Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05528/2016

THE IMMIGRATION ACTS

Heard at Field House	**Oral Decision & Reasons Promulgated**
On 19 January 2018	**On 7 March 2018**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

MISS MARINA ANNE MARCIA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Georget, Counsel, instructed by UK Migration Lawyers
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Guyana who was born on 7 June 1969. She appeals against the determination of First-tier Tribunal Judge Randall, whose determination was promulgated on 24 February 2017 dismissing her human rights claim. The appellant had applied for further leave to remain in the United Kingdom and the Secretary of State had by a decision

made on 12 February 2016 refused that application, hence her appeal to the Tribunal.

2. The appellant's immigration history is that she entered the United Kingdom as a student and effectively had leave to remain between 1998 and 2009. An application based on long residency was made but was unsuccessful. That was made on 4 August 2008. Subsequently a human rights application was made on 18 June 2009 and that was refused in December 2009. There then followed a period of time until this present application was made on 5 September 2015. During that period of time the appellant had no extant leave.

3. The determination of First-tier Tribunal Judge Randall is, I think it is accepted on all sides, a very careful piece of analysis. It sets out the requirements of the law and it deals in great detail with the circumstances of this particular case. Although the application was considered under the ten year partner route and the private life route the appellant had stated that her life would be in danger if returned to Guyana, that she had lost all ties there and that she suffered from depression. It was considered by the Secretary of State under Appendix FM and paragraph 276ADE and then outside the Rules on what the Secretary of State deemed to be a consideration of exceptional circumstances. That application failed and the matter progressed on the basis of a consideration of the appellant having entered into a genuine and subsisting relationship with a British partner with whom she was and is living in the United Kingdom. She is currently employed. He is a British citizen and has never lived in Guyana. I think it would be fair to say that he is a man of irreproachable conduct. That does not mean that the couple might not be able to live in Guyana but that was not the issue which the Tribunal considered.

4. It was accepted that the appellant had lived in Guyana for the majority of her life and the substantial issue was whether or not the appellant should be required to leave the United Kingdom and make an application for entry clearance on the basis of the relationship that she had with her British partner. Suffice it to say as to his circumstances, he has a substantial pension, owns property and has a considerable amount of savings. It is not realistically thought that he would relocate to Guyana but rather that she would travel to Guyana in order to regularise her position. That was the basis upon which First-tier Tribunal Judge Randall considered the application.

5. The determination is, in my judgment, a model of consideration of the various factors, by which I mean *all* the material factual matters to which the judge was required to pay consideration. The determination covers some nineteen pages of closely typed script and, although it consists only of 49 numbered paragraphs, there are in fact large sections where the paragraphs are subdivided into subparagraphs so that the consideration of the claim is not confined to a mere 49 paragraphs but is much more wide-ranging. It deals with the issues which are raised in the claim, sets out the material factors, recites the evidence and deals with the various issues.

No challenge is made to the material considerations which are set out in the determination.

6. However, what is said is that although the First-tier Tribunal Judge did not have the benefit of later case-law, he applied the case of *Chen* and in doing so inadvertently erred because that decision was overtaken by the subsequent decision in *R (on the application of Agyarko) v The Secretary of State for the Home Department* [2017] UKSC 11. Accordingly it is said that the legal landscape substantially changed with the judgment, in particular, the judgment of Lord Reed insofar as the correct approach is concerned in such human rights cases.

7. The issue before me is whether, inadvertently, the judge approached the matter incorrectly by relying principally on the decision in *R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality)* [2015] UKUT 189. It is said that the landscape of these claims fundamentally changed with the decision of the Supreme Court as a result of which the judge erred in his application of *Chen* to the circumstances of this appeal.

8. The judge considered the circumstances that the appellant and her partner were faced with and applied the provisions in *Chen*. Having done so, the judge determined that it was not disproportionate to require the appellant to return to Guyana to apply for entry clearance as an unmarried partner or spouse. Even though on his own findings such an application may be likely to succeed. In coming to that conclusion, the underlying reasoning, which is set out in the previous eighteen pages, was relied upon.

9. The grounds of appeal are in essence that as a result of the decision in *Agyarko* a different approach has to be adopted. The judge applied the wrong provisions because he failed to take into account what the Supreme Court said in *Agyarko*. The relevant passage relied upon by the appellant is paragraph 51 of the judgment of Lord Reed, with whom all of the other Supreme Court Judges agreed. He said:

> "Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter or at least if an application were made from outside the United Kingdom then there might be no public interest in his or her removal. The point is illustrated in the decision in *Chikwamba v Secretary of State for the Home Department*."

As a result of that passage in the judgment of Lord Reed it is said that the judge inadvertently misdirected himself by placing reliance on the earlier decision.

10. If one looks at the judge's application of *Chen* we turn to the judge's approach set out in paragraphs 44 to 48 of the determination. The judge was considering whether it was disproportionate to remove the appellant and require her to make an out of country application for entry clearance and whether that would be a breach of her Article 8 rights. In doing so the sponsor might or might not accompany the appellant. The situation in *Chen* was that it may be unreasonable to expect someone to return and apply for entry clearance even where there are no insurmountable obstacles to family life continuing elsewhere.

11. In paragraph 39 of *Chen* it was stated:

> "In my judgment, if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established while the immigration status of one party was precarious. In other words, in the former case it would be easier to show that the individual's circumstances fall within the minority envisaged by the House of Lords in *Huang* or the exceptions referred to in judgments of the European Court of Human Rights than in the latter case. However, it all depends on the facts."

12. The judge pointed out the particular circumstances of the case with which he had to deal, compared with those in *Chen*. He concluded:

> "The issue of her short-term safety in Guyana was correctly not vigorously pursued; there was nothing to suggest that she would be particularly at risk. Against this, there was nothing to suggest that the appellant and her partner would not satisfy the requirements of Appendix FM, given my findings about the relationship, the sponsor's means and the appellant's immigration history. Would there be a significant interference in the family life enjoyed by this couple if the appellant returned to apply for entry clearance? The sponsor's health, his means, his contract-based work and his family obligations do not, even cumulatively, prevent him from accompanying her to Guyana if he wishes, while she applies; and there are sufficient means for he couple to support themselves there, or for the sponsor to support the appellant, if she goes alone."

13. After consideration he found that it would not be disproportionate to require the appellant to return to Guyana to apply for entry clearance as

an unmarried partner or spouse even though in those findings such an application was likely to succeed.

14. The challenge that is made arises from what is said in the case of *Agyarko*. What is said by Lord Reed in paragraph 51 casts a very considerably different light on the approach which the Courts and the Tribunals are required to adopt when it comes to making an application from out of country in order to regularise an otherwise unlawful presence in the United Kingdom. Particular reliance is placed on the words

> "if, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal."

15. In my judgment that passage does not operate as a wholly different approach to that which has previously been adopted in the cases *Chikwamba* and *Chen*. It does not say that there is no public interest in requiring someone to regularise their stay in the United Kingdom if they have entered the United Kingdom lawfully but have thereafter remained in the United Kingdom when they have had no leave. It will be a question of balance. It will be a question of proportionality as to whether or not it is appropriate in any particular case to require that individual to regularise his or her stay by making an application for entry clearance from abroad as she would have had to have done had she returned when her leave expired and then sought to re-enter the United Kingdom as a partner of a British citizen.

16. In the circumstances of this case if there is no substantial difference between the law as was stated and was applied for by the judge following the decisions in *Chen* and *Chikwamba* then the fact that the judge inadvertently was unable to refer to the guidance which is provided in *Agyarko* makes no difference. It is only, in my judgment, if the decision of the Supreme Court has altered the application of principles in cases such as these that the judge would have erred. If one considers the determination it is clear that he was considering whether it would be proportionate to require the appellant to leave the United Kingdom and apply for entry clearance. The decision as he recorded in paragraph 48 was that following *Chen* he decided that it would not be disproportionate to require the appellant to return to Guyana to apply for entry clearance as an unmarried partner or spouse.

17. It is, in my judgment, a material consideration to say that the case was not argued on whether the appellant met all the requirements for entry clearance as a partner. That was not the approach that was adopted. Rather, it was said that those requirements were met. The case has been argued before me on the basis that the requirements of the Rules would be met and that may well be the case but there is, in my judgment, a difference between making a prognostication about whether the Rules would be met and a consideration by the Entry Clearance Officer that those Rules were met at the material time.

18. The background to this case is that at the time the application was made the appellant did not have entry clearance or leave to remain in the United Kingdom and was an overstayer. In those circumstances it is not unreasonable for the appellant to be put to the test and to establish the requirements of the Immigration Rules. Bearing in mind the fact that the appellant no longer had leave to remain in the United Kingdom, whilst it may be that in most cases the requirements are likely to be met we cannot say with any particular certainty whether those requirements are met because that was not the basis upon which the case was considered or argued.

