Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001599
IA/05760/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 May 2022	**On 29 July 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS JENNIFER MATSHIDISO MOLEFE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Lecointe, Home Office Presenting Officer
For the Respondent: Ms K Joshi, Legal Representative, Joshi Advcoates Ltd

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Dixon promulgated on 19 October 2021 in which he allowed the appeal of Miss Molefe against a decision of the Secretary of State to refuse her human rights claim and to refuse her leave to remain in the United Kingdom. That decision was made on 7 May 2021. I refer to Miss Molefe as the appellant as she was below for the avoidance of confusion but that does not mean that she is not the respondent here to the Secretary of State's application.

2. The appellant is a citizen of Botswana is married to a British citizen who has a number of health problems and in summary, it is her case that they had been in a genuine relationship and that it would be a breach of her rights pursuant to Article 8 of the Human Rights Convention to require her to leave the United Kingdom.

3. The Secretary of State's case is that the applicant did not meet the requirements of the Immigration Rules and that it would not be a breach of the United Kingdom's obligations pursuant to Article 8 to remove the appellant from the United Kingdom.

4. The factual background to the case is set out in the decision of Judge Dixon and there is no need to repeat it here. There is no challenge to the findings of fact in any material way and it does not appear that the Secretary of State did not make submissions to that effect at the hearing, rather, that the Secretary of State considered that even taking the case at its highest, the requirements of the Immigration Rules were not met and that removal would still be proportionate in terms of Article 8.

5. The judge, as I said, heard evidence from the appellant and her partner. The judge also heard evidence from Miss Mahachi, who gave evidence that was set out in the decision. In summary, the judge directed himself as to the relevant law and the Immigration Rules from paragraphs 44 to 56 and in particular at paragraphs 55 and 56 as to how to approach a situation where the Rules were not met, in particular paying attention to the decision in Chikwamba v The Secretary of State [2008] UKHL 40 as commented upon in Younas [2020] UKUT 129. The judge found that the appellant and her partner were credible witnesses and gave honest evidence to the Tribunal but found that there would not be insurmountable obstacles to the continuation of family life in Botswana for the reasons given at paragraph 61.

6. The judge also found that the appellant did not fall within the terms of the respondent's guidance in respect of those who could not leave the United Kingdom and return owing to COVID. The reason for that are set out at paragraph 62.

7. Having concluded that the appellant did not meet the requirements of the Immigration Rules, the judge then went on to consider the position outside the Rules from paragraph [63] onwards, adopting a balance sheet approach and taking into account [65] the situation of the appellant's friend, which the judge found similar.

8. The judge, considered and applied Chikwamba and having found that this situation was factually different from that in Younas. The judge found that the impact in particular on the appellant's husband of relocation to Botswana temporarily or being left in the UK without the appellant, the apparent inconsistent treatment from the appellant's case and that of her friend, the fact that at least for part of a period of lockdown which continued for a few months it was reasonable for the couple to remain at

home and not to consider that they should leave the United Kingdom and that the appellant would in fact meet all of the requirements for entry as a spouse, that removal would be disproportionate.

9. The Secretary of State sought permission to appeal against that decision in grounds running to seven paragraphs of which the operative paragraphs are 3 to 5. In summary, the Secretary of State's case is that the judge improperly had regard to the situation of the application of a friend of the appellant who was said to be in a similar position, that there was no legal reason why the judge should find the result of that case legally binding or persuasive, particularly given the salient differences such as the fact that the friend did not make an application as a fiancée. Second, that the judge failed to consider the fact that the appellant had applied under the fiancée Rules, which are no longer applicable, and third, that the judge had failed to give adequate reasons for allowing the appeal outside the Rules, particularly as it was open to make an application under the Rules by returning to Botswana. Permission to appeal to the First-tier Tribunal was granted and on that basis the appeal comes before me.

10. Having heard Ms Lecointe's submissions, I accept that she was in some difficulty, given the way in which they were framed, but she did not make any application at this to amend the grounds to raise either the point in respect of Agyarko or for that matter to challenge the application of the Chikwamba principle.

11. I consider that this is a decision in which the judge made careful and detailed findings of fact. The judge found, as was open to him, that there were no insurmountable obstacles to relocation and on that basis the requirements of the Immigration Rules were not met. The judge did, however, direct himself properly, as I have already mentioned, in respect of Chikwamba and Younas, and reached findings as to the honesty of the appellant and her partner which are adequately and sustainably reasoned. This and the unchallenged finding that the appellant otherwise met the requirements of the Immigration Rules are in my mind significant factors which permitted the judge to find that on the particular facts of this case it fell within the terms of reference set out in both Chikwamba and as explained in Younas and that thus the public interest in removal was, on the facts of this case, outweighed.

12. In reaching that conclusion, I note that the grounds of appeal do not challenge the application of Chikwamba nor do they challenge the findings of fact that the requirements of the Rules would otherwise be met. To that extent, it is not arguable that the judge had failed to give adequate reasons for allowing the appeal outside the Rules, given that the judge clearly explained why he was doing so, and in effect, what the Secretary of State is asking for is not reasons but "reasons for the reasons". It is entirely evident from the application of Chikwamba and from its principles explained in Younas that the judge did have regard to the possibility of returning to Botswana to make an application in any event.

13. Turning to the point raised at paragraph 4 of the grounds, I am not satisfied that the failure of the judge to consider that the appellant had originally applied under the fiancée Rules contained any merit or could materially have been relevant as that scenario was clearly set out in the judge's recitation of facts.

14. I come finally to the judge's reliance on evidence of the appellant's friend who, she said, was in a similar position. The judge was entitled to take note of that and contrary to what is averred in the grounds, it is not at all evident that the judge saw that as legally binding or persuasive. It was a factor which the judge took into account and it was one to which he attached weight. Given the other strong findings to which I have referred as to the couple's situation and given the clear and proper findings in respect of Younas and Chikwamba, I am satisfied that insofar as weight was attached to this it was not at any material level nor is it the case that any weight attached to that was impermissible or materially altered the outcome of the appeal given the other sustainable findings reached by the judge.

15. Accordingly, for these reasons I find that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it and that concludes my decision.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

No anonymity direction is made.

Signed Date: 10 June 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul