Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24070/2018

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 23 May 2019	**On 14 June 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

SAMJHANA SUNUWAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Brown, Solicitor, Drummond Miller (Edinburgh)
For the Respondent: Mr A Govan, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, who is a national of Nepal, has been granted permission to appeal the decision of First-tier Tribunal Judge Doyle. For reasons given in his decision dated 16 January 2019 the judge dismissed the appellant's appeal on human rights grounds against the Secretary of State's decision dated 12 November 2018 refusing her further leave to remain in the United Kingdom.

2. The appellant had arrived on a Tier 4 visa in the United Kingdom on 4 April 2010 with leave until 29 May 2012. That leave was curtailed on 21 October 2011. Between

2012 and 2017 the appellant made a number of applications for leave to remain. None gave rise to a right of appeal until the most recent dated 22 February 2017. This application was based on her relationship with Andrew Chalk, a British citizen. It was rejected by the respondent under the Immigration Rules as the couple had not been living together in a relationship akin to marriage or civil partnership for at least two years prior to the date of application and, in respect of the appellant's private life, it was not accepted there would be very significant obstacles to her integration into Nepal. It was considered that there were no exceptional circumstances. In particular the appellant had failed to provide any evidence to show that she was "very close" to her partner's children. In the context of their best interests, the appellant did not have parental responsibility for them as they resided in the United Kingdom with their biological parents. Judge Doyle made findings of fact that led him to conclude that the appellant could not meet the definition of a 'partner' contained in paragraph GEN 1.2 although she met the other requirements of the Immigration Rules.

3. In respect of EX.1, the judge observed at paragraph 11(d) to (j):

> "(d) The appellant meets the other requirements of the immigration rules. It is an eligibility requirement that the appellant cannot meet so I move on to consider paragraph EX.1. Are there are (sic) insurmountable obstacles to family life continuing outside the UK.
>
> (e) It is argued that the insurmountable obstacles are that Mr Chalk cannot turn his back on his eight-year old child (nor his 20-year old). He has well-paid employment in the UK and has financial commitments to support both of his children. He enjoys contact with his children. It is argued that he would be faced with the choice of turning his back on his children are moving to Nepal (sic), or ending his relationship with the appellant. It is also argued that the appellant has a familial relationship with Mr Chalk's 8-year old child because she provides childcare during contact periods.
>
> (f) Those argument is wholly undermined by the oral evidence of the appellant and Mr Chalk. Mr Chalk candidly admitted that if the appellant returns to Nepal she will immediately submit an application for entry clearance which he will sponsor. Because of the passage of time, the appellant & Mr Chalk have now lived together for more than three years. The respondent's decision is that the remaining parts of the immigration rules are met. The appellant can submit an application which has a realistic chance of success.
>
> (g) The appellant has not had the right to be in the UK since 2011. The current application was submitted as an over stayer. Put simply, the application fails because it is premature. The passage of time has cured that. The weight of reliable evidence indicates that the financial requirements are still met and that the relationship requirements can now be met. The appellant can once again submit an application, even though she is an over stayer. This time the application has a realistic prospect of success.
>
> (h) The fact that the appellant has two options which could lead to a grant of limited leave to remain in the UK indicates that family life can continue. There are therefore no insurmountable obstacles to family life continuing.

(i) Applying exactly the same reasoning, I find that the respondent's decision does not have unduly harsh consequences because it does not lead to final separation between the appellant and Mr Chalk, and does not bring the contact Mr Chalk has to his child to an end. Today, the appellant cannot meet the immigration rules because I have to look at the date cohabitation commenced and the date the application was submitted and measure the time that passes between those two dates.

(j) The appellant is a citizen of Nepal who lived there until she was 20 years of age. She spent the majority of her life in Nepal. She is familiar with the customs and traditions of Nepal and the language of Nepal. Because of her age and the length of time the appellant has been in the UK the appellant cannot meet the requirements of paragraph 276 ADE(1) (i) to (v) of the immigration rules. There is no reliable evidence before me of very significant obstacles to integration. The appellant cannot meet the requirements of the immigration rules."

4. Outside the rules, the judge found that family life within the meaning of Article 8 did not exist between the appellant and her partner's young child due to limited contact and that the Secretary of State's decision was not a disproportionate breach of respect for family life as it would not bring that to an end. The public interest outweighed the appellant's desire to have the Immigration Rules "waived to one side so that she can pursue her relationship with Mr Chalk".