19. It has been suggested by Mr Georget on the part of the appellant that the decision that has now been made in *Agyarko* makes a substantial difference to the case-law that has previously been applied and in particular he relies on the passage to which I have referred in paragraph 51 that where it is certain that the appellant is to be granted leave to enter if an application were made from outside the UK there might be no public interest in his or her removal. That may be the case but that would be depending upon a consideration of all the circumstances taken together. That includes a consideration of the circumstances in which the appellant came to be in the United Kingdom unlawfully, the period of time that she has been in the United Kingdom unlawfully and the public interest which arises from ensuring that those who are here unlawfully satisfy the requirements of the Immigration Rules. There may well be cases, even where somebody is in the United Kingdom unlawfully, where there is no public interest in his or her removal but that is a matter which is essentially a matter for the judge to determine and that is not any different from the position which was adopted by the judge in this particular case.

20. If one looks at the consideration of proportionality the judge was looking at all of the factors which might be said to be in favour of the appellant being granted leave to remain without formally meeting the requirements of an application for entry clearance made out of country but was also considering her immigration history. He considered at some length the position of her partner. His medical health was considered at some length. He has got three children and five grandchildren. He was anticipating a sixth. His links are well and truly within the United Kingdom. He has very adequate means. He described his income and he described his health condition. The judge took into account his past ill health. It was indeed a factor to which he attached some weight. He is currently in remission and has regular check-ups that occur every four months. That is something that would be unaffected were he to remain in the United Kingdom whilst his partner returned to Guyana to make an application for entry clearance. Accordingly, whilst there are very obvious reasons why he may not wish to settle in Guyana, nevertheless those reasons do not apply and what one is considering is the appellant regularising her stay by making an out of country application for entry clearance.

21. Mr Georget on behalf of the appellant sought to draw a distinction between the law as it stood and as it was applied by the judge following *Chikwamba* and *Chen* and submit that there was a considerable change since the decision of the Supreme Court in *Agyarko*. In my judgment, that difference is not as he submitted it to be. It will always a matter of whether it is proportionate to require a person to make an application from out of country. That will depend upon a consideration of all of the circumstances. Of those circumstances as identified by the judge some were in favour of the application succeeding on the basis that the application for entry clearance was likely to succeed but the other considerations were the immigration history of the appellant and whether or not she should reasonably be required to satisfy an Entry Clearance Officer by returning to make the appropriate application.

22. He recited the circumstances in paragraph 47. The relationship between the appellant and her partner had commenced when the appellant's status was not just precarious but was unlawful. No evidence had been provided as to the likely time that an entry clearance application in Guyana would take place. Indeed, the appellant had not made any of those enquiries. There was nothing to suggest that it would take an excessively long time, certainly not so long as to render it impossible for the appellant to support herself whilst there or for the sponsor to be with her. It is accepted that she had no accommodation there. That is not entirely surprising since she has not lived there for many years. The issue of her short-term safety was not vigorously pursued and there was nothing to suggest that she would be at risk by returning to the country of her origin and regularising her stay by making an out of country application.

23. That would then require the more detailed consideration of the requirements of Appendix FM and the basis upon which she would be entitled to seek entry clearance. The sponsor's health, his contract-based work and his family obligations were all taken into account by the judge but that did not prevent him accompanying her to Guyana if he wished to do so but at the same time the couple had sufficient means for the appellant to travel to Guyana and to make the appropriate application. In those circumstances I do not consider that the judge, even inadvertently, being of course unaware of the decision of *Agyarko*, would have reached a different conclusion. At all stages in the determination he was considering whether it was proportionate to return the appellant and indeed in paragraph 48 of his determination he expressly makes a finding that it would not be disproportionate to require the appellant to return to Guyana to apply for entry clearance as an unmarried partner or spouse even though on his findings such an application was likely to succeed.

24. In those circumstances I do not consider that the judge made an error of law, even inadvertently, or that the decision relied upon by the appellant in the form of the decision in *Agyarko* makes such a difference to the judge's reasoning that had he applied *Agyarko* properly he would have come to the conclusion that the application had to be allowed on the basis

that there was no public interest in her removal. In my judgment, there was no error of law.

DECISION

The First-tier Tribunal Judge made no error of law and the determination of the appellant's appeal shall stand.

No anonymity direction is made.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL