Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16857/2019

THE IMMIGRATION ACTS

On the papers	**Decision & Reasons Promulgated**
On 28 September 2020	**On 1 October 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

CHUN HONG IP
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Mace ('the Judge') promulgated on the 18 February 2020 in which the Judge dismissed his appeal on human rights grounds.

2. Permission to appeal was granted by another judge of the First-tier Tribunal; the operative part of which reads:

> "I am satisfied that there is an arguable error of law in this decision in that the Judge did not consider the guidance in the judgement in Agyarko [2017] UKSC 11 as to whether it was reasonable for the Appellant to leave the United Kingdom to apply for leave to enter from abroad".

3. Following the grant of permission directions were sent to the parties indicating a provisional view reached by the Upper Tribunal that the question of whether the Judge had made an error of law material to the decision to dismiss the appeal could be determined without a

hearing, inviting the parties to set out their views upon this proposal, and providing a structure in which further written submissions could be made in support of their respective cases. The time for complying with such directions and the provision of additional written submissions has passed. All submissions received have been considered.

4. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.

5. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.

6. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

> 34.—
> (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
> (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
> (4) Paragraph (3) does not affect the power of the Upper Tribunal to—
>
> (a) strike out a party's case, pursuant to rule 8(1)(b) or 8(2);
> (b) consent to withdrawal, pursuant to rule 17;
> (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
> (d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.

7. The grounds on which the appellant sought permission to appeal assert the Judge erred in law in his application of the decisions in Chen and Chikwamba, in not considering Agyarko, in not considering the respondents Long Residence Guidance, erred in relation to the public interest in the proportionality assessment, erred by not making a reasoned calculation of the days the appellant could have discounted towards the 18 months or correct number of days required for ILR, and erred in law when considering section 117B for the reasons set out in the application for permission to appeal.

8. The reasons it is claimed the Judge erred do not establish the existence of novel, difficult, or complex points of law that could only be properly considered by receiving oral evidence. Ample opportunity has been provided for written submissions to be made and it is not established, in a case where both parties are legally represented, that

the interests of justice or the overriding objectives can only be met if an oral hearing takes place.

9. It has not been shown to be inappropriate or unfair to exercise the discretion provided in Rule 34 by enabling the error of law question to be determined on the papers. Nothing has been made out that makes consideration of the issues on the papers not in accordance with overriding objectives at this stage considering the Covid-19 pandemic and resultant arrangements made within the Upper Tribunal.

Background

10. The appellant entered the United Kingdom lawfully on 2 September 2009 as a student. The appellant's immigration history shows further leave being granted in September 2011, July 2014, September 2015, March 2017, and January 2019. The application for indefinite leave to remain, based on long residence, was made on 20 September 2019. The Judge notes it was not disputed that the appellant had lawful leave to remain in the United Kingdom except for the period between 27 January 2017 and 4 February 2017 when he left United Kingdom without leave to remain.

11. The Judge records a gap of eight days without lawful leave but also absences of 732 days from the United Kingdom during the relevant 10-year period. The respondent asserted in the reasons for refusal letter that such absences were for reasons that could not be classed as being exceptional, as required by the guidance.

12. Having considered the written and oral evidence the Judge sets out his findings of fact from [6] of the decision under challenge. The Judge specifically refers at [10] to a schedule prepared by the appellant which shows that he had calculated that 226 of the days he had been absent from the United Kingdom were for medical trips and what he classed as "natural disasters", leaving 503 absents which was permitted under paragraph 276B of the Immigration Rules. The Judge analyses the appellant's assertions in relation to the periods of absence but concludes that [16]:

> 16. I am not satisfied that the appellant has demonstrated 10 years continuous lawful residence in the UK. The Home Office guidance on long residence, October 2019, states that where time spent outside the UK is for more than 18 months in total it may be appropriate to exercise discretion over excess absences where compelling or compassionate circumstances exist, for example where the appellant was prevented from returning to the UK through unavoidable circumstances. That would certainly apply to the delay in the appellant re returning due to the delay in the volcanic ash cloud. However I do not consider that would cover the appellant's absences in excess of 18 months for the reasons given above.

