Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11203/2016

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 10th January 2018	**On 31st January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

MR DALE MCINTIER
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Winter, Advocate, instructed by EMLC
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal Green dismissing an appeal on human rights grounds.

2. The appellant is a US citizen aged sixty-two. He entered the UK as a visitor in April 2015. His wife, Sandra McIntier, is a British citizen. The couple lived together in the USA for some years. The appellant's wife became ill and, being dissatisfied with the

medical treatment she received in the USA, returned to the UK for treatment.

3. The Judge of the First-tier Tribunal accepted that the appellant's wife is significantly disabled. She has a variety of health and care needs and the appellant is her primary carer. The judge was not satisfied, however, that her care needs could not be met by someone else and, if necessary, that she would not be adequately cared for by the state. If the appellant were to return to the USA to apply for entry clearance the couple could stay in touch by telephone and social media.

4. The judge further found that the appellant receives a pension from the USA. He has a son there and an interest in a property. There were no very significant obstacles to his return even for an indefinite period.

5. The judge considered whether there were any exceptional circumstances which would render refusal of leave and removal a breach of Article 8. Temporary separation while the appellant obtained entry clearance would not be disproportionate, in terms of *Chikwamba* [2008] UKHL 40 and *Hayat* [2012] EWCA Civ 1054.

6. The application for permission to appeal addressed first the question of whether the appellant should be expected to return to the USA to obtain entry clearance. It was contended that the First-tier Tribunal had conflated the test of whether there was a sensible reason for requiring the appellant to return to the USA to apply for entry clearance with the test of whether there were very compelling reasons for the appellant to stay in the UK. It was not clear that the judge of the First-tier Tribunal had in mind the correct question. There was no sensible reason for the appellant to return as he met the relevant requirements of the Immigration Rules.

7. Secondly the application contended that in assessing the claim outwith the Rules the First-tier Tribunal failed to have proper regard to the evidence and reached findings which were not adequately supported in fact or law. The First-tier Tribunal found the impact on the appellant's family life were the appellant to leave the UK indefinitely would not be disproportionate. The Tribunal did not, however, set out what this impact would be and such a finding was not supported by the case law. Where the appellant was his wife's primary carer, family life could not be maintained by Skype, email and occasional visits. The question was raised of whether the appellant's wife could afford medical treatment.

8. Permission to appeal was granted on the basis that all the grounds were arguable.

Submissions

9. At the hearing Mr Winter addressed me on the circumstances of the appellant and his wife and drew my attention to the grounds of the application for permission to appeal. Mr Winter referred to paragraph 22 of the decision of the First-tier Tribunal. Here the judge stated that he had already set out the impact on family life of the appellant returning to the USA indefinitely. In fact the judge had not set out the impact of this. Even if he had done so, the appellant's wife would stay in the UK for medical treatment. Family life could not be maintained by electronic communications and occasional visits. The appellant was the primary carer for his wife. His wife's permanent residence in the USA had lapsed. She was in receipt of attendance allowance at the higher rate for help and supervision by both day and night. Her GP said she was not in a position to fly to the USA.

10. For the respondent Mr Matthews referred to paragraph 15 of the decision, where the judge looked at the intentions of the appellant and his wife and observed that they were not particularly reliable witnesses. This was relevant because the appellant entered as a visitor and attempted to switch to a partner, which was not allowed under the Immigration Rules. At paragraph 16 the judge correctly noted that paragraph EX.1 of Appendix FM of the Rules did not apply. At paragraph 17 the judge set out the medical evidence. At paragraph 18 the judge accepted that the appellant was his wife's primary carer but was not satisfied that her care needs could not be met by alternative means. The judge then proceeded to consider whether the appellant could return to the USA to apply for entry clearance or to carry on family life and found the appellant could do either. The judge considered the effect of separation on the appellant's wife's health needs.

