Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01057/2020 (V)

THE IMMIGRATION ACTS

Heard remotely from Field House	**Decision & Reasons Promulgated**
On 7 July 2021	**On 28 July 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

AB
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of her family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the appellant: Ms A Jones, Counsel, instructed by Good Advice UK
For the respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the appellant's appeal against the respondent's refusal of her human rights claim. By a decision promulgated on 23 April 2021, I concluded that the First-tier Tribunal had erred in law and that its decision should be set aside. The error of law decision is appended to this re-making decision.

2. The appellant, a citizen of India, based her Article 8 claim primarily on the fact (this no longer being in dispute, following a preserved finding of the First-tier Tribunal) that she is a victim of domestic abuse perpetrated by her now ex-husband, Mr RA. It is said that this history, combined with lawful residence in the United Kingdom since her arrival in 2011 and all other circumstances, goes to show that it would be disproportionate to remove the appellant from the United Kingdom.

The evidence

3. In re-making the decision in this case, I have considered the following evidence:

    (a) the respondent's original appeal bundle;
    (b) the appellant's First-tier Tribunal bundle, indexed and paginated 1-210;
    (c) the appellant' supplementary bundle, indexed and paginated 1-145;
    (d) the brief oral evidence given by the appellant at the hearing.

4. In respect of (d), the appellant adopted her latest witness statement, dated 19 May 2021. There was no cross-examination by Ms Everett. In response to questions from me, the appellant stated that Mr RA's family in India were very influential and lived fairly close to her own family. False accusations and threats had been made by his family, and letters had been sent to the appellant's parents. The appellant did not believe that she could go and live in another part of India. She told me that she had never lived anywhere else and that to do so will entail her giving up everything she had established in the United Kingdom. She also believed that Mr RA's family could find her wherever she might relocate to. The appellant confirmed that there were no pending Family Court proceedings, following recent resolution of certain financial matters.

The parties' submissions

5. Ms Everett relied on the respondent's decision letter and what had been said in my error of law decision. She did not seek to challenge the appellant's credibility or the reliability of the documentary evidence. She did, however, maintain the respondent's position that it would not be disproportionate for the appellant to leave the United Kingdom. The relevant Immigration Rules ("the Rules") had not been met and this

was relevant. Whilst the appellant may hold a subjective fear of being traced by Mr RA's family if she relocated within India, such a move was objectively possible and reasonable.

6. Ms Jones relied on her skeleton argument, dated 30 April 2020, and the evidence as a whole. Mr RA had behaved appallingly towards the appellant over the course of time and this conduct was continuing to date. Whilst the appellant could not meet the Rules, her circumstances did fall within the objectives of the respondent's guidance on victims of domestic abuse. The barrier to success under the Rules was simply that the appellant had not, at the relevant time, had a visa as the spouse of a person present and settled in the United Kingdom. It was submitted that the appellant has an important support network around her, which is helping a deal with her mental health difficulties. A return to India would, it was submitted, result in losing the network and everything else built up in United Kingdom. The appellant had always been lawfully resident in the United Kingdom and remained in employment. Ms Jones acknowledged that this was not a "historical injustice" case, but it was one involving exceptional circumstances.

Findings of fact

7. There is in truth very little, if any, dispute as to the relevant facts. Having considered the evidence for myself, I regard Ms Everett's position as to the appellant credibility to be sensible and correct. The appellant's own evidence is well supported by the documents in almost all respects.

8. I find the appellant to be a truthful witness and the documentary evidence to be reliable in all material respects.

9. I find that the appellant married Mr RA in India in August 2014.

10. I am satisfied that the appellant is the victim of domestic violence and abuse at the hands of Mr RA. I find all of the incidents of physical attacks and sustained and significant controlling and coercive behaviour by him, as set out in the appellant's two witness statements and other evidential sources, have in fact occurred. I do not need to set out the details here. Suffice it to say that the serious misconduct has included hitting; threats; humiliation in private and public; emotional blackmail; oppressive financial control; the active harassment of third parties supporting the appellant (including her Family Law solicitors); making accusations against the appellant of deception to public authorities including the respondent; making accusations against the appellant to her employers; and deliberately engineering false information in order to prejudice the appellant's family law and immigration matters.

11. I make it very clear that the respondent has never suggested that the appellant has practised deception in any way and to anyone, nor that she has engaged in any other form of misconduct. I find that the appellant has an unblemished character.

12. I find that the appellant's marriage to Mr RA permanently broke down in or around May 2019.

13. I find that RA was granted indefinite leave to remain in 2017 and was then naturalised as a British citizen in 2018. I find that the abuse was ongoing throughout this period. Before the First-tier Tribunal, the respondent accepted that the appellant had wished to make an application for indefinite leave to remain and that, if such an application had been made, it was probable that it would have been granted. The judge agreed with this and so do I. Whilst the appellant has not expressly stated in evidence before me that RA physically prevented her seeking to apply to vary her leave to that of a partner (spouse) of a person present and settled in the United Kingdom or a British citizen, I find it to be more likely than not that her failure to do so was influenced by RA's abusive treatment of her during this period. Her evidence, when read in the round, indicates that RA had been exerting financial and emotional control and had specifically accused her of having had an affair. It is clear to me that the appellant was aware that RA was in a position of strength as regards immigration status: he had become settled and soon thereafter a British citizen, whilst she remained in a precarious situation, both in terms of her status and on an emotional basis as well. It is also clear enough that a number of RA's actions were intended to instil fear in the appellant as to the potential loss of any status in this country.

14. It is common ground that the appellant made her latest application (deemed to constitute a human rights claim, the refusal of which led to the current appeal) prior to the expiry of her last period of leave. Therefore, she continues to have leave by virtue of section 3C of the Immigration Act 1971.

15. I find that there is an extant Non-Molestation Order issued by the Family Court in February 2021. That order remains in place until February 2022.

16. The reliable medical evidence indicates a history over the last fifteen months or so of anxiety, depression, and the onset of a hand tremor. The psychiatric report by Dr Latifi, dated 16 January 2021, provides a diagnosis of clinical depression of moderate intensity. I find this to be the case. I find that the symptoms experienced by the appellant have included persistent low mood, feeling hopeless, disturbed sleep, poor appetite, and fleeting suicidal thoughts. The appellant is currently on relevant anti-depressant medication. I find that the appellant's current problems are directly related to the abuse suffered.

17. The reliable evidence before me shows that Mr RA and his family in India have endeavoured to threaten and harass both the appellant and her family. With reference to the appellant's 2020 witness statement, and the letters and supporting evidence provided by her sister, parents, and uncle, I find that both RA and his parents have subjected her relatives to abusive messages containing, for example, false accusations of adultery on the appellant's part.

18. I accept that Mr RA's family has a degree of influence in the home area, which I accept is close to that of the appellant's family. However, whilst not impugning the honesty of the belief held by the appellant, there is insufficient evidence to indicate that his family has significant influence beyond the home area of Bangalore.

19. Having said that, I am satisfied that, were the appellant to return to her parents' home, it is more likely than not that Mr RA's family would come to know of this and that they, in combination with Mr RA himself, would be likely to continue to harass and threaten the appellant in a manner similar to that undertaken in the United Kingdom.

20. In respect of other matters, the appellant plainly speaks excellent English and she is employed as a Senior Application Support Analyst in a bank, earning £43,000 per annum. I find that there are no pending Family Court proceedings following a resolution of outstanding financial matters. I accept that the appellant has established friendships in the United Kingdom and that she has been receiving support over the course of time.

Analysis and conclusions

21. It is common ground that the appellant has established a private life in the United Kingdom and that the respondent's decision constitutes an interference with that private life. There is no issue concerning the general legal framework within which the respondent's decision was made and the legitimate aim pursued by that decision.

22. The core issue in this appeal is that of proportionality and whether the respondent's decision strikes a fair balance between, on the one hand, the appellant's right to respect for her private life and, on the other, the important public interest in maintaining effective immigration control.

23. In conducting the appropriate balancing exercise, I have directed myself to relevant case-law (including, for example, Agyarko [2017] UKSC 11; [2017] 1 WLR 823), the relevant Rule (section E-DVILR of Appendix FM), and the mandatory considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act").

Factors weighing in the respondent's favour

24. In general terms, the public interest in maintaining effective immigration control is significant.

25. It has been acknowledged throughout that the appellant could not have satisfied the requirements of section E-DVILR of Appendix FM to the Rules, specifically the criterion under E-DVILR.1.2 that the last grant of leave must have been as the partner of a person present and settled in the United Kingdom or a British citizen. The

appellant's last grant of leave was as the partner of a Tier 2 migrant. As a result, notwithstanding the fact that the appellant is a victim of domestic violence and abuse, she has been unable to satisfy the immigration status element of the eligibility requirements.

26. An inability to satisfy a relevant Rule is a factor weighing in the respondent's favour (this being the logical inference of what is said at paragraph 47 of Agyarko and see also paragraph 52 of Mobeen [2021] EWCA Civ 886). Accordingly, I attach considerable weight to the appellant's inability to meet the Rules.

27. It is undoubtedly the case that the appellant's status in the United Kingdom has always been precarious, as that term has been construed by the courts (it has never, however, been unlawful). To this extent, the weight attributable to the appellant's private life is generally to be reduced, although this reduction may be offset by a reduction of weight attributable to the public interest, a matter to which I will return, below.

28. I take into account the impermissibility of a "near miss" argument in respect of the Rules (see Miah [2012] EWCA Civ 261 and Patel [2013] UKSC 72; [2014] AC 651, at paragraph 56). Patel also makes it clear that Article 8 is not to be employed as a "general dispensing power".

29. Taking the evidence as a whole, I conclude that the appellant would face unjustifiably harsh consequences if she were to return to her family home or its environs by virtue of the harassment and abuse likely to occur through RA and/or his family. However, I also conclude that the appellant could seek to relocate to another part of India. I appreciate that this would be very upsetting and not without real difficulties. Such a course of action would not result in unjustifiably harsh consequences for the appellant, given her educational and employment record and the availability (as I find it to exist) of treatment for mental health in India.

Factors weighing in the appellant's favour

30. The basis on which the appellant has been unable to satisfy the eligibility requirements of section E-DVILR of Appendix FM is of relevance in this case, even bearing well in mind the "near miss" issue highlighted above. In undertaking a proportionality exercise, all relevant matters should be accounted for. The particular circumstances faced by the appellant over the course of time is clearly a highly relevant matter.

31. The existence of section E-DVILR in Appendix FM illustrates the respondent's policy intention to provide victims with a route to settlement in the United Kingdom, notwithstanding the fact that they may not have established any significant wider private and/or family life here. Underlying this appears to be two interconnected considerations: first, that the Article 8 rights of victims of domestic violence require a form of recognition; second, that victims with leave to enter or remain as the partner

of specified persons (present and settled in this country, British citizens, refugees, or certain EU nationals) should not have to remain in an abusive relationship out of fear of losing all status and being removed from United Kingdom. It is of some note that the leave granted to successful applicants is indefinite and not simply limited.

32. I have found as a fact that the appellant was subjected to domestic violence and abuse during the period in which RA was initially a Tier 2 migrant, then a person present and settled in the United Kingdom, and finally a British citizen. The fact that the appellant is a victim is of itself a relatively significant factor, although this could not alone be enough.

33. In theory, it had been open to the appellant to apply to vary her last grant of leave once RA obtained his indefinite leave to remain or when he later naturalised as a British citizen. At that time, the relationship had not permanently broken down. On the face of it, there is no reason why such a variation application would not have been granted. Indeed, the likely success of a putative application was acknowledged by the Presenting Officer before the First-tier Tribunal and accepted by the judge. The fact that the appellant held an intention to make such application shows that she saw her future in the United Kingdom. I add to this my finding that the appellant was being subjected to domestic abuse throughout the period in question, that her failure to have made the application was probably influenced by the abusive nature of the relationship, and that a number of RA's actions show that he had intended to instil a fear in the appellant that she would lose any status in this country.

34. I take into account the impact of the abuse on the appellant's mental health. Whilst it may not be severe and would not of itself preclude relocation away from the home area in India, it is nonetheless a relevant factor deserving of some weight.

35. My finding on the ability of RA and his family to harass and abuse (or, potentially worse) the appellant if she were to return to her home area in India is also relevant. Again, this would not preclude relocation, but it would involve her being separated from her parents and having to set up a new life as a divorced woman who has experienced abuse and is suffering from mental health problems as a result. This factor is not decisive, but it attracts relatively significant weight, when viewed cumulatively with all other considerations.

36. Viewed holistically, I regard the appellant's circumstances during the relevant period during which she could have made an application for indefinite leave to remain and those pertaining to her life in this country thereafter as constituting a factor deserving of very significant weight in the balancing exercise. Put another way, the particular facts of the case disclose very compelling reasons in favour of her Article 8 claim.

