



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/00398/2020 (V)

**THE IMMIGRATION ACTS**

Heard at Cardiff Civil Justice Centre  
Remotely by Microsoft Teams  
On 1 July 2021

Decision & Reasons Promulgated  
On 2 August 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OMNINDER PAL

Respondent

**Representation:**

For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer  
For the Respondent: Mr A Mian, instructed by Bhavsar Patel Solicitors

**DECISION AND REASONS**

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal: Omninder Pal (appellant), Secretary of State for the Home Department (respondent).

**Introduction**

2. The appellant is a citizen of India who was born on 2 May 1990.

3. The appellant arrived in the United Kingdom on 8 April 2012 with entry clearance as a Tier 4 (General) Student valid until 15 August 2013. His leave as a Tier 4 Student was subsequently extended until 29 December 2014. However, on 15 October 2014, his leave was curtailed to 19 December 2014 because his college had lost its sponsor status.
4. On 12 December 2014 the appellant applied for further leave to remain as a spouse. That leave was granted on 5 May 2015 valid until 5 November 2014. On 17 October 2017, the appellant applied for an extension of that leave which was initially refused on 3 May 2018 with an out of country right of appeal. That decision was reconsidered and on 11 January 2019, a new decision refusing him leave as a spouse was made with an in-country right of appeal. On 24 January 2019, the appellant appealed to the First-tier Tribunal. Following a hearing, at which the appellant did not attend, his appeal was dismissed on 10 July 2019 and an application for permission to appeal was refused on 18 October 2019. He became appeal rights exhausted on 4 November 2019.
5. On 13 November 2019, the appellant applied for leave to remain on the basis of Art 8 of the ECHR. On 9 December 2019, that application was refused by the Secretary of State.
6. The appellant again appealed to the First-tier Tribunal. In a decision sent on 31 March 2020, Judge J W H Law allowed the appellant's appeal under Art 8 of the ECHR.

### **The Appeal to the Upper Tribunal**

7. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the judge had failed properly to carry out the balancing exercise under Art 8, in particular had failed properly to take into account the public interest. Further, the judge had been wrong to apply the "Chikwamba principle" (Chikwamba v SSHD [2008] UKHL 40) and concluded that it was disproportionate to require the appellant to return to India to seek entry clearance when the appellant could not establish that entry clearance would be granted on the basis that he met all the requirements of the spouse Rules.
8. Permission to appeal was initially refused by the First-tier Tribunal (Judge Bulpitt) on 13 August 2020.
9. On renewal, the Upper Tribunal (UTJ Rimington) granted the Secretary of State permission to appeal on the basis that the judge had arguably failed to take into account the public interest factors having regard to the fact that he had found that there were not insurmountable obstacles to the appellant and his spouse continuing family life in India and that an application for entry clearance was not bound to succeed.
10. Subsequently, the Secretary of State filed what is described as a rule 24 response, but which is in substance (as the Secretary of State is the appellant in the Upper Tribunal)

an application to amend the grounds of appeal to add a further ground. That contends that the judge was wrong not to permit the Presenting Officer at the First-tier hearing to withdraw the concession that the appellant and spouse had a “genuine and subsisting” relationship.

11. The appeal was listed for a remote hearing by Microsoft Teams at the Cardiff Civil Justice Centre on 1 July 2021. I was based at the Cardiff CJC and Mr McVeety, who represented the Secretary of State, and Mr Mian, who represented the appellant, joined the hearing remotely by Microsoft Teams.

