Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20886/2019

THE IMMIGRATION ACTS

Heard at Bradford by Skype for business	**Decision & Reasons Promulgated**
On the 29 July 2020	**On 12 August 2020**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

ABRAR AHMAD

Respondent

Representation:
For the Appellant: Ms Petterson, Senior Presenting officer on behalf of the Secretary of State
For the Respondent: Mrs Masih of Counsel instructed by Wright Justice Solicitors

DECISION AND REASONS

Introduction:

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Joshi) (hereinafter referred to as the "FtTJ") who allowed his appeal against the decision of the Respondent dated 19 November 2019 to refuse his human rights claim.

2. No anonymity direction was made by the First Tier-Tribunal and no application has been made on behalf of the Appellant or any grounds put forward to support such an application.

3. Whilst the Secretary of State is the appellant, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.

4. The hearing took place on 22nd July 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. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video as did the appellant and his wife. Although there was an intermittent issue regarding sound, which was resolved by Mrs Masih repositioning herself, 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. I am grateful to Ms Petterson and Mrs Masih for their clear oral and written submissions.

The background:

5. The appellant's immigration history is summarised in the decision of the FtTJ at paragraphs 1-8. The appellant is a citizen of Pakistan and arrived in the United Kingdom in January 2011 with leave to enter as a student valid until 13 March 2012. He enrolled at college to study for a postgraduate diploma in business management and in 2012 he applied for an extension of his leave which was granted until 22 July 2013.

6. In 2011 the appellant met his partner and she is a British citizen of Indian origin. She had converted to Islam and they married in 2012 and began living together as husband and wife. They had registered their Islamic marriage the following year in 2013. As a result of her conversion to Islam, her family had disowned her.

7. On 16 July 2013 the appellant made an in time application for leave based on his family life with his spouse. He was granted leave by the respondent until 16 January 2016 under the five-year spouse route under Appendix FM. On 11 January 2016 he made an extension application, but it was refused on suitability grounds in a decision taken on 9 March 2016. The respondent alleged that the appellant had acquired a TOEIC certificate by deception in 2011 and had used it for his further leave to remain application in 2012. The appellant made two further applications which were refused on the same basis. None of those decisions provided for a right of appeal.

8. The appellant then made a human rights claim on the 25 February 2019 in which the appellant provided an explanation relating to the allegation of deception.

9. In a decision letter of 17 July 2019, the respondent refused his application but with a right of appeal. It is recorded at paragraph 7 of the FtTJ decision that the respondent's decision was withdrawn at an appeal hearing because the respondent had failed in the decision to rely upon the suitability ground.

10. The respondent thus made a new decision dated 19 November 2019 and it was against this decision that the appellant appealed before the FtTJ.

11. The Respondent refused the application on 19 November 2019 under paragraph R-LTRP 1.1(d) (i) because he did not meet the suitability requirements under S-LTR 4.2 of Appendix FM of the Immigration Rules on the basis that the Appellant had, in an earlier application for leave to remain as a student, submitted an English language test certificate from ETS which was false. The Respondent referred to the Appellant's test scores having been cancelled by ETS and in reliance on generic witness evidence about such fraudulent tests and was satisfied that the Appellant's certificate was fraudulently obtained and that he had used deception in his application on the 12 March 2012.

12. The application was also refused on the basis of the failure of the appellant to satisfy the eligibility requirements of E-LTRP 2.1-2.2 because he had remained in the UK since the refusal of his application on the 9 March 2016 with no valid leave to remain and was thus in breach of immigration laws and could not meet the requirement as a partner under Paragraph E-LTRP 2.2 of Appendix FM of the Immigration Rules.

13. Separately, the Respondent considered the Appellant's circumstances on the basis of his family life established in United Kingdom and whether he was exempt from meeting certain eligibility requirements under R-LTRP of Appendix FM because paragraph EX1 applied. The respondent accepted that the appellant had a genuine and subsisting relationship with his British partner and considered the points raised in the application, including his partner's family in the UK, her medical conditions and that she would be discriminated against in Pakistan. However, it was considered that there was no evidence that they would be insurmountable obstacles in accordance with paragraph EX2 of Appendix FM. As to the assertion that he had received threats on his life, and would suffer persecution and discrimination in Pakistan, the appellant had not made a protection claim. Consideration was given to IVF treatment, the appellant's mental health, the circumstances of employment but that the respondent was not satisfied that the appellant and his wife would suffer any greater hardship than any other people in Pakistan and that the appellant's spouse if she decided to remain in the UK could continue to access health services to treat her medical conditions. It was therefore considered that the appellant failed to meet the requirements of EX1 (b) of Appendix FM.

