Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38610/2014

THE IMMIGRATION ACTS

Heard at Field House	**Oral Decision & Reasons Promulgated**
On 24 November 2015	**On 11 December 2015**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

MR THOMAS EDWARD GOLD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Heller, Counsel instructed by Sunrise Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought against the decision of First-tier Tribunal Judge Traynor promulgated on 6 February 2015 following a hearing at Taylor House on 22 December 2014 in which he dismissed the appeal of the appellant against the respondent's decision of 23 September 2014 refusing an application made on 9 July

2014 for the applicant to remain on the basis of a relationship that he had with his unmarried partner, Ms Wood, who is a British citizen. The appellant was born on 30 November 1955 and is 60 years of age. He is a citizen of the United States of America.

2. The crucial findings of the judge are seen in paragraphs 43 and 44. It was inescapable that the appellant was granted leave to enter as a fiancé and not as an unmarried partner. The judge continued:

> "43. He has now explained that he believed he had used the correct form and upon entry had not sought to challenge the fact that the visa stipulated that he did enter as a fiancé. In this case I find that ignorance of the law cannot be a defence which the appellant can rely upon in order to now claim that this was the reason why he did not marry within the period of time this visa permitted him. The appellant claims that until he and his partner went to the Chelsea Town Hall and were told that a civil partnership is different to an unmarried partnership, that he was otherwise unaware of the difference. Be that as it may, he is presumed to know the law under which he has been granted entry clearance and in this instance it was on the basis of him being a fiancé who, within the context of the Rules, was expected to marry within six months or a reasonable period thereafter, subject to an appropriate, suitable and reasonable explanation for any delay.
>
> 44. What is clear to me is that in his letter of September 2014 the appellant stated in the most unequivocal terms that he and his partner intended to marry but had not been able to do so because of her ill health. It is only when he has presented his grounds of appeal that he now claims that there was never an intention to marry until both he and his partner had agreed. He claims that he was mistakenly issued a fiancé visa when, all along, he wanted entry clearance as an unmarried partner. I must question why it was that the appellant did not put forward that suggestion when he had no intention of marrying until after the application was refused, when it was clearly open to him in replying to the earlier letter of August 2014 that he considered there was a mistake. At that stage the appellant could easily have alerted the respondent to the fact that he wished other factors to be taken into account but he did not do so."

3. The reference to the letter of 3 September is a letter which is found in the bundle and in which it is said by the appellant: "Second I want to assure you that it is Susie's and my intent to get married in the near future".

4. The decision of the judge followed the respondent's decision made on 23 September 2014 in which consideration was given to the route by which a non-national may seek entry clearance or leave to remain as an unmarried partner of a British citizen and there were a number of matters which were raised against the appellant. One of those matters was that the Secretary of State did not consider that the applicant and his partner were in a genuine and subsisting relationship. That was no longer in issue before the judge when the matter came up for hearing and it is certainly no longer in issue before me.

5. However, in the decision reliance was placed on E-LTRP.1.11 which was that if the applicant is in the United Kingdom with leave as a fiancé(e) or proposed civil partner

and the marriage or civil partnership did not take place during that period of leave, there must be a good reason why and evidence that it will take place within the next six months. The applicant did not supply that information and it was pointed out by the judge that the fact that the appellant's partner was suffering some medical problems did not preclude the marriage taking place within the six months and that the visa made it quite clear that as a fiancé he was required to marry within six months unless there was a suitable reason. No proper reason was put forward and accordingly the decision under the Rules had to fail for that reason alone.

6. It is important to consider the period of time in which the parties had been cohabiting as set out in paragraph 17 of the determination. I need not trouble with the early stages of the relationship but by the time the middle of 2012 had come about it is clear that the parties were spending a considerable amount of time together in the United States of America from 18 June to 8 July. They spent further time together from 13 to 29 September and it was then their case that from 1 November 2012 and continuing they had been cohabiting. The judge reached a conclusion on that in paragraph 14 of the determination, finding that although the relationship has subsisted since 2011 it was not the case that they were living in a permanent or stable relationship until December 2012.

7. He did not accept that the fact that they had a credit card to which Ms Wood's name had been added in July 2012 was evidence that they were living together, and accordingly he made what is a sustainable finding of fact that the relationship did not reach the stage of being a permanent or stable relationship until December 2012. It was at that stage therefore that they were living in a relationship akin to marriage.

