IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Extempore decision

Case No: UI-2022-002940

First-tier Tribunal No: HU/03707/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19 June 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

The Secretary of State for the Home Department

Appellant

and

Mandar Manowar Dangre
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr C. Avery, Senior Home Office Presenting Officer
For the Respondent: Mr E. Fripp, Counsel, instructed by JML Solicitors

Heard at Field House on 18 May 2023

DECISION AND REASONS

1. By a decision promulgated on 26 October 2021, First-tier Tribunal Judge Latta ("the judge") allowed an appeal brought against a decision of the Secretary of State dated 21 February 2020 to refuse a human rights claim made in the form of an application for leave to remain. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")

2. The Secretary of State now appeals against the decision of the judge with the permission of First-tier Tribunal Judge I. D. Boyes.

3. Although the appellant in these proceedings is the Secretary of State, for convenience we will refer to the appellant before the First-tier Tribunal as "the appellant".

Factual background

4. The appellant is a citizen of India. He arrived in the United Kingdom as a student in 2005. He held leave at times and had various periods without leave until 2012 when he became appeal rights exhausted, having sought to challenge a decision refusing to grant an extension of the leave that he then held. The appellant has remained in the country ever since and is now an overstayer of some vintage.

5. On 31 July 2018 he married a fellow citizen of India, Archana Arm Pawar ("the sponsor"). The sponsor is presently resident with limited leave to remain as a Tier 2 Migrant in a role on the shortage occupation list. The appellant applied for leave to remain as her spouse.

6. In her decision, the Secretary of State considered that the appellant was unable to meet the immigration status requirement under the Rules. She accepted that he met the eligibility relationship requirement and that there were no suitability concerns. The Secretary of State went on to consider whether the appellant was able to satisfy the requirements of paragraph EX.1 of the Immigration Rules, which disapplies the immigration status requirement if there would be "insurmountable obstacles" to the relationship continuing outside the UK, i.e., in India. The Secretary of State concluded that, since the sponsor was present only with limited leave to remain and not indefinite leave to remain, and nor was she British or here as a refugee, the provisions of EX.1.(b) were not engaged, and the appellant was unable to satisfy the requirements of that exception. There was no basis to conclude that the appellant had a child in the UK, thereby preventing him from relying on the exceptions on that basis. The Secretary of State continued to address the private life of the appellant finding that he did not meet any of the requirements of the Immigration Rules pertaining to those issues.

7. The issues before the judge related to a broader proportionality assessment conducted outside the Immigration Rules. It was accepted below on behalf of the appellant that he was unable to meet the requirements of the Rules relating to dependence of workers on the shortage occupation list primarily on account of his failure to be able to meet the immigration status requirement. The judge found, in a finding that has not been challenged by the Secretary of State to which we will return in more detail in due course, that the appellant met the requirements of Appendix SW of the Immigration Rules pertaining to skilled workers and dependants save for those contained in paragraph SW38.2. That paragraph is the source of the requirement for a dependant not to be present in the United Kingdom in breach of the immigration laws or on immigration bail.

8. In his decision, the judge approached the operative analysis before the Tribunal in the following way. At [40] he directed himself that the maintenance of immigration control was necessary. He said, "[t]he case therefore turns on whether the decision is proportionate to the legitimate public end sought to be achieved." The judge went on to direct himself at [41] in relation to the public interest factors contained in section 117B of the 2002 Act. He considered *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58, which addressed the approach that should be taken to the statutory public interest considerations set out in section 117B, and also the impact of an individual with a

precarious or unlawful immigration status and the weight to be ascribed to any private or family life they have established in that time. The judge directed himself at [43] that section 117B(5) stated that little weight should be given to private life which an appellant had established during such a period. The judge also noted at [44] that the relationship between the appellant and the sponsor also attracted little weight pursuant to Section 117B(4). That relationship was formed at a time the appellant was in the United Kingdom unlawfully.

