Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11953/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th November 2018	**On 13th December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS MENNANA EL BATTIOUI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit, Counsel
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Morocco born on 26th June 1963. The Appellant entered the UK on 8th June 2014 with entry clearance as the spouse of a settled person until 28th February 2017. On 25th February 2017 the Appellant applied for indefinite leave to remain as a spouse of a

© CROWN COPYRIGHT 2018

settled person. That application was refused by Notice of Refusal dated 22nd August 2017.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Paul sitting at Taylor House on 23rd July 2018. In a decision and reasons promulgated on 13th August 2018 the Appellant's appeal was allowed on human rights grounds.

3. On 21st August 2018 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. It was contended therein that the First-tier Tribunal Judge had erred in her assertion that the Appellant had an automatic right to re-entry and that any applications made must be considered on their merit and it was not the place of the First-tier Tribunal Judge to become a primary decision maker.

4. On 11th October 2018 Judge of the First-tier Tribunal I D Boyes granted permission to appeal. Judge Boyes considered it was difficult to reconcile the judge's reasoning that the Appellant can properly return to Morocco and yet that it would be disproportionate for her to do so.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel Mr Muquit. Mr Muquit is familiar with his matter in that he appeared before the First-tier Tribunal Judge. The Secretary of State appears by her Home Office Presenting Officer Mr Whitwell.

6. I appreciate that this is an appeal by the Secretary of State. However, for the purpose of continuity throughout the appeal process Mrs L Battioui is referred to herein as the Appellant and the Secretary of State as the Respondent.

Submissions/Discussion

7. Mr Whitwell starts by making the contention that in paragraph 19 of the decision the judge has erred in law in finding that the Appellant has an automatic right of re-entry. He submits that whilst it is an extension of the grounds it is unclear what the relevance made therein to the principles set out in *Chikwamba* has to the decision of the First-tier Tribunal Judge. I do note that thereafter Mr Whitwell goes on try and set out and extend his arguments, based on the fact that this is not factually a *Chikwamba* case and to his submission that there is no reason why family life could not continue by way of the Appellant returning to Morocco, at least for the purpose of making a further application.

8. As a preliminary issue, Mr Muquit challenges the *Chikwamba* point arguing that this is a new ground of appeal that has not been taken before. I am asked by both representatives to rule on the point as to whether or not, at this late stage, it is open to the Secretary of State to raise a new ground of appeal. I find that it is not and consequently despite the submission of the

authorities of *R (on the application of Chen) v the Secretary of State of State for the Home Department* and *R (on the application of Thakral) v the Secretary of State for the Home Department* by Mr Whitwell I rule that I do not need to consider those authorities further.

9. It is emphasised to me that the only mistake here made by the Appellant was that she sought an application of indefinite leave to remain rather than just leave to remain in the United Kingdom. It is the submission of Mr Muquit that the findings at paragraph 19 by the judge have to be looked at alongside previous paragraphs and that it was accepted that there were no difficulties financially in that the Appellant met the relevant Rules and that the judge had quite properly looked at this matter at paragraph 16 in concluding that if the Appellant were to return to make an entry clearance application it is highly probable that such an entry clearance application would, based on the facts, be successful. He points out that this is a mistaken application for ILR and whilst that may be an error of law in the assessment by the judge, it not being disputed that had there been application merely for leave to remain, that would have been granted. He submits therefore that whilst there is therefore an error of law it is not material.

The Law

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

11. 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

12. There is an error of law in this decision and that error is the assumption made by the First-tier Tribunal Judge that the Appellant would have an automatic right of re-entry. There is also an error made by the Appellant in that she had mistakenly applied for indefinite leave to remain as against merely seeking leave to remain. The question therefore arises as to whether the error is one that is material to the outcome of the decision. I find that it is not.

13. The decision of the First-tier Tribunal is not lengthy, it runs to some nineteen paragraphs but that is not to say that it does not succinctly address all relevant factors. At paragraphs 12 to 15 the judge sets out the basic principles to be considered in a case of this nature. The judge has made a perfectly proper and what indeed could be called a classic approach to the addressing of the issues in this matter and at the end of the day has made a discretionary decision that on the balance the arguments did not cross the threshold of showing insurmountable objects and that whilst there would be disruption to the marriage and the consequences for the parties having to live apart would be significant, the threshold had not been crossed. As a result the judge made findings at paragraph 16 to the effect that the husband was exempt from the income requirements by reason of the receipt of personal independence payments acting as carer for his mother. The judge was wrong in finding that entry clearance application must be granted but not that it might be granted.

14. However, I have to remind myself that the judge has already made some discretionary findings and thereafter has gone on to consider this matter and ask the question of whether interference is disproportionate because the disruption to family life is not necessary in this context. The judge has applied the five stage test of *Razgar*. Consequently, the judge thereafter comes to a decision that I was satisfied the judge was entitled to reach. Namely that the removal of the Appellant to Morocco would be disproportionate. Therefore, the judge was entitled to make the findings that she did and whilst there is an error of law in the decision it is not material and on that basis I find there is no material error of law in the decision of the First-tier Tribunal and I dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal Judge discloses no material error of law and the appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris