



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20711/2019 (V)

THE IMMIGRATION ACTS

Heard by Skype for business
On the 17 March 2021

Decision & Reasons Promulgated
On 01 April 2021

Before
UPPER TRIBUNAL JUDGE REEDS

Between

EMMANUELLA ATUWENI TAMBALA
(ANONYMITY DIRECTION NOT MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D. Eteko, of Iras and Co Solicitors

For the Respondent: Mr C. Avery, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Clarke (hereinafter referred to as the "FtTJ") promulgated on the 6 April 2020, in which the appellant's appeal against the decision to refuse her human rights application dated 10 October 2019 was dismissed.
2. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal.

3. The hearing took place on 17 March 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face -to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant who was able to see and hear the proceedings being conducted. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

Background:

4. The appellant is a national of Zimbabwe. She entered the United Kingdom on 18 January 2008 with entry clearance to working holiday maker which was valid from December 2007 to 18 December 2009. Following the end of her visa, the appellant remained in United Kingdom and took no steps to regularise her immigration status until 2019.
5. On the 10 October 2019 she made a human rights application in an application for leave to remain in the UK on the basis of her family life with her partner and on the basis of her private life.
6. The application was refused in a decision made on the 2 December 2019. The decision letter states that the appellant had made a human rights claim in an application for leave to remain in the UK under Appendix FM to the Immigration Rules on the basis of her family life with her partner.
7. It was accepted that the eligibility relationship requirement was met (on the basis that that the appellant was in a genuine and subsisting relationship).
8. The reasons given for refusing the application can be summarised as follows. The respondent considered her application under paragraphs R-LTRP of Appendix FM but considered that she could not meet the eligibility immigration requirements (E-LTRP 2.1 of Appendix FM) because she had not demonstrated that she had been living with her partner in a relationship akin to marriage of the two years immediately preceding the application. This is because she had provided no documents to demonstrate that the parties were living together during 2017 or 2018. Consequently, she could not meet the definition of a partner as defined in GEN 1.2 of Appendix FM.
9. The appellant also could not meet the eligibility immigration requirement (paragraphs E-LTRP 2.1 -2.2) because her previous leave as a working holidaymaker ended on 18 December 2009 and she had been without valid leave in United Kingdom for 3583 days and paragraph 39E did not apply. She was in the UK in breach of immigration laws and paragraph EX1 did not apply.
10. The respondent considered whether the appellant would be exempt from meeting certain eligibility requirements of Appendix FM because paragraph

EX1 applied. It was accepted that the appellant had a genuine and subsisting relationship with her partner who was a refugee from Zimbabwe. However the respondent did not accept that there were any insurmountable obstacles in accordance with paragraph EX2 of Appendix FM which means “very significant difficulties which will be faced by the appellant or her partner in continuing their family life together outside of the UK, and which could not be overcome or entail very serious hardship for her and her partner”. The respondent accepted that her partner could not be expected to return to Zimbabwe, however there was no evidence before the respondent to suggest that he would be in any danger if he were to accompany the appellant to Malawi. There had been no evidence as to a child in the UK. Therefore paragraph EX1 did not apply.

11. Her application was considered under the private life rules under paragraph 276 ADE, where it was noted that the appellant was a national of Malawi who had entered the UK in January 2008. She had lived in the UK for 11 years and it was not accepted that she lived in the UK continuously for 20 years; she was not between the ages of 18 and under 25 having lived in the UK for more than half her life and was over the age of 18 and therefore could not meet the requirements of paragraph 276 ADE(1) (iii)(iv) and (v). As to paragraph 276 ADE(1) (vi) the respondent did not accept that there would be very significant obstacles to her integration into Malawi if required to leave the UK because she resided in Malawi up to the age of 27, which included her childhood, formative years, and a portion of her adult life. It was considered that she would have retained cultural and linguistic connections to Malawi during his time in the UK. Consequently, she failed to meet the requirements of the Immigration Rules.
12. The respondent did not consider that there were any exceptional circumstances to warrant a grant of leave to remain and considered the issues that had been raised as to why it would be unjustifiably harsh for her to return to Malawi. The respondent took into account the basis of the application and that her partner could not be expected to return to Malawi due to its close proximity to Zimbabwe, where he was a refugee from. It was stated that she had no criminal convictions and not claimed benefits since arrival and that she would be contributing to the economy. However, although she claimed to wish to remain in the UK to work, it was considered that she could return to Malawi and gain employment there. As to her partner’s return to Malawi due to its close proximity to Zimbabwe, the respondent noted that the appellant provided no evidence to support the claim that a Zimbabwean national would be in any danger in Malawi.
13. It was noted that she commenced a relationship in the knowledge that her immigration status in the UK was as an over stayer and that she had no legitimate expectation to remain in the United Kingdom indefinitely and therefore from the outset, both parties should have been aware of the possibility the family life might not be able to continue in the UK. As her private life, the

