



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/25036/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21 September 2018

Decision & Reasons Promulgated
On 11 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

M U U
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Elliott-Kelly, Counsel, instructed by Rashid and Rashid
For the Respondent: Ms Kenny, Senior Home Office Presenting Officer

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Introduction

1. This is the remaking of the decision in the appeal of the Appellant following my error of law decision promulgated on 5 July 2018 in which I concluded that the First-

tier Tribunal had made material errors of law and that its decision had to be set aside. I then adjourned the appeal with directions (error of law decision annexed, below).

2. In essence I concluded that the First-tier Tribunal judge had failed to deal adequately with the effect of her conclusion that the Appellant's partner could not be expected to go and live with him permanently in Pakistan, and that she had also failed to address the question of whether the Appellant should return alone and make an entry clearance application (the Chikwamba point). I made it clear that there was no longer any dispute about the genuineness of the Appellant's relationship with his partner nor whether the latter could indeed be expected to go and live in Pakistan.

The evidence now before me

3. In addition to the Respondent's bundle and the Appellant's bundle that was before the First-tier Tribunal, I now have a new bundle from the Appellant's representatives, indexed and paginated 1-46, with additional documents attached thereafter. I admitted new evidence under Rule 15(2A) of the Upper Tribunal Procedure Rules without objection from Ms Kenny. The Appellant and his partner both attended the hearing and gave oral evidence, a full note of which is contained in the Record of Proceedings.

Submissions

For the Respondent

4. Ms Kenny accepted that the oral evidence had been fairly consistent. She also accepted that the Appellant had had at least some involvement with his partner's two children. However she submitted that this was not strong enough for him to succeed in his appeal. She noted that he did not live with the children, although acknowledged that this was a matter beyond his control. He had no involvement with their school lives and she noted the lack of evidence from the relevant institutions. Ms Kenny submitted that if the Appellant left there would be no practical consequences for the children as they live with their grandmother. She submitted that even permanent separation from them would not be disproportionate. The partner's son, who Ms Kenny accepted suffers from a number of additional challenges, was getting help from professionals. In respect of the partner, Ms Kenny accepted that she suffers from medical conditions but submitted that she could obtain help from her own mother. It was submitted that the Appellant could and should return to Pakistan to make an entry clearance application.

For the Appellant

5. Ms Elliott-Kelly relied on her detailed skeleton argument. In essence she submitted that the conclusion of the First-tier Tribunal judge that it would be harsh for the partner to go and live in Pakistan on a permanent basis, and my unchallenged interpretation of this that it had the effect of showing "insurmountable obstacles" in her doing so, was a very significant factor in this case. It showed that, at least on a hypothetical basis, the Appellant could satisfy EX.1(b) of Appendix FM to the

Immigration Rules. This was relevant because it meant that his lack of status and his inability to satisfy the minimum income threshold (an accepted fact) were, in essence, rendered of neutral effect. It also meant that the Respondent was essentially accepting that a permanent separation of the Appellant from his partner would be disproportionate. Therefore, the only way in which the Respondent could possibly justify the decision under appeal in the context of Article 8 was if the Appellant should be expected to return to Pakistan alone and make an entry clearance application. Ms Elliott-Kelly referred me to the Court of Appeal judgment in Tikka [2018] EWCA Civ 642, at paragraph 20. She noted that if the Appellant tried to make an entry clearance application from Pakistan it would be bound to fail: firstly because the minimum income threshold could not be met; secondly, and in her submission importantly, EX.1 of Appendix FM does not apply to entry clearance applications. This would have the consequence of the Appellant being effectively permanently separated from his partner. This would allow the Appellant to succeed in his appeal.

