Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07942/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th September 2017	**On 28th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR ADEBAMBO SHERIFF ADESOGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman, Counsel, instructed by Paul John & Co Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Nigeria, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 2nd March 2016 to refuse his application for leave to remain in the United Kingdom as the partner of a British national. First-tier Tribunal Judge Wyman dismissed the appeal in a decision promulgated on 22nd May 2017. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Shimmin on 5th July 2017.

2. The background to this appeal is that the Appellant says that he first met his now wife in 2008 when he visited the United Kingdom on holiday. He returned to Nigeria to complete his education and came back to the United Kingdom in January 2011, having been granted entry clearance as a visitor. His leave to remain expired on 10th June 2011 and he has not had further leave since then. He says that he decided not to return to Nigeria at that stage because his relationship had reached a critical stage. He made an application for leave to remain in June 2012 which was refused on 12th February 2013 with no in-country right of appeal. He requested reconsideration of that decision and that request was rejected on 29th April 2013. He sought to challenge that decision by way of Judicial Review but permission was refused on 10th March 2014. The Appellant and his wife, Ms Stern, married on 7th June 2014. The appellant applied for leave to remain on the basis of his marriage on 9th September 2014. That application was refused with no in-country right of appeal. He made a further application on 10th February 2016 and the decision to refuse that application is the subject of this appeal. The Secretary of State refused the application on the basis that the Appellant did not meet the requirements of EX.1 of Appendix FM of the Immigration Rules and had not established that there were insurmountable obstacles to family life with his partner continuing outside of the UK. The Secretary of State considered whether there were exceptional circumstances in the case and decided that there were not.

3. In approaching the appeal the judge set out the relevant case law including a summary of the findings of the Supreme Court in the case of **Agyarko and Others v Secretary of State for the Home Department [2017] UKSC 11**. The judge heard evidence from the Appellant and his wife in English. The Appellant's case was that his wife is employed on a full-time basis as a nurse. She is an only child and her family live nearby. The Appellant is a Muslim and his wife is a Christian and he asserts that it would be difficult for them to live in Nigeria because of their different religions. The judge made her findings at paragraphs 63 to 85 of the decision. In so doing the judge considered whether there were insurmountable obstacles to the Appellant and his wife continuing their family life outside of the UK. The judge also considered whether the Appellant and his wife could return to Nigeria on a temporary basis to apply for entry clearance and concluded that they could.

Grounds of appeal

4. The main issue raised in the Appellant's Grounds of Appeal is whether the First-tier Tribunal Judge properly applied the principles set out by the Supreme Court in **Agyarko** in relation to the weight to be given to the public interest if the Appellant were certain to be granted entry clearance if he returned to Nigeria. It is accepted in the Grounds that the judge properly directed herself to consider paragraph 51 of **Agyarko.** However, it is submitted that, reading the decision as a whole, the judge turned her back on the correct principles regarding the application of **Chikwamba [2008] UKHL 40**, failed to consider what the outcome of immigration control would actually be and failed to properly identify how much weight to attach to the Respondent's public interest and how much weight to attach to the family life of the Appellant and his wife.

5. It is contended that it was argued that an entry clearance application would be certain to succeed because the Respondent had accepted that the parties were in a genuine and subsisting marriage and that the Appellant met the eligibility and suitability requirements for leave to remain as a partner. It is contended that the earnings of the Appellant's wife were more than sufficient to meet the maintenance and accommodation requirements of Appendix FM, that the Appellant could speak English fluently and that there were no aggravating circumstances.

6. The Grounds argue that the First-tier Tribunal Judge did not properly ask herself whether an entry clearance application would succeed in light of the evidence. Instead, it is submitted, the judge only focused on the fact that an entry clearance application could be made rather than asking herself whether it would succeed and if it would whether there was any sensible reason to enforce a policy of requiring the application to be made from Nigeria.

7. Reliance is placed on the case of **Chikwamba [2008] UKHL 40** and on the case of **MA (Pakistan) v SSHD [2009] EWCA Civ 953** where the Court of Appeal held that the principle of **Chikwamba** applied notwithstanding that there were no children adversely affected by the decision in the case. It is contended that the real question is not whether there were insurmountable obstacles to the Appellant returning to make an application for entry clearance from Nigeria, but whether there was any sensible reason why he should be required to do so (paragraph 9 of **MA (Pakistan)**).

8. Permission to appeal was granted on the basis that it is arguable that the judge has not correctly applied the principles set out in the decision in **Agyarko**.

Submissions

9. At the hearing before me Mr Coleman submitted that it is clear from the factual findings that an application for entry clearance would be likely to succeed in this case. The Appellant's wife is working as a nurse, there is no adverse immigration history apart from overstaying and there are no aggravating factors. He therefore submitted that this was the type of case envisaged by paragraph 51 of **Agyarko**. He argued that the judge erred in failing to consider the case under paragraph 51 and that this is a material error because it is very likely that the entry clearance application would succeed and the judge may well have concluded that there may therefore be no public interest in the Appellant's removal. He submitted that in focusing on whether there were exceptional circumstances in the case the judge failed to apply the test set out in paragraph 51.

