UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: HU/11939/2016**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 25 January 2018	**On: 7 February 2018**

Before

Deputy Upper Tribunal Judge Mailer

Between

MR DILBAG SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: **Mr D Mold, counsel (instructed by MD UK Solicitors)**
For the Respondent: **Mr S Kotas, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge, promulgated on 25 October 2017, dismissing his appeal against the decision of the respondent to refuse to grant him leave to remain in the UK on the basis of his private life as an unmarried partner of a person present and settled in the UK.

2. On 22 November 2017, First-tier Tribunal Judge I V Boyes granted the appellant permission to appeal on the basis that the Judge erred in the proportionality assessment and failed to apply the Chikwamba principles correctly.

3. On behalf of the appellant, Mr Mold, who did not appear before the First-tier Tribunal, contended that the Judge's proportionality assessment was flawed. He adopted his grounds of appeal.

4. The Judge erred in the application of the Chikwamba principle. He noted that at [36] the Judge referred to the decision of the Supreme Court in Agyarko and Others v SSHD [2017] UKSC 11, and stated that paragraph [51] in Agyarko cannot be read in isolation but must instead be considered in the context of the overall assessment and guidance given in that decision.

5. She went on to state at [36] that she takes into account the decision in the case of R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – Temporary Separation – Proportionality) IJR [2015] UKUT 00189 (IAC) "as referred to in Aygarko" However as noted by Mr Mold, the decision in Chen was not referred to at all in Aygarko.

6. Mr Mold referred to [37] where the Judge stated that following Chen, it is apparent that proportionality assessment is fact specific and ultimately it is for the appellant to demonstrate that there would "be significant interference with family life by temporary removal." Mr Mold submitted that the reference to "significant" is a reference to the family life being sufficient to engage Article 8. That he submitted is supported by the reference in Chen to the case of R (Zhang) v SSHD [2013] EWHC 891 (Admin) which itself referred to R (Mdlovu) v SSHD [2008] EWHC 2089 which was a case where the engagement of Article 8 was found to be very tenuous.

7. The decision in Chen did not refer to "significant interference". It instead just referred to "interference". Paragraph [41] of Chen noted that the claimant had not placed before the respondent any evidence to show that her removal (if removal notionally took place consequent upon the refusal of leave to remain on the basis of Article 8) would interfere with any family life being enjoyed.

8. Mr Mold referred to the determination of the First-tier Judge at [8] where she noted that it was confirmed that no issue was taken by the respondent that the appellant and his partner were parties to a genuine and subsisting relationship. It was also acknowledged that the suitability, financial, language and accommodation requirements under Appendix FM were met.

9. He noted that the Judge accepted that the sponsor is presently undergoing a programme of IUI treatment [38]. She took into account that the sponsor's primary concern in respect of her husband seeking entry clearance from abroad is her fear that if her husband returned to India, the application process could take as long as

three to four years. The Judge found, however, that where there is reliable evidence that the appellant's application for entry clearance would likely succeed and having regard to the available data on processing times, that her concerns as to a protracted separation were without merit [38].

10. The Judge accordingly found at [39] that should the appellant return to India to regularise his status, any period of separation is likely to be a short one. She found that the sponsor's willingness "to agree" to a separation of a few months is indicative of her own recognition that a short, temporary separation would not amount to a significant interference with the family life enjoyed by her and the appellant.

11. Mr Mold referred to the decision of the Court of Appeal in SSHD v Treebhowan; Hayat v SSHD [2012] EWCA Civ 1054 at [30]. Lord Justice Elias was considering the proper scope and application of the decision of the House of Lords in Chikwamba v SSHD [2008] UKHL 40. In Treebhowan the appellant appealed against the decision of the Upper Tribunal which upheld the decision of the First-tier Tribunal that he had no right arising out of Article 8 to remain in the UK. In Hayat (Pakistan) the appellant was the secretary of state who challenged the conclusion of the Upper Tribunal that Hayat's Article 8 claim should be sustained.

12. Elias LJ referred to the decision in Chikwamba from paragraph [2] onwards. He summarised the principles applicable in Chikwamba and subsequent Court of Appeal decisions at [30]:

    (a) Where an applicant who does not have lawful entry clearance pursuant to an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.

    (b) Where Article 8 is engaged, it will be a disproportionate interference with the family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so;

    (c) Whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in Chikwamba. They will include the prospect of length and degree of disruption of family life and whether other members of the family are settled in the UK;

    (d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on the substantive merits, having had regard to all material factors, notwithstanding that the applicant has no lawful entry clearance;

    (e) It will be a very rare case where it is appropriate for the Court of Appeal, having concluded that the lower Tribunal has disproportionately interfered with

Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. Chikwamba was such an exceptional case. Logically, the Court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question;

(f) Nothing in Chikwamba was intended to alter the way the Court should approach the substantive Article 8 issue as laid down in such well known cases as Razgar and Huang;

(g) Although the cases do not say this in terms, in his judgment if the secretary of state has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise.