11. Mr Matthews then turned to the case law on requiring a person to return to their country of origin to apply for entry clearance. The most recent case on this was *Chen* IJR [2015] UKUT 00189. This stated at paragraph 39 that an appellant would need to show significant interference with family life arising from the requirement to apply for entry clearance. This was the test applied by the judge. The judge took account of the public interest arising from the appellant having entered as a visitor. At paragraph 22 the judge found the public interest was not outweighed in the balancing exercise under Article 8. This finding could only have been made in the context of respect for

family life as set out in *Chen*. Mr Matthews pointed out that in terms of *Agyarko* [2017] UKSC 11 the public interest must be given appropriate weight and the test of compelling circumstances required to be considered through the terms of the Rules themselves. In this case there was a non-switching rule, although this was not necessarily the only aspect of the public interest to be considered. The judge found it was not disproportionate to expect the appellant to apply for entry clearance and there was also an issue of choice as to where the appellant and his wife would carry on family life. There was no error of law identified in the application for permission to appeal.

12. In response Mr Winter referred to *Rhappiah* [2016] EWCA Civ 803 as showing that the public interest could be outweighed by special or compelling circumstances. Here there was the medical condition of the appellant's wife and the appellant's role as her primary carer. Mr Winter further submitted that the decision in *Chen* did not alter the effect of *Chikwamba* or *Hayat*. The decision in *Chikwamba* was upheld in *Agyarko*. Mr Winter sought to rely also on *MA (Pakistan)* [2009] EWCA Civ 953. A disproportionate interference would arise given the level of care required by the appellant's wife. Mr Winter referred to his written submissions for the First-tier Tribunal in which it as pointed out that the appellant met all the requirements for entry clearance.

Discussion

13. I may interfere with the decision of the First-tier Tribunal only if the decision is based upon an error of law. As Mr Matthews pointed out, there are two aspects to the decision. The first is whether it would be disproportionate if the choice by the appellant and his wife to carry on family life in the UK were not to be respected. The second was whether it would be disproportionate to require the appellant to return to the USA to apply for entry clearance as a partner. In essence, even if it would be disproportionate to expect the couple to carry on their family life outwith the UK, the appeal would still not succeed if it would not be disproportionate to require an application for entry clearance. The effect of this is that if the Judge of the First -tier Tribunal was correct in expecting an application for entry clearance to be made then any error in relation to the proportionality of carrying on family lie outwith the UK would not necessarily be material.

14. With this point in mind it appears I should address first the judge's approach to the question of requiring the appellant to apply for entry clearance. The starting point for this question is still the decision of the House of Lords in *Chikwamba*, in which it

was acknowledged that it would not always be necessary and proportionate to expect a person who could not meet the Immigration Rules from within the UK to leave this country to apply for entry clearance from abroad. Mr Winter submitted that the test in *Chikwamaba* was not affected by the more recent decision in *Agyarko* and this is confirmed by the reference to *Chikwamba* at paragraph 51 of *Agyarko*.

15. In relation to how the *Chikwamba* principle is to be applied, Mr Matthews referred me, in particular, to paragraphs 36 and 39 of the decision in *Chen*. He submitted that in terms of paragraph 36 it was not necessary to show a sensible reason for requiring an application for entry clearance to be made. It was for the appellant to show that removal pursuant to the refusal of leave would breach Article 8. Paragraph 39 requires a person to show that there would be significant interference with family life arising from temporary removal to apply for entry clearance. In Mr Matthews' submission this was the test the Judge of the First-tier Tribunal applied in the present appeal.

16. The judge's reasoning on whether requiring the appellant to apply for entry clearance would constitute a disproportionate interference with family life is to be found at paragraph 22 of the decision. Here the judge initially emphasises the question of whether there is a "sensible reason" to require an application for entry clearance. As stated at paragraph 36 of *Chen*, to pose the question in these terms is a misunderstanding of the decision of the Court of Appeal in *Hayat*, to which the judge referred. Although the decision in *Chen* was before the judge, he does not appear to have had regard to it.

17. As paragraph 22 proceeds the judge appears to state two quite contradictory tests. He states on the one hand, supposedly in reliance on *Hayat*: "If the requirement to apply for entry clearance constitutes a disruption sufficient to engage Article 8, there will be a disproportionate interference unless there is a sensible reason for insisting on it."

