Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/32842/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 30 July 2015	**On 14 August 2015**

Before

THE HON. LORD MATTHEWS
(Sitting as a Judge of the Upper Tribunal)

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS ALEXANDRA KOLODENKO

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office, Presenting Officer
For the Respondent: Mr Ian MacDonald QC, Direct Access Counsel

DETERMINATION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against a decision of Judge Ievins, promulgated on 13 April 2015, which allowed, on human rights grounds under article 8 of the Convention, the respondent's appeal against a decision of the Secretary of State dated 4 August 2014. Hereafter I will refer to Ms Kolodenko as the applicant and the Secretary of State as the respondent for the sake of consistency.

2. The respondent's decision was to refuse the applicant's application to vary her leave to enter or remain in the United Kingdom and to remove her from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006. It was proposed to remove her to the Russian Federation.

Background

3. The applicant was born on 19 February 1985 in the USSR, as it was then. She came to the United Kingdom as a Tier 4 Student on 17 September 2010 and was granted leave to remain as a Tier 1 (Post-Study Work) Migrant from 2 February 2012 until 2 February 2014. Soon after she arrived in the United Kingdom she met David James Collins and they were married on 19 October 2013. Before her leave expired she applied for leave to remain as a spouse on 23 December 2013. The applicant has been a freelance interior and graphic designer and now works as an architect, qualified in the Russian Federation but not in the United Kingdom. Her husband hopes to become a Blue Badge travel guide and earns his living as a professional poker player. The couple did not meet the financial threshold requirements at the date of the application and it failed.

4. The application was first considered by the Secretary of State on 19 May 2014 and was refused under Appendix FM of the Immigration Rules because the income threshold requirements set out in Appendix FM and FM - SE were not met. At that time the case of **MM and others** was under appeal and the application was put on hold.

5. Thereafter on 4 August 2014 the Secretary of State decided against granting the application. The reasons for refusal letter explains why and refers to the financial requirements. The First-tier Tribunal judge points out that in deciding to refuse the application the Secretary of State had considered the applicant's right to respect for family life protected by article 8 of the Convention. The judge goes on in paragraph 5 to say the following:

> "At the relevant time this fell for consideration under Appendix FM - EX.1. The appellant met the suitability requirements. The Secretary of State considered paragraph EX.1(b) which would apply if -
>
> > 'the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK. '
>
> The Secretary of State understood the phrase 'insurmountable obstacles' to mean the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for applicant or their partner. The Secretary of State considered there were no insurmountable obstacles why the appellant and her husband could not pursue family life in the Russian Federation. Thus the application was refused under R - LTRP.1.1(d)."

6. The Secretary of State also considered the private life aspect of the application, which fell to be considered under paragraph 276ADE(1). It was concluded that the applicant did not meet the requirements of paragraph 276ADE(1)(vi). She had lived in the UK continuously for less than 20 years but it was not accepted that there would be very significant obstacles to her integration into Russia.

7. Finally the Secretary of State concluded that there were no exceptional circumstances which might warrant consideration of a grant of leave under article 8 outside the rules.

8. The applicant gave notice of appeal and asked for an oral hearing. The substance of her grounds is set out in paragraph 7 of the determination of the First-tier Tribunal in the following terms:

> "Her grounds of appeal are in thirteen paragraphs. Inter alia those grounds point out, as is indeed the case, that her present income and savings qualify her under the Immigration Rules. It was asserted that the respondent's failure to take account of that new material, submitted as a variation of the application, breached section 3C(5) of the Immigration Act 1971 and so was unlawful. The immigration threshold requirements were intended to comply with article 8(2). The full circumstances of each individual case had to be considered and mechanical application of the requirements was unlawful. There had been no proper consideration of the effect of refusal of leave on the appellant's husband's article 8 rights. To require him to leave the United Kingdom would amount to what had been described as a 'colossal interference' with his right to respect for family life. It would be disproportionate to the interests of the economic well-being of the United Kingdom. The insurmountable obstacle test set out at EX.1(b) was too high as the Court of Appeal had suggested in **MF Nigera** (well-known, but no citation given). Home Office guidance required the decision maker to consider the abilities of the parties to lawfully enter and stay in the country concerned. While it was for the appellant to show that that was not possible there was no indication that the appellant's husband could even obtain leave to enter or find employment in Russia. To assert that married life could be carried on there was unreasonable. Furthermore, Parliament had in the Immigration Act 2014 set out in section 19 its view of the public interest considerations applicable in all cases. The appellant met the positive requirements of section 117B a substantial quantity of supporting documents were also enclosed and these showed (as must be accepted) that at the time of decision, and now, the appellant met the only requirements of the Immigration Rules ever disputed, the financial requirements."

9. Evidence was led before the First-tier Tribunal, including evidence as to the financial circumstances of the parties. Furthermore, in answer to a question from the judge, the applicant said that she did not know if her husband would be entitled to a spousal visa for Russia. The Russian authorities required evidence of employment for a travel visa.

10. There was evidence as to the circumstances of the parties, into which I need not go for present purposes.

11. The Home Office presenting officer relied on the reasons for refusal letter. It was accepted that the applicant did then meet the income requirements. In context that can only mean that she did not meet them at the time of the application. The letter had considered whether there were insurmountable obstacles preventing the couple from relocating to Russia, where the applicant had previously worked and where she had gained her qualification. There were no exceptional circumstances which might warrant allowing the appeal on article 8 grounds outside the Rules. She referred to the judgment of Underhill LJ in **Singh** at paragraph 64. The decision was proportionate and in accordance with the law, the legitimate aim being the public interest in the maintenance of effective immigration control.

12. Before the FtT, Mr MacDonald accepted that at the time of the application the applicant could not meet the financial requirements but, said that she was now able to meet the rules. The Secretary of State should have served a one-stop notice, although that was not pleaded.

13. It was argued that the Secretary of State should also have considered article 8 as part of her decision and Mr MacDonald relied on **Pankina [2010] EWCA Civ 719**.

14. He further submitted that an appeal under article 8 had to be decided on the facts as they were at the date of the hearing. There was no countervailing public interest because as at the date of the hearing it was unchallenged that the applicant satisfied the requirements of the Immigration Rules. The Secretary of State could not say if the sponsor could enter Russia. It was not reasonable to expect a British citizen's spouse to relocate to another country. Mr MacDonald sought a direction that if the appeal was allowed the applicant should be given leave to remain on a par with the leave she would have received as a spouse.

15. In reaching his decision the FtT judge set out Mr MacDonald's skeleton argument at paragraphs 20 to 22 of his determination. It was submitted that she met the financial requirements of the rules and that the sections in EX.1 and EX.2 did not apply because they were parasitic on a particular rule in Appendix FM. They were not freestanding. Reference was made to **Sabir Appendix FM - EX.1 (not freestanding) [2014] UK UT 63**. Reference was also made to sections 117A and B of the Nationality, Immigration and Asylum Act 2002 as amended. It was submitted that the appellant spoke English excellently, that she was not a burden on tax payers and that she had integrated very well into United Kingdom society. Paragraph 22 is in the following terms:

> "When as the new deportation provisions provide a complete code for the applicability of article 8 to deportation appeals, the case of **MF (Nigera v SSHD) [2013] EWCA Civ 1192** makes clear that the private life Rules in paragraphs 276ADE to 276DH and the family life Rules in Appendix FM are not a complete code so far as article 8 compatibility is concerned. The Court of Appeal, reflecting the jurisprudence of **Haleemudeen v SSHD [2014] EWCA Civ 558** and **Nagre v SSHD [2013] EWHC 720** has approved the notion that it is necessary to find 'compelling circumstances' to justify instances of article 8 outside the rules. However a differently constituted Court of Appeal has found that there was little utility in imposing an intermediary test as a preliminary to consideration of article 8 outside the Rules for a person who (as this appellant) fails under the Rules. That is a reference to **MM (Lebanon) v SSHD [2014] EWCH Civ 985**. Paragraph 16 of Mr MacDonald's skeleton argument is central. The Rules do set out the matters which the Secretary of State regards as attracting the greatest weight in respect of the public interest and where the Rules apply cases should first be considered under them but where the requirements were not met it is, I am satisfied, necessary to make an assessment of article 8 applying the criteria establish by case law. The criteria in the Rules do not accord with the criteria of an article 8 assessment established by case law. "

The judge then went on to consider article 8 and to follow the five-stage approach set out in **Razgar v SSHD [2004] (UK HL 27)** and in the light of section 117B of the Nationality, Immigration and Asylum Act 2002.

16. He found that the proposed removal would be an interference by a public authority with the exercise of the applicant's right to respect for her private and/or family life. She and her husband enjoyed a genuine and committed family life. That consisted not only of their relationship with each other but of their relationship with the wider and extended family. She was in settled employment in the United Kingdom. Paragraph 26 runs as follows:

> "That being so, would such interference have consequences of such gravity as potentially to engage the operation of article 8? It would. While the appellant could, presumably, find some kind of employment in the Russian Federation there is no

reason to suppose that her husband would be able enter there as a spouse. The Russian Federation, like the United Kingdom, appears to require proof of income before allowing such applications. To require this couple to live apart undoubtedly is a consequence of sufficient gravity to engage the operation of article 8."

The judge found that the interference was in accordance with the law and went on at paragraph 28 to say the following:

"The fourth **Razgar** question is whether such interference is necessary in a democratic society in the interests of one or more of the legitimate aims set out in article 8(2). There is no question of national security, public safety, the prevention of disorder or crime or the protection of health or morals being at issue in this appeal. The only legitimate aims that might be considered to be at issue are the economic well-being of the United Kingdom and the protection and the rights and freedoms of others. What is meant by those legitimate aims is amplified by section 117B and here I note that the appellant is in a fortunate financial position. There can be no question of her becoming a burden on public funds. The economic well-being of the United Kingdom is not harmed in any way by her been granted leave to remain in this country. The appellant speaks good English. The only legitimate aim that might arguably be at issue is the protection of the rights and freedoms of others by the maintenance of effective immigration control. I observe however in that regard that the appellant has scrupulously followed the requirements of the Immigration Rules.

At paragraph 29 the judge indicated that he was turning to proportionality. He said that there was no question of a burden or standard of proof but that he must carry out a balancing exercise, taking into account all the facts and factors of the case and having regard to section 117B(1) in particular.

Paragraphs 30 and 31 of his determination are as follows:

"30. The facts of the case are not in issue. It is undeniable that this appellant has a strong private life in terms of both her employment and her social networks. She now satisfies the financial requirements of Appendix FM and indeed she did so before the refusal decision. For at least six months she has been earning a salary and possessing savings well above the required financial limit. She has an unblemished immigration record. Her husband is a British citizen. It is important to note that there is no reason to suppose that he would be able to gain entry to the Russian Federation as a spouse. Although he would be willing to accompany his wife (for this is a genuine relationship) he would be unable to do so. It follows that the refusal of this application involves a serious and long-term separation of husband and wife. The deteriorating situation between the Russian Federation and United Kingdom is but one of a multitude of factors to make it unreasonable to force the sponsor to relocate. The answer, Mr MacDonald suggests, is clear. I have exercised my own judgment in carrying out the balancing exercise and I am satisfied that the balance falls clearly in favour of the appellant.

31. There remains but one possibility. As the appellant's leave to remain has expired, she cannot make another application now, although if she could it would undoubtedly succeed. But could she go back to the Russian Federation, without her husband, and make an application - which would be successful - from there. This is a situation that the case of **Chikwamba v SSHD [2008] UK HL 40** has to deal with. It is not necessarily unlawful to require an appellant to

return to her country of origin to make an application for entry clearance. The rationale behind the Home Office policy of routinely requiring appellants to apply from abroad was to deter others from entering without entry clearance. But this appellant did enter with entry clearance. There is no question of this appellant attempting to manipulate the Immigration Rules. The circumstances of each particular case need to be considered. This is not (as with **Chikwamba**) a case where there are presently children involved. The case of **Hayat (nature of Chikwamba principle) Pakistan [2011] UK UT 444** holds 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. The **Chikwamba** principle is not therefore confined to cases where children are involved. When that case reached the Court of Appeal in 2012 it was held that an application for leave to remain in the United Kingdom which did not succeed under the Immigration Rules but was being pursued under article 8 should not be rejected simply on the procedural ground that the applicant could apply for entry clearance from abroad. The claim should be allowed if the applicant does in fact have an article 8 right to remain in the United Kingdom. If the requirement to apply for entry clearance from abroad constitutes a disruption sufficient to engage article 8, there will be a disproportionate interference unless there is a sensible reason for insisting on it. Whether there is a sensible reason will depend on the facts of the case. There is no sensible reason in this case. This is a case where the likelihood of being granted entry clearance is more than very strong. I am in no doubt that if the appellant was required to return to the Russian Federation to make an application which would inevitably succeed the interference with her right to respect for private and family life (and that of the sponsor and the wider family) would be disproportionate to any legitimate aim."

The respondent's appeal

17. The respondent appealed against that determination.

The first ground is that the FtT judge failed correctly to apply Appendix FM. It is said that the judge found that the applicant could not meet the requirements of Appendix FM and reference was made to paragraph 23. This seemed to be on the basis, according to the respondent, that the applicant could not satisfy the financial requirements but it was not clear as there were later references to her ability to meet those Rules and reference was made to paragraph 30. This is disingenuous as it is perfectly plain that the judge means that she could not meet the Rules at the time of the application but that she can now.

18. The judge is criticised for not going on to consider EX.1 despite the refusal letter acknowledging that this was a case in which EX.1 could be reached. It is said that the judge allowed himself to be misdirected by the skeleton argument and consequently no finding was made as to whether or not there were insurmountable obstacles to family life with the partner continuing outside the UK, which is said to be the main issue in the appeal.

19. Ground 2 alleges that there were unsupported findings that the applicant's husband would not be able to accompany the applicant. If that were the case then the matter would have to be determined in the applicant's favour under EX.1 and within the rules. The ground goes on in the following terms:

> "However, these findings appear to be based upon the Judge's conjecture that the appellant's husband might not be able to gain entry clearance to Russia. No evidence for this flight of fancy is cited in the determination."

20. I cite that ground in full because I find it unfortunate to say the least that the use of such language is employed when a judicial office holder is being criticised by those representing the Secretary of State.

21. Ground 3 claims a material misdirection in law in relation to **Chikwamba** and **Hayat**. It is in the following terms:

> "The **Chikwamaba** (*sic*) principle was distilled in **Hayatt** (*sic*) thus:
>
> > *... 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.*
>
> In the instant case there was a failure to meet the substantive requirements of the rule, which was not the case in **Chikwamaba** (*sic*) or **Hayatt** (*sic*). In those cases, the applications would have been successful, but for a requirement that the application be made out country. That is not the case here.
>
> The appellant has failed to satisfy the financial and evidential requirements contained within Appendix FM and Appendix FMSE. The judge speculates that were the application to be made abroad now that (*sic*) the appellant would succeed. With respect that is not the *ratio decidendi* of **Chikwamba** or **Hayatt** (*sic*)."

22. Permission to appeal was granted by a judge of the First-tier Tribunal.

23. In opening his argument in support of the appeal, Mr Clarke relied on the grounds.

As I understood him, he submitted that there were two routes under the Rules which the applicant could have negotiated. She could either meet the financial requirements or succeed under R - LTRP 1.1(d) but paragraph EX.1 would have to apply in the latter circumstance. The financial requirements had not been met as at the time of the application and if the First-tier Tribunal had considered EX.1 under the Rules the appeal would have failed. The Rules fully dealt with family and private life and it would not have been necessary to consider article 8 thereafter.

24. There was no reason to think that the sponsor would not be allowed into Russia. In dealing with this matter the First-tier Tribunal had effectively reversed the burden of proof. It was for the applicant to show that he could not enter Russia. Saying that there was no reason to suppose that he would was not good enough. He had found that the sponsor would be willing to go to Russia. If he had applied the correct burden of proof EX.1 could not have been met. That also went to the assessment of article 8 outside the rules. Such evidence as there was available was not confirmed independently. Reference was made to the case of **Kareem (Proxy Marriages - EU Law) [2014] UKUT 24**.

25. As far as the third point was concerned the approach of the FtT was incorrect. Reference was made to the case of **R (on the application of Chen) v SSHD Appendix FM - Chikwamba - (temporary separation - proportionality) IJR [2015] UK UT 00189 (IAC)**. The

evidence did not support the speculative finding that the applicant could not meet the financial requirements. **Chikwamba** fell away because the applicant could not show that she could succeed under the rules.

26. In reply Mr MacDonald submitted that the appeal by the Secretary of State was misconceived. The applicant had accepted from the word go that she could not succeed under FM because she could not satisfy the financial requirements. That was the sole point upon which the Secretary of State took issue, as was made clear in preliminary letters written to the applicant. The refusal letter of 4 August 2014 confirmed that the applicant had been notified that the application fell to be refused solely because the applicant did not meet the income threshold requirements under Appendix FM. That was never contested and did not form part of the appeal before the First-tier Tribunal. That appeal was based solely on article 8.

