Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number
IA/35634/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court
On 20th November 2014

Decision and Reasons Promulgated
On 4th December 2014

Prepared 1st December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

JUAN JOUBERT
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr T Royston (Counsel, instructed by Paragon Law)
For the Respondent: Mr D Mills (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant entered the UK as a working holiday maker in October 2004, following an extension of his leave as a spouse his leave expired with a refusal of an application made in November 2010. An application outside the rules was made in June 2011 and refused and later reconsidered the subsequent refusal in October 2013 giving rise to these proceedings. In July 2013 the Appellant had started living with his partner in what was accepted to be a genuine relationship.

2. The Appellant's appeal to the First-tier Tribunal was heard at Bennett House in Stoke on Trent on the 25th of March 2014 and dismissed in a determination promulgated on the 4th of April 2014. The Judge found that the relationship was genuine and that the Appellant and his partner did not wish to live apart. That was against a background that the Appellant's partner, Mr Parker, had had mental health issues arising from his appreciating his true sexuality which the

Judge believed had been largely resolved. He found that it would not be disproportionate for the Appellant to return to South Africa to make an entry clearance application notwithstanding his family and private life in the UK and the fact that Mr Parker would not leave the UK.

3. The Appellant sought permission to appeal in grounds of the 11th of April 2014. It was asserted that there was a logical error, for the Appellant to be able to make an application for entry clearance from South Africa as he would have to leave with his partner to have cohabited for long enough. It was submitted that a different conclusion on proportionality might have been reached.

4. It was also argued that the Judge had failed to apply Chikwamba [2008] UKHL 40 which was not limited to Zimbabwe type cases and that the Judge had failed to have regard to the prospective length and degree of disruption.

5. Permission was granted by Deputy Upper Tribunal Judge Campbell on the 8th of May 2014. Although he was less favourably disposed to the Chikwamba point he granted permission to appeal on all the grounds raised, it appeared that the Judge had not considered the period of separation.

6. The submissions are recorded in the Record of Proceedings and are referred to where relevant below. In essence it was submitted for the Appellant that the proportionality assessment was based on the mistaken assumption that separation would be temporary and that principles in Chikwamba and VW (Uganada) [2009] EWCA Civ 5 applied. For the Home Office it was submitted that the requirements of Gen1.2 were not met as the Appellant and Sponsor had not cohabited for the time required. It was not a question of queue jumping and it was not a near miss as he failed on a substantive rule.

7. This is not a case such as Chikwamba where the Appellant meets the requirements of the Immigration Rules, he does not and so it cannot be said that the Appellant's return would be a formality. In any event while the Appellant and Sponsor do not have the required period of cohabitation the Appellant can apply for entry clearance to enter a civil partnership.

8. As noted in Ekinci [2005] EWCA Civ 1482 a failure to meet the Immigration Rules does not improve an article 8 claim and the Judge in this case would have had to assess the Appellant's immigration status which was precarious at the time that he entered the relationship with Mr Parker and when he had no expectation of being permitted to remain. The article 8 position would also have to be seen against the limitations arising from the decision in Patel [2013] UKSC 72.

9. While the Judge was wrong to proceed on the basis that separation would be temporary for the reasons he gave the Appellant would be able to apply on a different basis and it is not for the First-tier Tribunal or the Upper Tribunal to speculate on the likelihood of success of an entry clearance application, that it is a matter for the ECO. The Appellant will have the benefit of the positive findings made in the determination which are not challenged.

10. Given the Appellant's status at the time that he and Mr Parker entered their relationship, the fact that their circumstances do not fall outside the Immigration Rules only that they cannot meet them, that this is not a Chikwamba type of situation and an application can be made as outlined I am not persuaded that the Judge could have come to any different conclusion with regard to the proportionality of the Appellant's removal or return to South Africa.

11. In conclusion there was no material error in the determination and I decline to interfere in it.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing this appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 4th December 2014