5. As to the delay of 21 months between the date of application and the date of decision, the judge concluded at paragraph 14(j):

> "(j) In this case there has not been any unreasonable delay. The appellant applied prematurely after living illegally in the UK for years. Her relationship with Mr Chalk was established before she told him that she had no right to remain in the UK. No reliable evidence of the impact of any delay on the appellant is placed before me. In submissions, the appellant's solicitor said little more than 21 months is a long time."

before concluding at paragraph 14(K):

> "(k) After considering all of the evidence I still do not know enough about the appellant's home, her habits and activities of daily living, her significant friendships, any integration into UK society, or any contribution to her local community. There is no reliable evidence of the component parts of private life within the meaning of article 8 of the 1950 convention before me. The appellant fails to establish that she had created article 8 private life within the UK."

6. Permission to appeal was granted by First-tier Tribunal Judge Rai on the basis that it was arguable that "…the judge had erred in the overall proportionality assessment having found the Immigration Rules were met at the date of hearing" … with reference to the decision of the Supreme Court in *Agyarko v SSHD* [2017] UKSC 11. The judge considered the point made in that case was that it was clear there is no public interest if it is certain that an application is likely to succeed if made from abroad.

7. The hearing began with a discussion of the relevant Immigration Rules with reference to a partner application and an analysis of the suitability and eligibility requirements with a view to establishing why it was the judge had considered the case under Appendix FM EX.1. and to establishing the factors which were inhibiting the grant of leave.

8. A partner is defined in GEN.1.2. of Appendix FM, and relevant to the issue in this appeal (as the couple are neither married nor in a civil partnership):

> "**GEN.1.2.** For the purposes of this Appendix "partner" means -
>
> (i) …
>
> (ii) …
>
> (iii) …
>
> (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix."

9. In relation to an application for entry clearance as a partner the relevant provisions of Section EC-P are as follows:

> "**EC-P.1.1.** The requirements to be met for entry clearance as a partner are that -
>
> (a) the applicant must be outside the UK;
>
> (b) the applicant must have made a valid application for entry clearance as a partner;
>
> (c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability –entry clearance; and
>
> (d) the applicant must meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner."

10. As to in-country applications, the requirements for limited leave are at Section R-LTRP: Requirements for limited leave to remain as a partner, as follows:

> "**R-LTRP.1.1.** The requirements to be met for limited leave to remain as a partner are-
>
> (a) the applicant and their partner must be in the UK;
>
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
>
> (c)
>
> (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
>
> (ii) the applicant must meet all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; or

(d)

(i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1-2.2.; and

(iii) paragraph EX.1. applies."

11. It is unnecessary to consider the suitability requirements as the respondent made clear in the refusal letter that the application did not fall for refusal on any of the grounds under paragraph S-LTR of Appendix FM. For the purposes of this appeal, and the issues that are engaged, there is no material difference between the suitability requirements for an entry clearance application and an in-country application.

12. Relevant to the issues in this appeal, the material differences between the eligibility requirements for an in-country application as opposed to an entry clearance application are as follows. For in-county applications the 'Immigration Status Requirements' are:

"**E-LTRP.2.1.** The applicant must not be in the UK -

(a) as a visitor; or

(b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings.

E-LTRP.2.2. The applicant must not be in the UK -

(a) …

(b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph EX.1. applies."

13. Paragraph EX provides exceptions to certain of the eligibility requirements for leave to remain as a partner or parent and, relevant to the issue in this appeal:

"**EX.1.** This paragraph applies if

(a) …

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

14. In entry clearance applications, the rules provide in paragraph 320(7B) for circumstances where entry clearance or leave to enter is to be refused based on *inter*

alia overstaying. Paragraph A320 dis-applies this provision for applications to enter or remain as a Family Member.

15. Paragraph 320(11) under the heading 'Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused' provides:

> (11) Where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:
>
> (i) overstaying; or
>
> …
>
> and there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process."

16. Mr Brown and Mr Govan accepted that as the appellant did not come within the definition of a "partner" she was unable to avail herself of the provisions in EX. Judge Doyle considered this provision nevertheless and found that there were no insurmountable obstacles to family life continuing based on a new in-country application being made or, in the alternative, from abroad.