6. As regards the two children's circumstances and the partner's health, Ms Elliott-Kelly submitted that these issues simply added further strength to the Appellant's case although she did not have to rely on these circumstances in order for him to succeed. It was submitted that even a temporary separation, were the Appellant to seek entry clearance, could not be justified in light of what were described as "compelling" factors. It was in the children's best interests, particularly those of the partner's son, for the Appellant to remain part of their lives. Neither child had been told of the Appellant's immigration circumstances and any separation at all would cause serious distress. The partner's son's conditions would exacerbate this. The partner herself suffered from a number of health issues and had had a number of flare ups in recent times. She could not reasonably seek assistance from her mother who was already looking after the children by virtue of court orders. These orders prevented the partner from living with her children, and therefore her mother as well. The inability to meet the minimum income requirement would have been fatal to an entry clearance application but not to an in-country application on the basis that EX.1 was satisfied. The unlawful residence of the Appellant was not in and of itself sufficient to refuse an in-country application either because, once again, of the effect of EX.1. I was referred to paragraph 51 of Agyarko [2017] UKSC 11. Ms Elliott-Kelly submitted that there was no sensible reason for the Appellant to return to Pakistan to make an entry clearance application.
7. At the end of the hearing I reserved my decision.

Relevant findings of fact

8. There is no longer any dispute about the nature of the Appellant's relationship with his partner. I find that they are, and have been for a number of years, in a genuine and subsisting relationship and that they began cohabiting relatively soon after the relationship began in November 2014. I find that the partner has two children both of whom reside with their maternal grandmother by virtue of orders of the family court. I do not have the precise details of these orders but suffice it to say that they require the children to live with the grandmother and prevent the partner from having unsupervised contact with the children or to live with them under the same

roof. I find that the partner's son is eleven years old and has recently started secondary school. I find that he has a diagnosis of ADHD and is awaiting assessment for possible autism as well. I find that a psychologist has also raised issues of particular attachment issues. I accept the partner's oral evidence that her son had an Educational Health Care plan whilst at primary school.

9. I turn to the evidence relating to the Appellant's relationship with the children. On a general note I found the evidence of the Appellant and his partner to be highly consistent, both in its written and oral form. Both were quite properly tested in cross-examination by Ms Kenny. There were very few, if any, discrepancies. None of the evidence was in any way inherently improbable. Applying the balance of probabilities I find both to have given credible evidence to me.
10. I find that the Appellant does indeed have a significant involvement in the children's lives and has done since approximately 2015. I find that he sees them both every weekend. He quite candidly accepted that he did not have particular involvement in their school lives, but in my view nothing turns on this. He does not see them during the week, something which I find to be entirely plausible, and the weekends, the time when he does see them, are spent in pursuance of leisure activities rather than schoolwork, again something that I find to be plausible. I find that whilst the Appellant does have a good relationship with the partner's daughter, as she sees her own biological father on a regular basis, their bond is somewhat more limited, as perhaps indicated by the fact that she calls him by his first name rather than, for example "dad". However, this stands in sharp contrast to the Appellant's relationship with his partner's son. It is quite clear to me that there is a particularly strong bond between the two, with the son now referring to the Appellant as his "dad". In many cases a strong relationship may still carry only so much weight. In this case the son's condition (ADHD) and likely other challenges, in conjunction with the complete absence of his biological father from his life, and the fact that he is only just starting in secondary school (a considerable step for any child) lead me to find that the son places very significant reliance on his relationship with the Appellant. I find that the son does indeed see the Appellant as a father figure, indeed the *only* father figure that he has ever known.
11. It is extremely likely in my view that the son would experience very great distress leading to considerable detriment to his emotional and quite possibly his educational wellbeing were the Appellant to leave. This is all compounded by the fact, as I find it to be, that the Appellant's very precarious situation in this country has not been raised with the children. I fully understand the reasons behind this (particularly relating to the son) and the departure of the Appellant, even on a temporary basis, would come as a real shock thus exacerbating what would already and in any event be a very difficult scenario.
12. In respect of the partner's mother, I find that she is in all likelihood unable, even if willing, to offer meaningful practical support to her daughter. She is already taking care of two young children, one of whom clearly faces significant challenges in his life. Beyond this, it is impossible for the partner to stay at her mother's home (because the children are there) or for the mother to stay with the partner (because

the children would need to come with her). I accept the partner's evidence that she has no other family members or indeed friends who would be able to step in and assist her.