respondent took into account that she held no formal immigration status in the UK for a significant period of time and there was nothing to suggest any of the ties made in the UK went above those of normal emotional ties between adults. The claim to be a good character was not considered as an “exceptional circumstance” because it was accepted that all those who wish to enter and remain United Kingdom must adhere to the laws are set out. It was considered that as she was able to integrate into British culture after spending her entire life in Malawi, it was considered that should be able to use the same resourcefulness to reintegrate into Malawi in culture, a country where she has spent the majority of her life and health social and family ties.

14. The respondent noted that a mere wish or desire or preference live in the UK did not amount to an exceptional circumstance. It was noted that obtaining employment and accommodation in another country may be an inconvenience, but a degree of inconvenience did not amount to an exceptional circumstance. The ECHR did not oblige the UK to accept the choice of someone as to which country they would simply prefer to reside in.
15. Therefore the respondent did not find that there was any evidence to demonstrate that there were any “exceptional circumstances” established in her case.

The appeal before the First-tier Tribunal:

16. The appellant’s appeal against the respondent’s decision to refuse leave came before the First-tier Tribunal (Judge Clarke) on the 14 February 2020.
17. In a determination promulgated on the 5 March 2020, the FtTJ dismissed the appeal on human rights grounds, having considered that issue in the light of the appellant’s compliance with the Immigration Rule in question and on Article 8 grounds. The judge heard evidence from the appellant and also heard evidence from her partner.
18. In summary, the First-tier Tribunal found that the appellant could not meet the requirements for a grant of leave to remain under Appendix FM of the Immigration Rules; specifically she could not meet the eligibility immigration requirements of the rules as her leave ended in 2009 and failed to meet E-LTRP 2.2.
19. By reference to her relationship with her partner, the judge accepted that she was in a genuine and subsisting relationship with her partner who had been granted refugee status and that they had been living together in a relationship akin to marriage at least 2 years before the application had been made (at [13-14]).
20. At paragraphs [15-26] the FtTJ addressed the issue of “insurmountable obstacles”

21. The FtTJ concluded that the evidence was insufficient to meet the high test for insurmountable obstacles in paragraph EX1(b) of the rules because there were no insurmountable obstacles to family life continuing outside of the United Kingdom.
22. The FtTJ made the following findings of fact:
 - the appellant entered the United Kingdom on 18 January 2008 having entered as a working holidaymaker with leave valid until December 2009. She has had no valid status since that date (at [15]).
 - She was born and educated in Malawi and was aged 27 when she came to the United Kingdom.
 - She had employment experience and worked as a sales executive in publicity and advertising and has worked in the United Kingdom in social care. She therefore had the education skills and able to support herself financially in Malawi (At [16]).
 - The appellant has family in Malawi although she is not in regular contact with them (at [17]).
 - She would not be returning to a country whose language and customs are unfamiliar to her (at [17]).
 - Her partner is a Zimbabwean national who entered the United Kingdom in 2002 as a student. His claim for asylum in 2007 was initially refused following a successful challenge she was granted refugee status in 2008/9. In March 2017 was granted ILR at [18]).
 - Her partner has worked in the social care sector and has obtained further qualifications having completed studies in higher education. He therefore has transferable skills which will enable him to find work in Malawi (at [19]).
 - When questioned why the appellant had not made an application before 2019 both witnesses confirmed that they had been focused on her partner's status. They had sought legal advice in the past, but the advice was to wait until her partner was granted ILR (at [20]).
 - The appellant's partner stated he had no intention of moving to Malawi. In evidence in chief he referred to being active and continuing to militate for true change in Zimbabwe and that he would not take the risk of relocation to a country as close to Zimbabwe as Malawi. However the judge found "I have no cogent information before me concerning the reasons for the partner's application for asylum. There is no persuasive evidence before me of X being active in any political, military or other platform in Zimbabwe since arriving in the United Kingdom" at [23]).
 - No cogent evidence in place before the tribunal as to the reasons why the appellant or her partner would be in danger if relocated to Malawi (at [24]).