17. It will be seen from the extracts cited above that a history of overstaying for an in-country partner application is captured by E-LTRP. It follows that even if the appellant had, at the time of application, been able to demonstrate the necessary period of time to come within the definition of a partner, she did not meet the eligibility immigration status requirements set out above.

18. Pausing there for the moment, even if the applicant were to now reapply in-country as contemplated by Judge Doyle, it is difficult to see why he considered that, apart from the two year requirement, the rules were met due to the difficulties caused by the appellant's overstaying. She would need to rely on paragraph EX and persuade the respondent that there were insurmountable obstacles to the relationship continuing **abroad** (being the actual test rather than basis considered by Judge Doyle). Mr Govan observed at the outset of the hearing that there was uncertainty for any in-country application in the light of the appellant's immigration history.

19. Were the appellant to apply from abroad, she would need to show that her overstaying did not fall within 320(11). Mr Brown argued with some force that with the appellant having met by the hearing time period for a partner application, absent any deficit in the suitability requirements, the judge was tasked with making the decision whether the decision was compatible with the Human Rights Act in the absence of an application to the Secretary of State. Were the appellant to have to apply from abroad, he contended the only issue she had to meet was under paragraph 320(11). Mr Govan accepted that there is a need to show more than overstaying in relation to this provision. Mr Brown referred to *Chikwamba v SSHD* [2008] UKHL 40 in support of his argument that the public interest would not require

a party to apply for entry clearance in a case such as this. As to whether this was a very clear case, Mr Brown responded that despite the unlawful presence, there were no aggravating factors. By way of response Mr Govan maintained that an assessment would need to be made nevertheless and the Secretary of State's position was that this was not a totally clear case. Mr Brown maintained that the judge had erred by failing to apply *Chikwamba* and had he done so it would have affected his assessment of the public interest.

20. I drew the parties' attention to the recent consideration by the Court of Appeal of the *Chikwamba* principle in *SSHD v R (on the application of Kaur)* [2018] EWCA Civ 1423, in particular the observations of Holroyde LJ at [41] to [45] as the basis for my enquiry whether this was a very clear case. The final paragraph of that passage explains:

> "41. In *Chikwamba*, the SSHD's policy, as recorded in her Asylum Policy Instruction, Consideration of Article 8 Family Life Claims, was that in cases where there was a procedural requirement under the Rules requiring a person to leave the UK and make an application for entry clearance from outside the UK, such a person should return home and make an application for entry clearance from there:
>
> > "In such a case, any interference would only be considered temporary (and therefore more likely to be proportionate). A person who claims that he will not qualify for entry clearance under the rules is not in any better position than a person who does qualify under the rules - he is still expected to apply for entry clearance in the usual way, as the entry clearance officer will consider article 8 claims in addition to applications under the rules."
>
> 42. Lord Brown, with whom the other Law Lords agreed, accepted that it would in some cases be reasonable and proportionate to follow that policy. He went on, however, to say at paragraph 44:
>
> > "I am far from suggesting that the Secretary of State *should* routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."
>
> Mrs Kaur understandably relies on that statement.
>
> 43. It must however be noted that the facts in *Chikwamba* were striking. The claimant was a Zimbabwean national. In June 2002 her asylum claim and leave to enter were refused. Her removal was however suspended because of deteriorating conditions in Zimbabwe. She then married a Zimbabwean man who had earlier been granted asylum in this country, and in April 2004 a daughter was born to them. In November 2004 the bar on forced removals to Zimbabwe was lifted. The claimant appealed against the Secretary of State's refusal of her claim that removal to Zimbabwe would breach her Article 8 right to respect for her family life. The issue was whether she should be required to return to Zimbabwe in order to apply from there for permission to rejoin her husband. It was accepted that he could not return to Zimbabwe. It was found by the adjudicator that

conditions in Zimbabwe would be "harsh and unpalatable". The facts were such that the claimant would have "every prospect of succeeding" if she made an application from Zimbabwe for permission to re-enter and remain in this country. However, if the claimant had to return to Zimbabwe her child would either have to face those unpalatable conditions for a time, or be separated from her mother. In those circumstances, Lord Brown said at paragraph 46:

> "is it really to be said that effective immigration control requires that the claimant and her child must first travel back (perhaps at the taxpayers' expense) to Zimbabwe, a country to which the enforced return of failed asylum seekers remained suspended for more than two years after the claimant's marriage and where conditions are 'harsh and unpalatable', and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the United Kingdom to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer."