### **The Judge’s Decision**

12. Before Judge Law, the Presenting Officer sought to withdraw the concession in the decision letter that the appellant and his wife had a “genuine and subsisting relationship”.
13. Initially, the Presenting Officer sought an adjournment of six weeks in order that the decision could be reconsidered in the light of the fact that the decision under appeal failed to take account of the earlier appeal decision in which it had been accepted that the marriage between the appellant and sponsor was a marriage of convenience and not genuine. That application was opposed by the appellant’s representative and the judge, applying the overriding objective of dealing with the case fairly and justly, concluded that it would not be fair to adjourn the hearing for a lengthy period when it would have been open to the Presenting Officer to withdraw the decision under appeal if he thought it was incorrect (see paras 5 – 7 of the decision).
14. In the light of that decision, and that the appeal hearing should proceed, the judge declined to allow the Presenting Officer to cross-examine the appellant and sponsor on the basis that the marriage was not genuine as that was incompatible with the respondent’s decision letter (see para 7 of the decision). The judge went on to conclude that the concession made by the respondent in the decision letter could not properly be withdrawn.
15. Having done so, and having heard the appellant and sponsor give oral evidence, the judge made a number of findings.
16. First, he concluded that, applying para EX.1 of Appendix FM, it had not been established that there were “insurmountable obstacles” to the appellant and his wife continuing their family life in India (see para 20 of the decision).
17. Having reached that conclusion, the judge also went on to conclude that he was not satisfied that there were “very significant obstacles” to the appellant’s integration in India under para 276ADE(1)(vi) of the Rules.
18. Having, therefore, concluded that the appellant could not succeed under the Immigration Rules, the judge went on to consider whether the appellant could succeed under Art 8 outside the Rules. The judge accepted, on the basis of the concession, that the appellant and his wife had a “genuine and subsisting

relationship” and therefore had “family life” for the purposes of Art 8.1 of the ECHR and that the appellant’s removal would interfere with that family life.

19. The judge then went on to consider whether the interference was proportionate having regard to the public interest. At para 30, the judge said this about s.117B of the Nationality, Immigration and Asylum Act 2002:

“With regard to the amended Sections 117B of the 2002 Act, I do not know whether the appellant is able to speak English and he is not financially independent, being supported by friends: Section 117B(2) and (3). With regard to Section 117B(4), their relationship was established while the appellant had leave to remain. With regard to Section 117B(5), I am required to give little weight to the appellant’s private life in the UK.”

20. Then at para 31, the judge cited and summarised the House of Lords’ decision in Chikwamba that it would not generally be proportionate to require an individual to leave the UK in order to seek entry clearance which would be granted.

21. At paras 34 – 38, the judge gave his reasons for allowing the appeal on the basis that the decision to remove the appellant was disproportionate:

“34. I have found that there would not be insurmountable obstacles to the family life of this appellant and his wife continuing in India. However, the question at the heart of this appeal is whether it would be proportionate to expect the appellant to go there either with his wife or on his own solely for the purpose of making an entry clearance application.

35. The Supreme Court indicated in **Agyarko** (page 51) that there may be no public interest in the removal of an appellant who is certain to be granted leave to enter if an application was made outside the UK. In this case, I have no information about the accommodation or maintenance arrangements so it cannot be said that an application by the appellant for entry clearance from India would be bound to succeed. Considerations relating the best interests of children are not relevant in this case.

36. Miss Brankovic submitted that there would be ‘unjustifiably harsh consequences’, as referred to in paragraph GEN.3.2. of Appendix FM, due to the limited accommodation and lack of job prospects, coupled with the fact that the appellant had lived in the UK for a number of years and had been granted leave to remain as a spouse in 2015. As referred to in the grounds of appeal, she submitted that there was an element of perverseness in the respondent’s decision-making process, since it was no longer being claimed that the marriage was one of convenience.

37. If the appellant returned to India without his wife, there will be a period of interference with his family life of uncertain duration. It is not clear whether he will be granted entry clearance, particularly since he has been in the UK in breach of immigration law; regardless of whether paragraph 39E might apply to him, it would not alter the fact that he had been in the UK without leave since his appeal rights became exhausted. Bearing in mind that the appellant was on a path to settlement in the UK and the respondent has now accepted, and I have found, that they are a genuine couple, it is hard to see what public interest would be served by requiring

the appellant to return; on the one hand, it would send a deterrent message to others, but it would also risk undermining public confidence in the immigration system in a sense that his removal would solely be the result of the respondent having once decided that the appellant's marriage was not genuine, even though it was subsequently decided otherwise.

38. Having considered all the submissions and balancing the public interest if the appellant should return against his right to respect of family and private life, I find that the respondent has not satisfied me that the decision under appeal is proportionate."