- At [25] the FtTJ considered the medical evidence relating to the appellant but considered that there was “scant other information as the medical difficulties experienced by the appellant”. When asked why relevant medical treatment could not be obtained in Malawi, the appellant referred to the better facilities and United Kingdom that she could not afford to pay for treatment in Malawi.
 - The judge concluded that having considered all the evidence, was not persuaded that there were insurmountable obstacles family life continuing outside of the United Kingdom and therefore the provisions of paragraph EX 1 (b) were not met.
23. At paragraphs [27]-[35] the judge went on to consider the proportionality of the appellant’s removal under Article 8 of the ECHR but concluded that it would not be a disproportionate interference with her right to respect for private and family life.
 24. The FtTJ took into account that the appellant and her partner could not show compliance with the immigration rules(paragraph EX1 (b) as regards insurmountable obstacles and paragraph 276ADE) .The appellant has been in the UK unlawfully since her leave ended 2009 (see [31]).
 25. When considering the section 117 public interest considerations, the FtTJ that took into account that the appellant spoke English and whilst the judge was not given full details, including documentary evidence of his income as at the date of the hearing there was evidence that the appellant had been financially supported by her partner.
 26. The judge took into account that she had entered the United Kingdom lawfully but that she had no valid status since December 2009 and made the decision not to return to Malawi in 2009 when her visa expired and no application was made to regularise her status until October 2019, two years after her partner was granted ILR.
 27. He concluded that the appellant and her partner established a private life together when both parties were aware that the appellant’s immigration status was precarious and that their relationship continued for some 11 years when both had been aware that the applicant was in the United Kingdom unlawfully. He therefore attached little weight to those factors.
 28. The judge finally concluded at [35] that having taken into account and considered the submissions from both representatives and all of the documentary evidence and taking into account the public interest in the maintenance of immigration control, the judge found that the respondent’s decision was proportionate and a justified interference with the appellant’s family and private life.
 29. The FtTJ therefore dismissed the appeal.

30. Permission to appeal was issued on the 20 March 2020 and on 4 May 2020, permission to appeal was granted by FtTJ Adio stating:-

“It is arguable that the appellant’s husband would have still been considered a refugee following his grant of indefinite leave to remain and no reasons given by the respondent that the reasons for the ground no longer exists. It is argued that the judge therefore erred at paragraph 23 and her finding that there is no persuasive evidence before her of X being active in any political, military, or other platform in Zimbabwe since arriving in the UK. This therefore obviously had a bearing on the judge’s decision as to whether it is reasonable for the appellant and her husband to return to either Malawi or Zimbabwe. The fact remains that X is not a national of Malawi. The grounds of the application are arguable and there is an arguable error of law. It is argued that the issue of insurmountable obstacles has not been properly assessed and likewise the consideration of the matter outside the rules.”

The hearing before the Upper Tribunal:

31. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 15 July 2020, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face -to -face hearing. It does not appear that any reply was provided to those directions and on 24 November 2020 directions were given for a remote hearing to take place and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.
32. Mr Eteko on behalf of the appellant relied upon the written grounds of appeal.
33. There was a Rule 24 response filed on behalf of the respondent dated 26 October 2020.
34. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear and helpful oral submissions during the hearing.
35. I intend to consider the submissions made by the parties when considering the grounds advanced on behalf of the appellant.

Discussion:

36. In the the written submissions at paragraph 8 of the grounds, it is submitted that the decision of the FtTJ under the Immigration Rules was flawed as it did not disclose clearly which of the Immigration Rules consideration was given to (Immigration Rules or asylum), nor does it provide any satisfactory reasons as to why the requirements of those (unidentified) Rules were not met.
37. In my judgement, this is a submission based on form and not substance. Whilst the FtTJ did not specifically make reference to the individual numbers of the

Immigration Rules under Appendix FM, the FtTJ plainly addressed each of them when carrying out an assessment of the appellant's overall claim and as referenced in the respondent's decision letter.

38. By reference to Appendix FM, the respondent considered that the appellant failed to establish that she resided with her partner in a relationship akin to marriage for two years prior to the application (GEN 1.2) however the FtTJ found that the appellant met GEN 1.2 for the reasons set out at paragraphs [13]-[14] in view of the evidence that they had resided with each other since 2008.
39. The judge found at [15] that the appellant was in the UK without leave to remain. It therefore follows that on that analysis the appellant failed to meet the IR requirement under E-LTRP 2.2.
40. At paragraphs [15-26] the FtTJ addressed the issue of "insurmountable obstacles" (under EX1(b) of Appendix FM). The FtTJ concluded that the evidence was insufficient to meet the test for insurmountable obstacles in paragraph EX1(b) of the rules because there were no insurmountable obstacles to family life continuing outside of the United Kingdom. At [27] the FtTJ expressly stated that the appellant could not meet the requirements of Appendix FM.
41. At [27] the FtTJ again expressly considered the immigration rules relevant to private life under paragraph 276ADE.
42. Consequently in my judgement the decision of the FtTJ made it plain on what basis the appellant had failed to meet the immigration rules. I agree with the submission made on behalf of the respondent that whilst it might have been of greater assistance to have stated the relevant provisions under Appendix FM, it could not amount to an error of law given that the considerations were properly considered when the decision is read as a whole.
43. In his oral submissions Mr Eteko stated that he advanced 2 issues on behalf of the appellant. Dealing with the first issue, he submitted that the FtTJ erred in law on the assessment of the issue of insurmountable obstacles and by reference to the ability of the parties to integrate to Zimbabwe or Malawi.
44. In his submissions he particularly identified paragraphs [23] and [24] of the decision and submitted that the judge's approach at [23] was to "open a debate on an issue that had already been settled", namely that the appellant's partner had been granted refugee status. In addition at [24] Mr Eteko submitted that the judge was wrong where he stated that there was no evidence that the appellant's partner would be in danger in Malawi when there was material at pages 63 - 66 of the appellant's bundle and the judge failed to engage with that evidence.
45. I have not been addressed upon the relevant law by either advocate. However the relevant legal principles can be addressed as follows.

46. Paragraph EX.1. reads as follows (so far as relevant):

" EX.1. This paragraph applies if.

(a) ...; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

47. The Supreme Court in Agyarko considered the meaning of the "insurmountable obstacles" requirement at [43] to [45] of the judgment as follows:

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

44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner." That definition appears to me to be consistent

with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.

45. By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate."

48. The Supreme Court held that the requirements were Article 8 compliant, recognising that the requirements reflected the Minister's view of where the public interest lay.
49. As the Supreme Court also made clear, even where those requirements are not met, an applicant may still be granted leave if the consequences of removal result are "unjustifiably harsh". However, as the Supreme Court went on to say when looking at the grant of leave to remain outside the Rules, this will only arise in exceptional circumstances. The rationale for that approach is explained at [54] and [55] of the judgment as follows:

"54. As explained in para 49 above, the European court has said that, in cases concerned with precarious family life, it is "likely" only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious. The court has repeatedly acknowledged that "a state is entitled, as a matter of well-established international law, and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there" (*Jeunesse*, para 100). As the court has made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a *fait accompli*.

On the contrary, "where confronted with a *fait accompli* the removal of the non-national family member by the authorities would be incompatible with article 8 only in exceptional circumstances" (*Jeunesse*, para 114).

55. That statement reflects the strength of the claim which will normally be required if the contracting state's interest in immigration control is to be outweighed. In the *Jeunesse* case, for example, the Dutch authorities' tolerance of the applicant's unlawful presence in that country for a very prolonged period, during which she developed strong family and social ties there, led the court to conclude that the circumstances were exceptional and that a fair balance had not been struck (paras 121-122). As the court put it, in view of the particular circumstances of the case, it was questionable whether general immigration considerations could be regarded as sufficient justification for refusing the applicant residence in the host state (para 121)."

50. In the case of *Lal v SSHD* [\[2019\] EWCA Civ 1925](#) at paragraph 35 of that decision the Court of Appeal gave its view as to the correct interpretation of insurmountable obstacles. The Court of Appeal indicated in paragraphs 36 and 37:

"36. In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK. If not, the decision-maker needs finally to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both).

37. To apply the test in what Lord Reed in the *Agyarko* case at para 43 called 'a practical and realistic sense', it is relevant and necessary in addressing these questions to have regard to the particular characteristics and circumstances of the individual(s) concerned. Thus, in the present case where it was established by evidence to the satisfaction of the tribunal that the applicant's partner is particularly sensitive to heat, it was relevant for the tribunal to take this fact into account in assessing the level of difficulty which Mr Wilmshurst would face and the degree of hardship that would be entailed if he were required to move to India to continue his relationship. We do not accept, however, that an obstacle to the applicant's partner moving to India is shown to be insurmountable - in either of the ways contemplated by paragraph EX.2. - just by establishing that the individual concerned would perceive the difficulty as insurmountable and would in fact be deterred by it from relocating to India. The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to an applicant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together".

51. I have given careful consideration to the submissions made on behalf of the appellant, but I am satisfied that the FtTJ did not err in law in her approach to the status of the appellant's partner when considering the issue of "insurmountable obstacles." As Mr Avery submits, the FtTJ was plainly aware of the sponsor's status as a refugee and it was accepted by both the FtTJ and the respondent in the decision letter that in those circumstances, family life could not be established in Zimbabwe.
52. Whilst Mr Eteko has directed the tribunal's attention to paragraph [23] of the decision, it is necessary to read that paragraph alongside the earlier paragraph at [22]. The issue was not whether family life could be established in Zimbabwe (which both the judge and the respondent accepted would not be possible) but whether there were any insurmountable obstacles to family life being established in Malawi. At paragraph [22] the FtTJ recorded the evidence of the appellant's partner who had been asked whether he and the appellant had discussed living in Malawi. The judge recorded the sponsor's evidence where he referred to being active and continuing to militate for true change in Zimbabwe and that "it would be suicidal for him to take the risk of relocation to a country as close to Zimbabwe as Malawi". At paragraph [23] the FtTJ stated:

"23. However, I have no cogent information before me concerning the reasons for X's application for asylum. There is no persuasive evidence before me of X being active in any political, military, or other platform in Zimbabwe or since arriving in the United Kingdom.

24. Further, no cogent evidence been placed before me as to the reasons why x or the appellant would be in danger if relocated to Malawi."
53. By stating that she had no "cogent information" concerning the reasons of his application for asylum, the judge was not seeking to go behind the grant of refugee status but was considering the sponsor's claim that he would be at risk if he lived in Malawi. As the judge found, contrary to the sponsor's evidence, there was no persuasive evidence that the appellant's sponsor was active in any political or other military platform in Zimbabwe or since his arrival in the UK to demonstrate that he would be at risk in Malawi as a result of any such political activities or beliefs.
54. Furthermore, there is no merit in the submission that the judge was wrong in reaching the finding at paragraph [24] that there was no evidence that the appellant's partner would be in danger in Malawi. The judge did not say that there was "no evidence" as to the reasons why the sponsor and the appellant would be in danger if they relocated to Malawi but that there was "no cogent evidence". As submitted on behalf of the respondent, there was no cogent evidence beyond the sponsor's assertion that he would be at risk in Malawi. As the FtTJ observed, there had been no evidence submitted to the tribunal to indicate that his grant of refugee status was based on risk of return to Malawi or that he had evidenced his claim to be active in politics or any other form of association (at [23]).

55. Whilst Mr Eteko directed the tribunal to evidence in the appellant's bundle at pages 63 – 66, this comprised of a map showing the two countries (page 63). Mr Eteko submitted that it was less than one hour flight between Zimbabwe and Malawi and as a result of the proximity between the countries, that was sufficient to show that he would be at risk in Malawi.
56. In my judgement, a finding of risk on return in Zimbabwe does not demonstrate a risk in Malawi and the fact that the countries are close proximity does not, without more demonstrate a risk to the sponsor or to the appellant. Thus the judge was correct to reach the finding that there had been no cogent evidence provided in the form of any objective evidence to support any such risk. The material referred to in the bundle at pages 64 – 66 was generalised material referring to Zimbabwe after the death of President Mugabe (issues relating to petrol protests, inflation and problems still continuing). None of that evidence made reference to Malawi or provided any possible support for a risk to the sponsor. As was submitted on behalf of the respondent if the appellant sought to rely on his asylum application to make good his claim to be at risk Malawi, the judge could not be expected to know the specifics of his asylum claim in the absence of evidence which is what the judge clearly stated at paragraphs [22 – 24]. I am therefore satisfied that there is no error on the basis submitted in the written grounds at paragraphs 9 – 10 or in the oral submissions as recorded above.
57. Mr Eteko raised a further point in oral submissions. He submitted that the appellant's partner was not a Malawi National and that it was not possible to know if Malawi would allow him entry. Beyond that short submission, nothing further was stated. I observe that this was not a point raised in the grounds of challenge. Whilst I observe that Judge Adio had made a passing reference to the issue where he stated "the fact remains that x is not a national Malawi" nothing further was stated or any elucidation of how that was an error of law. However notwithstanding those difficulties, I shall go on to address that point raised.
58. There was no dispute that the appellant's partner was not a citizen of Malawi. The respondent's guidance (that was in the appellant's bundle) at paragraph 23 states "the onus is on the applicant to show that it is not feasible for them or their family to enter or stay in any other country for this to amount to an "insurmountable obstacle"". In the skeleton argument (page 16 at paragraph 52) reference is made to sections of the Malawi Immigration Act 2003 (set out at paragraphs 53 – 57) where it is submitted that to enter Malawi the appellant's sponsor would need to satisfy the Malawian authorities that he was a temporary visitor and even if admitted, as the appellant had been absent for 12 years she could be required to report to an immigration officer and therefore the sponsor's residence would come to the attention of the authorities and that he would be treated as a prohibited migrant.
59. The difficulty with that evidence is that the burden is on the appellant to demonstrate that it was not feasible to enter or stay in Malawi for this to

amount to an “insurmountable obstacle”. The evidence submitted was plainly selective in the extracts that were provided and were insufficient to demonstrate that the sponsor would not be able to enter or stay there whether as a temporary migrant, or as a spouse/partner of a Malawian national. Foreign law, including nationality law, is a matter of evidence to be provided by expert evidence directed specifically to the point in issue (see decision in *Hussain and another (status of passports: foreign law)* [2020] UKUT 00 250 at paragraph 9). In that case, the Upper Tribunal found that it was not sufficient to produce Tanzanian statutes and assert the statute represented the whole of the law on the subject. The same is true here where selective parts of the law was set out; no reference was made to the entry of those who were partners of a Malawi National and no expert evidence was before the tribunal on this issue. Therefore, it has not been demonstrated that the appellant had discharged the burden on her to demonstrate that her partner’s nationality would be an “insurmountable obstacle” on the evidence before the FtTJ.

60. The Court of Appeal in Lal indicated that one has to look at the factors relied on in an objective sense rather than on the basis of what the appellant and/or the appellant’s spouse perceive to be the difficulties and that when determining the question of whether return would entail “very serious hardship” based on the evidence which was before the FtTJ (see paragraph [43] of the judgment).
61. When looking at the decision as a whole, in my judgement the FtTJ gave adequate and sustainable reasons that were in accordance with the relevant case law and evidence for reaching the decision that the circumstances relied upon by the appellant and the sponsor did not amount to “insurmountable obstacles” when viewed cumulatively to family life being established outside the United Kingdom.
62. The second ground set out at paragraphs 11-14 of the written grounds assert that the FtTJ erred in her analysis of Article 8 and that the findings set out at paragraphs [31 – 35] were “insufficient for the purposes of analysis of the appellant’s Article 8 rights”. In essence, in his oral submissions Mr Eteko submitted the judge failed to carry out a proper proportionality balance and failed to give adequate reasons for reaching her decision.
63. In his oral submissions he referred to section 117B (4) and that whilst it stated “little weight” should be given to a private life or a relationship formed with a qualifying partner established when the person is in the UK unlawfully, it did not mean that “no weight” should be given in the proportionality balance. He therefore submitted that at paragraphs 33 – 34, the judge only considered the appellant’s unlawful residence.
64. He further submitted that in the balancing exercise the scales must be properly balanced by the findings made and by adequate reasoning, but this had not been carried out here. He submitted that this was a case where there had been no criminality on the part of the appellant, she spoke English and did not access

any benefits and that she would have to pay for her healthcare. As the judge had found this to be a genuine and subsisting relationship, the scales should have fallen in favour of the appellant.

65. Mr Avery on behalf the respondent made the point that the submissions amounted to no more than a disagreement with the FtTJ's analysis and did not demonstrate any error of law in the FtTJ's approach either in law or in fact. He submitted that the judge applied the section 117 considerations to the circumstances and properly took into account that the appellant was a long-term overstayer since 2009 and that she and the sponsor had no realistic expectation to be allowed to remain as a couple and that this was a factor that was heavily weighted against the appellant.
66. I have given careful consideration to the submissions advanced on behalf of the appellant and have considered them in the context of the evidence and the assessment made by the judge. Having done so, I am satisfied that the judge did properly carry out an Article 8 assessment in accordance with the evidence and the relevant legal principles and gave adequate and sustainable reasons for reaching her decision.
67. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or Tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see Hesham Ali v SSHD [2016] UKSC 60 and see R (MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43].
68. In my judgement the FtTJ correctly identified that when considering the public interest the appellant could not meet the Immigration Rules either under Appendix FM, for the reasons given and where the judge found that there were no insurmountable obstacles for family life being established outside the UK and Paragraph 276 ADE based on her length of residence and in light of the findings that there were no very significant obstacles to her integration to Malawi (at [27]). A court must accord "*considerable weight*" to the policy of the Secretary of State at a "*general level*": *Agyarko* paragraph [47] and paragraphs [56] - [57]; and see also *Ali* paragraphs [44] - [46], [50] and [53]. This includes the policy weightings set out in Part 5A (sections 117A- 117D) of the Nationality, Immigration and Asylum Act 2002 (inserted by the Immigration Act 2014).
69. As provided by section 117A (1), Part 5A applies where a Court or Tribunal is required to determine whether a decision made under the Immigration Acts breaches Article 8 and as a result would be unlawful under Section 6 of the Human Rights Act 1998. Section 117A (2) requires the Court or Tribunal, in

considering whether an interference with a person's right to respect for private and family life is justified under article 8(2), to have regard in all cases to the considerations listed in section 117B. Section 117B states as follows: -

"Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to-

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

70. I am satisfied that the FtTJ directed herself in accordance with the law and the decision in *Agyarko*, that even when the requirements are not met, an applicant may still be granted leave "outside the Rules" on the basis of if the consequences of removal are "unjustifiably harsh".

71. Given that the FtTJ had addressed the circumstances or those that would lead to "unjustifiably harsh consequences" which had been advanced in behalf of the appellant which consisted of her relationship with her partner which the FtTJ

accepted was genuine and subsisting, the issue of medical treatment (at [25])) his refugee status and that it had not been established that her partner would be at risk of harm in Malawi, it was therefore open to the judge to reach the conclusion as he did at [35] that there were no such consequences identified that outweighed the public interest in effective immigration control. When reaching her decision, it was open the FtTJ to take account of the earlier factual findings made that there were no insurmountable obstacles or nor were there circumstances which could amount to “very serious hardship” to family life being established outside of the UK.

72. As regards the public interest considerations the FtTJ found that the public interest in effective immigration control was engaged under S117B (1) at paragraph [35]). At [32] the judge took into account that the appellant spoke English and at [34] whilst the FtTJ had not been given full details of the sponsors income, the judge accepted that there was evidence that the appellant had been financially supported by her partner even if he had not demonstrated compliance with the rules relating to the financial requirements. However financial independence in the United Kingdom alongside an ability to speak English would be neutral factors in the analysis under Section 117 of the 2002 Act (as amended).
73. Whilst Mr Eteko submitted that the FtTJ attached no weight to the private life established nor to her relationship established with her partner which was contrary to S 117B(4), the FtTJ did attach some weight to those factors (see [33] and [34]). Little weight does not equate to “no weight” and in any event the submissions are, in the terms relied upon by the appellant, disagreements of weight. Barring irrationality, weight attached to any particular factor is a matter for the judge. Consequently the FtTJ was entitled to place little weight upon the appellant’s length of residence and her private life which was established when her stay United Kingdom had been initially precarious (under section 117B (5) and unlawful thereafter (under S117B (4) and that her relationship was established at a time when the appellant was unlawfully in the United Kingdom. The FtTJ was entitled to place weight on her earlier assessment and findings that family life could continue in Malawi.
74. Mr Eteko made reference to the *Chikwamba* principle, that is, that there is no public interest in requiring her to leave the UK in order to make a successful application for entry clearance when the sponsor could show he earned over £18,000. This was not a point raised in the grounds seeking permission to appeal nor in the grant of permission. Furthermore, on the material before the FtTJ the judge found at [32] that she had not been given full details, including documentary evidence of the sponsor’s income. That is supported by the documents at p32-37 of the bundle. Mr Eteko referred to other documents provided at the hearing which were said to evidence a second job which would put the sponsor’s income above £18,000. I could find no evidence within the file and no reference was made in the decision of the FtTJ to this evidence. Mr Avery confirmed that he could find no reference to that evidence in his papers.