37. In attributing that weight, I treat it as reducing the importance ordinarily placed on the public interest, with reference to section 117B(1) of the 2002 Act. I do not also place it into the context of section 117B(5) of the 2002 Act. In this way, I am not

double-counting the effect of the factor in question (see Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351(IAC), at paragraph 84).

38. This factor does not constitute the application of a "near miss" argument. I am not saying that the appellant should be treated as though she had met the Rules. Nor am I saying that the very limited nature of the reason why she could not meet the Rules should, *for that reason alone*, in some way cancel out the considerable weight attributable to those Rules.

39. For the avoidance of any doubt, this is not an example of an "historical injustice" scenario. The appellant's failure to have made an application for indefinite leave to remain was not due to any fault on the respondent's part. Again, I am concerned with the particular circumstances of the appellant's history and how these relate to the overall balancing exercise.

Factors of neutral weight

40. The appellant speaks excellent English and is clearly financially independent. These two matters avoid the adverse consequences if they were not present.

Overall conclusion on the balancing exercise

41. Bringing all of the above together, I conclude that the respondent's refusal of the appellant's human rights claim does not strike a fair balance between her right to respect for private life and the public interest. That decision and any consequential removal from United Kingdom constitutes a disproportionate interference with the appellant's private life and is therefore unlawful under section 6 of the Human Rights Act 1998.

42. My conclusion is based on a highly fact-specific evaluation of the competing factors in this case. The margin of success may not be wide, but, put shortly, it is predicated on the combination of three elements: the general importance attached to victims of domestic violence and abuse; the specific nature of the abuse suffered by the appellant over the course of time; and the consequences of that abuse in respect of the appellant's status in this country, her mental health, and what she would have to do on return to India in order to avoid further harassment and abuse.

43. I am not employing Article 8 as a "general dispensing power". My conclusion is based on an evaluation of all relevant factors, not on sympathy or a "near miss" basis.

Anonymity

44. It is entirely right that an anonymity direction remains in place. The credible evidence before me shows that Mr RA has sought to discover as much as possible about the appellant's various legal matters and to try and disrupt these and/or distort what she has said and/or provided in order to make her life as difficult as possible. The need to protect the appellant plainly outweighs the public interest in disclosure of her identity.

Notice of Decision

45. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

46. I re-make the decision by allowing the appeal on Article 8 grounds.

Signed: *H Norton-Taylor* Date: 14 July 2021

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.00.

Signed: *H Norton-Taylor* Date: 14 July 2021

Upper Tribunal Judge Norton-Taylor

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01057/2020
(V)

THE IMMIGRATION ACTS

Heard remotely from Field House
On 31 March 2021

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

A S K B
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of her family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the appellant: Ms A Jones, Counsel, instructed by Good Advice UK
For the respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of First-tier Tribunal Judge Behan ("the judge"), promulgated on 27 October 2020. That decision dismissed the appellant's appeal against the respondent's decision, dated 3 January 2020, to refuse a human rights claim.

2. The appellant, a citizen of India born in 1989, came to the United Kingdom in January 2013 as a student. In August 2014 she married a Tier 2 Migrant and was subsequently granted leave to remain in the capacity of a dependent from October 2014 until September 2020. In 2017 her husband was granted indefinite leave to remain and he naturalised as a British citizen a year later. In May 2018 the marriage broke down as result of domestic violence perpetrated by the husband against the appellant. The husband informed the respondent that the marriage was no longer subsisting with the result that the appellant's leave to remain was curtailed so as to expire in August 2019. Prior to that expiry, the appellant made the human rights claim leading to the respondent's decision of January 2020. The human rights claim was based on Article 8 ECHR, with particular reference to the claimed domestic violence.

3. In making that decision, the respondent made only passing reference to the domestic violence issue. The said that the appellant could not satisfy paragraph 276ADE(1) of the Immigration Rules ("the Rules"), nor were there any "exceptional circumstances" in her case. In respect of any claimed fear in India as result of the breakdown of the marriage, it was suggested that the appellant could make a protection claim.

The decision of the First-tier Tribunal

4. At [16] the judge noted the Presenting Officer's acknowledgement that the appellant would very probably have been granted a "spousal visa" (in other words, leave to remain as the partner of a person settled in the United Kingdom or a British citizen) if she had applied for one following her husband's grant of indefinite leave to remain in 2017 or his naturalisation as a British citizen in 2018. It was also accepted that the marriage had broken down as a result of domestic violence. The judge herself found that the appellant had an intention to apply for indefinite leave to remain and that if this had in fact been done, there was a likelihood that such leave would have been granted. She also found that, if applied for, the appellant would probably have been able to obtain leave to remain as a spouse under Appendix FM to the Rules.