9. Having directed himself in accordance with those factors, the judge referred to the judgment of Lord Thomas in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 which recommended that judges assessing Article 8 and the proportionality of prospective removal in an immigration case should adopt a so-called balance sheet approach. The judge proceeded to perform such an assessment at [46] noting the factors on the Secretary of State's side of the equation. Those included the need to maintain immigration control, the fact the appellant did not meet the requirements of the Immigration Rules either on long residence or private life grounds as set out in the decision of the Secretary of State under challenge. He reminded himself once again that the requirements of section 117B stated that private life or relationships formed with a qualifying partner are to be given little weight. He recalled that the appellant had valid leave to remain until 2012 but that his relationship with the sponsor began initially in 2013, by which stage he was resident unlawfully.

10. At [47] to the end of the decision, the judge addressed the factors that he considered fell to the appellant's side of the balance. At [48] he noted that the appellant's wife was in a role on the shortage occupation list. It was in this context that the judge addressed the requirements of the Rules relating to those with leave to remain under Appendix SW and it was in that context that he found that the only barrier to the appellant being able to succeed under those provisions of the Rules was his unlawful immigration status.

11. The judge then addressed submissions that had been advanced by the appellant's then representative pursuant to what he described as the "*Chikwamba* principle", from *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40. He quoted from *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11 in relation to that principle in the following terms. He quoted Lord Reed's judgment at [51] which was as follows:

> "Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control otherwise might be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."

It was against that background that the judge found that the appellant would be virtually certain to succeed in an application from outside the UK. He addressed the overall length of the appellant's residence in the United Kingdom, directing himself that the length of residence alone would not be sufficient to tip the balance in his favour, especially when giving consideration to section 117B. He

addressed the significance of the sponsor's intention to remain in the United Kingdom on a path to settlement and directed himself that the impact of the removal decision the Secretary of State proposed to take on the sponsor was a significant factor as part of his overall assessment. The judge said at [58]:

> "In reaching this decision, I am fully aware that there is no requirement for the appellant's wife to leave the UK with him. However, it is clear from the evidence that they are very much in a genuine and subsisting relationship, and that they are currently trying to start a family. When I consider the role which his wife is undertaking in the UK, one identified as a shortage occupation, then in my view this reduces the public interest in removal, and tips the balance in favour of the appellant remaining in the UK with her. I reach this finding when giving particular consideration to the requirements of Appendix SW, as considered above, and my finding that all of the requirements are met with the exception of SW38.2."

12. The judge concluded that the factors on the appellant's side of the scales outweighed those on the respondent's side of the scales and allowed the appeal.

Issues on appeal to the Upper Tribunal

13. As pleaded, there are two grounds of appeal.

14. The first is that the judge made a material misdirection in law. This ground has several facets. First, the judge found erroneously that the appellant met the Immigration Rules and that that finding infected the judge's reasoning and the consequential public interest and proportionality considerations. Secondly, the judge made "very limited" proportionality findings which were flawed because they did not "adequately" employ the mandatory considerations contained in Section 117A to D of the 2002 Act. Finally, under this ground of appeal, the judge had "not properly considered" *Chikwamba* and therefore the judge's decision was a misdirection of law.

15. The second ground of appeal was that the judge failed to give adequate reasons for allowing the appeal on Article 8 grounds.

16. Mr Avery, for the Secretary of State, submitted that it was plainly wrong to conclude that the public interest did not militate in favour of the appellant's removal. That was a finding, submitted Mr Avery, which failed properly to analyse where exactly the public interest in the appellant's prospective removal lay. This was an appellant who was a serious overstayer. It was incumbent on the judge expressly to address those factors in the course of reaching his decision.

17. In relation to the second ground of appeal, Mr Avery submitted that the Secretary of State is at a loss to understand why the judge allowed the appeal. It was difficult to understand wider factors that were advanced on the part of the appellant were able to outweigh those on the Secretary of State's side of the scales. This was a situation, submitted Mr Avery, in which the sponsor was merely looking at a period of temporary separation, on the judge's findings that the appellant would succeed on an out of country application, and therefore the Secretary of State was "mystified" as to how those factors outweighed the weighty factors on the Secretary of State side of the scales.

18. Mr Fripp's submissions were essentially that the judge considered all relevant factors and gave sufficient reasons for the conclusions that he reached. The Secretary of State's grounds of appeal were, properly understood, no more than disagreements of weight and emphasis that revealed no error of law.

The law

19. It is not necessary to set out at length the statutory provisions which the judge sought to apply in his decision; those provisions are familiar to the parties.

