Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10492/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 November 2017	**On 30 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

MR ALI RAZA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Richardson of Counsel
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan. He was born on 25 August 1990. He appealed against the respondent's decision dated 21 October 2015 refusing his application for further leave to remain.

2. In a decision promulgated on 1 March 2017, Judge of the First-tier Tribunal Alis (the judge) dismissed the appellant's appeal against the respondent's decision because he found that striking a balance between the interests of the appellant and his wife and that of the state in upholding its

immigration policy, it would not be disproportionate to require the appellant to leave.

3. The grounds conceded the appellant did not meet the requirements of the Rules but nevertheless, the manner in which he did not meet the Rules, that is, the immigration status requirement, was relevant and potentially determinative of the appeal on Article 8 grounds outside the Rules. In particular, with regard to **Agyarko [2017] UKSC 11**.

4. The grounds claimed that **Chikwamba [2008] UKHL 40**, was also of relevance. The appellant's accepted ability to meet the Rules if he was to seek entry clearance from abroad, dictated that the public interest in removing him was so diminished that his appeal ought to have been allowed.

5. In his analysis of **Agyarko** the judge said at [48]:

> *"The Supreme Court was not saying that if an application was bound to succeed there would be no public interest in removal. The court suggested that it might make a difference as against did make a difference."*

The grounds claimed that by focusing on the word "might" at [48] the judge to some extent missed the point and ignored the expectation in **Chikwamba** that cases where an appellant should be compelled to seek leave from abroad would be rare.

6. Judge Grant-Hutchison granted leave on 18 September 2017. She said that the judge considered the argument at the hearing that the accepted ability of the appellant to meet the Immigration Rules, save for the immigration status requirement, was highly relevant and potentially determinative of the appeal on Article 8 grounds outside the Rules. That argument was founded on [51] of **Agyarko**.

> *"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 *ratio* in **Chikwamba** as expressly preserved by the Supreme Court in **Agyarko** strongly supported an argument that the appellant's accepted ability to meet the Immigration Rules if he was to seek entry clearance from abroad dictated that the public interest in removing him was such that his appeal ought to have been allowed. Judge Grant-Hutchison was of the view that by focusing on the word "might" it was arguable that the judge missed the point and ignored the expectation in **Chikwamba** such that he arguably erred in his assessment.

7. The Secretary of State's Rule 24 response was dated 8 October 2017. That claimed that the judge was open to find when considering **Agyarko** that if a case was bound to succeed, that did not mean the public interest

would not be considered. It was open for the judge to find that the appellant should make the application from abroad.

Submissions on Error of Law

8. Mr Richardson relied upon the grounds. There was no skeleton argument. The only issue was that the application was made at a time when the appellant had no leave. Given the fact that the appellant satisfied the Immigration Rules in all other respects apart from his lack of immigration status at the time of the application, the appeal should have been allowed.

9. Mr Tufan submitted that there was nothing exceptional about the circumstances. The appellant had formed a relationship here at a time when his immigration status was known to be precarious to both parties. See **Rajendran (S.117B – family life) [2016] UKUT 138 (IAC)**. Precariousness was a criterion of relevance to family life as well as private life cases. The appellant had delayed in making his application until August 2015, whereas he had ceased his studies some twelve months before he submitted his application. His leave was curtailed by the respondent on 21 January 2015. The appellant and his wife embarked on a relationship in the knowledge that he was not attending college and had failed to do anything about his situation. The judge found that his status was precarious. See [45] of the decision.

10. Mr Richardson submitted that **Chikwamba** is authority that it is only in comparatively rare situations that an Article 8 appeal should be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad.

11. Mr Richardson submitted that the ratio in **Chikwamba** preserved by the Supreme Court in **Agyarko** strongly supported an argument that the appellant's accepted ability to meet the Immigration Rules if he were to seek entry clearance from abroad, dictated that the public interest in removing him was so diminished that his appeal ought to have been allowed. Mr Richardson submitted that in focusing on the word "might" at [48] of his decision, the judge to some extent might have missed the point and ignored the expectation in **Chikwamba**.

Conclusion on Error of Law

12. I find that the judge did not miss the point. He carried out a careful analysis of the parties' circumstances in light of the appropriate case law. He took into account the precariousness of their family situation. Their relationship had commenced at a time when the appellant had ceased his studies and failed to do anything about his lack of status. I do not accept that the judge erred in making his finding at [48] that the Supreme Court suggested that it "might" make a difference as against "did" make a difference. **Chikwamba** refers to comparatively rare cases, in particular family cases involving children. The appellant and his wife have no children.

13. The quote from **Agyarko** at [51] has been taken out of context in Mr Richardson's submissions. [51] was primarily concerned with consideration of the weight of the public interest, comparing automatic deportation of a foreign criminal as deserving considerable weight to be attached as compared to there being no public interest in the removal of a person otherwise certain to be granted leave to enter if applying from abroad, notwithstanding unlawful presence here. The Presenting Officer before the judge accepted the appellant satisfied the financial and English language requirements and further accepted that if he had made an in-time application that he would have satisfied the Rules. See [8] of the decision. There was no concession on the particular facts of the appellant's case that if he returned to Pakistan to make an out of country application that he was "…..*otherwise certain to be granted leave to enter…..*" as per [51] of **Agyarko** such that in such circumstances the judge should have allowed the appeal.

14. The judge clearly looked at the circumstances of the appellant and the sponsor in considerable detail. The judge found there were no "*very significant difficulties*" in terms of EX.1(b). See also **Agyarko** at [60].

15. Having analysed the same and having set the circumstances against the case law, the judge found that whilst it might make a difference, (see decision at [48]), nevertheless in the particular circumstances, bearing in mind the balance between the interests of the individual and that of the state in upholding immigration policy, it was not disproportionate to require the appellant to leave. What the judge had to do was carry out a balancing exercise; he did so. The fact that family life had been established in the full knowledge of the appellant's lack of status affected the weight to be attached to such family life. See **Agyarko** at [50].

16. I find the judge was entitled to come to his findings and conclusion on the evidence before him.

Notice of Decision

17. The decision of the Tribunal contains no error of law and shall stand.

No anonymity direction is made.

Signed Date 24 November 2017

Deputy Upper Tribunal Judge Peart