5. Between [43] and [51], the judge made reference to the domestic violence provisions within the Appendix FM. In so doing, she noted at [44] the public interest aim of reducing domestic violence through the provisions of Appendix FM and the "extra weight" attributable to a private life:

> "established during the probationary period set out in Appendix FM because the purpose of the appellant leaving their home country and migrating to the UK is to

> join a spouse who already has settled status and because of that than if they came to join a spouse with time-limited leave to remain."

6. The judge noted that the appellant had not left India to join a settled spouse. She concluded that the breakdown of the marriage due to domestic violence did not add weight to the private life and that the appellant's status in the United Kingdom had remained precarious throughout her residence. [50] to [53] of the decision read as follows:

> "50. I have considered whether the fact that the Respondent has made provision for some domestic abuse survivors, whose position seem similar to the appellant's, permits me to increase the weight I give to the appellant's private life or reduce the weight I give to immigration control in this appellant's case. In my judgment it does not because how two competing public interests, one the need for immigration control and the other reducing domestic violence, are to be balanced is a matter for the Respondent and not the Tribunal.
>
> 51. Likewise, it is not this Tribunal's role to assess whether the distinction drawn by the Respondent between a spouse who entered the UK with leave under Appendix FM and one who entered as a family member of a Tier 2 migrant who is later granted ILR is justified.
>
> 52. However sympathetic one might be to this appellant, article eight must not be used as a way to circumvent the rules or the provisions in s.117B of the 2002 Act, expand the Respondent's policy or try to compensate the appellant for the actions of her husband.
>
> 53. The role of the Tribunal in this appeal is to (*sic*) solely to assess whether the effect of the decision on this particular appellant's private life outweighs the need for immigration control."

7. The judge went on to conclude that the respondent's decision was proportionate and lawful.

The grounds of appeal and grant of permission

8. The somewhat lengthy grounds can be pared down to the following points. First, the judge erred by failing to take proper account of the fact of domestic violence when undertaking the proportionality exercise. Second, although the appellant could not meet the strict immigration status criterion under Appendix FM, she had in fact been married to a person who had, prior to the breakdown of the marriage, become settled and then a British citizen to her expectation of been able to seek settlement herself the United Kingdom.

9. Permission to appeal was granted by First-tier Tribunal Judge Holmes, in a decision dated 25 November 2020. He deemed it to be "well arguable" that, amongst other matters, the judge had effectively treated the inability to satisfy Appendix FM as being determinative of the Article 8 claim.

The hearing

10. Ms Jones relied on the grounds of appeal. She acknowledged that the appellant was unable to satisfy the particular Rule because her last grant of leave to remain had been as the dependent of a Tier 2 Migrant, and not as the partner of a person settled or a British citizen. However, she submitted that the judge had misconstrued the Rule by linking the necessary leave with entry into this country rather than the last grant of leave, which did not have to have been that held on entry. Ms Jones also submitted that the judge had failed to undertake her own assessment of proportionality above and beyond a consideration of the Rules. The particular circumstances of the appellant, including the fact that her Tier 2 dependent leave remained valid whilst she was being subjected to domestic violence and that her husband had become settled and then a British citizen prior to the breakdown of the marriage, had not been adequately factored into the exercise.

11. Mr Kotas submitted that the appellant's submission was nothing more than a "near miss" argument. In respect of what was said at [50] and [51], Mr Kotas submitted that even if the judge had not approached proportionality in this way, the effect of section 117B of the Nationality, Immigration and Asylum Act 2002 was to give the appellant's private life "little weight". Thus, any error would be immaterial.