13. This leads on to my findings on the partner's own health. There is a good deal of medical evidence before me. I find it all to be reliable. It is clear that the partner suffers from a number of medical conditions not least of which is a liver condition. There are also issues relating to cysts on her ovaries, leg pain, and generalised pain. On the evidence before me I find that the "flare ups" described by the partner in her oral evidence have in fact occurred to such a serious extent in the last three or four months that she has been admitted into hospital on three occasions. I accept that during these episodes she is very seriously disabled in terms of functionality and her ability to undertake certain aspects of personal care and general day-to-day activities around the house. I accept her evidence that it is the Appellant, and the Appellant alone, who assists her with these issues, particularly during the more difficult episodes.

Conclusions

14. The Appellant is, strictly speaking, still unable to satisfy the Rules because he had not been cohabiting with his partner for at least two years prior to the making of the human rights claim on 11 May 2016. On that basis alone the Appellant has been and is unable to rely on EX.1 in light of the case of Sabir (Appendix FM - EX.1 not free standing) [2014] UKUT 00063 (IAC). The Appellant's case therefore falls to be considered on Article 8 grounds outside the context of the Rules.
15. The essential test is whether the Respondent's decision strikes a fair balance between the Appellant's rights on the one hand and the public interest on the other. In respect of the latter the Rules are of considerable significance as they represent the Respondent's view of where that balance lies.
16. There is in this case clearly family life as between the Appellant and his partner. It is also clear to me that there is family life as between the Appellant and the partner's two children especially in relation to her son, on the facts that I have found them to be. The absence of cohabitation with the children is, in the circumstances of this case, really beside the point.
17. The Respondent's decision was clearly an interference of sufficiently serious gravity for Article 8 to be engaged.
18. The Respondent's decision was in accordance with the law and pursued the legitimate aim of maintaining effective immigration control.
19. I turn to the question of proportionality. Having regard to the mandatory factors set out in section 117B of the NIAA 2002 and in the light of relevant case-law, I adopt a "balance sheet" approach.

Factors in the Respondent's favour

20. The Appellant is, and has been since 2005, an overstayer. The public interest in this, as in any case, is a very weighty factor. In addition, the Rules are there to be met and an inability to do so is a matter that reinforces the general public interest. In this case the Appellant is unable to meet all of the requirements of the Rules because of the "partner" issue discussed above. There is of course a general expectation that people should be able to meet the requirements of the Rules or, if they cannot, leave the United Kingdom to make an appropriate entry clearance application from abroad. I of course bear in mind the fact that the Appellant's relationship with his partner was established at a time when he was in this country unlawfully. On the face of it, this clearly reduces the weight attributable to his family life with his partner and her two children. Although the financial independence factor under section 117B(2) would appear to count against the Appellant, the satisfaction of EX.1 then suggests that the inability to meet the relevant income threshold can be 'neutralised' (see discussion, below). For current purposes, I will count the lack of income against the Appellant.

Factors in the Appellant's favour

21. Although he is unable to meet each and every requirement of Appendix FM, something more needs to be said about this issue. In light of what the First-tier Tribunal judge said, and my interpretation and preservation thereof, there are "insurmountable obstacles" to the partner going to live with the Appellant on a permanent basis in Pakistan. That point was not contradicted by the Respondent either at the error of law hearing or at any time before the remaking hearing. With respect to Ms Kenny, some aspects of her submissions have rather given the impression that this issue remains live. I conclude that it is not, and this is so for two reasons. First, because of what I set out in clear terms in my error of law decision at [16] and [26]. Second, and in any event, the circumstances of this case clearly show that insurmountable obstacles exist. The Appellant's partner has two children, neither of which are permitted to live with her. She has a loving parental relationship with both of them. It would be wholly against the children's best interests for their mother to effectively abandon them in this country and go and live in Pakistan. There is no question that the partner is in some way at "fault" for the children's situation (the background to their residence at her mother's has not been explored at any stage and in fairness, Ms Kenny has not sought to rely on what would be an unattractive submission). The partner's daughter sees her biological father and is clearly well cared for by her loving grandmother, but would certainly need to have her mother in her life. As for the son, his additional challenges and the fact that he has no contact with his biological father whatsoever would render the effective disappearance of his mother from his life utterly unconscionable and certainly disproportionate.
22. In these circumstances the Appellant's partner cannot leave the United Kingdom and could not have left at any time during the relationship. This being the case, the Appellant can show that he hypothetically meets the requirements of EX.1 of Appendix FM. This has the effect in turn of, as it were, 'neutralising' his inability to meet the minimum financial threshold and lack of immigration status (see R-

LTRP.1.1(d) of the Appendix). It follows from this that the Appellant would succeed in an in-country application for leave to remain if such an application were now made.

23. Although certain aspects of Ms Kenny's submissions might have indicated that the Respondent was suggesting that a permanent separation between the Appellant and his partner would be proportionate, that does not logically follow from the existence of insurmountable obstacles and the significance of this to the framework of the Rules themselves. If significant weight is to be attached to the Rules, as it must, this is so whether they operate in favour of or against a particular appellant. Here, they in fact act in his favour by permitting him to say, in effect, that the Respondent's decision must be disproportionate unless there is a good reason why he should go back to Pakistan alone and make an entry clearance application. This is because the Rules reflect what the Respondent regards as being the fair balance between the rights of the individual and the public interest. Those Rules (including, importantly, EX.1) provide that an individual *will* succeed in their application (an application which is course predicated entirely upon Article 8) if, along with other criteria, EX.1 is satisfied. The significance of such compliance with the Rules has recently been highlighted by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, at paragraph 34.
24. I now turn to the Chikwamba point. Although Ms Elliott-Kelly has submitted that the Chikwamba issue does not even arise in the context of this appeal, in my view it is prudent to deal with its merits for the sake of completeness.
25. In my view there are two reasons why no sensible reason exists for the Appellant to make an entry clearance application from Pakistan, or to put it another way, it would be disproportionate to require him to pursue this particular route. Either reason suffices.
26. First, as it now stands and in light of the conclusion that insurmountable obstacles exist, the Appellant meets all of the relevant provisions of Appendix FM as regards an in-country application for leave to remain. The only barrier to him succeeding within the context of the Rules in this appeal is, as has been discussed previously, because his partner could not be considered a "partner" as at the date of the human rights claim in 2016. That particular barrier would now of course fall away were a fresh hypothetical in-country application made. However, if the Appellant were to go back to Pakistan and make an entry clearance application from there it is entirely clear that this would be doomed to failure. This is because he simply could not meet the minimum income threshold and also, *unlike in an in-country application*, could not rely on EX.1 because this does not apply to entry clearance applications. Therefore, he would effectively be marooned in Pakistan thus giving rise to the very significant chance of a permanent separation from his partner. The "safety net" of EX.1 would not be available and the Respondent's ability to try and justify a temporary separation would face its own insurmountable obstacle.
27. Second, even a temporary absence would have significant consequences in the context of this case. The Appellant's partner suffers from significant health

conditions which have caused her to be hospitalised on several occasions in recent months. She is unable to turn to anyone else for meaningful support. There would be, I conclude, genuinely adverse consequences for her if the Appellant were to leave. In respect of the children, as has been said previously, they are entirely unaware of the Appellant's immigration circumstances. If he were to leave without warning or explanation this would cause significant distress and be adverse to their best interests. Alternatively, even if they were to be told of what was happening, their age and in particular the son's difficulties would still be contrary to their overall wellbeing. The best interests/section 55 factor is of course highly significant.

Neutral factor

28. The Appellant speaks excellent English and this is, as the law stands, a neutral factor.

Overall evaluative judgment

29. Having weighed up all relevant factors I conclude that this is a very strong Article 8 claim with compelling features such that the Appellant can show that the Respondent's decision does not strike a fair balance between his protected rights on the one hand and the important public interest on the other.

30. In essence, the combination of the insurmountable obstacles and the absence of a reasonable entry clearance option goes to outweigh the important public interest matters.

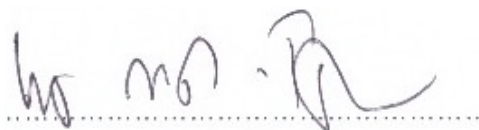
31. In these circumstances I allow the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

I remake the decision by determining that the Respondent's refusal of the Appellant's human rights claim is unlawful under section 6 of the Human Rights Act 1998.

I therefore allow the Appellant's appeal.



Signed

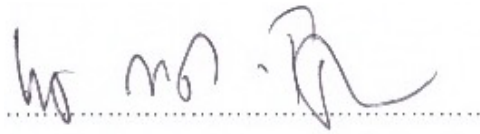
Date: 8 October 2018

Deputy 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 fee award of £140.00. the Appellant has succeeded in his appeal and there are no sound reasons to reduce the award.

A handwritten signature in blue ink, appearing to read 'W. M. Norton-Taylor', written over a horizontal dotted line.

Signed

Date: 8 October 2018

Deputy Upper Tribunal Judge Norton-Taylor

ANNEX: ERROR OF LAW DECISION



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/25036/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 26 June 2018**

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**M U U
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Revill, Counsel, instructed by Rashid & Rashid Solicitors
(Merton High Street)

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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DECISION AND REASONS

32. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Kaler (the judge), promulgated 27 February 2018, in which she dismissed his appeal against the Respondent's refusal, dated 27 October 2016, of his human rights claim. That refusal followed an application made on 11 May 2016, which was based on the following circumstances. The Appellant had a British citizen partner, with whom he lived. The partner has two children from a previous relationship. Due to particular circumstances, those children live with their grandmother rather than the partner, although the latter saw her children on a regular basis.

The judge's decision

33. The judge accepted that the Appellant and his partner had been in a genuine and subsisting relationship since 2014, and that they had cohabited since at least August 2015. The Appellant had at all material times been in this country on a precarious basis. At [15], the judge found that it was open to the Appellant to return to Pakistan and make an entry clearance application from there. A temporary separation would not have a disproportionate impact on his relationship with his partner.

34. The judge goes on to find that the Appellant did not have a parental relationship with either of his partner's children. At [18] she states:

"They have come to know the Appellant as the mother's partner but they do not live together as a family, and have never done so. I do not accept that they have established family life with the Appellant. I am not persuaded that the absence of the Appellant would have a significant impact on the wellbeing of these children. That [X] is developing a closer bond with the Appellant is noted but his best interests lie in his being in a loving and protected environment with his grandmother, and not in having regular contact with the Appellant."

35. At [19] the judge accepted that it would be "harsh" to expect the partner to leave the United Kingdom, given the circumstances of her two children. Finally, the judge attaches considerable weight to the Respondent's guardianship of the public interest and concludes that the interference with the Appellant's family life was proportionate. On this basis the appeal was dismissed.

The grounds of appeal and grant of permission

36. The grounds make the following points. It is said that the judge failed to consider to what extent the Appellant could meet the various requirements of the Rules (specifically Appendix FM) as at the date of hearing. This, it is said, was relevant to whether the Respondent's decision was proportionate. It is also asserted that the judge failed to deal adequately with the two children's best interests insofar as they related to the Appellant's presence in their lives. There is no challenge to the judges' conclusions on paragraph 276ADE(1)(vi).