10. He submitted that it was never a realistic submission that family life could not take place outside the UK. He accepted that it was a choice made by this couple but the real issue was whether it was necessary and proportionate in law. He accepted that the judge noted the findings in **Agyarko** and **Chikwamba** but submitted that the judge failed to apply or consider the guidance from those cases. In Mr Coleman's submission it is hard to imagine a more eligible case to be considered under paragraph 51 of **Agyarko**.

11. He submitted that the observations made at paragraph 71 of the First-tier Tribunal Judge's decision were from the perspective of the Respondent but the judge undertook no balancing exercise as to whether it was necessary for the Appellant to return to Nigeria to make an application from abroad and the decision is therefore flawed because of the absence of that analysis.

12. In his submissions Mr Duffy argued that the facts in this case were different from those in the case of **Chikwamba**. Here, he submitted, the appeal turned on the argument as to whether there were insurmountable obstacles to family life continuing in Nigeria. In these circumstances, given that there were no such insurmountable obstacles, the case of **Chikwamba** does not apply. He submitted that the judge did what was required of her in considering whether there were insurmountable obstacles and exceptional circumstances as set out in paragraph 51 of **Agyarko**. He submitted that paragraph 51 of **Agyarko** would apply in a situation where the Secretary of State accepted that an application for entry clearance would be successful. In his submission an interpretation of paragraph 51 which would cover many people in the Appellant's situation would render Ex 1 pointless. He submitted that there had to be very strong or compelling circumstances and that there were not in this case.

13. In response Mr Coleman submitted that the ratio of **Agyarko** is very clear and that this case falls to succeed under paragraph 51. He submitted that there was no requirement for the Secretary of State to agree that an Appellant met the Rules. He submitted that paragraph 57 of **Agyarko**, which refers to exceptional circumstances, makes specific reference to a consideration of all factors relevant to the specific case in question including where relevant the matters discussed in paragraph 51.

14. I reserved the decision.

Discussion and Conclusions

15. The guidance given by Lord Reed in **Agyarko** in relation to precariousness and exceptionality is as follows;

> "*Precariousness*
> 49. In *Jeunesse*, the Grand Chamber said, consistently with earlier judgments of the court, that an important consideration when assessing the proportionality under article 8 of the removal of non-settled migrants from a contracting state in which they have family members, is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be "precarious". Where this is the case, the court said, "it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8" (para 108).
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> 50. Domestically, officials who are determining whether there are exceptional circumstances as defined in the Instructions, and whether leave to remain should therefore be granted outside the Rules, are directed by the Instructions to consider all relevant factors, including whether the applicant "[formed] their relationship with their

partner at a time when they had no immigration status or this was precarious". They are instructed:

> "Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK."

That instruction is consistent with the case law of the European court, such as its judgment in *Jeunesse.* As the instruction makes clear, "precariousness" is not a preliminary hurdle to be overcome. Rather, the fact that family life has been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affects the weight to be attached to it in the balancing exercise.

51. 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 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 UK, 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.*

52. It is also 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 the enforcement of immigration control. This point was made by Lord Bingham and Lord Brown of Eaton-under-Heywood in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] AC 1159, paras 15 and 37. It is also illustrated by the judgment of the European court in *Jeunesse.*

53. Finally, in relation to this matter, the reference in the instruction to "full knowledge that their stay here is unlawful or precarious" is also consistent with the case law of the European court, which refers to the persons concerned being aware that the persistence of family life in the host state would be precarious from the outset (as in *Jeunesse*, para 108). One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.

Exceptional circumstances

54. As explained in para 49 above, the European court has said that, in cases concerned with precarious family life, it is "likely" only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious. The court has repeatedly acknowledged that "a state is entitled, as a matter of well-established

international law, and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there" (*Jeunesse*, para 100). As the court has made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a fait accompli. On the contrary, "where confronted with a fait accompli the removal of the non-national family member by the authorities would be incompatible with article 8 only in exceptional circumstances" (*Jeunesse*, para 114).

55. That statement reflects the strength of the claim which will normally be required, if the contracting state's interest in immigration control is to be outweighed. In the *Jeunesse* case, for example, the Dutch authorities' tolerance of the applicant's unlawful presence in that country for a very prolonged period, during which she developed strong family and social ties there, led the court to conclude that the circumstances were exceptional and that a fair balance had not been struck (paras 121-122). As the court put it, in view of the particular circumstances of the case, it was questionable whether general immigration considerations could be regarded as sufficient justification for refusing the applicant residence in the host state (para 121).

56. The European court's use of the phrase "exceptional circumstances" in this context was considered by the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department*[2013] EWCA Civ 1192; [2014] 1 WLR 544. Lord Dyson MR, giving the judgment of the court, said:

> "In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal." (para 42)

Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as the Master of the Rolls made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling ... is required to outweigh the public interest", applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in *Hesham Ali*.