14. The application was refused on private life grounds under paragraph 276ADE(1) of the Immigration Rules on the same suitability grounds as above and on eligibility grounds that there were no very significant obstacles to his return to Pakistan where he has resided for the majority of his life and where he has retained knowledge of life, language and culture. There were no exceptional circumstances found to warrant a grant of leave to remain outside of the Immigration Rules.

15. The Appellant appealed that decision and on the 27 February 2020 his appeal was heard by the First-tier Tribunal. In a determination promulgated on the 22nd April 2020 the judge allowed his appeal on human rights grounds. The FtTJ began his

consideration with the issue of deception raised by the respondent. At paragraphs 39 – 47 the FtTJ set out his analysis of this issue and applied the three-stage approach as set out in the decision of *SM & Qadir* [2016] EWCA Civ. That involves considering, first, whether the Secretary of State has met the burden on her of identifying evidence that the TOEIC certificate was obtained by deception; second whether the claimant satisfies the evidential burden on her of raising an innocent explanation for the suggested deception; and third, if so, whether the Secretary of State can meet the legal burden of showing, on the balance of probabilities, that deception in fact took place.

16. The FtTJ reached the conclusion at paragraph 40-41 that the respondent had discharged the initial evidential burden. It is also plain from reading the evidence referred to in the decision that the appellant had offered an innocent explanation thus the judge was required to consider the evidence as a whole to consider whether the respondent discharged the burden on him to demonstrate that deception had taken place on the balance of probabilities.

17. In reaching his overall conclusion, the judge took into account the appellant's evidence about taking the test at the college in December 2011 (see paragraph [42]).

18. At paragraph [43], the judge took into account his earlier English language ability as demonstrated by his University degree with English as one of his compulsory subjects, his completion of a diploma in computer science in 1999, his IELTS in band 5 in 2008 and that he had completed the first part of a post graduate diploma in management in English and could not continue because his college licence had been revoked. The FtTJ also noted that after the alleged deception he had completed a city and guilds level 2 in health and social care in English in March 2016. Thus, the FtTJ reached the conclusion that it was not credible that he would use a proxy in an area of skill in which he was proficient.

19. In conclusion the FtTJ found that the appellant was a credible witness, that he had raised an innocent explanation and having taken into account all the documentary and oral evidence the judge found that the appellant had sat the test himself and that there was no reason for him to use a proxy test taker. The judge found that there was no individual evidence provided by the respondent that established that he took the test by deception and that the presenting officer accepted that there was no specific evidence relating to the appellant or specific to the college where the test took place. The appellant also had not been invited to interview and no voice recording had been provided. Thus, the judge found that the respondent failed to discharge the burden of proof to demonstrate the appellant had used deception.

20. The Secretary of State sought permission to appeal that decision and on the 13 May 2020 First-tier Tribunal Judge O'Garro granted permission for the following reasons: "The judge carefully considered the correct evidential burden of proof and found that the Secretary of State failed to discharge the legal burden of proving dishonesty. However it is arguable that in considering whether the appellant and his partner would face insurmountable obstacles if they moved to Pakistan, the judge did not apply the guidance

given by the Court of Appeal in Lal v SSHD [2019] EWCA Civ 1925 and that led to the error in his decision. Permission is granted."

The grounds:

21. There were two grounds advanced on behalf of the respondent in the grounds. The first ground related to the issue of deception relating to the use of an English Language certificate to obtain leave (such allegation was set out in the decision letter in which it was stated that in an application made by the Appellant on the 12 March 2012 he had submitted a TOEIC certificate from ETS). The second ground related to the issue of insurmountable obstacles.

22. However, FtTJ O'Garro upon her assessment of the grounds stated that she found no arguable error of law on ground 1 and granted permission on ground 2 relating to the issue of insurmountable obstacles. Ms Petterson on behalf of the respondent submitted that she accepted that this was a conditional grant of permission and that as the respondent had not sought at any stage to enlarge the grounds, her submissions were only going to be directed to ground 2.

23. Ms Petterson relied upon the written grounds. In her oral submissions she submitted that the matters set out at paragraph [51] of the decision may suggest there may be difficulties for the parties but that they did not meet the rigorous test of "insurmountable obstacles". In particular, the potential lack of employment on return and that they may not have a place of residence, taken together with the sponsor's health were insufficient to demonstrate "insurmountable obstacles".

24. She submitted that at paragraph [51] the FtTJ addressed the question as to why the appellant did not claim asylum, but the fact that the expert took the view that the sponsor faced discrimination was insufficient to demonstrate persecution and was not an " insurmountable obstacle."