13. The Judge then went on to examine the appellant's claim outside the Immigration Rules setting out the evidence provided, and submissions made, including references to section 117 of the 2002 Act. The Judge specifically records being invited to consider the decision in Chikwamba which he does by reference to the later decision of Chen,

at [22]. Having considered the evidence and submissions the Judge sets out his conclusions in relation to the article 8 claim at [23] in the following terms:

> 23. The appellant has made a number of applications for leave from Hong Kong on previous occasions and he gave evidence at the hearing that in general it had taken on average a period of approximately two weeks for those applications to be considered and granted. I accept that the application he would make were he to return and apply for leave to enter as a partner would be in a different category to the applications he had made before. However, I find it reasonable to consider that any such application would be dealt with in a similarly timely manner. Therefore, any separation between the appellant and his partner would be relatively short. Further, the appellant's partner gave evidence that she is entitled to annual leave. While that leave is limited and the dates have to be fixed some considerable time in advance, Miss Wing gave evidence at the hearing that she has periods of leave booked over the forthcoming few months. She also stated that she has not as yet made any particular plans for those periods of her leave. I consider it entirely reasonable that she could return to Hong Kong with the appellant during at least part of the time he would be required to remain there while his application for leave was being considered. That would limit the disruption to their relationship and their private lives. On that basis I do not consider that the appellant has shown that his Article 8 rights would be interfered with disproportionately by him being required to leave the UK for a limited amount of time in order to make an application to re-enter the UK where he can then resume his private life with his partner and seek the employment he wishes to take up in this country. The decision does not constitute a disproportionate interference with the rights of the appellant under Article 8.

Error of law

14. The appellant asserts the Judge erred as the principles set down in Chikwamba and Chen also applied for the benefit of an application made outside the Rules. It is also asserted the Judge erred as R-LTRP.1.1.(e), the 5-year route, does not require an individual who cannot otherwise meet the requirement to demonstrate they can overcome paragraph EX.1. The appellant asserted that the requirements of the 5-year Partner Route were met save the Judge requiring that an application should be made from outside the UK. The appellant is said to be able to meet the requirements for entry clearance under EC-P Appendix FM. The appellant asserts that the principles in Chikwamba and Chen have moved on referring to the decision of the Supreme Court in Agyarko. The Judge is also criticised by the appellant for not identifying what 'good purpose' will be required by the appellant having to return to Hong Kong to make an application for entry clearance which was said to be a mandatory requirement when assessing the proportionality of the decision. The alleged error is that the judge did not identify the particular facet of the public interest that will be served by requiring the appellant to leave the United Kingdom to make an application for entry clearance.

15. Whilst acknowledging that the Judge was satisfied that any interference will be for a short period, he is further criticised for not addressing what 'good purpose' was to be served by even such

limited interference in light of the facts of this case. The grounds argue, in the alternative, that in the circumstances any separation would amount to a disproportionate interference when balanced against a need for maintaining an effective system of immigration control.

16. The appellant also argues the Judge erred in relation to section 117B as his partner is a 'qualifying partner' as she is a British citizen and that the Judge considers precariousness at [19] contrary to the required public interest consideration in section 117B(4) which, had the Judge done so, should have led to the Judge concluding that the public interest requirement was supportive of the Chikwamba principles or as part of a stand-alone test did not require the appellant to leave the United Kingdom.

17. It also claims the Judge did not provide a reasoned calculation of the figure that could be discounted from the appellant's absences from the United Kingdom for medical treatment.

18. The principles outlined in Chikwamba and Chen are relevant in a case such as this where the matter under consideration is the proportionality of the respondent's decision and, I find, were properly taken into consideration by the Judge. The Judge was required to carry out a balancing exercise to decide whether the proposed interference is proportionate, with due weight being given to the strength of public interest in removal – see R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11. I find this is the Judge undertook.

19. In Agyarko previous House of Lords decisions such as Chikwamba and EB (Kosovo) were upheld. Although Lord Reed explained that the weight to be given to precarious family life will increase in cases where a spouse would qualify for leave to enter if they made an application from outside the UK or where family life develops during a protracted delay in enforcing immigration control, and added a further category of persons to whom a "less stringent approach" to precariousness might be appropriate, there is arguable merit in the respondent's submission that the Supreme Court did not introduce a legal test of 'good purpose' or 'useful purpose' requiring the respondent to demonstrate in order to rebut some kind of presumption that the appellant will succeed by reference to Chikwamba. I do not find it made out that the basis of challenge relied upon by the appellant, categorised as a 'good purpose' or 'useful purpose' test has been shown to exist in law.