8. The consequences of that on the timescale are as follows. The application was made for leave to remain on 9 July 2014 at which time, according to the judge, they had been in a relationship akin to marriage for about eighteen months. The decision itself was made on 23 September 2014. Once again, at that stage they had not been in a relationship which had lasted for as much as two years.

9. It was of course the case that when the matter came before the judge on 22 December 2014 by that stage they had been living in a relationship of almost exactly two years and nobody is suggesting that on 22 December 2014 the two years had not by that stage elapsed.

10. Accordingly the issue that was principally argued before me was that it was open to the judge in December 2014 to allow the appeal on the basis that the requirements of the application should be looked at at the date of the hearing and should be allowed because those requirements had been met in December 2014.

11. That in my judgment relies upon a misunderstanding of what the Tribunal said in *EA (Section 85 (4) explained) Nigeria* [2007] UKAIT 00013 and in particular it is said that the judge got it wrong by not applying these words which arise in paragraph 7 of the determination of the Tribunal:

> "The correct interpretation of Section 85(4) is perhaps best indicated by saying that the appellant cannot succeed by showing that he would be granted leave if he made an

> application on the date of the hearing: he can succeed only by showing that he would be granted leave if he made, on the date of the hearing, the same application as that which resulted in the decision under appeal."

12. It is as well to remind oneself as to the contents of Section 85(4). The material parts are:

> "On an appeal under Section 82(1) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision."

Accordingly the principles with which I am concerned relate to the substance of the decision. In relation to any analysis of the substance of the decision it is permissible to look at postdecision material which, colloquially speaking, 'sheds light' on the substance of the decision.

13. The most obvious case is where it is said that a particular sum of money had to be in the hands of the appellant at the date of the decision but evidence of that was not put forward by the appellant at the date the decision was made. It would be open to the appellant to include at the hearing evidence that, at the date of decision, he had in fact that sum of money in his bank account. In other words the Tribunal does not make a decision as at the date of the hearing. Rather it permits evidence at the date of the hearing to throw light on what is the lawfulness of the earlier decision. That is clear from the circumstances of paragraph 7 in its entirety which reads as follows:

> "It is thus not open to an appellant to argue simply that, on the date of the hearing, he meets the requirements of the Immigration Rules. He can succeed only if he shows that the decision that was made was one which was not in accordance with the Immigration Rules. Section 85(4) allows him to show that by reference to evidence of matters postdating the decision itself, and it may well be that the effect is that the question for the Tribunal in an in-country case is whether the decision can be justified as a correct one at the date of the hearing. But that does not mean that the Tribunal is the primary decision maker. The Tribunal's task remains that of hearing appeals against decisions actually made. The correct interpretation of Section 85(4) is perhaps best indicated by saying that the appellant cannot succeed by showing that he would be granted leave if he made an application on the date of the hearing …"

13. The circumstances of the decision in the case of *EA* show that principle being put into effect. In paragraph 9 of the determination the judge recounted the circumstances which gave rise to the appeal:

> "As soon as the appellant realised that Anfell College had closed, he supplemented his application by letter indicating that he now sought leave to remain in order to study at Holborn College rather than Anfell College. Mr Avery was able to confirm that the letter was now on file: it was posted on 30 January and received in the Home Office on 2 February, some days before the decision was made. It is evident that it had not reached the file in time, and so the decision related solely to Anfell College without taking account of the amendment to his application that the appellant had submitted."

14. The material words in this passage are that there was material which the Secretary of State was required to take into account which was material the Home Office received

some days before the decision was made and which should have been the basis of a revised application, an application made to study at Holborn College rather than Anfell College. It was for that reason that the Tribunal considered whether or not it was able to look at that fresh material. What the determination does not say is that it was open to this applicant in December 2012 to make an application which the Tribunal was required to consider on the basis that, at the date of the hearing, he had been in a relationship akin to marriage for a period in excess of two years.

15. The function of the judge was to look at the decision that was made in July of 2014 and whether that was a decision made in accordance with the Immigration Rules or in accordance with the law, and it is plain that that decision was a decision which was correctly made because in July 2014, however one looked at the postdecision evidence, the applicant had not fulfilled the requirements.

