Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39129/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Determination Promulgated**
On 9th April 2014	**On 24th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE COATES

Between

PASCAL MARIE-JOSEE ST-FLEUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Pipi
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Haiti born on 19th March 1984.

2. On 29th July 2014 the Appellant applied for variation of leave to remain on the basis of her marriage to a British citizen. The application was refused by the Respondent on 9th September 2014. An appeal against that refusal was allowed on human rights grounds by Judge of the First-tier Tribunal V A Cox on 30th December 2014.

3. The Respondent's representative applied for permission to appeal to the Upper Tribunal and permission was granted by Judge of the First-tier Tribunal Kelly on 12th February 2015. Permission was granted on the basis that it was arguable that the

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First-tier Tribunal's finding that the Appellant's removal would be "simply in order to secure formal compliance with the entry clearance Rules" was inconsistent with its earlier finding that the Appellant had not met the substantive requirements of Appendix FM of the Immigration Rules. The former finding appears to have been the mainstay of the Tribunal's decision to allow the appeal notwithstanding its later and arguably contradictory assertion that it had "not placed emphasis on any prospects of success on return".

4. Thus the matter came before me in the Upper Tribunal for an error of law hearing on 9th April 2015. The Appellant was present. Representation was as mentioned above.

5. The Appellant has a good immigration history. She first arrived in the UK in 2010 with a valid student visa. While in the country in that capacity the Appellant met and formed a relationship with Mr Matthew John Bull, a British citizen, whom she has since married. The Appellant returned to Haiti in 2011 but her relationship with Mr Bull developed and in 2014 the Appellant was granted a visa as a fiancée and she returned to the UK. In June 2014 she and Mr Bull were married. It is not disputed that their marriage is genuine and subsisting. Both the Appellant and her husband were found to be credible by the First-tier Judge and that finding is not the subject of challenge. The First-tier Judge records in her decision that at the date of the appeal hearing the Appellant was approximately five weeks' pregnant. She had only discovered her pregnancy the week before the appeal hearing. Now, the appellant is six months' pregnant and her baby is therefore due to be born in three months time.

6. Mr McVeety's submission before me was short and succinct. He relied upon the reasons submitted by his colleague in support of the application for permission to appeal. He argued that the First-tier Judge had plainly misapplied the Chikwamba principles in allowing the appeal on human rights grounds. The judge had clearly found earlier in her decision and reasons that the appellant had failed to meet the maintenance requirements of the Immigration Rules, therefore it was a material error to allow the appeal on the basis that requiring her to return to her home country to apply for entry clearance would be a mere formality.

7. The Appellant's representative, Mr Pipi, submitted a skeleton argument in which he sought to argue that the appeal should have been allowed under the Immigration Rules and he applied to adduce additional documents. There were two letters confirming the fact of the Appellant's pregnancy and further evidence in the form of payslips relating to the Appellant's husband.

8. The representatives had also submitted a Rule 24 response dated 6th April 2015 but Mr McVeety argued that the Appellant's representative was attempting to put forward an argument which had been expressly prohibited by virtue of the Upper Tribunal's decision in EG and NG (UT Rule 17: with Rule; Rule 24: scope) Ethiopia [2013] UKUT 00143 (IAC). Paragraph 3 of the head note to the decision in EG and NG states –

> "A party that seeks to persuade the Upper Tribunal to replace a decision of the First-tier Tribunal with a decision that would make a material difference to one of the party's needs permission to appeal. The Upper Tribunal cannot entertain an application purporting to be made under Rule 24 for permission to appeal until the First-tier

Tribunal has been asked in writing for permission to appeal and has either refused it or declined to admit the application."

9. Mr Pipi accepted that no written application for permission to appeal had been made and therefore he was obliged to concede that the Upper Tribunal could not entertain his application purporting to be made under Rule 24.

10. It seems abundantly clear that the First-tier Judge unfortunately erred in law in her application of the guidance given in Chikwamba. That only applies where it is clear than an applicant would satisfy the requirements of the Immigration Rules and the issue is whether it is reasonable to expect that applicant to return to his or her home country in order to make an application for entry clearance. In this appeal, the First-tier Judge clearly found that the Appellant did not satisfy the financial requirements of the relevant Rules but nevertheless proceeded to allow the appeal under Article 8 in accordance with the Chikwamba principles.

11. The present situation is that the Appellant is now approximately six months through her pregnancy and her baby is therefore due in three months time. The child's father, Mr Matthew Bull, is a British citizen and the baby will therefore be entitled to British nationality. Mr McVeety did not seek to argue that it would be reasonable to expect the Appellant to return to Haiti, with or without her husband, at this late stage in her pregnancy. Nor would it be reasonable to take a very young baby who, as a British citizen, is fully entitled to the benefits which this country has to offer in terms of healthcare, to a country such as Haiti. Equally, it would be unreasonable to separate mother and baby by requiring the Appellant to return to Haiti in order to apply for entry clearance.

12. Section 55 does not apply to the best interests of an unborn child. I could set aside the decision and proceed to make a fresh decision myself but since there is no dispute regarding the background circumstances, there seems little point in taking such a course. I have decided that the most appropriate course is to rule that the error of law made by the First-tier Tribunal is not material and to direct that the determination shall stand.

NOTICE OF DECISION

The making of the decision by the First-tier Tribunal involved the making of an error on a point of law but the error is not material and therefore I do not set aside the decision.

No anonymity direction is made.

Signed | Date 23rd April 2015

Deputy Upper Tribunal Judge Coates