



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/03701/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 1 December 2017

Decision & Reasons Promulgated  
On 7 December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADNAN TARIQ  
(NO ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer  
For the Respondent: Mr N O'Brien, Counsel

**DECISION AND REASONS**

1. In this case it is the Secretary of State for the Home Department who has appealed against the decision of the First-tier Tribunal allowing the appeal on article 8 grounds of Mr Adnan Tariq. As Mr Adnan Tariq was the appellant before the First-tier Tribunal it is more convenient to continue to refer to him as "the appellant" and to the Secretary of State as "the respondent".
2. The appellant entered the UK as long ago as January 2007, initially with leave as a student. He overstayed his leave and, in January 2012, claimed asylum on the basis that he was at risk from the family of S with whom he had been in an extramarital relationship while in Pakistan. He also claimed he had subsequently

married her. However, his application was refused and his appeal to the First-tier Tribunal dismissed. The First-tier Tribunal judge found the appellant's account was not credible and, although the appellant appeared to have been severely injured at some point in the past, he found his injuries were not the result of an attack by S's family.

3. The appellant subsequently became appeal rights exhausted. In September 2014 he made further submissions which led to the decision under appeal, dated 30 March 2017. The reasons for refusal letter maintained the refusal of the protection claim, relying on the findings of the First-tier Tribunal and also pointing out the appellant could receive a sufficiency of protection and could exercise an internal flight alternative in Pakistan.
4. The refusal also considered whether removing the appellant would breach article 8 of the Human Rights Convention. The appellant now claimed to be in a relationship akin to marriage with a British citizen, Ms Moorghen. At the time of the decision, she did not fall within the definition of 'partner' provided by Appendix FM of the rules and, in any event, the respondent considered that the appellant could not meet the requirements of paragraph EX.1 of the rules.
5. The appellant appealed against the decision. At the hearing before the First-tier Tribunal, held on 15 June 2017 at Hatton Cross, the appellant's counsel confirmed that the appeal was only pursued on article 8 grounds, even though the appellant had maintained in his witness statement that he was still at risk from S's family and Ms Moorghen expressed her fears on this score in hers. The First-tier Tribunal Judge therefore treated the asylum claim as having been abandoned. The judge heard oral evidence from the appellant and his partner and found the relationship was genuine and subsisting. In paragraph 22 of his decision he set out his key findings as follows:

"The appellant's article 8 claim rests on his relationship with his new partner. I accept that the relationship is genuine and subsisting. They have been through a religious ceremony and have tried to register their union civilly. They have now cohabited for well over 2½ years. He has integrated with her family. If they return together to make a new application for entry clearance she will lose her employment and her ability to satisfy the financial requirement for his sponsorship. Even if she were able to overcome the financial problem, the process might be lengthy and I accept the reasons why it would be onerous on her to live in Pakistan, where she speaks very little of the local language. Her parents would not be able to keep up with the mortgage payments without her contribution. If, on the other hand, the appellant were to return alone to renew his application, I can see no reason why the application might fail. Any consideration of his application under the rules would be defeated because at the date of application of the current claim they had not been living together for two years, but I have to consider the human rights position as of the date of hearing. "Exceptional circumstances" warranting consideration outside the rules have recently been considered in *R (Agyarko) v SSHD* [2017] UKSC 11, where the principle involved in *Chikwamba v SSHD* [2008] UKHL 40 was upheld. I find that it applies in this case. I have also borne in mind the rights of the appellant's British partner and of her parents. Whereas she can be criticised for conniving in his unlawful status, her parents were

presented with a *fait accompli*. I find this has become a close family unit which extends beyond the appellant and his partner. Even if the removal of the appellant would be in accordance with the law I find that, in the light of the principle in *Chikwamba*, it would be disproportionate to the public interest in the maintenance of fair but firm immigration [control].”