13. Mr Mold contended that [30 b-g] of Treebhowan applied.

14. He noted that in Hayat the appellant entered the UK as a student. Leave was extended. Before his leave expired he again applied for further leave to remain as the partner of a points based system migrant. The First-tier Tribunal found that unlike the appellant in Chikwamba, the appellant was not seeking leave to settle in the UK as a spouse. It found that the decision was proportionate and served a public end. The decision of the respondent was not sufficiently serious as to amount to a breach of the appellant's Article 8 rights.

15. In that case, the substantive application was for leave to remain in the UK for only a limited period. The Judge concluded that there was a good reason to reject the Article 8 claim and she identified the factors which dictated her conclusion. She did not unthinkingly apply a policy.

16. The Court of Appeal found that the Judge did not dismiss the Article 8 application simply on the formalistic basis that the application should be renewed from Pakistan because the rules should be obeyed. Elias LJ noted that the Judge focused on three matters which go to the substantive merits of an Article 8 claim and are also relevant to the question of whether it was in any event legitimate to require the applicant to make his application from Pakistan. Firstly, as persons only permitted to be temporarily in the UK, neither the applicant nor his wife had any legitimate expectation of a right to remain. Secondly, the family life could continue in Pakistan, although the wife would not wish to return. The third was that any period of separation would be short. In Chikwamba, Lord Brown identified the length and degree of family disruption as a factor which would be highly relevant to the question of whether it is proportionate to insist that the application be made from abroad.

17. Mr Mold noted that the sponsor is a UK citizen. The processing times would be as long as three months. He referred to the decision of the High Court in R (Zhang) supra at [80]. In that case, the Judge considered whether on the particular facts the

requirement under the rules to leave the country in order to apply for entry clearance was proportionate.

18. Mr Justice Turner concluded that it was not. The claimant's Article 8 rights were engaged and infringed. She was in a loving marriage. She had no real option but to endure separation from her new husband for about two months. She had an impeccable immigration record. Both she and her husband were likely to continue to make a valuable contribution to the economic well being of the UK. The claimant was reluctant to overstay and return to China. This meant that she would be separated from her husband for as long as it took for the application to be made, processed and accepted. Her husband was not able to join her because his passport was in the possession of the UKBA pending determination of his own application.

19. In the circumstances Rule 319C(h)(i) could not lawfully be applied to the claimant in that case.

20. Mr Mold accepted that the appellant's immigration history "was not exemplary". He referred to R (Agyarko) at [51]. Lord Reid stated that 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 any immigration control might otherwise be. For example, if an applicant might otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal would 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, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. That point is illustrated by the decision in Chikwamba.

21. At [52] of Agyarko Lord Reid held that it is necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish – or looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase – if there is a protracted delay in enforcement of immigration control. He referred to the decision of Lord Bingham and Lord Brown in EB (Kosovo) v SSHD [2009] AC 1159 at [15] and [37].

22. In conclusion, Mr Mold submitted that the factors relating to the public interest in requiring the appellant to apply from abroad had diminished.

23. On behalf of the respondent, Mr Kotas submitted that it is not simply enough to say that the application is likely to succeed. There are other factors. That was the outcome in the appeal relating to Hayat at [52].

24. The Judge properly directed himself in accordance with Chen. He had regard to the other factors which were in play, including how long the process would take. It is

likely to be a short period. The Judge was entitled to take into account the poor immigration history. He had regard to the potential problems relating to the IUI treatment which might have to be postponed for a short period [39]. He also had regard to medical evidence relating to the sponsor's depression since 2009. There was nothing to suggest that her mental health would suffer any real detriment as a consequence of the short separation. [42]

25. She was entitled to conclude that there was no significant interference with family life in these circumstances.

Assessment

26. The First-tier Tribunal Judge has given a detailed decision and has set out the competing submissions.

27. She noted that the appellant claimed to have arrived in the UK illegally in 2002. He had remained here ever since. He applied for leave to remain on the basis of the claim that he had private life which was rejected in April 2016. A further application made on 3 February 2016 was refused on 20 April 2016.

28. She noted that he applied for leave to remain as an unmarried partner of a person present and settled in the UK. It had been conceded by experienced counsel at the hearing that the claim could not succeed under Appendix FM. It was however contended that there were compelling circumstances making the respondent's decision disproportionate under Article 8 [9]. That was the basis on which the appellant advanced his appeal.

29. The Judge has set out in some detail the evidence given by the appellant and his sponsor. He had entered and remained in the UK illegally, having arrived here initially in 2002. He had thus remained here unlawfully for the last 15 years.

30. She had regard to the appellant's evidence that they had a religious marriage in January 2012 which was accepted as being genuine and subsisting. She had regard to the fact that his wife was having treatment in order to have a child. This treatment was available in India [13].

31. The Judge also had regard to the evidence from the appellant's partner. They had been living together for seven years. She had been living in the UK for 12 years and was settled and in employment. Her GP confirmed that she was presently suffering from depression. The Judge noted that she became a citizen in 2012. She had no other family here. She found out about her husband's immigration status in 2010. She stated in evidence that she could not go and live in India because that would mean giving up everything that she has established in the UK [17].