75. As set out above this is not a point raised in the grounds of permission. In the decision of Das (paragraph 276B - s3C - application validity) [2019] UKUT 00354 (IAC) the Upper Tribunal stated at [16]:

16. "It has recently been necessary for the Court of Appeal to underline the importance of adherence to proper standards of appellate advocacy in immigration appeals. It is not permissible, whether in that court or in the Upper Tribunal, for advocates to consider that they are at liberty to advance any argument which occurs to them, whether or not it appears in the grounds of appeal and whether or not any notice of the argument has been given to the respondent or the Upper Tribunal. The grounds of appeal frame the arguments which are to be advanced. As Hickinbottom LJ said in Harvey [2018] EWCA Civ 2848, the grounds are the well from which the argument must flow: [57]. And as Lewison LJ stated in ME (Sri Lanka) [2018] EWCA Civ 1486, the arguments which can be raised on appeal are limited by the grounds of appeal for which permission has been granted: [22]. These observations apply with equal force to appellate proceedings before the Upper Tribunal. An application may be made to vary the notice of appeal but, in the absence of such a notice, advocates should expect that scope of their argument will be restricted to the grounds upon which permission was granted".

76. Even if I did consider that the grounds should be enlarged to consider this, neither the decision in *Chikwamba* nor *Agyarko* support the contention that there cannot be a public interest in removing a person from the UK who would succeed in an entry clearance application. In *Agyarko*, a case in which the *Chikwamba* principle was not at issue, it is only said that there "might" be no public interest in the removal of such a person. The circumstances in the decision of *Chikwamba* are very different from the circumstances of the present appeal. The appellant in *Chikwamba* was a failed asylum seeker from Zimbabwe whose removal was temporarily suspended because of the harsh conditions in Zimbabwe. Whilst in the UK she married a national of Zimbabwe who had been granted asylum and they had a daughter. Shortly after her daughter was born, the suspension on removals to Zimbabwe was lifted.

77. In the decision of *Kaur, R (on the application of) v Secretary of State for the Home Department* [2018] EWCA Civ 1423, the appellant's argument raising the *Chikwamba* principle was not decided by the Court, but the nature of the principle was discussed. Holroyde LJ noted that the facts in *Chikwamba* were "stark". At paragraph 45 he stated:

"I have quoted in paragraph 26 above the passage in which Lord Reed (at paragraph 51 of his judgment in *Agyarko*) referred to *Chikwamba*. It is relevant to note that he there spoke of an applicant who was "certain to be granted leave to enter" if an application were made from outside the UK and said that in such a case there *might* be no public interest in removing the applicant. That, in my view, is a clear indication that the *Chikwamba* principle will require a fact-specific assessment in each case, will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain."

78. The Upper Tribunal considered the *Chikwamba* principle in the decision *R (on the application of Chen) v Secretary of State for the Home Department* (Appendix FM – *Chikwamba* – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC). In that decision the Upper Tribunal observed that Lord Brown was not laying down a legal test when he suggested in *Chikwamba* that requiring a claimant to make an application for entry clearance would only “comparatively rarely” be proportionate in a case involving children, and that in all cases it will be for the individual to demonstrate, through evidence, and based on his or her individual circumstances, that temporary removal would be disproportionate.
79. On the facts of this appeal, no such evidence or any argument regarding temporary removal had been provided to the FtTJ. Therefore, even if the grounds had raised this point (which I am satisfied that it did not), it would not have succeeded in demonstrating a material error of law on the part of the FtTJ.
80. I understand that the appellant and her partner disagree with the decision reached by the FtTJ. However, I remind myself that I can only interfere with a decision of the First-tier Tribunal if it has been demonstrated that the FtTJ fell into legal error. I further remind myself that the question whether the decision contains a material error of law is not whether another Judge could have reached the opposite conclusion but whether this Judge reached a conclusion by appropriately directing himself and assessing the evidence on a rational and lawful basis.
81. In summary and when addressing the second ground advanced on behalf of the appellant, I am satisfied that the FtTJ properly undertook a proportionality assessment outside of the rules and applied it on the circumstances of the individual case that was before her carrying out a “fact sensitive assessment”. The findings made by Judge Clarke were neither irrational nor unreasonable. It was therefore open to the FtTJ to reach the conclusion at [35] that the refusal of the appellant’s human rights claim constituted a proportionate and fair striking of the balance between the public interest and the rights protected under Article 8.
82. For the reasons given above, I am satisfied that the decision of the FtTJ did not make an error on a point of law and the decision stands. The appeal is dismissed.

Notice of Decision.

83. The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision stands. The appeal is dismissed.

Signed *Upper Tribunal Judge Reeds*
Dated 18 March 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.