6. The respondent sought permission to appeal on two grounds. Firstly, it was submitted that the First-tier Tribunal Judge had failed to conduct an adequate balancing exercise in that he had not taken into account the appellant’s poor immigration history. In particular, he had made no reference at all to the impact of section 117B(4) of the 2002 Act. Secondly, the grounds argued that the First-tier Tribunal Judge had failed to identify insurmountable obstacles to family life being continued in Pakistan. The matters relied on by the judge in this respect were merely matters of preference.
7. Permission to appeal was granted by the First-tier Tribunal because it was arguable the judge’s failure to have regard to section 117B involved an error of law which might have made a material difference to outcome.
8. I heard submissions from the representatives as to whether the First-tier Tribunal Judge had made an error of law in his decision. In brief, Ms Everett argued the judge’s balancing exercise was inadequate, including with respect to *Chikwamba*. Outlining the appellant’s immigration history at the beginning of the decision was not sufficient to show he had balanced the appellant’s case against the public interest. She argued that the judge’s approach to *Chikwamba* involved a misdirection of law. The principle applied where the only point on the side of the public interest was that the appellant should go back to apply for entry clearance. It was not clear the appellant would succeed in an application.
9. Ms Everett argued that the judge had applied a test lower than the insurmountable obstacles threshold, namely onerousness. The only difficulties identified were Ms Moorghen’s language difficulties and her parents’ mortgage repayments. That was not enough to meet the legal test.
10. She argued it was an error in this case not to have applied the provisions of section 117B. She accepted that it was a test of substance over form, in line with *Dube (ss.117A-117D)* [2015] UKUT 00090 (IAC). However, it was not apparent that the judge in this case had applied the section.
11. Mr O’Brien handed in a brief rule 24 response and outline submission. He built on these arguments and replied to Ms Everett’s submissions. Firstly, he suggested Ms Everett’s submission that *Chikwamba* had been wrongly applied was not a matter on which permission to appeal had been granted. It had not previously been challenged and the judge’s decision on it should be left untouched.
12. Mr O’Brien disagreed with Ms Everett that the judge had applied a test of onerousness, being less stringent than the correct test of insurmountable obstacles. In any event, the judge had correctly directed himself in terms of

*Agyarko* and it was legitimate to look for very compelling circumstances why removal might not be proportionate, even in a case of precarious family life.

13. Mr O'Brien said it was clear from paragraph 22 of the judge's decision that he was searching for exceptional circumstances. *Chikwamba* was such a case and the judge was entitled to find this factor tipped the balance in the appellant's favour. He was right to look at the impact on all family members in line with *Beoku-Betts* [2008] UKHL 39. In terms of the public interest, the judge expressly referred to Ms Moorghen conniving in the appellant's lawful status, which showed he had had the appellant's history in mind. The judge's reasoning was concise but sufficient.
14. As for the absence of any mention of section 117B, there was no requirement to make explicit reference to it provided it had been applied in substance (*Dube*). In any event, the section did not mandate any particular outcome (see paragraph 49 of *Rhuppiah v SSHD* [2016] EWCA Civ 803 per Sales LJ). The presence of very compelling circumstances will prevail, as shown by *Agyarko*.
15. Ms Everett disagreed that, had the judge made express reference to section 117B, it could be assumed his decision would have remained the same.
16. The representatives were in agreement that, if I found an error of law and set aside the decision, the preferable course was to remake the decision myself. The representatives had made their submissions in addressing the First-tier Tribunal's decision. There were no new factual matters save for the fact the couple had married on 23 August 2017. I was shown the marriage certificate.

#### **Error of law?**

17. Having carefully read the decision and considered the arguments put forward by the representatives I have concluded that the decision of the First-tier Tribunal contains material errors of law such that it must be set aside. My reasons are as follows.
18. It is common ground in this case that the relationship between the appellant and Ms Moorghen, which the appellant claims began around August 2012 and led to cohabitation since October 2014, has been established at a time the appellant was without leave. He made no mention of Ms Moorghen at his previous appeal hearing in April 2013. His last grant of leave had expired in May 2009. His relationship with Ms Moorghen was disclosed to the respondent as a fait accompli in his representations of September 2013.
19. The correct approach to article 8 in cases of precarious family life was the subject of definitive guidance in the judgment of Lord Reed in *Agyarko*. In paragraph 49 of his judgment, Lord Reed explained the significance of this factor as follows:

“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).”

20. Lord Reed explained that the test of insurmountable obstacles, as used in paragraph EX.1 of Appendix FM of the rules and later defined in paragraph EX.2, was taken from the jurisprudence of the ECtHR. In paragraph 33 he cited with approval Sales LJ in the Court of Appeal’s judgment that,

“[i]t imposed a stringent test, illustrated by *Jeunesse v The Netherlands* (2015) 60 EHRR 17, para 117, where the court found that there were no insurmountable obstacles to the applicant’s family settling in Suriname, although they would experience a degree of hardship if forced to do so. It was to be interpreted, both in the European case law and in the Rules, in a sensible and practical rather than a purely literal way.”

21. However, as Mr O’Brien said, the test of insurmountable obstacles was not the end of the matter. Lord Reed:

“42. In *Jeunesse*, the Grand Chamber identified, consistently with earlier judgments of the court, a number of factors to be taken into account in assessing the proportionality under article 8 of the removal of non - settled migrants from a contracting state in which they have family members. Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were “insurmountable obstacles” in the way of the family living in the country of origin of the non - national concerned, and whether there were factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (para 107).

43. It appears that the European court intends the words “insurmountable obstacles” to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non - national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to “un obstacle majeur” (*Sen v The Netherlands* (2003) 36 EHRR 7, para 40), or to “major impediments” (*Tuquabo - Tekle v The Netherlands* [2006] 1 FLR 798 , para 48), or to “the test of ‘ insurmountable obstacles’ or ‘major impediments’” ( *IAA v United Kingdom* (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could “realistically” be expected to move (*Sezen v The Netherlands* (2006) 43 EHRR 30, para 47). “Insurmountable obstacles” is, however, the expression employed by the Grand Chamber; and the court’s application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant’s partner was in full - time employment in the Netherlands: see paras 117 and 119.”

22. As to the general approach to be taken, Lord Reed referred to the leading authorities on deportation and article 8 and said as follows:

“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.”

23. Returning to paragraph 22 of the judge’s decision, it was incumbent on the judge to follow a structured approach. The existence of valuable family life was accepted and the determinative issue was the proportionality of removing the appellant notwithstanding the fact the appellant enjoys a genuine and subsisting relationship with a British citizen.

24. It is not possible to find within the judge’s reasoning any reference to the importance of the public interest in maintaining immigration controls. The appellant has, by any standards, a poor immigration history. Having come to the UK in order to pursue studies, which he did for around two years, he remained here unlawfully as an overstayer and then pursued what turned out to be an unmeritorious asylum claim, which was rejected at his first appeal and which he abandoned at his second appeal. He had resided in the UK for 10½ years by the date of the hearing in the First-tier Tribunal but he had only had leave to remain in the UK for a period of a little over two years.

25. Of course, I accept the judge was fully aware of this history. He set it out in paragraphs 1 to 5 of his decision. However, this does not mean that it is clear from paragraph 22 that the judge weighed the public interest in removing overstayers in the balancing exercise. With the exception of the single reference to Ms Moorghen conniving in the appellant’s unlawful status, he only sets out matters favourable to the appellant. That reference to Ms Moorghen was in the context of the application of the *Chikwamba* principle, which I shall come to. It cannot seriously be argued that this reference was shorthand for giving weight to the appellant’s deliberate flouting of the law. Nor does it begin to show the judge took account of the fact the relationship was formed in the knowledge that the appellant was living in the UK unlawfully and could therefore be expected to leave the UK. The judge appears to have given predominant weight to the relationship which the appellant enjoys with his British citizen partner without

recognising that he was required by statute to reduce the weight which could be given to that factor.

26. When it came to assessing the key question of whether there were insurmountable obstacles to family life being pursued in Pakistan, the First-tier Tribunal Judge identified the reasons, including the need for Ms Moorghen to remain in employment so that she could assist her parents to meet their mortgage commitments. The meaning of insurmountable obstacles was made clear by Lord Reed in *Agyarko* and it was previously considered extensively in the Court of Appeal ([2015] EWCA Civ 440). Sales LJ had explained that the phrase “insurmountable obstacles” imposes a high hurdle and the test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the UK.
27. The two issues relied on by the judge, namely Ms Moorghen’s few words of Urdu and the need to contribute to her parents’ mortgage repayments, do not come close to showing the high threshold of the test had been reached and I find he did not direct himself correctly on this point notwithstanding the citation of *Agyarko*.
28. I am conscious the appellant conceded in this case he could not meet the requirements of Appendix FM. I understand that was because the appellant and Ms Moorghen had not lived together for two years by the date of application, although they had by the date of hearing. As seen, the test of insurmountable obstacles was drawn from ECtHR case law and Appendix FM did not apply a higher or more demanding test. This was still a matter the judge was required to consider in line with the authorities.
29. A further error of law was the failure to have regard to the factors listed in section 117B of the 2002 Act when considering the public interest, as the judge was required to do by virtue of section 117A(2). As explained by Sales LJ in *Rhuppiah*, Part 5A of the Act was intended to provide for a structured approach to the application of article 8 which would produce in all cases a final result which was compatible with article 8 (see paragraph 45). However, it was common ground in that case that it was possible to conceive of cases caught by sections 117B(4) and (5) in which a private or family life of an especially strong kind had been established such that it should be accorded great weight (see paragraph 46). However, where Parliament has declared that something is in the public interest that is definitive as to that aspect of the public interest (see paragraph 49). It might still be outweighed by other relevant considerations (see paragraph 53) but,
- “[i]n order to identify an exceptional case in which a departure from that approach would be justified, compelling reasons would have to be shown...” (paragraph 54)
30. Not only is paragraph 22 of the judge’s decision silent as regards the factors set out in section 117B but it is not possible to see that he has implicitly considered them and carried out a structured assessment giving weight to Parliament’s assessment of where the public interest lies. It may be possible to say that the judge acknowledged that the appellant could speak English and was able to work

such that the factors in section 117B(2) and (3) would not weigh against the appellant. However, such findings would not weigh in his favour; they would be neutral factors. The key issue was the application of section 117B(4) and it is not possible to see that the judge recognised that little weight should be given to the appellant's family life.

31. Mr O'Brien argued that this did not matter because the judge identified very compelling circumstances to outweigh the public interest in any event. However, before doing so, it was incumbent on the judge to show he had given great weight to the public interest. I find this was a material error of law.
32. I now turn to the *Chikwamba* point which Mr O'Brien argued the judge was entitled to deploy in this case so as to find the scales tipped in the appellant's favour. It is true the point was not expressly addressed in the grounds seeking permission to appeal or in the grant of permission to appeal. However, the issue is so bound up in the judge's article 8 assessment and the issue of very compelling circumstances that I find it is appropriate to regard it as a live issue in this appeal.
33. The principle was summarised by Lord Reed in *Agyarko* as where an applicant, even if he were residing in the UK unlawfully, was certain to be granted leave to enter if an application were made from outside the UK, then there might be no public interest in his removal (see paragraph 51). The point has sometimes been put in terms that there would be no sensible purpose in requiring someone to go abroad in such circumstances (see *Hayat v SSHD* [2012] EWCA Civ 1054).
34. In *R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality)* IJR [2015] UKUT 00189 (IAC) it was held that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to her home country to make an entry clearance application to re-join family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights.
35. Mr O'Brien told me that counsel for the appellant and the presenting officer at the hearing in the First-tier Tribunal had a conversation in which there was agreement that the appellant would be likely to succeed on application for entry clearance. However, there is no indication from the decision that it was presented to the judge in such a way that he was entitled to rely on a concession to that effect. That would be highly unlikely given the fact, as Ms Everett said, it was not clear, let alone certain, that the appellant would succeed.
36. It must be right, particularly given the passage of time, that the entry clearance officer be enabled to take a fresh look at the case by reference to the rules, including the general grounds for refusal. It must also be right to consider the



individual circumstances of the case when assessing the impact of temporary separation. This is a couple in the early years of their relationship (now marriage) with no children. The facts are far from those in *Chikwamba*. As Elias LJ put it in *Hayat*,

“14. In this case it was held that the removal of the applicant with her child to the harsh and unpalatable conditions of Zimbabwe would cause a grave disruption to the family which was not justified simply by invoking the mantra that rules are to be obeyed. There has to be good reason for enforcing the policy and there was none in this case. Lord Brown held that in the longer term no one doubted that the family would be allowed to live together and accordingly, on the particular facts he concluded that her removal would violate her Article 8 rights.”

37. I conclude the judge did not give adequate reasons for his decision to allow the appeal on the basis the decision to remove the appellant was disproportionate.

38. For these reasons I set aside the decision first-tier Tribunal.

### **Remaking the decision**

39. I remake the appeal by dismissing it. The salient facts are undisputed and are amply set out above.

40. I accept the appellant and Ms Moorghen enjoy family life as a married couple. They married very recently but their family life was well established by June 2017 when the First-tier Tribunal heard the appeal. It is reasonable to infer from the appellant's silence at his earlier appeal in April 2013 that the relationship had not yet taken on any degree of seriousness of permanence. I accept there has been cohabitation since October 2014, a period of a little over three years. I accept the couple entered into a religious marriage in September 2016. I accept that Ms Moorghen's family are supportive and fond of the appellant. There are no children. There are no significant health issues. The appellant is no longer claiming he is at risk in Pakistan and he could return there and stay with family members while he applies for entry clearance.

41. In conducting the balancing exercise to assess the proportionality of the decision, I accept the appellant has no criminal record and no reasons have been given that his presence in the UK is not conducive to the public good. However, his immigration history is very poor and shows a grave disregard for the law. He has achieved his lengthy residence by dint of pursuing a false asylum claim. There is strong public interest in maintaining immigration controls in this case. The usual consequence of overstaying is removal.

42. The appellant's relationship with Ms Moorghen has been established and developed in the knowledge that the appellant had no right to remain in the UK and he could be required to leave.

43. The appellant has not shown there are insurmountable obstacles to his family life continuing in Pakistan. It is not the preference of the parties for very

understandable reasons. However, the test is a demanding one and the matters raised regarding Ms Moorghen's lack of language skills and the need for her to contribute to her parents' mortgage repayments do not show anything more than that there would be some degree of hardship in expecting the couple to live together in Pakistan. The obstacles mentioned could be overcome by Ms Moorghen learning the language and by her parents making other financial arrangements.

44. The application of sections 117B(2) and (3) does not weigh against the appellant. However, the application of section 117B(4) means little weight can be given to his relationship with Ms Moorghen.
45. There are no very compelling circumstances which outweigh the public interest in removal in this case. The appellant's immigration history is very poor and his relationship with Ms Moorghen has always been precarious. It is possible to find cases in which family life is so strong that removal will be disproportionate even where there are no insurmountable obstacles to family life continuing elsewhere. However, that is not the case in this appeal.
46. In particular, there are good reasons for expecting the appellant to return to Pakistan to apply for entry clearance so that an entry clearance officer can apply proper scrutiny to the claim by reference to Appendix FM of the rules. Time has elapsed and the impact of the appellant's immigration history and persistence in bringing a false asylum claim are proper matters for the respondent to assess. Unlike in a case such as *Chikwamba*, there would be no significant hardship in the temporary interruption to family life which this would bring about.

### **NOTICE OF DECISION**

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside.

The following decision is substituted:

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed

Date 7 December 2017

**Deputy Upper Tribunal Judge Froom**