25. As to the sponsor's different background and religion, she submitted that as the appellant's spouse had converted to Islam upon marriage, there was no evidence that she would face problems in Pakistan and as she would be accompanying her husband they would form a family together.

26. Ms Petterson made reference to the decision in Lal as cited in the grant of permission. She directed the Tribunal to paragraph 40. By reference to the factors in the present appeal, she submitted that they did not show any particular hardship. Therefore, the FtTJ erred in law in allowing the appeal on this basis.

27. Mrs Masih relied upon her amended Rule 24 response which attached to it the skeleton argument that she had provided before the FtTJ. It was submitted that the FtTJ had regard to the skeleton argument and the case law cited therein at [25] which referred to the decision in Lal v The Secretary of State for the Home Department and that contrary to the grounds, the FtTJ was live to and considered with care the test the appellant was required to discharged under EX1 as defined in EX2 (see [49]).

28. She submitted that the FtTJ identified facts he considered met the test and the evidence before him pointing to the same at paragraphs [51-52].

29. The written reply highlights that the presenting officer did not dispute the facts claimed at [26] including the difficulties the sponsor would face in Pakistan (set out at [25]) and instead asserted that the test of insurmountable obstacles was not met, on the facts (see paragraph [29]).

30. In addition, the FtTJ had the benefit of hearing the oral evidence of the appellant and his partner, whom he found credible and considered the documentary evidence in the appellant's bundles, which included a report by country expert dated 11 September 2019 (AB1 p12-37) which looked at the conditions/circumstances the parties had and were likely to face in Pakistan (on account of their interfaith marriage, cultural and language issues, sponsor's health and accessibility to treatment, IVF treatment options and lack of accommodation and employment /financial circumstances); the contents of which, were also not challenged by the presenting officer (see paragraph [25]).

31. Accordingly, the FtTJ was entitled to find as he did, having regard to the cumulative effect of all the factors, that the test had been met based on the degree of hardship they would face in Pakistan (at paragraph 53). Therefore, there was no error of law in his approach.

32. In conclusion it is submitted that the decision of Judge Joshi read as whole, demonstrates that he did sufficiently considered the relevant tests under Appendix FM and Article 8 ECHR outside the rules, that he applied the law correctly and had regard to the relevant principles established in case law. There is no error of law in the Judge's consideration of the tests under the Immigration Rules and Article 8 ECHR.

33. She submitted that the respondent's grounds were nothing more than a disagreement with the Judge's findings and an attempt to re-argue the case on a different basis to that which was put forward on the respondent's behalf on the day of the hearing (at [23-24]).

34. By way of response, Ms Petterson submitted that notwithstanding the expert evidence, the evidence did not satisfy the test for "insurmountable obstacles".

Decision on error of law:

35. I have carefully considered the submissions of the advocates as summarised above. The written grounds assert that the "Secretary of State has not seen any evidence that there are insurmountable obstacles in accordance with paragraph EX2 of Appendix FM which means very significant difficulties which would be faced by the appellant and his partner in continuing family life together outside the UK Pakistan which would not be overcome or would entail very serious hardship for them both." The

grounds then set out a number of statements as to why the Secretary of State did not consider there to have been any insurmountable obstacles.

36. With respect to the author of the written grounds, the issue was not whether the Secretary of State had seen any evidence but whether the FtTJ properly analysed the evidence provided and whether the judge gave adequate and sustainable reasons for being satisfied that the evidence reached the threshold to demonstrate that he was satisfied that there were "insurmountable obstacles" on the particular facts of this appeal.

37. Ms Petterson did not direct the Tribunal to the written grounds in her oral submissions and in fairness her submissions were to the effect that the evidence did not meet the threshold of the rigorous test applicable. In her submissions, she made reference to the decision of Lal v SSHD [2019] EWCA Civ 1925.

38. 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).
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> 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".

39. At paragraph 41 of the decision the Court of Appeal pointed out that the question of the difficulties a person might face on relocation did not necessarily require objective confirmation by third party evidence, stating:

> "The question is one of fact and there is nothing wrong in principle with basing a finding about a person's sensitivity to heat on evidence given by the person concerned and members of their family, as the FtT judge did in this case, if such evidence is regarded as sufficiently compelling".

40. In paragraph 45 of Lal, the Court of Appeal also identified an assessment of whether there were insurmountable obstacles should not proceed "by considering the matters relied on separately from each other without also assessing their cumulative impact". In paragraph 46 the Court of Appeal concluded that the 70 year old British spouse's proven sensitivity to heat, the fact of his living all of his life in the UK, and his ties to friends and family including his four children and six grandchildren, left it open as to whether an assessment would lead to a finding that he would face insurmountable obstacles on relocation to India

41. In summary ,the decision in Lal v Secretary of State for the Home Department [2019] EWCA Civ 1925 makes clear that it is the cumulative effects of the various factors which must be considered when assessing whether there are insurmountable obstacles to family life continuing in the Appellant's home country. The Court of Appeal also 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).