57. That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or

"exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

58. The expression "exceptional circumstances" appears in a number of places in the Rules and the Instructions. Its use in the part of the Rules concerned with the deportation of foreign offenders was considered in *Hesham Ali*. In the present context, as has been explained, it appears in the Instructions dealing with the grant of leave to remain in the UK outside the Rules. Its use is challenged on the basis that the Secretary of State cannot lawfully impose a requirement that there should be "exceptional circumstances", having regard to the opinion of the Appellate Committee of the House of Lords in *Huang*.

59. As was explained in para 8 above, the case of *Huang* was decided at a time when the Rules had not been revised to reflect the requirements of article 8. Instead, the Secretary of State operated arrangements under which effect was given to article 8 outside the Rules. Lord Bingham, giving the opinion of the Committee, observed that the ultimate question for the appellate immigration authority was whether the refusal of leave to enter or remain, in circumstances where the life of the family could not reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudiced the family life of the applicant in a manner sufficiently serious to amount to a breach of article 8. If the answer to that question was affirmative, then the refusal was unlawful. He added:

> "It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* [*R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368] , para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test." (para 20)

60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the

> Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above."

16. I set Lord Reed's consideration of these issues in full because the comments at paragraphs 51 and 57 relied upon by the Appellant in this case must be read in the context of the entire decision.

17. In this case First-tier Tribunal Judge Wyman was fully aware of the Appellant's immigration history and the basis of his claim as set out at paragraphs 3-15 of the decision. The oral evidence is set out at paragraph 39-61. The judge was clearly aware of the background to the appeal. The Appellant has not had leave to remain in the UK since 10 June 2011 when his entry clearance as a visitor expired. The relationship was formed whilst the Appellant's status was precarious and they were married when he was without leave to remain in the UK.

18. The judge considered whether there were 'insurmountable obstacles' to the Appellant and his wife continuing their family life outside of the UK in accordance with Ex.1. She concluded that there were not [81]. Therefore the Appellant could not meet the requirements of Appendix FM. This finding has not been challenged.

19. The challenge here is to the judge's consideration of the appeal under Article 8 and the weight given to the public interest in the proportionality assessment. Although the judge did not set out the consideration within and outwith the Immigration Rules separately in my view it is clear that she considered both.

20. In considering the appeal under Article 8 outside the Rules the judge followed the guidance in **Agyarko** looking at whether there are exceptional circumstances as set out in particular at paragraph 57 of **Agyarko.** The judge found that there are no exceptional circumstances such as to outweigh the public interest in this case [69, 83]. According to the guidance in **Agyarko** this is what is required in the context of precarious family life.

21. Mr Coleman submitted that the judge failed to *"consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52…"*(paragraph 57 of the decision in **Agyarko)**. However it is clear from reading the decision as a whole that the judge did in fact consider all factors relevant to the Appellant's case. The judge considered the circumstances in Nigeria should the couple choose to return there together or the Appellant on his own. The judge considered the Appellant's immigration history and his decision to *'deliberately flout UK immigration laws and remain in the United Kingdom illegally'* [79].

22. There was no concession by the Secretary of State that the Appellant was 'certain' to be able to meet the entry clearance requirements if he made an application from Nigeria. Although Mr Coleman argued that the basis of the appeal in the First-tier Tribunal was that he would be able to meet the entry clearance requirements, it is not

clear from the First-tier Tribunal Judge's decision that this was the thrust of the Appellant's case before her. It is not clear that the documents before the First-tier Tribunal establish that the Appellant was *'certain'* to meet the entry clearance requirements. It is clear from paragraph 67 that the judge had the possibility of the success of an entry clearance application in mind. In my view it is clear from the decision as a whole that the judge did not find it established that the Appellant was 'certain' to be granted entry clearance. In any event, as acknowledged by Mr Coleman, this is a factor which *'might'* outweigh the public interest in removal. It is one factor to be considered along with all of the other factors in the case. In my view it is clear from the decision that the First-tier Tribunal Judge considered all of the evidence before her.

23. At paragraph 57 of **Agyarko** Lord Reed said that when a court or Tribunal is considering this issue it must give appropriate weight to the Secretary of State's policy, expressed in the Rules and instructions, that the public interest in immigration control can be outweighed only where there are insurmountable obstacles or exceptional circumstances. It is clear that the judge undertook an assessment of insurmountable obstacles and exceptional circumstances in this case. The Supreme Court said that the critical issue will generally be whether the Article 8 claim is sufficiently strong to outweigh the strength of the public interest in removal of a person in a particular case. In cases concerned with a precarious family life the court said that a very strong or compelling claim is required to outweigh the public interest. It is clear that the judge found that there were no exceptional circumstances in this case, taking into account all of the facts.

24. Accordingly the judge made a decision which was open to her on the evidence before her properly applying the relevant case law including the guidance in **Agyarko.**

Notice of Decision

The decision of the First-tier Tribunal does not contain a material error of law.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed Date: 27 September 2017

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 27 September 2017

Deputy Upper Tribunal Judge Grimes