16. In addition to this, the decision was considered on the basis of E-LTRP.1.11, and that was that, if the applicant was in the United Kingdom with leave as a fiancé, the marriage should have taken place within that period of leave and there had to be a good reason why not and evidence to support it and that it would take place within the next six months. Of course there was no such evidence. The justification provided by the appellant was not considered to be satisfactory. There is no reason why the couple should not have married. The justification by the applicant was that he did not think that he got entry clearance as a fiancé and consequently he did not need to comply with that requirement but that was belied by the letter that he wrote in September 2014, to which I have referred, where he said that he intended to marry in the near future. That was contradicted by the evidence that he gave and which was to the effect that they were quite happy living as they were and that they had no intention of marrying at that time.

17. So, on any view, the decision that was made by the judge in relation to the application was a lawful decision and the fact that the applicants have now acquired two years of cohabitation akin to marriage was not one which the judge was required to, or indeed could, take into account for the purposes of seeing whether the requirements of the Rules had been met.

18. There then comes a consideration as to whether there was an Article 8 claim whereby the applicant could properly put forward a claim that he should be entitled to leave to remain as a result of the principles identified in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40. This provides a sensible limitation on an over-officious stance by the Secretary of State requiring that an individual who demonstrates that he can meet the requirements for entry clearance should not in those circumstances be expected to make a long journey to make an application for entry clearance which will almost inevitably succeed.

19. In a case where an applicant has no immigration history which operates against him it would be disproportionate to require that individual to seek entry clearance from abroad. The only benefit would be that there has been formal compliance with the requirements of the Immigration Rules. The *amour propre*, as it were, of the Secretary of State would be maintained but at a cost which was disproportionate, namely the

cost of travelling back to the country of nationality, making an application, awaiting the outcome of that application and returning to the United Kingdom when the result is a foregone conclusion.

20. In this case, however, the judge dealt with *Chikwamba* in this way:

> "In the first instance I find that in the absence of any health grounds and while I find that reasons advanced concerning the appellant's partner's relationship with her parents are simply a matter of convenience then I find that the respondent's decision does not presume the outcome of such an application for entry clearance as being a formality. What the respondent requires the applicant to do is to demonstrate that he can meet the requirements for entry clearance as an unmarried partner. The outcome of that application is not a foregone conclusion."

Accordingly the judge found that it was therefore not a case where the *Chikwamba* principles made it an entirely unnecessary exercise. There was therefore a public interest in ensuring that there was an out of country application.

21. In reaching that conclusion it is clear that the judge accepted in paragraph 55 of the determination that the appellant speaks English and appears to be financially self-sufficient, thereby at least meeting some of the requirements for entry clearance in this capacity. However, what the decision has within it is the fact that the original decision to refuse entry clearance was a lawful decision. That was a decision that was made because the applicant did not meet the requirements for leave to remain. He did not meet the requirements because, as I have pointed out, he had been granted leave as a fiancé and that during that period of leave he had failed to provide a good reason why the marriage had not taken place or provided evidence that the marriage would take place within six months. We know as a matter of fact of course that no marriage has not since taken place.

22. In those circumstances it does not seem to me that it can be said that there is no public interest in requiring the appellant to make an application for entry clearance in the correct capacity. He had failed in his application that was made on 9 July 2014. He knew about that on 23 September 2014 and the option remained with him to leave the United Kingdom and apply for entry clearance, meeting the requirements as they may be from time to time for entry clearance at the time the application is made in the United States of America.

23. For these reasons I am not satisfied that, because the application for leave to remain has been refused for the good reasons set out in the decision made by the Secretary of State, the applicant can nevertheless succeed without making an application out of country as he is normally required to do by applying the *Chikwamba* principles. It may well be that some of those requirements have been established but where an individual has been lawfully refused entry clearance or leave to remain under the strength of the Immigration Rules the public interest in requiring him to leave the United Kingdom and regularise his position is a real one and the judge was correct in saying that the *Chikwamba* principles did not apply to prevent the Secretary of State from seeking the appellant's removal.

24. I find that the judge made no material error of law and I dismiss the appellant's appeal.

DECISION

The judge made no material error and the determination of the First-tier Tribunal shall stand.

No anonymity direction is made.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
9 December 2015