22. As a result, at para 39, the judge allowed the appeal under Art 8 of the ECHR.

## **Discussion**

### *The 'Concession' Argument*

23. Before turning to the grounds of appeal which, in substance, challenge the judge's reasoning at paras 34 - 38, I should deal first with the additional ground raised by the Secretary of State in her "rule 24" response dated 21 October 2020.
24. Mr McVeety, on behalf of the Secretary of State invited me to consider this additional ground which challenges the judge's refusal to permit the Presenting Officer to withdraw the concession in the decision letter that the appellant's marriage was genuine and subsisting. He submitted that the judge had failed properly to consider that issue which was relevant both to the Rules and whether family life was established for the purposes of Art 8. He was unable to explain why this ground was not in the Secretary of State's original grounds of appeal but he submitted it was a somewhat obvious point that Judge Law had only considered the impact of withdrawing the concession from the point of view of the appellant whilst fairness required that both parties' circumstances and any prejudice to them should be considered. He submitted that it had been clear before the judge that the Presenting Officer accepted that there would have to be an adjournment in order that the appellant, if he so wished, could prepare in order to deal with the additional issue of whether his marriage was "genuine and subsisting".
25. Mr Mian on behalf of the appellant invited me not to allow the amendment. He submitted that no judge had granted permission on this ground and that it was now too late to raise this point at this stage of the proceedings before the Upper Tribunal.
26. Having heard the submissions, I indicated that, subject to any requirement of fairness to the appellant, I granted the Secretary of State permission to add this additional ground of appeal.
27. The grounds of appeal are contained in the application for permission to appeal which stands as the notice of appeal in the Upper Tribunal (see rule 22(2)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended)). The UT may, however, permit a party to amend any document, including the notice of appeal under its case management powers in rule 5(3)(c). That is a discretionary

power that has to take into account the overriding objective of dealing with a case “fairly and justly” under rule 2. Here, the history of the appellant’s applications for leave as a spouse indicates that the Secretary of State, and on appeal the First-tier Tribunal in 2019, considered that the appellant’s marriage was not a “genuine and subsisting” one. The issue was not taken in the decision letter dated 9 December 2019 which is the subject of this appeal. In that decision, it is stated:

“You have a genuine and subsisting relationship with your British partner.”

28. Mr McVeety was unclear why this point had been accepted in the decision letter. Mr Mian submitted that it might well be that, as a result of further supporting material submitted with the most recent application, the Secretary of State had decided that the position was otherwise than the one reached on appeal in 2019. That is, of course, speculation. The important point is, however, that the appellant whilst not expecting this to be an issue at the First-tier Tribunal hearing was, at least, aware of the fact that the point had previously been raised and a judicial decision had been made against him. Mr Mian pointed out that that hearing took place in the absence of the appellant and sponsor due to a confusion over attendance at the hearing. Nevertheless, it was a judicial finding and it was unsuccessfully challenged when permission to appeal was refused by the First-tier Tribunal. Of course, given that the appellant was not expecting the issue to be a live one at the First-tier Tribunal, it may well have been necessary, as a matter of fairness, to adjourn that hearing if this issue was again to be a live one in order to allow the appellant to have an opportunity to present the best possible case, in terms of evidence and otherwise in order to seek to establish that his relationship was indeed a “genuine and subsisting” one. That could have been done, and the Presenting Officer in effect accepted that as did Mr McVeety before me, if the judge had allowed the concession to be withdrawn. Mr Mian did not suggest that he was not in a position to deal with the concession issue and whether the judge erred by preventing the Presenting Officer from withdrawing that concession.
29. In these circumstances, applying the overriding objective, I considered it just and fair to permit the Secretary of State to raise this additional ground of appeal.
30. Turning now to the substance of that ground, Mr Mian submitted that the judge was properly entitled, on the basis of the case law, not to allow the concession to be withdrawn. He submitted that there was clear prejudice to the appellant of a delay in the Tribunal proceedings and a cost of a subsequent hearing also had to be considered. Mr Mian submitted that the judge had been correct not to conclude that the decision in R v IAT and another ex parte Kwok On Tong [1981] Imm AR 214 required the judge to be satisfied that the appellant met all the requirements of the Immigration Rules insofar as that was relevant to concluding whether he could succeed under Art 8 of the ECHR. Mr Mian submitted that that case was properly distinguishable as, unlike in Kwok On Tong, the respondent had specifically conceded that one part of the Rules had been met.
31. I begin first with the approach to withdrawal of a concession made by the respondent. The case law is helpfully summarised in the Court of Appeal’s decision

in AK (Sierra Leone) v SSHD [2016] EWCA Civ 999 (Jackson and Black LJ) at [31]-[38] as follows:

31.....I shall begin by reviewing the law concerning the making and withdrawal of concessions.

32. Carcabuk, appeal number 00/TH/01426 dated 18 July 2000 was a decision of the Immigration Appeal Tribunal comprising Collins J and Mr Ockelton dealing with two cases where issues arose concerning concessions made by the Secretary of State. The concessions concerned the credibility of the Claimants in two cases at hearings before the adjudicator. In paragraph 11 of his judgment, Collins J, delivering the judgment of the Immigration Appeal Tribunal, held that concessions of fact made by a Home Office Presenting Officer may be queried by a adjudicator, but if the Home Office Presenting Officer maintained the concessions, they bound the adjudicator. Nevertheless, the Secretary of State may be able to withdraw the concessions on appeal.

33. In Opacic, appeal number 01/TH/00850 dated 15 May 2001, the Immigration Appeal Tribunal reviewed the application of the principles stated in Carcabuk to different circumstances. The Immigration Appeal Tribunal noted that in Carcabuk the concessions under consideration related to credibility, whereas in the matters before the Immigration Appeal Tribunal, the concessions were in a different context. At paragraph 22, the tribunal said:

"Where an appeal has been conceded in its entirety, as in these cases, we do not consider that such a concession can be withdrawn and we see nothing in Carcabuk and Bla that leads us to any contrary view."

34. In Secretary of State for the Home Department v Davoodipannah [2004] EWCA Civ 106 an issue arose about a concession made by the Secretary of State. Kennedy LJ, with whom Clarke LJ and Jacob LJ agreed, said that the Immigration Appeal Tribunal had power to allow withdrawal of a concession. The tribunal would exercise that power in order to do justice in the circumstances of the case.

35. In NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856 the Home Office Presenting Officer made two different concessions at separate hearings. The first concession was that if the appellant was a lesbian, she would be at real risk on return. The second concession made at a separate hearing was that the appellant was indeed a lesbian and in a relationship with a woman called Ms S in 2006 and 2007. The Asylum and Immigration Tribunal allowed the Secretary of State to withdraw both the concessions. The Court of Appeal upheld that decision. Goldring LJ, with whom Lloyd LJ and Mummery LJ agreed, stated at paragraph 12:

"As Kennedy LJ makes clear, the Tribunal may in its discretion permit a concession to be withdrawn if in its view there is good reason in all the circumstances for that course to be taken. Its discretion is wide. Its exercise will depend on the particular circumstances of the case before it. Prejudice to the applicant is a significant feature. So is its absence. Its absence does not however mean that an application to withdraw a concession will invariably be granted..."

36. The Court of Appeal applied those principles in CD (Jamaica) v Secretary of State for the Home Department [2010] EWCA Civ 768, but that judgment does not call for any further discussion.

37. Similar issues arose in a case in this court last week, namely Koori v Secretary of State for the Home Department [2016] EWCA Civ 552. The appellants in that case contended that they could benefit from rule 276ADE(iv) of the Immigration Rules. That rule provided that the requirements to be met by an applicant for leave to remain on the grounds of private life in the UK were that the applicant was under the age of 18 years and had lived continuously in the UK for at least seven years, discounting any period of imprisonment, and that it would not be reasonable to expect the applicant to leave the UK.

38. Mr Malik on behalf of the appellants contended that the Secretary of State had conceded that the seven year rule was satisfied. Mr Malik failed in that submission on the facts. In relation to the issue of principle, however, Elias LJ, with whom Underhill LJ and Peter Jackson J agreed, said this at paragraph 31:

"I would accept that if there had been a considered and lawful decision to deem the seven year rule to be satisfied, the Secretary of State should not be allowed to resile from that decision. An administrative body cannot keep revisiting decisions which affect individual rights: there must be finality, at least unless there is a powerful public interest to the contrary."