18. Further on in the same paragraph the judge states: "Where Article 8 is engaged and there is no sensible reason for the disruption, the Article 8 claim should be determined on its substantive merits. I accept that there will be some hardship for the Appellant and his wife but I am not prepared to go so far, based on the evidence, this amounts to undue hardship and a very compelling reason for the Appellant's appeal to be allowed."

19. Thus the judge sets out in the same paragraph these two different tests, neither of which is correctly stated. On the first test, according to the judge, if Article 8 is engaged and there is

no sensible reason for requiring an application for entry clearance, both of which conditions the judge appears to accept are met, then on the judge's own reasoning the appeal should have been allowed. Instead of reaching a decision in these terms, however, the judge proceeded to expound a second test, stating there is in essence no difference between the test for requiring an application for entry clearance and the test for allowing an appeal under Article 8 where the question of making an application for entry clearance does not arise. If this were correct, then the decision in *Chikwamaba* would be irrelevant. The test would always be simply the normal balancing exercise under Article 8.

20. While in *Chen*, at paragraph 36, it was pointed out that it is a misreading of H*ayat* to look for a sensible reason why an application for entry clearance should be made, as pointed out at paragraph 39 it is open to an appellant to show that an application for entry clearance would be granted and that there would be significant interference with family life by temporary removal. This reduces the weight to be given to the formal requirement of obtaining entry clearance but it is still necessary to consider the individual circumstances of the case.

21. In this appeal I accept that at paragraph 22 the judge erred in law by failing to set out and apply correctly the *Chikwamba* test, as explained in subsequent cases, most notably *Chen*. As a result of this error the judge did not properly assess the proportionality of requiring an application for entry clearance to be made. The decision requires to be re-made on this point.

22. It is clear that if the proper approach is taken then requiring an application for entry clearance to be made would constitute a significant interference with family life. It does not appear to be disputed that an application for entry clearance would be expected to succeed – the suitability and eligibility requirements, including those relating to maintenance and accommodation being met. As far as family life is concerned the appellant and his wife are in a relationship of long-standing. This is not a case in which family life has been established in precarious circumstances. The couple lived together in the USA. By itself the existence of the relationship might not be sufficient for the appellant to succeed. There is, however, a further very significant factor. This is the high degree of disability suffered by the appellant's wife and the appellant's position as her principal carer. In this regard the judge observed that if necessary alternative care arrangements might be made but when making this observation the judge was not addressing the correct question. Indeed in making his findings the judge appears to have regarded the appellant as alternatively a carer or a

husband but rarely seems to have considered the impact of the appellant being both a husband and a carer.

23. The decision which should be made on the basis of *Chikwamba* and *Chen* is that in the circumstances of this appeal it would be a disproportionate interference with family life to require the appellant to leave the UK to apply for entry clearance. The extent and severity of the interference with family life arising from this outweighs the formal requirement of obtaining entry clearance.

24. I have not addressed in detail the other basis for the decision of the First-tier Tribunal, to the effect that in any event the appellant could return indefinitely to the USA without a disproportionate interference with family life under Article 8. Mr Winter submitted that the judge's findings in this regard were inadequate and, although it is not necessary for me to decide the point, I am inclined to agree. As Mr Winter pointed out, the judge states at paragraph 22 that he has set out the impact on the appellant's family life were he to leave the UK indefinitely. It is difficult, however, to ascertain where precisely in the decision this impact is set out. Furthermore, as I have already noted, the judge appeared reluctant to take into account the appellant's dual roles of both a husband and a carer. I am not satisfied that the judge's decision on carrying on family life in the USA is soundly based, although as the appeal is allowed under the *Chikwamba* principle it is not necessary for me to consider this issue in further depth. I may merely add that the parties appeared to be agreed that none of the provisions of s 117B of the Nationality, Immigration and Asylum Act 2002 weighed against the appellant, although of course acknowledging the significance of the public interest in s 117B(1).

Conclusions

25. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

26. I set aside the decision.

27. I re-make the decision by allowing the appeal.

Anonymity

I have not been asked to make a direction for anonymity and I see no reason of substance for so doing.

Fee award (N.B. This is not part of the decision.)

Although I am allowing the appeal the issues involved are of a degree of complexity such that I do not consider it appropriate to make a fee award.

Deputy Upper Tribunal Judge Deans 30th January 2018