27. Turning to the specific grounds, it was submitted that EX.1 was parasitic on particular rules and did not stand alone. Mr MacDonald took me through the various Rules to which it was an exception and referred to the case of **Sabir.** EX.1 did not apply to certain of the requirements in certain circumstances. It only applied where it said it applied. However, the FtT judge had in fact had regard to EX.1 as paragraph 5 of the determination showed. Thereafter his approach in paragraphs 22 and 23 was entirely in accordance with the law. Reference was made to **MF (Nigeria) [2014] 1 WLR 344** and **R (Agyarko) v SSHD [2015] EWCA Civ 440**.

    In the latter case the court confirmed at paragraph 24 that the "insurmountable obstacles" criterion was not an absolute requirement in applying article 8 outside the Rules. The FtT judge's assessment of proportionality in paragraphs 24 to 30 was not wrong in law. As was made in **Beoku Betts [2008] 3 WLR 166** the article 8 rights of the sponsor had to be taken into account. The respondent had not considered them and the FtT judge did not need to, having regard to his decision in relation to the applicant's Convention rights. They would however be seriously interfered with if the respondent's decision was upheld. It was extraordinary that the respondent should require a British citizen to pursuer his married life in Russia where there was now no conceivable damage to the economic well-being of the UK but on the contrary a real benefit if the applicant were allowed to remain.

28. If there were insurmountable obstacles it mattered not whether the appeal was allowed pursuant to EX.1 or article 8. There was evidence before the FtT judge from the applicant that the Russian authorities required evidence of employment and means to grant a visa and if their requirements were anything like the UK's, the sponsor would not obtain the necessary visa. The suggestion that the judge's conclusions were "unsupported" "conjecture" and "flights of fancy" was, apart from being offensive and inappropriate, wrong. The UT (IAC) had made it clear that when an issue was raised the respondent should check through the British Embassy what the relevant requirements were. Immigration appeals were not just about burdens of proof. Migrants would not be in a position to get an expert in Russian law but the Secretary of State could contact the Embassy and obtain information. In any event there was no need for corroboration and no point was taken before the First-tier Tribunal. If an assertion was not challenged then the First-tier Tribunal could accept it. Where particular evidence was wanted it was set out in rules, for example in relation to bank statements.

29. As far as **Chikwamba** was concerned the *ratio* was nothing like what was being suggested. Lord Browne at paragraph 44 had held that:

> "Only comparatively rarely … should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."

The applicant met the financial requirements at the date of the hearing and continued to do so. It would clearly be disproportionate to require an application to be made from abroad. That might also result in her losing her employment, which would also be clearly disproportionate.

The evidence about the income was in the bundle and the FtT was entitled to make the decision he did.

The article 8 claim *per se* was not challenged in terms of the balance drawn. Reference was made to **Nagre**. This applicant had a faultless immigration history, the length and degree of family disruption involved in sending her abroad would be disproportionate and her present financial status would be able to satisfy the conditions of Appendix FM. There was no sensible reason to sustain the submission that the FtT got it wrong on **Chikwamba**.

30. Mr MacDonald submitted that the case called out for the Secretary of State to have issue a one-stop notice.

31. In reply Mr Clarke submitted that finances were not the only issue. EX.1 was dealt with by the Secretary of State so there was a burden to show that there were insurmountable obstacles. There was no need to look outside the Rules when all the issues had been dealt with under the rules. The argument that the Rules could be by-passed was erroneous. It was incumbent on the appellant to rebut the suggestion in the letter that there were no insurmountable obstacles. An article 8 case could not be one on the basis of choice. It was incumbent on a person who raised something as part of their case to prove it. If the rules had to specify what evidence was required in each case they would infinitely long. There was no duty to issue a one-stop notice.

32. In final submissions Mr MacDonald referred to the case of **Singh and Khalid v SSHD [2015] EWCA Civ 74.** That case endorsed **Nagre**. **Nagre** in turn endorsed the approach in **Izuazu**. Unlike the position in deportation cases the Rules did not provide a complete code. In this case there was an enormous gap between the Rules and article 8. It was important to note that in this case no point was taken against the fact that the judge had embarked on an article 8 analysis. On occasions choice could trump the UK's borders.