20. It is also the case that the decision in Chen referred to Chikwamba and it is not made out the Judge erred in law in considering that reported decision of the Upper Tribunal.

21. The Judge noted that the appellant may be highly likely to succeed if an application for re-entry was made from Hong Kong and in Agyarko [2017] UKSC 10 Lord Reed said again that if 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. The bare assertion in the grounds that a short period of separation would

itself make the need for the appellant return disproportionate does not establish arguable legal error. The obligation upon the Judge was to weigh up and consider the competing interests relied upon by the Secretary of State and the appellant opposing removal and to assess whether an interference and an accepted right was proportionate. Such an assessment is fact specific. It is not made out there was sufficient evidence before the Judge to show that an application or entry clearance 'was otherwise certain' to succeed if made. The language used by the Judge is very specific 'likely to succeed' not 'certain to succeed'.

22. The previous Senior President of Tribunals in TZ (Pakistan) and PG (India) v Secretary of State for the Home Department [2018] EWCA Civ 1109, recalled Lord Reed's point that when undertaking an article 8 evaluation outside the rules, in striking a proportionality balance a tribunal must take the executive's policy into account and attach substantial weight to it "at a general level". The court held that a tribunal's determination on a decision that is within the rules might not involve the consideration of an article 8 element because other aspects of the rules might not be satisfied, meaning that the appellant could not come within the rules. On the other hand, in cases where article 8 is engaged and consideration outside the rules is due the tribunal should consider the insurmountable obstacles test within the rules before considering the exceptional circumstances test outside the rules. The tribunal's evaluation of whether there were insurmountable obstacles would be relevant to the question of exceptional circumstances.

23. In general, the key issue will be whether the strength of the article 8 claim and the related positive obligation on the state to permit the applicant to remain in the UK outweigh the strength of the public policy in immigration control in any given case. Razgar [2004] UKHL 27 does not displace "the need to undertake this critical balance."

24. That is the exercise carried out by the Judge. It is not made out that there were any insurmountable obstacles or exceptional circumstances preventing the appellant returning to Hong Kong to make the application. The material relied upon by the appellant failed to establish that any temporary interference whilst an application was made would make removal disproportionate.

25. The Judge as part of the assessment process clearly considered section 117 of the 2002 Act. The Judge is criticised by the appellant for not considering this at [19] of the decision under challenge but this is the paragraph of the determination in which the Judge considers the question of whether there were very significant obstacle to reintegration into Hong Kong pursuant to paragraph 276ADE of the Rules. There is no merit in the challenge to the Judge's analysis of this element of the case.

26. It is not made out that the Judge has erred in law in a manner material to the decision in finding the appellant was unable to meet the requirements of the Immigration Rules to enable him to succeed in-country under Appendix FM or the long residence provision. The

analysis of the periods of absence from the United Kingdom and reasons why the appellant could not satisfy the relevant period of continuous lawful residence are fully reasoned enabling the reader of the decision to understand why the Judge came to the conclusion he did. The inability of a person to satisfy the requirements of the Immigration Rules is relevant to assessing the proportionality of any interference.

27. There is merit in the Secretary of State's response that as any interference is likely to be for a short period of time it would not amount to a significant interference sufficient to warrant a reduction in the weight to be given to the public interest in immigration control.

28. The assertion the Judge failed to consider the respondent policy guidance on long residence fails to specify any aspect of that guidance that would have made a material difference to the decision under challenge and fails to acknowledge the fact that at [16] the Judge made specific reference to such guidance which was clearly taken into account.

29. Whilst the appellant disagrees with the Judge's decision and considers that a requirement for him to return to Hong Kong to make an application to enable him to re-enter the United Kingdom lawfully is not warranted and not proportionate, the grounds fail to establish arguable legal error material to the Judge's decision to the contrary. The Judge clearly considered the competing arguments and makes findings supported by adequate reasons that have not been shown to be outside the range of those reasonably open to the Judge on the evidence. The Judge undertook the 'balance sheet exercise' of assessing the points relied upon by the appellant and those relied upon by the Secretary of State before concluding that the respondent had established that any interference was proportionate to the legitimate aim of immigration control. As noted above that is a fact specific assessment.

30. It is not made out the Judges erred in law in a manner material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

31. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

32. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed.....
Upper Tribunal Judge Hanson

Dated the 28 September 2020