IAC-HX-DML-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/31274/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 4th December 2014** | **On 18th December 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE E B GRANT**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MS ANN MARIE CHAPELIN MCINTOSH**

Respondent

**Representation:**
For the Appellant: Ms A Holmes, Senior Presenting Officer
For the Respondent: Mr R Subramanian of Counsel

**DETERMINATION REASONS**

**The Background to this Appeal**

1. On 9th February 2012 the respondent applied for leave to remain as on Article 8 grounds arising from family and private life in the United Kingdom. By a decision dated 22nd July 2013 the appellant refused that application and issued notice of an immigration decision to remove the respondent to Jamaica. The respondent appealed and her appeal came before the First-tier Tribunal on 3rd June 2014

whereupon, in a determination promulgated on 20th June 2014, First-tier Tribunal Judge C M Philips allowed the appeal.

2. The appellant sought permission to appeal under Article 8 and the grounds are in the following terms:

> ***"The judge erred in law, by failing to accord due weight to the appellant's criminal conviction.***
>
> 1. *The judge at [30] held that*
>
> *"I attach weight to the fact that despite the disclosure of her conviction in her long residence application the appellant's extent tearful leave was not curtailed. The fact that the respondent did not curtail believe undermines the respondents refusal of her current application insofar as this is based upon the assertion that the appellant's presence in the UK is not conducive to the public good.*
>
> *At [32] it was held that there was*
>
> *"an inconsistency in the respondents approach between on the one hand not curtailing the appellants extant leave on the basis of her conviction but on the other hand refusing a later application for leave to remain outside the immigration rules on the basis of family and private life because her conviction makes it undesirable to allow the appellant to remain in the United Kingdom".*
>
> 2. *The extant leave was as a Tier 4 student. That leave was conferred for a specific purpose, and for a limited time. It is therefore qualitatively different to a grant of indefinite leave to remain, or to limited leave to remain on a route to settlement. Different considerations can properly be said to apply. Where a migrant is settled, or on a path to settlement, that migrant is likely to remain in the UK for longer, accrue strong rights to remain based on family or private life, and be subject to less stringent monitoring. It is therefore quite rational for the respondent, in her discretion, not to curtail the extent leave as a student; but rather to decline to award a further, longer-term grant of leave.*
>
> 3. *There exists a strong public interest in (a) removing from the UK those who commit criminal offences, and (b) deterring migrants in the UK from committing such offences. Lord Bingham in Huang [2007] UKHL 11 at [16] notes that*
>
> *"There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet allowed to remain..."*
>
> 4. *Moreover, the Rules pre July 2012 required consideration of an appellant's criminal record. The former Para 276B provided that:*
>
> ***276B:*** *the requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:*

*(i) [she has had 10 years continuous lawful residence, or 14 years continuous residence, and]*

*(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given in definite leave to remain on the ground of long residence, taking into account his:*

*[…]*

*(c) personal history, including character, conduct, associations and employment records; and*

*[…]*

*(e) previous criminal record and the nature of any offence of which the person has been convicted. .."*

5. *The requirements of the Rules are a relevant consideration in any proper proportionality evaluation.*

6. *Accordingly, the judge erred in law by failing to accord due weight to the Appellant's criminal conviction.*

***II. The judge erred in law by applying the reasoning in Chikwamba [2008] UKHL 40 to the current case.***

7. *At [41] the judge held that "because there is nothing pointing to the fact that an application for entry clearance would be refused, including nothing in the general grounds guidance to indicate the appellant's conviction would be a relevant consideration then Chikwamba applies. I have attached weights not only to Chikwamba but also to all these other factors."*

8. The judge erred in so holding. Para S-EC 1.1 states that

"The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2 to 1.8 apply."

S-EC 1.5 describes the Appellant's situation:

The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance.

9. S-EC 1.5 in Appendix FM therefore suggests that the appellant's conviction would be a relevant consideration that could properly lead to an ECO refusing any subsequent entry clearance application from the appellant. The judge erred in law by holding otherwise.

Accordingly, the Respondent seeks leave to appeal."

3. By a decision dated 6th November 2014 First-tier Tribunal Judge Parkes granted permission to appeal and the substance of the grant of permission is in the following terms:

> *"The grounds argue that the Judge erred in failing to attach due weight to the Appellant's criminal conviction, misapplying paragraph 276B and erring in respect of Chikwamba. There is no reference to paragraph 400 of the Immigration Rules which requires article 8 decisions to be decided with reference to Appendix FM and paragraph 276ADE."*

4. Thus the matter came before me. Ms Holmes relied upon the grounds. The grounds speak for themselves. They criticise the judge for not having placed due weight on the conviction. They criticise the judge for not taking into account the context of the decision made and the different statutory framework in place at the time of the conviction. Ms Holmes submitted that the judge should have made more of the conviction bearing in mind that at the time the decision was made Ms McIntosh could not succeed under the Immigration Rules. The final aspect of the grounds takes issue with the judge's application of **Chikwamba** a very different case on its facts. The judge failed to take into account the relevant paragraphs of Appendix FM and Ms Holmes submitted that the judge erred in law and the decision should be set aside.

5. Mr Subramanian relied upon his skeleton argument. In relation to the points made by Ms Holmes the appeal was heard in June 2014 but the application was made in February 2012 when the new immigration rules had not yet come into effect. The judge was quite correct to carry out an old style Article 8 balancing exercise because the new public interest immigration rules had not come into force.