37. Permission to appeal was granted by First-tier Tribunal Judge Page by a decision dated 26 April 2018.

The hearing before me

38. Ms Revill referred me to paragraph 34 of TZ (Pakistan) [2018] EWCA Civ 1109. The question of whether there would be insurmountable obstacles to the partner going to live in Pakistan was relevant to an Article 8 claim outside of the context of the Immigration Rules. She also referred me to the judgment of the Court of Appeal in Tikka [2018] EWCA Civ 642. Here, as in that case, any entry clearance application was, she submitted, bound to fail: in the present case the partner's income was well below the minimum threshold of £18,600 required under Appendix FM. This was a relevant factor that the judge had failed to consider. The ability, or otherwise, of an individual to satisfy the relevant Rules was, in the light of recent case law, relevant. I was referred specifically to the cases just mentioned and Agyarko [2017] UKSC 11.
39. Ms Revill submitted that the judge's approach to the best interests issue was insufficient. Whilst it was clearly the case that the children's best interests lay in living with their maternal grandmother, the judge should also have considered whether or not those interests had an additional element to them, namely whether this included having contact with the Appellant (him being their mother's partner). She submitted that what is said in [18] is inadequate.
40. Ms Isherwood submitted that the combination of [6], [16], [17] and [18] of the judge's decision is adequate in respect of the best interests question. In relation to [19], she accepted that the judge was concluding that the partner could not be expected to leave the United Kingdom, and this was the effect of the use of the term "harsh". However, it was open to the judge to conclude that the Appellant could go to Pakistan and make an entry clearance application. It was unattractive to say that an individual who simply could not meet the Rules would be in a stronger position than an individual who potentially could and took it upon themselves to go and make an entry clearance application.
41. In reply Ms Revill submitted that the possibility of making an entry clearance application was not determinative of an Article 8 claim outside the context of the Rules. The same applied to the question of whether insurmountable obstacles existed.
42. At the end of the hearing I reserved my decision.

Decision on Error of Law

43. After careful thought, I have concluded that there are material errors in the judge's decision. This conclusion is based upon the following matters.
44. With respect, the findings and conclusions of the judge in respect of the overall Article 8 assessment are not all entirely clear. She has not, for example, stated in clear terms that the Appellant was unable to meet the requirements of Appendix FM. However, from the finding at [13] that cohabitation had only begun in August 2015, I

deduce that the requirements could not be relied on. The human rights claim (the relevant application) was made on 11 May 2016, and therefore there had not been at least two years of cohabitation prior to the application. In turn, the Appellant's partner was not in fact a "partner" within the meaning of GEN.1.2(iv) of appendix FM. This was itself a decisive, if technical, factor in respect of the ability (or rather inability) to satisfy the rules, including EX.1.

45. In light of the above, the judge was considering the Article 8 claim outside of the context of the Rules. In so doing, the judge was required, as an initial step in the overall exercise, to assess to what extent, if at all, the Appellant could meet the various requirements of the Rules as at the date of hearing (see, for example, paragraph 48 of Agyarko and paragraphs 31-34 of TZ (Pakistan)).
46. She had, by virtue of her finding on cohabitation, concluded that the Appellant was in a genuine and subsisting relationship and was, as at the date of hearing, able to show that his partner was indeed his "partner" within the meaning of the rules.
47. Two important matters then arise. The first is whether or not there would be "insurmountable obstacles" to the Appellant's family life continuing outside of the United Kingdom (i.e. in Pakistan). There is no specific finding by the judge on this important matter. This in itself would be a significant error of law. However, by common consent at the hearing, it was agreed that the reference in [19] to it being "harsh to expect the Sponsor to leave the UK" denotes a conclusion that such obstacles did in fact exist, and that the basis on which I am considering the judges decision.
48. Whilst her implicit conclusion could not have permitted the Appellant to succeed in his appeal with reference to the Rules themselves (by virtue of what I have said in paragraph 13, above), it was clearly a highly relevant factor in the overall proportionality exercise. That relevance is highlighted, if not increased, by the fact that it was only the operation of GEN.1.2(iv) of appendix FM which, having regard to the implicit conclusion, defeated the Appellant's claim within the context of the rules,
49. In my view, the judge has failed to factor in this important conclusion when conducting the proportionality exercise. The very brief reference in [19] to it being "harsh" to expect the sponsor to leave United Kingdom is insufficient. If the conclusion was in fact taken into account, there are inadequate reasons for why this appears to have carried no weight in the overall assessment. There is an error here.
50. As rightly acknowledged by Ms Revill, the insurmountable obstacles conclusion would not have been determinative in the Appellant's favour. However, it was very clearly a highly material issue.
51. The second matter arising relates to the financial requirements under Appendix FM. The judge was of the view that the Appellant could return to Pakistan alone and make an entry clearance application (see [15]). However, at [6] the judge noted the evidence of that the Appellant's partner earned just £16,200 a year. It appears as though the Appellant was not himself earning. Therefore, on the evidence before her, the minimum income threshold of £18,600 was clearly not met. There is

