeal, and further statements of intent, such as "these grounds of appeal are being submitted without prejudice to further grounds of appeal and evidence…". The entry promised additional documents and "such legal materials as seem relevant to the to the determination of this appeal by the Tribunal." It concluded by requesting a fee award in the event that the appeal was successful. The date given was 26 November 2021.

9. The entry included the following:

> "C) Schedule of Issues -

> 11. In light of the Appellant's failure to meet the Immigration Status Requirement, whether it would be proportionate in accordance with the test established in *Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 00129 (IAC) to require the Applicant to return to Sri Lanka and make a 'fresh' application for Entry Clearance, which would inevitably succeed."

And later:

> "15. The Appellant appeals on the grounds that:
>
> (I) there are insurmountable obstacles to family life continuing outside the UK in Sri Lanka.
>
> (II) it would be a breach of Article 8 ECHR outside the Rules.
>
> (III) It would be disproportionate to require the Appellant to return to Sri Lanka and make a 'fresh' application for Entry Clearance."

These submissions were the Chikwamba submissions.

The appellant's appeal skeleton argument before the First-tier Tribunal

10. The appellant's appeal skeleton argument ("ASA") before the First-Tier Tribunal was settled by Ms Amanda Jones of Counsel. Para. 11 of the ASA stated:

> "The issues for the tribunal to determine in this case are:
>
> (i) whether there are insurmountable obstacles to family life continuing in Sri Lanka (appendix FM, paragraph EX);
>
> (ii) whether there are very significant obstacles to integration in Sri Lanka (276ADE)."

11. The two issues identified by Ms Jones at para 11 of her skeleton argument were adopted at paragraph 3 of the Respondent's Review, which was signed by the Central London Presenting Officers' Unit and uploaded to CCD on 17 August 2022.

12. Neither party identified the *Chikwamba* submissions as being issues for the First-tier Tribunal to resolve.

The appeal before, and the decision of, the First-tier Tribunal

13. In her decision, the judge summarised the appellant's immigration history, the decision of the Secretary of State, the identified issues (which correlated with those identified by Ms Jones and the respondent's review: see para 12), the documents and evidence that were before the tribunal, the law, and the submissions advanced on behalf of both parties. At para. 34, the judge recorded that Ms Jones relied on her skeleton argument, the ASA.

14. The judge's operative analysis commenced at para. 36. The findings of fact and conclusions reached by the judge are not subject to challenge in these proceedings (other than in respect of what is said to be her failure to consider the Chikwamba submissions) so it is not necessary to summarise her findings in any depth. Put simply, the judge found that the appellant was not at a real risk of serious harm in Sri Lanka, as he had claimed in his evidence for the appeal (this was a new mater to which the Secretary of State had not given her consent, but the judge considered it in any event). He could not meet the Immigration Rules; there would be no insurmountable obstacles to his relationship with his wife continuing in Sri Lanka, and he would not face very significant obstacles to his

own integration. The judge considered the public interest considerations in section 117B of the 2002 Act, attaching little weight to his private and family life, in light of his precarious and, latterly, unlawful immigration status. The judge concluded that the public interest was in favour of the appellant's removal and dismissed the appeal.

Issues on appeal to the Upper Tribunal

15. The focus of the grounds of appeal, and of Mr Swain's submissions, was the judge's claimed failure to consider the *Chikwamba* submissions. This was a case where the appellant would inevitably succeed in an application for entry clearance under the partner route if he returned to Sri Lanka. That being so, there was no public interest in his removal. The appeal should have been allowed. That had been raised as an issue in the grounds of appeal by Chancery Solicitors dated 26 November 2021. It was an error for the judge not to determine those submissions. There were insufficient features in the appellant's case to make it in the public interest to require him to return to Sri Lanka to apply from there. It was not reasonable to expect the sponsor to leave the country. There was nothing in the Secretary of State's decision that suggested that such an application would not succeed, and, having not identified such factors, the Secretary of State was now prevented from relying on any adverse or suitability factors in a future application for entry clearance, thereby rendering the appellant's prospective success in such an application to be a virtual certainty. Further, the judge failed to ascribe sufficient significance to the sponsor's status as a British citizen, contrary to *UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1095 at para. 7(iii).

16. For the Secretary of State, Ms Rushforth submitted that the judge did not fall into error. The appellant did not pursue the *Chikwamba* submissions at the hearing, and the judge could not be criticised for addressing only the issues that were advanced before her. There is no free-standing duty on a judge to consider *Chikwamba*, and, in any event, even had she expressly considered the point, the appellant's case does not fall into the narrow category of applications identified by Laing LJ in *Alam v Secretary of State for the Home Department* [2023] EWCA Civ 30.