32. At [48]–[49], Jackson LJ added this:

"48. It follows that the concessions made by the Home Office Presenting Officer were such as to determine the entire appeal. The First-tier Tribunal Judge, as he was entitled to do, accepted those concessions. That was the end of the case.

49. I do not need to go so far as to say that in such circumstances the Secretary of State could never appeal to the Upper Tribunal, but on the facts of this particular appeal, it seems to me quite unjust that the Secretary of State, having conceded on all points, should be entitled to resurrect her case and withdraw the concessions which she had made. As Mr Fortt rightly concedes, the Upper Tribunal gave no good reason for allowing the Secretary of State to take that course."

33. I would make two points. First, the case law recognises that a concession may be withdrawn if it is in the interest of justice to do so, having regard to all the circumstances including any prejudice to the parties and the nature of the concession whether it is to fact or law. Secondly, however, as can be seen from the summary of the case law, the concessions that were being considered were ones *either* made in the First-tier Tribunal and sought to be withdrawn in the Upper Tribunal (or its equivalent at the time) *or* were made in the Upper Tribunal (or its equivalent at the time) and were sought to be withdrawn in the Court of Appeal. An example of the latter, in which the Court of Appeal declined to allow a concession to be withdrawn that had been made in the Upper Tribunal before it, is AM (Iran) v SSHD [2018] EWCA Civ 2706. At [44], Simon LJ (with whom Thirlwall and Sharp LJJ agreed) said this:

In my view the Secretary of State's application to withdraw the concession made before the UT cannot easily rely on principles of justice and fairness, particularly when it is sought to do so in a belated and informal way. One would expect those who seek to withdraw a concession to explain both promptly and frankly why the concession was made, why it was mistaken and why it is now just and fair

that they be allowed to withdraw it. It is striking that when the application for permission to appeal to the UT from the UT decision was made, the Secretary of State's newly instructed and experienced counsel (who was not the counsel instructed before this court) did not seek assert that there was a mistake or seek leave to withdraw the concession.

34. Consequently, none of the concessions being considered in the cases were ones made solely in the decision letter. They had been made during the judicial process and it was sought to resile from them on appeal. That is important as it results in a change of stance by the respondent after, at least, the initial appeal hearing has been completed and, in all likelihood, the appellant was successful. There may be a greater reluctance to permit withdrawal in the interest of justice at a later stage of the judicial process which has previously proceeded on the basis of a concession.
35. In this case, the judge treated the Presenting Officer's request to re-open the issue of whether the relationship was a "genuine and subsisting" one as withdrawing a concession. It had, of course, only been made in the decision letter. At paras 9-10 the judge said this:
- "9. Although he did not put it in that way, Mr Aigbokie may have been seeking to withdraw a concession made by the respondent. In **SSHD v Davoodipannah [2004] EWCA Civ 106** the Court said that the Tribunal can allow a concession made by either party to be withdrawn if it considers there is a good reason in all the circumstances to do so. The Tribunal must try to obtain a fair and just result and consider each case on its own merits. It may be relevant to consider the nature of the concession, the timing and whether there will be prejudice to one of the parties if the withdrawal is allowed. It is not essential to demonstrate prejudice before an application to withdraw a concession can be refused. In the absence of prejudice, if a party has made a concession which appears in retrospect to be a concession which should not have been made, then probably justice will require that the party be allowed to withdraw that concession.
10. I consider that to allow the concession to have been withdrawn in this case would have caused prejudice to the appellant. Furthermore, it was not an obvious error by the decision-maker, since the decision letter refers to the previous appeal having been dismissed by the Tribunal and it follows that the decision-maker had that unsuccessful appeal in mind. It is perfectly possible that he or she reviewed the answers given during the marriage interviews and decided that it was not in fact realistic for the respondent to argue that it was not a genuine marriage, especially in the light of the fact that the appellant failed to attend the hearing in July 2019, due to what is said in the current grounds of appeal to have been miscommunication between him and his previous solicitors."
36. Mr McVeety, rightly in my judgment, pointed out that the judge only looked at the impact upon the appellant of withdrawing the concession. What the judge did not do was looked to consider whether any prejudice to the appellant could be overcome. It could, of course, be overcome by allowing an adjournment to the appellant if that was necessary in order to allow the appellant to prepare his case to

deal with the issue of whether his marriage was a “genuine and subsisting” one. Unlike the case law, this concession was one that was made in the decision letter and the respondent sought to withdraw it at the outset of the Tribunal proceedings. It was not a concession that had been made at one level within the Tribunal structure and which was then sought to be withdrawn subsequently, after the appeal was completed either in the Upper Tribunal or above that in the Court of Appeal. It seems to me that the withdrawal of the concession at such an early stage of the proceedings is less problematic than a subsequent or, as the Court of Appeal described it in AM (Iran), a “belated” withdrawal of a concession. This was not a case where the Secretary of State, having lost an appeal, in the sense that the appellant’s appeal had been allowed, and then on further appeal seeks to re-open a matter previously conceded.

37. The importance of the point that the concession was withdrawn at the first opportunity in the appeal hearing, is perhaps reflected in case law beginning with Kwok On Tong. In that case, it was held that before a judge could allow an appeal on the basis that a decision was not in accordance with the Immigration Rules (as the grounds of appeal then permitted) the judge must be satisfied that the individual meets all the requirements of the Immigration Rules.
38. In RM (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039, the AIT summarised the effect of Kwok On Tong as follows at [10]:

“In Kwok On Tong (and also in R v IAT ex parte Hubbard [1985] Imm AR 110) the Court had to consider what the position was if a refusal of entry clearance was based on one element of the Rules, but by the time of the hearing it became apparent that there was some other requirement of the Rules which the appellant could not meet. Both those cases decide that the notice of refusal is not equivalent to a pleading; if new elements of the Immigration Rules come into play they are to be dealt with on the appeal, and the parties must be allowed any appropriate adjournment in order to avoid the injustice of being taken by surprise. The reason is the wording of s19. Even if the appellant shows that he met a particular requirement of the Immigration Rules that had been in issue at the appeal, the decision to refuse him is not a decision that was “*not in accordance with the law including any applicable Immigration Rules*” unless, at the time of the decision, he met the requirements of the Immigration Rules applicable to his case. To put it another way, an appellant can lose his appeal by failing to meet just one requirement of the Rules (whether specified or not in the notice of refusal), but he can win only by meeting all the requirements of the Immigration Rules (whether specified or not in the notice of refusal).”

(See also CP (Section 86(3) and (5); wrong rule) Dominica [2006] UKAIT 00040 at [18] and [23].)

39. Of course, the present permitted grounds of appeal in s.84 of the 2002 Act as amended by the Immigration Act 2014 no longer allow the First-tier Tribunal to allow an appeal on the basis that a decision is “not in accordance with the Immigration Rules” but, for these purposes, only on the basis that the decision is a breach of s.6 of the Human Rights Act 2000, in particular, for the purposes of this

appeal, a breach of Art 8 of the ECHR. However, the reasoning in Kwok On Tong, approved in RM, applies with equal force in a case where an individual is seeking to establish that a decision of the Secretary of State or an ECO is a breach of Art 8 because the individual meets the requirements of the Immigration Rules and, as such, there is no public interest in their removal or preventing their entry to the UK (see TZ (Pakistan) v SSHD [2018] EWCA Civ 1109 at [34] and Begum (employment income; Rules/ Article 8) [2021] UKUT 115 (IAC)).

40. The point was made by the Upper Tribunal (UTJ Blundell and DUTJ Thomas) in the unreported decision of Bajaj (HU/12628/2019) 2 December 2020 at [21]-[22] as follows:

“21. Whether the respondent failed to turn her mind to S-LTR 1.6 or whether she considered that provision and decided not to apply it to the appellant, Mr Tufan submitted that we were in any event bound to consider its application. He cited the decision of Glidewell J in Kwok on Tong and that of the Asylum and Immigration Tribunal in CP (Dominica) in support of his submission. These are decisions of some antiquity in the sphere of immigration law and we note that the statutory regime - and the appellate jurisdiction under Part 5 of the Nationality, Immigration and Asylum Act 2002 in particular - has changed markedly since those decisions were issued. The essential point remains valid, however, despite those changes. Where it is submitted to a judge of the Immigration and Asylum Chamber that an appeal falls to be allowed on human rights grounds because an appellant meets the requirements of the Immigration Rules, the judge must be satisfied that *all* of the requirements of the Rules are met. He or she is not confined, in undertaking that assessment, to the points specifically identified in the notice of refusal. Under the old statutory regime, a judge (whether Immigration Judge or Adjudicator) could not allow an appeal under the Immigration Rules unless those Rules were met. Under the current statutory regime, a judge cannot allow an appeal on human rights grounds because the Immigration Rules are met unless those Rules are indeed satisfied.

22. In some circumstances, it will be apparent to a judge that an appellant is unable to meet the Rules for a reason not stated expressly in the respondent's decision. In Kwok On Tong, for example, it was apparent to the IAT that the appellant was not, as had been claimed in his application, a partner in his uncle's food shop; the relationship was one of disguised employment, contrary to the requirements of the Rules. The critical word in each of the preceding sentences, however, is 'apparent'. It was apparent in Kwok On Tong that the relationship was not one of equals but of master and servant. It might become apparent to a judge that an appeal cannot succeed on the basis contemplated at [34] of TZ (Pakistan) if, for example, an appellant is the subject of a deportation order [2]. Even where that point is not taken by a decision maker, it operates as an absolute and incontrovertible bar to an appellant satisfying the Immigration Rules.”

41. I agree with this statement of principle which accords with my own view expressed above.
42. It was, at least in part, the appellant's case that he met the requirements of the Immigration Rules and so, on that basis, should succeed under Art 8. The judge was wrong in para 8 of his decision to distinguish Kwok On Tong on the basis that it was

no longer relevant under the new scheme of appeal rights in the 2002 Act. It was, for the reasons I have set out above.

43. Further the judge was wrong to distinguish Kwok On Tong on the basis that it did not apply because a “concession” had been made in the decision letter rather than the matter not being raised at all. The logic, that the appellant had to establish before the judge all the requirements of the partner rule were met, applies whether or not the matter was conceded or simply not disputed in the decision letter.
44. Given that the need for fairness if the concession was withdrawn could have been dealt with by an adjournment if required, it was, in my judgment, wrong for the judge not to permit the Secretary of State to withdraw the “concession” made in the decision letter not least because the judge had to be satisfied, if the appellant’s argument was to succeed, that he met all the requirements of the Immigration Rules including that his marriage was a “genuine and subsisting” one. The fact that the judge was not satisfied that the other requirements of the Rules were met did not detract from the importance of the Secretary of State at the outset of the hearing being able to present her case on each part of the Immigration Rules which, in her view, the appellant could not establish.
45. In my judgment, the Judge erred in law in not permitting the respondent to withdraw her concession made in the decision letter and by not permitting the Presenting Officer to address in the evidence and submissions the issue of whether the appellant’s relationship was a “genuine and subsisting” one.

*The Public Interest Argument*

46. Turning now to the Secretary of State’s other grounds of appeal, the judge found that there were no “insurmountable obstacles” to the appellant and his wife continuing their family life in India and that, therefore, para EX.1 of Appendix FM was not satisfied.
47. The judge’s approach to whether or not the appellant could nevertheless succeed under Art 8 outside the Rules was, to say the least, confusing.
48. At para 34, the judge appeared to treat the case as being one to which the Chikwamba principle was to be applied, namely whether it was disproportionate to require the appellant to leave the UK temporarily to seek entry clearance. The judge said this was the “question at the heart of this appeal”. At para 35, he referred to [51] of the Supreme Court’s decision in Agyarko (R (Agyarko and another) v SSHD [2017] UKSC 11) which recognised that principle. Lord Reed summarised the principle as follows:

“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*.”

(See also Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC) - but emphasising that the relevant public interest considerations in s.117B must still be considered.)

