



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

Appeal Number: IA/27944/2012

THE IMMIGRATION ACTS

Heard at North Shields

On 20th June, 2013

**Determination
Promulgated**

On 3rd July, 2013

Before

Upper Tribunal Judge Chalkley

Between

**XIAO LING CHEN
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs L Brakaja solicitor of Iris Law Firm

For the Respondent: Ms R Pettersen, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of China whose date of birth is 8th March, 1976. The appellant claims to have entered the United Kingdom using a false instrument to which he was not entitled. On 20th November, 2012, a firm of solicitors (not those currently instructed) wrote to the Home Office on

behalf of the appellant seeking permission for the appellant to remain in the United Kingdom, on the basis of her rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2. The appellant's application was refused by the respondent who, on 28th November, 2012, made the decision to remove the appellant as an illegal entrant.
3. The appellant appealed that decision and her appeal was heard on 31st January, 2013, by First-tier Tribunal Judge Katharine E Gordon.
4. In her determination, promulgated on 13th February, 2013, First-tier Tribunal Gordon found that the appellant did enjoy family life with her partner and accepted that they had lived together since March 2009. However, she went on to dismiss the appeal, suggesting that that the appellant in decision of the House of Lords in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, was a refugee who could not be returned to Zimbabwe and seeking to distinguish the facts of this appeal. The Immigration Judge found that there was no certainty that the appellant would be allowed to return to the United Kingdom, because she could not meet the maintenance requirements of the Immigration Rules. In considering proportionality, the judge concluded that the appellant's removal would not be disproportionate.
3. First-tier Tribunal Judge Froom granted the appellant permission to appeal and in doing so said this:-

"The appellant seeks permission in-time to appeal against the decision of Judge K E Gordon, dismissing her appeal against a decision of the respondent to remove her as an illegal entrant, having refused her application for leave to remain on human rights grounds. The judge accepted that the appellant has been in a relationship with her partner, Mr Chong Hin Siow, and lived with him since 2009. He is a Malaysian national with indefinite leave to remain in the United Kingdom. The appellant did not meet the suitability requirements of the new rules. The judge then considered the article 8 claim according to existing case law. She concluded that removal was proportionate. In doing so she distinguished the case from the facts of *Chikwamba*. She found that there was a 'sensible reason' for requiring the appellant to return to China to apply for entry clearance because she did not appear to be able to meet the maintenance rules. The judge saw no reason family life could not be continued by means of Mr Chong joining her in China. There are no children.

The grounds seeking permission to appeal argue, in essence, the judge treated the maintenance rule as a condition for success on proportionality, rather than as a starting point. The grounds also suggest the rules would be met in any case. I grant leave because it is arguable that the judge failed to apply the *Chikwamba* principles correctly in the light of the subsequent determination the Court of Appeal in *KH (Pakistan)*."

4. The reference by First-tier Tribunal Judge Froom to *KH (Pakistan)* is, of course, a reference to *Secretary of State for the Home Department v Kizhar Hayat (Pakistan) and Arvim Treebhowan (Mauritius) v Secretary of State for the Home Department* [2012] EWCA Civ 1054.

5. I indicated to Ms Pettersen that while I was open to be persuaded otherwise and had not made a decision, having read the Secretary of State's Rule 24 response and the Court of Appeal decision in *Hayat*, I was of the preliminary view that the determination could not stand. Ms Pettersen indicated that she agreed with me.
6. I referred both representatives to paragraph 7 of the Senior President's Practice Statement and indicated that I was minded to remit the appeal for hearing before the First-tier. Both representatives indicated that they would not object to this course.
7. Paragraph 7 of the Senior President's Practice Statement provides as follows:-

"7. Disposal of appeals in Upper Tribunal

- 7.1 Where under Section 12(1) of the 2007 Act (Proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under Section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to remake the decision under Section 12(2)(b)(ii).
 - 7.2 The Upper Tribunal is likely on each such occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
 - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.
 - 7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact-finding is necessary.
8. I am satisfied that this is a case which falls squarely within paragraph 7 of the Senior President's Practice Statement, given the length of time the parties would have to wait for the matter to be re-listed before me in either North Shields or in Field House and that it could, conversely, be heard relatively speedily by the First-tier Tribunal and in view of the overriding objective informing the onward conduct of this appeal, I have decided that the appeal be remitted to the First-tier Tribunal for hearing afresh before a First-tier Tribunal Judge, other than First-tier Tribunal Judge Katharine E Gordon.

A handwritten signature in black ink, appearing to read 'Chalkley', with a long horizontal flourish extending to the right.

Upper Tribunal Judge Chalkley