32. She was informed that the average time to process spouse applications from Chandigarh was shown to be 12 weeks. The sponsor stated that she did not believe it

would be so little time. She stated that if it was done within 12 weeks, "I can agree to that" [18].

33. The Judge found that the evidence did not demonstrate that there would be insurmountable obstacles to this couple continuing family life outside the UK should they be willing to do so [22]. The appellant had not lost his linguistic, religious or cultural links to India where he was born, educated and lived until he was 24 years old. His mother remained there. The sponsor herself originates from that region and lived there until she came to the UK in 2005, although she is now a British citizen [22]. There was no evidence suggesting that the appellant or the sponsor would not be able to use their skills and experience of employment in the UK to find employment in India to accommodate and support themselves.

34. The Judge had regard to the fact that there was evidence that the sponsor suffers from depression and that there was no suggestion that suitable support and treatment for that condition would not be available to her in India. There was nothing in the evidence to cause her to believe that the appellant is at risk of any harm on return to India. It was confirmed by counsel that no protection claim was advanced.

35. Accordingly, she was satisfied that there would not be very serious difficulties as a consequence of the level of hardship amounting to insurmountable obstacles to family life being enjoyed outside the UK [22].

36. The Judge accordingly considered the claim as advanced under Article 8 outside the rules. She referred to the Razgar principles. She was satisfied that the appellant has family life in the UK with a British citizen. If required to leave, there would be interference with their right to a family life.

37. She found that the interference would be in accordance with the law. She assessed the proportionality of the decision. She had regard to the provisions of s.117B of the Nationality, Immigration and Asylum Act 2002.

38. She was entitled to take into account under s.117B (4) that little weight should be given to the private life and relationship formed with a qualifying partner which was established at a time when the appellant was in the UK unlawfully. She again noted that he arrived here illegally in 2002 and for the entire period, his residence in the UK had been unlawful. No attempt had been made to regularise his status in the UK prior to an unsuccessful application made in January 2012 - [30]

39. She repeated that at [32]. His wife learned about his immigration status in 2010. Accordingly, that relationship developed and a marriage took place at a time when she was fully aware that his presence in the UK was unlawful. She found that the public interest considerations in s.117B(4) accordingly applied in respect of his family life.

40. She noted that Ms Kaur is a British citizen in full time employment with a strong and established private life in the UK. It was a matter for her whether she would be prepared to continue family life in the UK. It was noted that it has been accepted that there were no insurmountable obstacles to family life continuing in the UK, which had been conceded [33].

41. She had in mind counsel's argument that the public interest does not require the appellant to leave the UK to undertake "an academic exercise" of seeking entry clearance from abroad [34].

42. She directed herself at [35] in accordance with paragraph [51] of the Supreme Court's decision in Aygarko, supra. She noted that where the appellant had resided in the UK unlawfully and would be certain to be granted leave to enter and that the application was made outside the UK, then "there might" be no public interest in his removal. However, she stated that paragraph [51] could not be read in isolation and had to be considered in the overall assessment and guidance in that decision.

43. Although, as submitted by Mr Mold, the decision in Chen was not referred to in Agyarko, the Judge had proper regard to the approach in Chen and set it out in full - [36]

44. She noted that the assessment of the proportionality is fact specific. It was for the appellant to show that there would be significant interference with family life by a temporary removal.

45. She had full regard to the evidence relating to the sponsor's undergoing of a programme of IUI treatment [38]. Her prime concern in respect of the appellant seeking entry clearance from abroad was her fear that the process would take three or four years. However, she found that where there is reliable evidence that the application for entry clearance would likely succeed and having regard to the available data on processing times, her concerns over a protracted separation were without merit. She also took into account Ms Kaur's own evidence that she would agree to a period of separation if this involved the matter of a few months rather than years.

46. On that basis, she found that this was indicative of her own recognition that a short, temporary separation would not amount to a "significant interference" with her family life enjoyed by her and the appellant.

47. In assessing proportionality at[40], she reminded herself that Ms Kaur was aware from an early stage in the relationship prior to their marriage in 2012 and prior to the commencement of fertility treatment that the appellant was here unlawfully.

48. She also found that neither could have had any expectation that the appellant would be entitled to remain in the UK. Article 8 does not afford the individuals a choice as

to where they wish to establish their home. She also took into account that whilst it is the couple's desire to start a family of their own, there are currently no children who would be affected by the decision [40].

49. In the circumstances she found that the couple's desire to proceed with fertility treatment was not, without more, a compelling circumstance so as to outweigh public interest under s.117B(4). She had regard to the medical evidence produced: There was nothing to suggest that the sponsor's mental health would suffer any real detriment as a consequence of the short separation. It was in any event open to the sponsor to travel or visit the appellant in India during the short period involved in the processing of an out of country application or to maintain regular contact with him.

50. She thus concluded that although there would be an interference with family life, the requirement to make an application from abroad was proportionate and served the public interest.

51. The Judge referred to and considered other relevant factors before reaching the conclusion that Article 8 was not infringed by requiring him to return to India. That finding was sustainable on the evidence.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error on a point of law. The decision shall accordingly stand.

No anonymity direction made.

Signed Date 2 February 2018

Deputy Upper Tribunal Judge C R Mailer