44. I note that in *Hayat v SSHD [2011] UKUT 444 (IAC)*, Upper Tribunal (Lord Menzies and UT Judge PR Lane, as he then was) said:

> "23 The significance of Chikwamba, however, is to make plain that, where the only matter weighing on the respondent's side of the balance is the public policy of requiring a person to apply under the rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance.
>
> 24 Viewed correctly, the Chikwamba principle does not, accordingly, automatically trump anything on the State's side, such as a poor immigration history. Conversely, the principle cannot be simply "switched off" on mechanistic grounds, such as because children are not involved, or that (as here) the appellant is not seeking to remain with a spouse who is settled in the United Kingdom."

With every respect to the Upper Tribunal, I do not think that Lord Brown's words in *Chikwamba* justify the inclusion of the word "usually" in paragraph 23 of their decision.

45. I have quoted in paragraph 26 above the passage in which Lord Reed (at paragraph 51 of his judgment in *Agyarko*) referred to *Chikwamba*. It is relevant to note that he there spoke of an applicant who was "certain to be granted leave to enter" if an application were made from outside the UK, and said that in such a case there *might* be no public interest in removing the applicant. That, in my view, is a clear indication that the *Chikwamba* principle will require a fact-specific assessment in each case, will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain."

21. The grounds of challenge by the appellant are threefold although Mr Brown indicated he did not pursue the third which related to the appellant's private life. They are in summary:

(1) The judge had erred by dismissing the appeal on the basis of the relationship in terms of cohabitation at the date of application and failed therefore to consider the case with reference to Section 85(4) of the 2002 Act. Proper consideration would have dealt with the only reason for dismissing an appeal which was that the application was premature.

(2) Had the judge properly considered Article 8, with reference to the decision of the Supreme Court in *Agyarko v SSHD* [2107] UKSC 11, although having referred to the principle established, the judge had failed to weigh *Chikwamba* as a relevant factor in the proportionality assessment.

(3) The appellant's history constituted a very significant private life and the conclusion that there was no private life in the UK was erroneous.

22. It seems to me that grounds 1 and 2 may be taken together since they both challenge the judge's approach to Article 8. The judge referred to *R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality IJR)* [2015] UKUT 00189 (IAC) and *Chikwamba* itself. He cited the headnote from *Chen*. He also correctly referred to Section 117B of the 2002 Act and explained that immigration control was in the public interest so that he must attach little weight to the appellant's family life. It is correct that he did not specifically ask the question whether, having directed himself as to the principle in *Chikwamba,* the public interest in requiring the appellant to apply for entry clearance from abroad was diminished by virtue of any ability of the appellant to meet the requirements of the rules.

23. In my judgment, had the judge applied the principles in *Chikwamba,* he could not, on the facts, have come to a conclusion that it was a very clear case in the light of the overstaying by the appellant since 2011 by reference to the impact of E-LTRP.2.2. or paragraph 320(11). Whilst neither represented an insuperable hurdle, despite the suitability and the eligibility (as to finance and the length of the relationship) requirements being met, the outcome was not a certainty. The public interest in maintaining immigration control remains a factor of some force in the Article 8 assessment. Although Mr Govan accepted that more than overstaying was required for paragraph 320(11) to bite, his position was that an assessment would need to be made and he was not willing to concede the matter. It is for the Entry Clearance Officer to decide whether the appellant's immigration history which will include the nature of the applications that she made after curtailment of her leave (and the reasons for that curtailment) triggered 320(11). It may be an aspect that the appellant will be able to satisfactorily address but the result cannot be considered clear cut.

24. Drawing these matters together, although Mr Brown eloquently argued the appellant's case, on careful examination, her immigration history remains a significant factor. He acknowledged that the ground of challenge was essentially a failure to apply the principles in *Chikwamba*. In my judgment, had the judge done so, the result would have been the same. Accordingly, I conclude that although the judge erred in not applying the *Chikwamba* principle to his Article 8 proportionality assessment, such an error, if corrected, could have only resulted in the appeal being dismissed on the evidence and findings reached.

NOTICE OF DECISION

This appeal is dismissed.

No anonymity direction is made.

Signed Date 11 June 2019

UTJ Dawson

Upper Tribunal Judge Dawson