6. Contrary to Ms Holmes's submission and what is set out in the grounds the judge had taken into consideration the conviction which is referred to at paragraph 38 and also at paragraph 42. He had details of the offence before him which are set out at paragraph 19.

7. The judge properly considered Article 8 and carried out a balancing exercise on proportionality and made findings that were open to him. Mr Subramanian asked that the determination be upheld.

8. It is clear from the determination that the appellant's representative accepted in submissions that the decision that is the subject of appeal had been made under the wrong immigration rules insofar as it was based upon Appendix FM and paragraph 276ADE. The application was made on 9th February 2012 and in line with the traditional provisions the post-9th July 2012 immigration rules were not applicable to the appeal before the First-tier Tribunal Judge. The only issue before him for determination was proportionality under Article 8 and the relevant date for assessing proportionality was the date of hearing.

9. The judge dealt at length at paragraph 38 of the decision with the appellant's offence in the following way:

> *"The seriousness of the offence is reflected in the fact that the appellant received a community order to carry out 60 hours of unpaid work and make restitution amounting to £50. The appellant has been in the United Kingdom lawfully on short-term visas from 2010 and but for her conviction she would have been entitled to indefinite leave to remain under the Immigration Rules, on the basis of long residence. As at the date of the hearing over two and a half years had elapsed since the date of conviction. Over two years of this period has been spent awaiting a decision on her application. The appellant has not committed any further offences and her conduct since the offence appears to have been exemplary. The appellant is a Jamaican national. Her partner is a United Kingdom citizen. The appellant and her partner have been in a relationship akin to marriage sine 2010. Their family life is effective as is evidenced by the financial, practical and emotional support that the relationship provides. The witness knows about the offence. This took place after they entered into a family relationship. Despite the offence the strong relationship has continued. The witness considers that the offence arose from the appellant's naivety and is an isolated blip. There are no children of the relationship. The witness was born in Jamaica, the country of return, but has lived in the United Kingdom from the age of six. He is established in the United Kingdom. His family including his adult son is in the United Kingdom. He has gainful employment in the United Kingdom that meets the financial threshold for the appellant to gain entry as an unmarried partner. He has nothing in Jamaica to return for. If the appellant is removed he will support her application to return as his partner. As a UK citizen he cannot be removed with the appellant. The appellant and witness have solid ties with the United Kingdom. The appellant's ties with Jamaica are tenuous because although she was aged thirty-nine when she left her close family is in USA and she has been in the United Kingdom for over thirteen years. I have attached weight to all these factors."*

10. Details about the offence are set out in paragraph 19 of the decision as follows:

> *"The appellant described her offence as follows. Her friend was a cashier at the store. Her friend asked the appellant to purchase goods using the friend's card to obtain a staff discount. The appellant used her friend's card. The appellant did not know this was wrong. In addition her friend voided some items. The appellant was caught later on. The appellant does not know what her friend did but the appellant was telephoned. She was traced because she had used her own bank card to pay for the discounted items. The appellant was not arrested. Her bank card was involved so she was told to plead guilty and did so. The Community disposal was 60 hours of unpaid work and restitution of £50."*

11. At paragraph 42 the judge found that apart from the conviction the evidence did not raise any adverse issues concerning personal history, character, conduct, association or employment record. The refusal of the long residence application did not raise any other issues apart from the criminal conviction. The guidance provided by the respondent showed that in applications for leave to remain the conviction is a discretionary ground for refusal. The judge properly attached weight to those factors.

12. At paragraph 49, having in the preceding paragraphs of the decision set out the factors in favour of the appellant and the factors in favour of the respondent the judge found as follows:

> *"I have taken full account of all relevant considerations as set out above. I have weighed these up, even handedly and in the round noting carefully the weight to be attached to the Immigration Rules and the strong public interest in a fair and firm system of immigration control in the economic interests of the United Kingdom. Having done so in light of all the facts*

*and factors including the fact that I have found family life to be established and the offence to be of some age and an isolated and minor one, I find that the decision to refuse the application for leave to remain is disproportionate. I find in line with Huang that the appellant's family life with the witness cannot reasonably be expected to be enjoyed elsewhere. The refusal prejudices the appellant's family life in a manner sufficiently seriously to amount to a breach of the fundamental rights protected by Article 8. I find that applying the principles set out in the case law, without slavishly referring to each case and either adopting or distinguishing this, that the Article 8 claim of this appellant is a claim that properly succeeds."*

13. It is settled law that the weight to be attached to a matter is properly to be determined by the judge. A submission that a judge attached too much or too little weight to a particular factor cannot found an argument that the judge erred in law. In order to succeed in this application the appellant would have to show that the judge's conclusion was so unreasonable as to be perverse. Having considered his determination carefully I find that his conclusions are neither unreasonable nor perverse. That does not mean that a different judge might have come to a different conclusion but that is not the test I have to apply.

14. Overall I find the judge gave cogent reasons for his findings. I find he properly carried out the balancing exercise required of him and in so doing gave due weight to the factors in favour of the Secretary of State and gave weight to the factors in favour of the respondent before determining, as he was entitled to do on the evidence before him, that the balance fell in favour of the Ms McIntosh.

15. For these reasons I find the Secretary of State has not established there is an arguable error of law in the determination and the application is dismissed.

**Conclusion**

16. The decision of the First-tier Tribunal stands I do not set aside the decision.

Signed 15 December 2014

Deputy Upper Tribunal Judge E B Grant