49. However, at para 35, the judge found that it was *not* established that the appellant’s entry clearance application in India would “be bound to succeed” because there was no information about accommodation or maintenance arrangements. It would seem, therefore, that the “question at the heart of this appeal” should have been resolved against the appellant since he could not fall within the Chikwamba principle.
50. At paras 36–37, the judge went on to consider, apparently under the rubric of “unjustifiably harsh consequences” (which mirrors the approach set out by the Supreme Court in Agyarko (e.g. at [60]) to determining whether the public interest would be outweighed by the individual’s circumstances), as if the appellant was being required to return to India alone and without any prospect of obtaining entry clearance. That approach would, of course, fly in the face of the judge’s finding that there were not “insurmountable obstacles” to both the appellant and his wife continuing their family life in India. At para 37, the judge appeared to return to the scenario that the appellant would return to India without his wife for an “uncertain duration”, namely because he would return alone without obtaining entry clearance. That would appear to be an assessment based upon the premise, despite his earlier finding, that there were no “insurmountable obstacles” to them living in India together.
51. In reaching his assessment of proportionality, I accept Mr McVeety’s submission that the judge failed properly to consider the public interest in assessing the proportionality of the appellant’s removal. There was undoubtedly a public interest in the appellant’s removal given that he had no basis to remain in the UK under the Immigration Rules (see s.117B(1) of the 2002 Act). Further, the judge found in para 30, that the appellant was not “financially independent” and so the public interest was again engaged by s.117B(3). However, that finding, given that he was financially supported by friends, may not survive the view of the Supreme Court in Rhuppiah v SSHD [2018] UKSC 58 at [53]-[56] that credible and reliable third party support equates with financial independence under s.117B(3).
52. In paras 36 and 37, particularly the latter, the judge concluded that the public interest was diminished by the fact that the respondent was no longer claiming that the appellant’s marriage was not a genuine and subsisting one, having once decided that it was. The difficulty with that reasoning is that, as I have already found, the judge was not entitled to prevent the Secretary of State raising the issue that it remained to be established whether the relationship was “genuine and subsisting”. Further, in any event, even if the marriage was now to be taken as genuine, when previously it had not, the fact that it was now to be taken as genuine did not cast doubt upon the

earlier judicial finding that that it had not been established. Indeed, Mr Mian's submissions were that the concession in the decision letter may have been based upon the additional and new evidence submitted with the current application to establish the genuineness of the relationship. Even if the relationship was therefore taken as being genuine, the public interest was not diminished by the notion that therefore the public confidence in the immigration system was somehow undermined by the Secretary of State's earlier "mistake".

53. Given the judge's finding in relation to para EX.1. and that the appellant could not establish that his entry clearance application would necessarily succeed, the task for the judge was to assess whether there were "unjustifiably harsh consequences" sufficient to outweigh the public interest engaged by, at least, s.117B(1) of the 2002 Act. The judge's reasoning at paras 34 - 38 fails properly to engage with that assessment and the reasons given cannot properly sustain his finding that the appellant's removal would be disproportionate.
54. For those reasons, therefore, the decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 involved the making of a material error of law.

### Decision

55. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 involved the making of an error of law. That decision cannot stand and is set aside.
56. The decision must be remade, including, to the extent that the Secretary of State no longer accepts that the relationship was a genuine and subsisting one, that issue under the Rules and in order to establish "family life" under Art 8 of the ECHR.
57. Given the nature of the fact-finding required, and that the evidence is likely to include oral evidence from the appellant and sponsor, the appropriate disposal of the appeal is to remit it to the First-tier Tribunal for a rehearing in order to remake the decision under Art 8. However, the judge's finding in relation to para EX.1, namely that there are not insurmountable obstacles to family life continuing in India (at para 20 of his decision), was not challenged and I see no basis to set it aside and it is preserved. Of course, it may be open to the judge on rehearing the appeal to reconsider that issue if sufficiently compelling up-to-date evidence requires that.
58. The appeal is remitted to the First-tier Tribunal to remake the decision under Art 8 on that basis to be heard by a judge other than Judge Law.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
19 July 2021