12. At the conclusion of the hearing I reserved my decision.

Decision on error of law

13. For the reasons set out below, I conclude that the judge has erred in law and that her decision should be set aside.

14. There are two aspects to my reasoning on the error of law issue.

15. The first relates to the judge's overall approach to the proportionality exercise. It is long-established that, on appeal, a tribunal must reach its *own* conclusion on where the fair balance lies between, on the one hand, the public interest in maintaining effective immigration control, and on the other, the individual's protected rights under Article 8 (see, for example, Huang [2007] UKHL 11; [2007] 2 WLR 581). The fact that the appellant could not meet all the requirements of the relevant Rule (in this case E-DVILR of Appendix FM) was not a complete answer to the Article 8 claim. An inability to meet the Rules is certainly a relevant factor, but it is not the be-all and end-all. With regards to what the judge stated at [50] and [51], I agree with what Judge Holmes said in his grant of permission, namely that the judge has effectively treated the ability or otherwise to satisfy the Rule in question as being determinative. Whilst it is of course for the respondent to decide the content of her Rules, a judge must conduct their own independent assessment, taking account of all relevant factors (the Rules being one of these). In my judgment, [50] and [51] indicate

that the judge failed to undertake a merits-based assessment of proportionality in its wider form. I do not regard what is said at [53] as rectifying or negating the erroneous approach set out in the previous paragraphs.

16. On the facts found, the appellant's circumstances included the following:

a) she was the victim of domestic violence;

b) that abuse had been ongoing during the currency of her Tier 2 dependent leave to remain;

c) she had intended to apply for indefinite leave to remain;

d) if she had applied, she would in all likelihood have been successful;

e) that the husband had become a settled person and then a naturalised British citizen after her last grant of leave to remain and whilst he was perpetrating abuse against her.

17. Whilst acknowledging that a "near miss" argument is, to an extent, impermissible, factors such as those listed above were relevant to a wider proportionality exercise, notwithstanding the fact that the Rule in question could not be met. The judge's disinclination to engage in her own balancing exercise had the effect of either leaving these factors out of account entirely, or at least failing to assess their weight in the appropriate context.

18. The second issue concerns the interaction between the specific terms of the Rule and the appellant's particular circumstances. Strictly speaking, the appellant could not satisfy the Rule because of the nature of the leave last granted to her (i.e. as a dependent of a Tier 2 Migrant). However, there is force in Ms Jones' submission that the judge appears to have misconstrued what is said in E-DVILR as regards immigration status. The requirement for leave to have been granted under Appendix FM is not the same as having to show that entry clearance was granted as a partner: it is the *last* grant of leave which is crucial, and that may have been connected to entry clearance or it may have arisen subsequently. In my view, there is a genuine possibility that this misapprehension on the judge's part may have had a bearing on her assessment of the relevance of domestic violence. Further, or in any event, there is a possibility that this deflected the judge's attention from focusing on the particular facts of the appellant's case, whether or not they brought her within the Rule.

19. The "little weight" mandatory consideration set out in section 117B(5) of the 2002 Act is not a fixity. In appropriate cases, it is quite possible that a judge might attach more than a "little weight" to a private life established during the currency of precarious leave. In my view, this statutory requirement is not fatal to the appellant's case at this stage.

20. Ultimately, I conclude that the errors identified, whether seen in isolation or cumulatively, are material. They *might* have affected the outcome of the appeal. Taking this into account, I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set the judge's decision aside.

Disposal

21. I have considered whether I should simply go on and re-make the decision in this case based on the materials currently before me. This was the course of action commended by Mr Kotas. However, I am, in the particular circumstances of this case, willing to accede to Ms Jones' request for a resumed hearing to take place in due course on the basis that further evidence is to be sought by the appellant.

22. As matters stand, I see no reason why the resumed hearing should not be conducted remotely.

23. I preserve the finding of fact that the appellant is a victim of domestic violence in the circumstances set out in the judge's decision.

Anonymity

24. The First-tier Tribunal made an anonymity direction. I maintain that direction on the basis that the appellant is a victim of domestic violence perpetrated against her in this country.

Notice of Decision

25. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

26. I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

27. I adjourn this appeal for a resumed hearing in the Upper Tribunal.

Directions to the parties

1. **No later than 7 days after** this decision is sent out, the appellant shall confirm with the Tribunal and respondent whether any oral evidence is to be called in this case

and whether there are any objections to the resumed hearing being conducted remotely;

2. **No later than 14 days after** this decision is sent out, the respondent is to confirm with the Tribunal and the appellant whether there are any objections to the resumed hearing being conducted remotely;

3. **No later than 28 days after** this decision is sent out, the appellant is to file and serve a consolidated bundle of all evidence relied on (including any new evidence which must be accompanied by a notice under rule 15(2A) of the Tribunal's Procedure Rules);

4. **No later than 10 days before** the resumed hearing, the respondent may file and serve any further evidence relied on;

5. With liberty to apply.

Signed: *H Norton-Taylor* Date: 19 April 2021

Upper Tribunal Judge Norton-Taylor