Decision

33. It seems to me that this is a somewhat unusual case. I do not think it correct to say that the Secretary of State's refusal letter was based only on the financial requirements since, as I have indicated in my reference to the determination under appeal, the refusal letter did in fact go on to consider article 8 in terms of R - LTRP 1.1(a), (b) and (d) and EX.1. The point was made that EX.1 was not a stand-alone provision and while this is correct, it seems to me to be academic. In the first place, the case of **Sabir** was one where the applicant sought to rely on EX.1 as a freestanding route to entitlement to leave. That is not the situation here. Secondly, and perhaps more relevantly, the refusal letter makes it plain to which rules EX.1 is an adjunct in the current circumstances.

However, I do not consider that the respondent's first ground of appeal is well-founded. It seems clear to me from the determination as a whole, but particularly from paragraph 5, that the First-tier Tribunal judge did consider paragraph EX.1. He noted that the Secretary of

State considered that there were no "insurmountable obstacles" to the applicant and her sponsor continuing family life in the Russian Federation. The judge did not go behind that and the only logical conclusion which can be drawn is that he accepted that that was the position. His whole approach was on the basis that the applicant could not meet the Rules. As **Agyarko**, along with other cases, makes clear and, as is well-known in any event, applications can be considered under article 8 outside of the Rules where that is appropriate. Whether it was appropriate to do so in this case is debatable but I do not detect in the grounds of appeal any proper challenge to the FtT's making of an article 8 assessment, nor to the results of that assessment. The FtT's views as to where the balance should be drawn are not themselves challenged.

34. Ground 2, of course, goes on to say that one of the factors on which the judge relies was unsupported by evidence. That factor is the difficulties, if any, which the sponsor would have in entering Russia to continue family life with the applicant. There is some evidence that there would be such difficulties. The determination refers to evidence from the applicant that she did not know if her husband would be entitled to a spousal visa but the Russian authorities required evidence of employment for a travel visa. This reflects the applicant's answer to question 6.12 in the application form which asks whether she and the sponsor could live together outside the UK if necessary. Her answer was in the negative and she went on to say the following:

> "My sponsor does not have any qualification or eligibility to obtain Russian business visa in order to support ourselves in Russia. My sponsor has strong family and cultural ties in the UK. All our friends are mutual now in the UK and I have been very close with my sponsor's family."

35. This is *prima facie* evidence that the sponsor would face difficulties in entering Russia and it was a matter which the judge took into account in the balancing exercise, which of itself has not been challenged.

The evidence was before the FtT and does not appear to have been challenged by the presenting officer. The case of **Kareem** was a case involving the evidence required to establish a foreign marriage. This can be a complex area of law and it can easily be seen that it would be unsatisfactory, to say the least, to proceed on the basis of unsupported assertions by a private individual. Difficulties in obtaining visas seem to me, to some extent at least, to be matters of practical experience as well as law and the observations in **Kareem** may not carry quite the same weight. While **Kareem** does give guidance which I think should be regarded as general and not confined to marriage cases, I do not read it as holding that no judge is entitled to accept evidence which he finds credible, particularly where it is not challenged. Another judge might have rejected the evidence but that is not the point. There is no merit in the submission that the FtT judge subverted the onus of proof. The remarks complained of simply made it clear that there was no contradictory evidence.

36. I therefore reject ground 2.

37. As far as ground 3 is concerned, it appears from paragraphs 10 and 11 of the determination that Mr MacDonald submitted, before the evidence was completed, that the applicant now fully complied with the financial requirements of the Rules. That assertion does not appear to have been challenged before the FtT. The judge did not set out in the determination all of the material in the payslips and the bank statements. He did not need to since it appears clear that no issue was taken before him by the presenting officer that the assertion that the applicant now met the Rules was false. If ground of appeal 3 wanted to challenge the finding that she now met the Rules it should have said so in terms rather than merely

accusing the judge of speculation. It is fair to say that the fact, as the judge found it, that she now meets the Rules, was something the judge took into account in his article 8 assessment but it seems to me that the **Chikwamba** point was very much an afterthought and had no effect on the article 8 assessment, which had already been made.

I do not consider that ground 3 is well-founded but even if it was I would have held it to be immaterial for the foregoing reason. The case of **Chen** is of no assistance to the respondent in the circumstances.

Notice of decision

40. I refuse the appeal of the Secretary of State on all grounds.

At the conclusion of the hearing I indicated that if any question of costs or fees arose parties could, if they chose, deal with that by way of written submissions in due course. If there are to be such submissions they should be lodged no later than four weeks after this decision is promulgated.

Signed Date

Lord Matthews