The judge did not err by not expressly considering *Chikwamba*

17. By way of a preliminary observation, I understand Mr Swain to accept that Ms Jones did not advance any *Chikwamba*-based submissions. This is not a case where the appellant says that the judge failed to address something relied upon by a party at the hearing. In her detailed decision, the judge referred to Ms Jones as having relied on her skeleton argument in her oral submissions. There is no suggestion that Ms Jones supplemented her skeleton argument with *Chikwamba*-based submissions orally. The premise of Mr Swain's case before the Upper Tribunal is that, notwithstanding the fact that the judge was not expressly invited to consider *Chikwamba*, it was an error of law for her not to have done so in any event. My analysis will proceed on the footing that the Chikwamba submissions were <u>not</u> advanced.

18. In my judgment, it was not an error of law for the judge to focus her analysis on the matters she was invited to consider by the parties. The focus of the proceedings before the First-tier Tribunal lies in the "Schedule of Issues" identified in an appellant's ASA. It is to those issues, as identified, that the Secretary of State responds in the Respondent's Review, as she did in these proceedings. Those are the issues which the judge is invited by an appellant to consider. See

para. B5 of the Practice Statement No. 1 of 2022, issued by Judge Michael Clements, the then President of the First-tier Tribunal, Immigration and Asylum Chamber.

19. Where, as here, an appellant raises a point in high-level terms in the initial grounds of appeal, it is still necessary to identify, expand and rely upon the ground in the ASA, and if not in the ASA, orally at the appeal hearing itself. Barring a '*Robinson* obvious' error, it is not an error of law for a judge to focus his or her consideration on the matters identified by the parties as the sole issues requiring resolution. To the extent that an appellant's initial grounds of appeal differ from the schedule of issues as subsequently identified by the parties and agreed upon with the judge, the appellant can be taken to have abandoned reliance on those issues.

20. That is precisely what happened here: the appellant submitted a lengthy series of points in the initial grounds of appeal. Counsel subsequently drafted the ASA, to which the Secretary of State responded, and the judge quite reasonably resolved the proceedings on the basis of the issues as thereby identified.

21. In any event, the so-called *Chikwamba* submission would have been without merit, even had it been advanced. In *Alam*, the Court of Appeal held that there is no free-standing principle that where an appellant looks set to succeed in an application for entry clearance, there can be no public interest in his or her removal: see paras 106 and 107. In the original *Chikwamba* case, Laing LJ said that "the Secretary of State met a very strong article 8 case by relying on an inappropriately inflexible policy", and the case succeeded on its facts.

22. Laing LJ identified three further factors militating against the existence of a free-standing *Chikwamba* doctrine. First, Article 8 caselaw has moved on since *Chikwamba*. Secondly, Parliament has since enacted Part 5A of the 2002 Act, which includes section 117B(4) (which the judge considered at paras 62 to 64). Section 117B(4) provides that the very relationship between the appellant and the sponsor which is said by the appellant to negate the public interest in his removal attracts "little weight". Thirdly, at the time of *Chikwamba*, the Immigration Rules did not make the provision now contained in para. EX.1 of Appendix FM to address situations where there are "insurmountable obstacles" to family life abroad.

23. Finally, in *Alam*, the Court of Appeal held that the prospective ability of an appellant to succeed in an application for entry clearance is only relevant to the public interest assessment where the application "was refused on the narrow procedural ground that the applicant must leave the United Kingdom in order to make an application for entry clearance" (para. 6(i)). This appellant's application was not refused on that narrow procedural ground. It was refused because he did not meet the substantive requirements of the Immigration Rules, pursuant to a full Article 8 assessment.

24. Ms Jones was right not to rely on any Chikwamba submissions. This ground of appeal is without merit.

No error for the judge not to ascribe significance to the sponsor's British nationality

25. I reject the submission that it was an error of law for the judge not to ascribe greater significance to the sponsor's British nationality. First, *UT (Sri Lanka)* is not authority for a general proposition that British nationality attracts weight going beyond that ascribed by section 117B. Para. 7(iii) of *UT (Sri Lanka)* ("British

citizenship had an intrinsic value") merely recorded some of "matters" to which the First-tier Tribunal in those proceedings drew attention in its decision. Secondly, weight is a matter for the judge, in light of the public interest considerations contained in Part 5A. In framing those considerations, Parliament chose to ascribe little weight to relationships formed with qualifying partners in circumstances, such as those of this appellant, when a person is in the UK unlawfully. By definition, a "qualifying partner" includes a British citizen. The prospect of minimal weight being ascribed to a relationship with a British partner is something expressly endorsed by Parliament. The fact that one First-tier Tribunal Judge ascribed weight to a different appellant's British citizenship on different facts in *UT* is nothing to the point. The Court of Appeal *UT*'s case was at pains to say that it involved no new issue of principle: para. 1. This submission is without merit.

Conclusion

26. This appeal is dismissed.

Notice of Decision

The appeal is dismissed.

The decision of Judge Gribble did not involve the making of an error of law such that it must be set aside.

Upper Tribunal Judge Stephen Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 April 2023