



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004642

First-tier Tribunal No: HU/00261/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

5th February 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Mr Mamoor Khan
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr C Mupara, Direct Access

For the Respondent: Mr T Lindsay, Home Office Presenting Officer

Heard at Field House on 9 January 2024

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Graves, ('the judge'), promulgated on 19th July 2023 dismissing the appellant's appeal. The appellant had appealed on human rights grounds against the respondent's decision dated 13th January 2023 refusing his application dated 12th August 2022 for leave to remain on human rights grounds.
2. The appellant entered as a student on 7th June 2008 and successfully extended his leave to 7th April 2016, after which he became an overstayer. He made successive applications for an EEA residence card, which were refused and then claimed asylum in February 2017, which application he then withdrew.
3. He met his partner Ms Lilybeth Velasco Vinuya a British citizen originally from the Philippines in August 2017 and they began living together in January 2018. He asserts a right to remain on Article 8 grounds on the basis that he and his

partner would face insurmountable obstacles to the continuation of their relationship in Pakistan and in the alternative removal would result in unjustifiably harsh consequence. The respondent accepts that all of the requirements for family life application are made save for the immigration status requirement and does not accept that there are insurmountable obstacles to family life in Pakistan.

4. The judge, at [17] found the appellant had familial, educational, social and cultural ties in Pakistan that would assist him in reintegrating there and he had not established why he could not live in a less conservative rural area. He would be able to assist his wife in communication as there was no evidence to show she could speak any of the majority languages in Pakistan. The appellant has parents and a brother who live in Pakistan but it had not been established that he was estranged from his family and it was far from evident that the couple would face destitution, even though the family home was not large enough for them to live in. There were no health issues and the appellant was highly educated with a business degree in finance and had a postgraduate diploma and experience of working with children. The sponsor has two adult children living in the UK with one grandchild, but they did not live with her and were not financially dependant and could retain contact by visits and remote means.
5. Although it was recorded at [22] that the sponsor is a Christian and has concerns about living in Pakistan, as stated the appellant had produced no country information in his bundle about any difficulties the sponsor might face in Pakistan as a Christian, albeit that he refers to human rights violations against Christians in his statement but did not provide copies and none was provided by Mr Mupara, representing him, either. The judge found there was insufficient evidence in the appeal to establish that the sponsor herself would be a target of violence, that she was evangelising or a proselytising Christian who would attract adverse interest or she would be unable to practice her faith in Pakistan.
6. Nor did the judge accept at [23] it would be illegal for the couple to live together in Pakistan as they are not married and they had not produced any evidence to that effect. Further, they had not raised any legal, practical or personal obstacles to marriage and why they could not marry if they chose to do so.
7. At [24] the judge accepted the appellant and sponsor were in a genuine and subsisting relationship and the sponsor earned enough funds to meet the requirements of the immigration rules.
8. Under Appendix FM at [26], the judge found that there would be no very significant obstacles to reintegrating to Pakistan on the facts, nor would there be insurmountable obstacles to family life continuing in Pakistan. It would be difficult for the sponsor to leave her friends [28] and family behind but she had already done this by moving to the UK.
9. At [29] the judge found there was no sufficient evidence to find there would be very significant difficulties facing this couple as a result of their unmarried status and it was not for the Tribunal to step into the arena to look for evidence such as country information or other evidence to substantiate the appellant's assertions. The respondent had said repeatedly in the decision there was no evidence of the obstacles relied on and the appellant was on notice that this in issue.

10. Further at [30] the judge found it has not been established that the appellant and sponsor could not find work to support and accommodate themselves. Thus, the appellant had not met the Rules.
11. The judge at [32] turned to the Article 8 balancing exercise and considered **Chikwamba v SSHD** [2008] UKHL 40 and noted that the Rules had been changed since **Chikwamba** in order to consider wider factors that might cause unjustifiably harsh consequences, GEN.3.2.
12. Other factors relevant to the proportionality and balancing exercise had now been included by statute, Section 117B. These the judge reasoned were legal developments, all postdating the reasoning in **Chikwamba**. The judge referred to **Alam v Secretary of State** [2023] EWCA Civ 30 and **Younas (section 117B(6)(b); Chikwamba; Zambrano)** [2020] UKUT 129 (IAC) and directed himself at [34] as follows:

“34. In both Younas and in Alam, there was [no] held to be no general presumption that the public interest does not require removal, where the appellant meets all of the requirements under the Rules, save for immigration status, and so has been refused on the narrow ground of the availability of entry clearance from abroad (where EX1 does not apply). However, issues relevant to the proportionality of an application for entry clearance may still be a relevant factor in the balancing exercise.”

And in particular, the judge set out at [27] the questions to be asked under **Younas**.

13. Taking all the factors into consideration, the judge found at [43] that temporary separation for that purpose would not be a disproportionate outcome and that the appellant could, if he chose, remove himself to Pakistan to make an application for entry clearance.
14. The grounds for permission to appeal were submitted on the following four grounds.

Grounds of Appeal

15. They were fourfold as follows:
 - (i) the judge employed the wrong legal test when considering whether public interest was outweighed by other factors.
 - (ii) it was a material error of law to expect a British citizen to leave the UK in order to continue family life with a partner abroad.
 - (iii) it was a material error of law to treat the strong public interest in **Younas** and this appellant’s case as equally strong
 - (iv) it was a material error of law to suggest that the **Chikwamba** principle was superseded by Appendix FM and Section 117 of the 2002 Act.
16. The first two grounds were refused permission by the judge granting permission, only grounds 3 and 4 were granted permission.
17. Ground 3 submitted that the judge erred in law by failing to recognise declaring distinction between the appellant and **Younas**. On the judge’s analysis **Younas**

obtained entry clearance by deception as they entered as a visitor despite intending to remain long-term as a partner, thereby circumventing the Immigration Rules. Therefore there was a strong public interest in requiring that individual to leave the UK. The appellant however entered the UK legally as a student. He did not enter with a sinister motive, he was here for eight years studying. He complete two academic degrees. Whilst here he developed a genuine and subsisting relationship.

18. Secondly, finding the appellant arguably seeks to circumvent the rules was egregious. The respondent did not make the allegation in a decision under challenge and the respondent was not represented at the substantive hearing. There was no cross-examination. This was a very serious allegation for which there was no lawful basis for concluding that the appellant was someone who was arguably seeking to circumvent the Immigration Rules. In **Younas** the appellant clearly intended to circumvent the Rules. The same is not true here and had the judge correctly directed herself to the facts in law she would have reached a different conclusion.
19. Ground 4 advanced that it was a material error of law to suggest that the **Chikwamba** principle was superseded by Appendix FM and Section 117 of the 2002 Act.
20. The judge appeared to suggest that the **Chikwamba** principle was superseded by Appendix FM and Section 117B and this was a material misdirection. **Chikwamba** was still good law and its principle has endured having been affirmed, **VW (Uganda) v Secretary of State for the Home Department [2009] EWCA Civ 5** at [43], **SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054** at [30], **Agyarko [2017] UKSC 11** at [50] to [52], and **Younas**. All these authorities addressed the question of whether it was in the public interest and/or proportionate to require someone to leave the UK in order to apply for entry clearance in order to return to the UK (which is exactly what the judge did). These authorities were addressed in the appellant's skeleton argument and submissions and the judge failed to engage with the appellant's legal arguments.

The hearing

21. At the hearing Mr Mupara agreed that the issues raised in his skeleton argument were recorded by the judge at [9] of the decision and in particular Mr Mupara submitted that **OA** held that where the appellant could satisfy the Rules, there was a requirement to point to something more in the public interest when removing an appellant. In **Younas** the appellant was required to leave because he had obtained leave to remain by deception and had attempted to come here to live with his partner as a visitor and there was a strong public interest to that case. However, in this case the public interest is not that strong. The appellant developed a relationship. He accepted when he had no leave to remain but in the view of Mr Mupara the strength of the public interest was not the same and he disagreed with what the judge said about that. I was referred to [27] and [28] of **OA** and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 65 (IAC), which identifies that the Secretary of State would need an additional reason to remove the appellant and the judge did not point to any particular reason. Indeed, at [38] the judge acknowledged that past overstaying did not prevent him from re-entering. And the judge stated at [38] that he was likely to meet the Rules and thus should he have to leave and make an application from Pakistan? It was open to the judge to allow the case on the proportionality

assessment and the appellant had pointed to the cost and time spent in attempting to apply from abroad.

22. In relation to ground 4, Mr Mupara submitted that the judge appeared to be suggesting that **Chikwamba** was no longer good law and although Mr Mupara accepted that **Chikwamba** may have been watered down, the approach by the judge was wrong.
23. Mr Lindsay accepted there was no Rule 24 response but submitted that ground 3 was misconceived. The judge had not treated **Younas** as a factual precedent. There were accepted differences with this case, and the judge noted that in **Younas** the public interest was strong. Nevertheless, the judge had proceeded to adopt the recommended balance sheet approach, which he set out at [41] and particularly at [41(b)] the judge identified that as an overstayer therefore there was still a strong public interest in him leaving the UK. That was an unimpeachable finding on the facts. The paragraphs cited from **OA** by Mr Mupara were not relevant here, this appellant could not meet the Rules as he did not meet the immigration status requirement. Furthermore, **OA** was not pleaded in ground 3 or 4.
24. In the second point made in ground 3, exception was taken to the judge finding the appellant was trying to circumvent the Rules, but that did not form part of the Article 8 assessment. In any event the set of facts the judge faced was that of an appellant who had overstayed his leave to remain and had not left the UK when arguably he should have done and was expressly asking the Secretary of State and the Tribunal to issue leave to remain on a freestanding Article 8 basis. That, indeed, was seeking to circumvent the Rules and the description was de facto circumvention, that is going round. The judge was entitled to take the view he did.
25. In relation to ground 4, the appellant suggested it was wrong to suggest that **Chikwamba** had been superseded, but that is precisely what the senior courts have found to be the case. The judge looked at **Younas** which was considered in **Alam** and the judge set out at [33] specifically what **Alam** said. The judge went on to find that matters had moved on from **Chikwamba** and Section 117 is now applicable where an appellant relies on **Chikwamba** which was correct. In any event, **Chikwamba** was decided on its own facts and that is what was said in **Alam**. Particularly in **Chikwamba** there were very harsh conditions for the appellant returning to Zimbabwe.
26. Here the judge looked at the facts and found the appellant had a poor immigration history and was entitled to find a clear public interest in requiring the appellant's compliance with the Rules. On the judge's findings there was no disproportionate finding in relation to Article 8.

Conclusions

27. At the outset I note that there was no successful challenge to the finding by the judge that the appellant and sponsor could relocate to Pakistan and that there would be no insurmountable obstacles to family life continuing in Pakistan. No permission to appeal was granted on that particular ground and therefore the finding by the judge that the appellant had not met the Immigration Rules stands.

28. Secondly, Mr Mupara submitted that the judge failed to follow **OA and others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC)**. However, the headnote in **OA** is as follows:

“Human rights appeals

- (1) *In a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, a finding that a person (P) satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that (provided Article 8 of the ECHR is engaged), the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the Secretary of State in the proportionality balance, so far as that factor relates to the particular immigration rule that the judge has found to be satisfied.*
- (2) *The fact that P completes ten years' continuous lawful residence during the course of P's human rights appeal will generally constitute a 'new matter' within the meaning of section 85 of the 2002 Act. The completion of ten years' residence will normally have a material bearing on the sole ground of appeal that can be advanced in a human rights appeal; namely, whether the decision of the Secretary of State to refuse P's human rights claim is unlawful under section 6 of the Human Rights Act 1998. This is because paragraph 276B of the Immigration Rules provides that a person with such a period of residence is entitled to indefinite leave to remain in the United Kingdom, so long as the other requirements of that paragraph are met.*
- (3) *Where the judge concludes that the ten years' requirement is satisfied and there is nothing to indicate an application for indefinite leave to remain by P would be likely to be rejected by the Secretary of State, the judge should allow P's human rights appeal, unless the judge is satisfied there is a discrete public interest factor which would still make P's removal proportionate. Absent such factors, it would be disproportionate to remove P or require P to leave the United Kingdom before P is reasonably able to make an application for indefinite leave to remain.*

That specifically states that in a human rights appeal it is where there is a finding that the appellant satisfies the requirements of a particular Immigration Rule and that Article 8 is engaged that the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor in the proportionality balance. To my mind, [28] of **OA** underlines the point that the appellant must fulfil all the various requirements of the Immigration Rules, including, for example, “the general grounds of refusal” which at that point was [322(2)]. Notwithstanding the judge in this case has identified specifically found the appellant could not meet the Immigration Rules.

29. It is clear from the structure of the decision and on a careful reading of the decision, that the judge has not treated **Younas** as a factual precedent and acknowledged the differences in the cases and further, as submitted by Mr Lindsay recommended a balance sheet approach. The judge was quite clear the question she needed to ask herself was whether the interference for the appellant and sponsor's rights under Article 8 and those of other family members

arising from the appellant's removal was justified and that there needed to be a proportionality evaluation. The judge quite properly identified at the start of [41] that the Rules were not met for the reasons already given and that included that there were no insurmountable obstacles to the sponsor and appellant removing to Pakistan. The judge was obliged to consider the public interest in the maintenance of immigration control and the fact that Mr Mupara disagreed with the weight to be given to evidence should not be characterised as an error of law. The judge was correct to identify at [41(b)] that "The appellant has a poor immigration history, as an overstayer and so there is a strong public interest in requiring him to seek entry clearance to comply with the Rules". That was a correct factual analysis.

30. Exception was taken to finding the appellant was trying to circumvent the Rules, but I conclude that that was not part of the actual assessment of proportionality under [41] and in any event, circumvention means "going round" and is a neutral term, a matter of face and not necessarily pejorative. What the appellant was asking was for the judge to adopt a freestanding Article 8 approach.
31. The judge was obliged to apply section 117B and lawful to apply **Younas**, which at the first headnote states as follows:

*"(1) An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') including section 117B(1), which stipulates that 'the maintenance of effective immigration controls is in the public interest'. Reliance on **Chikwamba v SSHD [2008] UKHL 40** does not obviate the need to do this."*
32. The judge made a proper assessment at [42] stating, "Striking a fair balance between the competing public and individual interests involved I find that the factors raised by the appellant do not outweigh the public interest. Return of the appellant to Pakistan would not give rise to unjustifiably harsh consequences."
33. As noted at [43] the judge found the appellant had not been able to point to any particularly compelling features, which would render his removal disproportionate and took into account that the appellant could reasonably be expected to return to Pakistan and, if he chose, to make an entry clearance application as a partner noting that there is a reasonable prospect that his partner and sponsor would be able to meet the minimum income threshold. The judge further made a finding that temporary separation for that purpose would not be a disproportionate outcome weighed against the maintenance of immigration control. The judge made no reference to the appellant acting nefariously and it was simply open to him that the appellant had not met the Immigration Rules and was subject to the balancing exercise in relation to his Article 8 claim. There is no material error in the judge's approach.
34. The judge did not materially err in approach to **Chikwamba**. In terms of Article 8, the case law in relation to **Chikwamba** has clearly developed in the light of **Younas** and later by the Court of Appeal decision in **Alam**. Bearing in mind grounds 1 and 2, were found not to be arguable, and I have found ground 3 not to be arguable, the facts remain that the judge found the appellant had not met the Immigration Rules, Section 117B was clearly applicable and the relationship was established at a time when the appellant had been an overstayer for a number of

years and was in the UK unlawfully. The judge was bound to take those considerations into account.

35. The Court of Appeal in and **Alam** at [113] held that **Chikwamba** is only relevant if the Secretary of State refuses an application on the narrow procedural ground. That is not the case here. The judge carefully considered all relevant material and on the basis of the evidence placed before him, and the temporary separation for the purpose of returning to make an entry clearance application was not disproportionate. The grounds are not made out.

Notice of Decision

36. I find there is no merit in the grounds of appeal and the First-tier Tribunal decision will stand.
37. The appeal remains dismissed.

Helen Rimington

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1st February 2024