20. An appeal lies to the Upper Tribunal on a point of law arising from a decision made by the First-tier Tribunal. As reported by the presidential panel in *Joseph (permission to appeal requirements)* [2022] UKUT 218 (IAC):

> "There are many reported authorities, in this jurisdiction and from further afield, addressing the need for grounds of appeal to be pleaded properly and succinctly, and by reference to an arguable error of law. Maintaining the distinction between errors of law and disagreements of fact is essential; it reflects the jurisdictional delimitation between the first-instance role of the FTT and the appellate role of the UT, and reflects the institutional competence of the FTT as the primary fact-finding tribunal."

21. It is also necessary to have regard to the oft-quoted summary of an error of law in *R (Iran) v the Secretary of State for the Home Department* [2005] EWCA Civ 982. At [9] the different facets of an error of law were described in terms that included the following points. First, making perverse or irrational findings on a matter or matters that were material to the outcome. Secondly, failing to give reasons or any adequate reasons for findings on material matters. Thirdly, failing to take into account and/or resolve conflicts of fact or opinion on material matters. Fourthly, giving weight to immaterial matters and fifthly, making a material misdirection of law on any material matter. There are other facets of an error of law, both in *R (Iran)* and other authorities but for present purposes those we have summarised are sufficient.

The judge's proportionality assessment considered all material factors

22. We have had regard to Mr Fripp's helpful skeleton argument when addressing the arguments of both parties, alongside the Rule 24 notice that was drafted by Counsel who appeared on behalf of the appellant below.

23. We accept Mr Fripp's submissions that the judge took into account all relevant factors. At [40] to [42] of the decision, as we have already outlined, the judge directed himself concerning the statutory framework addressing the public interest in the maintenance of effective immigration controls and the factors that were relevant to the application of those principles. The judge went on to address, in a series of findings that have not been challenged by the appellant, that there were weighty factors on the Secretary of State's side of the scales. Against those factors, the judge set out the considerations that weighed on the appellant's side of the scales. He found the witnesses to be credible. His conclusion set out concerning the reduced weight to the principle of immigration control, and the fact that the so-called *Chikwamba* point was a factor that militated in the appellant's favour, has not been expressly challenged by the Secretary of State other than in broad terms in the grounds of appeal alleging that it was not expressly or properly considered. In our judgment the judge did

not purport solely to allow the appeal on the basis of what has been termed the "*Chikwamba* point".

24. The judge considered, as one factor as part of his overall proportionality assessment, that the appellant's ability to succeed in an entry clearance application from overseas, may well have reduced the public interest in his removal. That approach was entirely consistent with the summary of *Chikwamba* in the Supreme Court, to which we have already referred. At the hearing before us, Judge Haria reminded the parties that the Court of Appeal's decision in *Alam v the Secretary of State for the Home Department* [2023] EWCA Civ 30 provided guidance on the application of the *Chikwamba* principle.

25. The guidance in *Alam* may be summarised briefly as follows. The *Chikwamba* point is only potentially relevant when an application for leave to remain is refused on the narrow procedural ground that the applicant must leave the United Kingdom in order to make an application for entry clearance and in any event, a full analysis of the Article 8 claim is necessary; see [6] of the Lady Justice Laing's judgment, with which the other members of the Constitution agreed. Mr Avery had not based his submissions on the decision of the Court of Appeal in *Alam*, but responding to the query from the bench, Mr Fripp submitted that the concern of the Court in *Alam* was to prevent *Chikwamba* from being a sole basis upon which an appeal could be allowed, as though it provided in some way an ability to dispense with the requirements of the Immigration Rules "writ large".

26. Mr Fripp submitted that in these proceedings the so-called *Chikwamba* point was not the sole reason for the judge allowing the appeal. Instead, and compatibly with the guidance given in *Alam*, the judge proceeded to conduct a full proportionality assessment, taking into account all relevant factors.

