



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/12128/2015

THE IMMIGRATION ACTS

Heard at Field House

On 8 January 2018

**Decision & Reasons
Promulgated**

On 30 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

**SANDRIA MARIA KERR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs H Price, instructed by Morgan Mark solicitors

For the Respondent: Ms A Brokelsby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge Hanley, promulgated on 10 March 2017. The appellant is a Jamaican national born in 1968 and her immigration history is recited in the decision of the First-tier Tribunal.
2. The judge carried out a full summary of the background and the evidence given by the appellant and others and came to the conclusion at paragraph 44 that, on the face of it, the appellant and his sponsor met the requirements of the Immigration Rules which would entitle her

to a spousal visa in the event that she were to return to Jamaica and make that application from overseas. However she concluded that there were no exceptional circumstances such that the appeal could be determined in the appellant's favour.

3. This is by any account a detailed and careful decision, but the subsequent decision of the Supreme Court in **Agyarko [2017] UKSC 11** has redefined the landscape when considering public interest factors and the possibility of an out-of-country visa application being granted. Paragraph 51 of **Agyarko** reads as follows:

“Whether the applicant is in the United Kingdom unlawfully, or is entitled to remain in the United Kingdom 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, 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 by the decision in **Chikwamba v Secretary of State for the Home Department**.”

4. In the light of the guidance now available from the Supreme Court, I cannot be satisfied that the issue received the detailed and focussed scrutiny required, nor that the delicate balance of public interest considerations was properly and fairly conducted in accordance with the relevant principles. My preliminary view that this matter required to be looked at afresh was not resisted on behalf of the Home Secretary, which was entirely realistic in the circumstances.
5. Ms Price, who appears for the appellant, urges me to retain the matter in the Upper Tribunal and to remake the decision. I do not consider that to be appropriate. The proportionality balancing exercise is a careful one which is fact-sensitive. It is not appropriate to make preserve the judge's findings of fact or those as to credibility.
6. There is a flaw in this decision which can only be remedied by remitting the matter to the First-tier Tribunal for the decision to be remade by a judge other than Judge Hanley.

Notice of Decision

- (1) Having found a material error of law, the decision of the First-tier Tribunal herein is set aside.
- (2) The matter is remitted to the First-tier Tribunal to be heard afresh by a judge other than Judge Hanley. No findings of fact are preserved.
- (3) No anonymity direction is made.

Signed *Mark Hill*

Date

29 January 2018

Deputy Upper Tribunal Judge Hill QC