Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-006664
First-tier Case Number: HU/52501/2022
LH/00441/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 7 February 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

LEON LISTON ROBERTS
(Anonymity order not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Ferguson, Counsel
For the Respondent: Ms A Nolan, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 5 February 2024

The Appellant

1. The Appellant is a national of Grenada born on 27 November 1985. His appeal against a decision of the respondent dated 11 April 2022 (to refuse him leave to remain as a spouse) was allowed by the First-tier Tribunal in a determination dated 12 October 2022. The respondent

appeals that decision with leave. Although the appeal comes before me as an appeal by the respondent, for the sake of clarity, I shall continue to refer to the parties as they were known at first instance.

2. The Appellant came to the United Kingdom in September 2021 as a visitor. On 14 February 2022 he lodged an application for further leave to remain as a partner under Appendix FM of the Immigration Rules.

The Appellant's Case

3. The appellant is married to Chervaughn Archibald-William a British citizen born on 23 July 1992 ("the sponsor"). The couple first met in Grenada in 2008, lost contact with each other, reconnected and finally the appellant travelled to the United Kingdom in September 2021 to visit the sponsor. They married on 8 January 2022. The sponsor has a daughter, C, by a previous relationship who is also a British citizen.

4. The appellant's application for leave to remain as a partner was refused by the respondent for two reasons. The first was that the appellant's status in the United Kingdom was that of a visitor and it is not permitted under the immigration rules to switch categories as sought by the appellant. The second reason was that the sponsor's earnings fell short of the requirement of £18,600 per annum (in Appendix FM-SE) during what the respondent said was the relevant period under the rules namely six months leading up to the date of application. That is from August 2021 until February 2022.

5. The sponsor's earnings for that six month period were £15,000 per annum. Her earnings had been reduced because of the effect of Covid restrictions but after the restrictions were lifted her earnings did not increase. That was because she had childcare responsibilities. The respondent's view was that it would be reasonable to expect the Appellant to leave the United Kingdom and apply for entry clearance from Grenada when the rules were met.

The Decision at First Instance

6. The judge set out the Covid concession relied upon by the appellant at [23] of his determination and held that the wording of the concession was ambiguous. He found that the concession did apply to the sponsor's earnings. The Sponsor's loss of income occurred prior to October 2021 (when the concession came to an end) and was a consequence of Covid. He therefore considered that there were limited public interest arguments in relation to the financial requirement. The concession did not formally amend the Immigration Rules and the judge directed himself that he was not able to make a finding that the financial requirement of the Immigration Rules was met. However, but for the fact that the Appellant was in the UK as a visitor the application would have succeeded.

7. The question was how much weight should he attach to the fact that the Appellant entered the United Kingdom in a category that does not normally permit switching. The judge considered the case to be "almost akin to **Chikwamba**" given the appellant's and sponsor's explanation that they did not understand that the application was not supposed to be made from inside the United Kingdom. The judge considered that there were very significant obstacles to family life being conducted elsewhere, in Grenada. This was in large part due to the fact that C's father who had regular weekly contact with C might lose that contact in the event that the appellant and sponsor relocated. He allowed the appeal.

The Onward Appeal

8. The respondent appealed against this decision arguing in effect that the Covid concession was not ambiguous as the judge indicated. The sponsor had to show earnings for six months up to the date of the application and that she had failed to do. It appeared to be her choice that she had not gone back to work sufficient to pass the earnings threshold. The respondent also took issue with the judge's reasoning that the appellant could not return to the Grenada to make an application for entry clearance. The respondent argued that the existence of C was being used as as a trump card. Permission to appeal was granted in general terms by the First-tier on 23 November 2022.

The Hearing Before Me

9. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

10. For the respondent reliance was placed on the grounds of onward appeal. The Covid policy had not been extended beyond 31 October 2021 and the sponsor was still on a reduced salary. The error on the judge's part in misinterpreting the Covid policy concession was material because it infected how the judge arrived at his conclusion that the application would have succeeded but for the fact the appellant was present in the United Kingdom as a visitor. The case of **Chikwamba** relied upon by the judge was not applicable as it only applied where the applicant must leave the United Kingdom to apply for leave to enter but otherwise all other requirements were met. That was not the case here.

11. The judge had said "It is not suggested that the Appellant has a parental relationship with his stepdaughter which must be correct given that he has only been in her life for a year and she does have two active and involved biological parents even if her biological father does not pay financial support." Yet despite these comments, no reason was given why it would be disproportionate to require the appellant to return to Grenada to apply from there.

12. In response counsel relied on the rule 24 reply. It was not accepted that the judge had misdirected himself on the requirements of the concession. The judge had allowed the appeal under article 8 outside the rules and had taken into account all relevant factors. The decision was coherent and made sense. The sponsor had earned £22,000 per annum before her income was reduced due to Covid. There was a discussion in the determination as to what he Covid policy meant. The judge had identified some ambiguity in the policy and he was entitled to look at the rationale which underlay the concession. There was nothing irrational or unlawful in what the judge had done in his approach to the policy. The sponsor would have amply met the income requirements but for Covid. Where the policy was ambiguous that ambiguity should be construed against the respondent whose policy it was.

13. The judge had said there was limited public interest in requiring the appellant to leave the United Kingdom to apply from abroad. It was not at all clear how C's relationship could be maintained with her biological father if C's mother and stepfather the appellant went to Grenada. They now had a baby boy who was also a British citizen. At [8] and [9] the judge set out the framework for assessing the appeal under article 8 outside the rules. The judge was entitled to allow the appeal.

14. In conclusion the presenting officer said that the judge had not taken into account the fact that the sponsor was still on reduced hours by the time of the appeal hearing. The judge had made no assessment of what the position was after October 2021.

Discussion and Findings

15. At first instance the judge held that under the covid concession policy the Sponsor's income ought to have been examined on the basis of the six months before her hours were cut due to the pandemic. On that basis the requirement would have been met.

16. The judge set out the policy at [23] of his determination.

> "If you've experienced a loss of income due to coronavirus up to 31 October 2021, we will consider employment income for the period immediately before the loss of income, provided the minimum income requirement was met for at least 6 months immediately before the date the income was lost.
>
> "If your salary was reduced because you were furloughed we will take account of your income as though you're earning 100% of your salary
>
> The policy concludes:
>
> "The concessions have not been extended beyond 31 October 2021. Any income loss after this date will not be taken into account within the financial concessions listed above and applicants will be expected to

meet minimum income and adequate maintenance requirements as per pre-pandemic levels."

17. At the date of application the sponsor could not show that for the six months preceding the application she had earned £18,600 on an annual basis, she could only show that she had earned the equivalent of £15,000 per annum. The judge found that the appellant could avail himself of the respondent's covid concession which operated outside the rules but which had the effect of modifying the income levels required in certain circumstances. The judge found the policy to be ambiguous.

18. The policy is quite clear that it ends on 31 October 2021. What are the consequences of the end of the policy? The judge interpreted the policy as meaning that if there was a loss of income during the lifetime of the policy (which was the case here because the sponsor's income went down from £22,000 per annum to £15,000 per annum) then the sponsor could rely on the six months worth of income received prior to the reduction in income. The sponsor had experienced a loss of income due to the coronavirus up to 31 October 2021.

19. The problem for the appellant was that his application was lodged at a time when the sponsor was no longer experiencing a loss of income due to coronavirus. She was by that stage experiencing a loss of income because she had childcare responsibilities and so could not work the same hours that she had worked when she was earning £22,000 per annum pre-Covid. The concession is clear in its terms, that an income loss suffered after 31 October 2021, which applied to the sponsor, would not attract the "the financial concessions listed above and applicants will be expected to meet minimum income and adequate maintenance requirements as per pre-pandemic levels". What the judge was doing was extending the life time of the policy concession to beyond 31 October 2021 which he was not entitled to do.

20. The six month period prior to the lodging of the application in February 2022 began in August 2021. Thus for more than half of the relevant six month period for which the sponsor had to demonstrate earnings, the Covid policy no longer applied. I would therefore disagree respectfully with the First-tier Tribunal's interpretation of the policy concession. The appellant's application for leave to remain was made after the policy had ceased to exist. He was therefore in a position where he could only show the sponsor's earnings for the six months prior to the application. If the interpretation of the policy suggested by the First-tier was correct it would mean that in effect the appellant could apply for leave to remain at any time in the future under the concession because the sponsor had at one time suffered a loss of earnings due to the Covid restrictions.

21. That cannot be the intention of the policy. The respondent must have intended that the concession would come to an end at some point, in this case 31 October 2021. It follows therefore that the judge materially erred in law in finding that the appellant could bring himself within the policy.

As the respondent submitted to me that infected the remainder of his findings. The appellant had not failed to meet the requirements of the immigration rules simply because he had applied while having the status of a visitor. He had failed to meet the requirements of the rules because his sponsor had insufficient earnings. This was not a **Chikwamba [2008] UKHL 40** or akin to a **Chikwamba** case. It was not a mere bureaucratic formality that the appellant would have to go back to Grenada to apply. It was not otherwise certain that he would have succeeded in his application.

22. Given that the judge found the appellant did not have a step-parent relationship with C it is difficult to see what the harshness would be in requiring the appellant to return to Grenada to apply correctly rather than gain an unfair advantage (over other applicants) by applying in the United Kingdom. The judge noted that the appellant and sponsor assumed that as their application was accepted they had not considered whether the appellant should return to Grenada to make an application. Nevertheless the appellant was not entitled to switch visas and his application inevitably fell for refusal on that basis.

23. I asked the parties for their submissions that in the event of a material error of law being found what directions should be made by the Upper Tribunal for a rehearing. The parties' view was that the matter should be remitted back to the First-tier to be reheard. I concur with that because the error in relation to the policy concession affects all of the judge's findings but in particular the balancing exercise that was essential in the article 8 analysis. I therefore direct that this appeal should be remitted to be heard de novo with no findings preserved save that the appellant and sponsor are married and that their relationship is genuine and subsisting (which was conceded by the respondent at the hearing at first instance). Remittal will mean that the appellant will also have the opportunity of putting in further evidence for example about the British citizen child which the couple now have. Any further evidence should be filed and served at least 14 days before the renewed hearing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside. I direct that the appeal be remitted back to the First-tier Tribunal to be reheard on the first available date before any judge except judge Seelhof.

Respondent's appeal allowed to that extent.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 6th day of February 2024

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee award was made at first instance and therefore there can be no fee award now.

Signed this 6th day of February 2024

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Judge Woodcraft
Deputy Upper Tribunal Judge