27. We agree. The fact the appellants would, on the judge's unchallenged findings of fact, succeed in an application for entry clearance made from overseas was a factor which the judge was rationally entitled to consider. On this issue, in our judgment, the application of any proportionality assessment, is an exercise which is multifactorial. It is an assessment of a legal standard which involves questions of fact and degree which any first instance judge is pre-eminently in the best position to conduct. As Lord Hoffman said in *Biogen Incorporated v Medeva Plc* [1996] UKHL 18 at [54]: "Where the application of a legal standard … involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation." That authority was cited in *MA (Pakistan) v the Secretary of State for the Home Department* [2021] EWCA Civ 1711. In our judgment, it cannot be said that the appellant's ability to meet the Immigration Rules, on an application from outside the United Kingdom, was a factor that was wholly irrelevant to the judge's analysis. On the contrary, it was a factor that it was rationally open for the judge to take into consideration. Further, the judge's consideration of the shortage occupation list in relation to the appellant's wife is a factor that has not been expressly challenged by the Secretary of State. As Mr Fripp very fairly and candidly acknowledged, the decision of the judge in these proceedings is not one that would have been reached by all judges but nevertheless, for the reasons given by the judge, it was open to the judge to ascribe significance to the sponsor's role and status as holding leave on a shortage occupation basis.

28. We therefore find that the first ground of appeal has not been made out; the judge considered all material factors that were relevant to the proportionality assessment that he had to conduct.

29. Before moving on to ground 2 we conclude simply to observe that there are features in the application for permission to appeal that suggest that the author of the grounds had not read the decision carefully. In particular, contrary to what is there asserted, there is no conclusion on the part of the judge that the appellant *meets* the Immigration Rules; rather the judge fully accepted that he could not meet the Rules on account of the immigration status requirement (see [51]).

The judge provided sufficient reasons for his proportionality assessment

30. Mr Avery presented the second ground of appeal as a reasons-based challenge. There are many authorities on the need to give adequate reasons and on the approach that should be taken by appellate courts and tribunals to considering challenges brought on that basis. As Mr Fripp submitted, the Presidential Guidance in *Joseph*, adopting the judgment of Lord Justice Warby in *AE (Iraq) v the Secretary of State for the Home Department* [2021] EWCA Civ 948, was that it is important to resist the temptation to dress up or repackage disagreements of fact as findings that an error of law has been made. One of the leading authorities concerning the duty to give sufficient reasons is *English v Emery Reimgold & Strick Ltd* [2002] EWCA Civ 605. Lord Phillips, Master of the Rolls as he then was, said at [118]:

> "… an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision."

31. We can deal with this ground of appeal briefly. The judge's decision is clear. He summarised all relevant factors as part of his general self-direction, he set out the factors on the Secretary of State's side of the scales, and he set out the factors on the appellant's side of the scales. In doing so, the approach he adopted, to borrow from the terminology of Mr Fripp, was to "double dip" his analysis of section 117B of the 2002 Act. By that we take Mr Fripp to mean that the judge addressed himself concerning the provisions of section 117B as part of his general self-direction at [40] to [42] and then revisited the same factors as part of his overall proportionality assessment, tempering some of the considerations that were otherwise advanced on behalf of the appellant.

32. The reason the judge allowed the appeal was that he considered the factors on the Secretary of State's side of the scales, on the basis of his unchallenged findings of fact, to have been outweighed by those on the appellant's side of the scales. Contrary to what was submitted by Mr Avery, there is nothing "mystifying" about the judge's decision. It is more than adequately clear; it is in our view very clear.

33. As we conclude, we note that it was difficult for this Tribunal to understand why Judge I. D. Boyes granted permission to appeal. That was a factor that was identified in the Rule 24 notice drafted by Ms L Mair, Counsel, who appeared before the judge below and she put in these terms at [6] of her notice:

> "No reasons are attached to the grant of permission except to say 'the grounds are clearly arguable' and as such the appellant cannot respond directly to that ground. However, the appellant responds directly to the two grounds of appeal raised by the respondent."

34. We conclude by observing that it is always helpful for a judge granting permission to appeal to give brief reasons for doing so. Had Judge I. D. Boyes done so on this occasion, it may have been the helpful discipline which the presidential panel in *Joseph* encouraged and an exercise in judicial self-restraint. Properly understood, the Secretary of State's grounds of appeal are nothing more than a disagreement of fact and weight.

35. This appeal is dismissed.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Transcript approved 9 June 2023