unfortunately no finding to this effect. In any event, taking the claimed income as an accurate reflection of the couple's circumstances, any application for entry clearance would clearly be doomed to failure, at least under the Rules.

52. It is of course the case that any application for entry clearance would not only be considered under the rules but in light of the Respondent's residual discretion under Article 8. The question arising in that scenario is as follows: given the judge's conclusion that the Appellant partner could not follow him to Pakistan to live, given that the couple's income was insufficient to meet the financial requirements under Appendix FM, and in the absence of any suitability issues, would entry clearance have to be granted to the Appellant in order to be compatible with his protected Article 8 rights? This set of circumstances has not been dealt with by the judge. It may be that this is because there has not been a more logical, methodical approach undertaken, in line with the pathway recommended in TZ (Pakistan), amongst other cases.
53. The answer to the question just posed is not certain, but was relevant to the Chikwamba issue. In my view, the judge has failed to engage with this issue, and this represents a second material error in her decision.
54. The two errors identified above are sufficient for me to set the judges decision aside.
55. In respect of the best interests issue, I am less convinced by the merits of Ms Revill's argument. [16] – [18] do indicate that the judge had relevant matters in mind and addressed the relevant relationships in the children's lives. Having said that, there was evidence before the judge to indicate that at least one of the children had, by the date of the hearing, established somewhat more of a connection than is perhaps recognised in the decision (see [5] and [6]). In saying this, I bear in mind that the particular child as conditions which might have been relevant to his perception of the Appellant and the impact of a separation.

Disposal

56. Having set the judges decision aside, I will retain it in the Upper Tribunal and remake the decision at a resumed hearing in due course.
57. There is now no dispute about either the nature of the Appellant's relationship with his partner, the fact that she cannot be expected to go and live in Pakistan, or the factual circumstances relating to the partner's children.
58. The issues to be addressed at the resumed hearing will include whether the Appellant should return to Pakistan alone and make an entry clearance application. The question of the full extent of the children's best interests can also be the subject of evidence and submissions. Oral evidence will be permitted, but only on a limited basis. I issue directions to the parties, below.

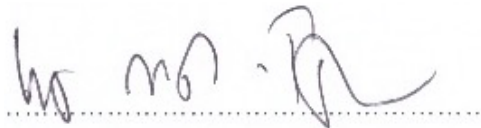
Notice of Decision

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

I set aside the decision of the First-tier Tribunal.

I adjourn the appeal for a resumed hearing before me in due course.

Anonymity direction made because this appeal concerns children subject to an order of the Family Court.



Signed

Date: 1 July 2018

Deputy Upper Tribunal Judge Norton-Taylor

Directions to the parties

- 1. Any further evidence relied on by either party shall be filed with the Upper Tribunal in accordance with rule 15(2A) of the Upper Tribunal Procedure Rules and served on the other side no later than 21 days before the resumed hearing;**
- 2. On the Appellant's side, no oral evidence will be permitted unless an updated witness statement is produced, addressing the issues of the children's best interests and the possibility of making an entry clearance application.**