42. At [49] the FtTJ began his consideration of the issue of whether the appellant and his spouse would face insurmountable obstacles in continuing their family life outside of the UK and expressly made reference to the definition provided in EX2 of Appendix FM. The FtTJ was therefore plainly aware of the test that he was to apply.

43. The FtTJ set out his assessment of the issues at paragraphs [50]-[53]. At paragraph [51] the FtTJ gave his reasons for finding that the parties would face insurmountable obstacles if they were expected to continue their family life in Pakistan. He began with the issue of the parties' interfaith marriage and stated "the sponsor is a convert to Islam from Sikhism of Indian origin. The evidence before me is that when she visited Pakistan in 2013, she found it extremely difficult to adjust to the different culture and traditions and she was not accepted by the appellant's family. Her liberal attitude made it difficult for her to adjust to life there, she was not allowed to sit together with a husband or to hold his hand, and they were not allowed to eat together due to cultural norms in Pakistan". The FtTJ also considered

the evidence in the expert report which had been summarised in counsel's skeleton argument at pages 9 to 15 which the judge found supported their claim of fear and discrimination and potential persecution and return to Pakistan based on her background of being of Indian origin and having converted from Sikhism.

44. At [52], the FtTJ turned to the evidence which related to the sponsor's health conditions which included her epilepsy, her fertility treatment via IVF and mental health issues. The judge took into account that she was a British national she was taking medication and receiving treatment with the NHS and that on return they would not have a place of residence together and no immediate employment.

45. Whilst the assessment of whether there were "insurmountable obstacles" was in succinct terms, it is important to note that the FtTJ found both the appellant and his spouse to have given consistent evidence with each other and found them to be entirely credible witnesses (see paragraph [50]). Furthermore, the FtTJ was entitled to make his assessment on the unchallenged expert evidence (see [25]).

46. I am satisfied that the assessment that he undertook was firmly based on the evidence that was before the FtTJ and in particular the expert evidence. The written grounds assert that the claim made that the appellant's spouse would be discriminated against "does not amount to insurmountable obstacles or difficulties". There is no attempt to address that submission by any reference to the factual findings or the evidence that was before the FtTJ. The reference made to the couple living in Pakistan for one month pays no regard to the actual evidence that was before the FtTJ which underpinned his assessment. The evidence in the form of the expert report considered how the parties' interfaith marriage would be received in Pakistan. At paragraphs 14 – 41, the expert report made reference to objective material relevant to societal attitudes, issues of discrimination and stigmatisation and the lack of social acceptance. Societal harassment, and other issues related to the interfaith marriage such as the lack of work opportunities available to them without the support networks were also outlined in the report. In addition, the FtTJ had the evidence of the parties concerning the experience of the appellant's spouse on a visit to Pakistan in 2013. The judge recorded that evidence at [51] that it was extremely difficult to adjust to the different culture and traditions and that she was not accepted by the appellant's family. He highlighted that her liberal attitude made it difficult for her to adjust to life there; she was not allowed to sit together with a husband would hold his hand, they were not allowed to eat together due to cultural norms in Pakistan. It was therefore open to the judge to find that the evidence given by the parties based on their actual experience was consistent with the expert evidence before him. Where the grounds assert that the appellant's spouse's lack of knowledge of the culture did not amount to an insurmountable obstacle as she would be relocating with the appellant who could support her wholly fails to engage with the expert evidence and the evidence of the parties.

47. At [52] other factors that the FtTJ had considered related to the appellant's spouse and her access to medical treatment including fertility treatment. In relation to the

latter, the expert report set out the obstacles to IVF treatment in Pakistan at paragraphs 103 – 110 and also societal attitudes towards IVF and the underlying negative social attitudes to such treatment. In the light of that evidence which was unchallenged it was open to the judge to take that into account when addressing the issue of whether they were "insurmountable obstacles" to family life in Pakistan.

48. I conclude that on the particular factors which the FtTJ properly considered, and addressed and when taken cumulatively, were capable of showing that the appellant and his wife would face "very significant difficulty" in relocating to Pakistan, that there are not steps that they can reasonably take to mitigate that difficulty and that the "very serious hardship" that they would face shows that the test of insurmountable obstacles had been met on the evidence that was before the FtTJ which he plainly accepted.

49. Even if I were wrong, in the decision of AJ(Angola) Sales J at paragraph 49 referred to two categories of case in which an identified error of law might be said to be immaterial:

"49.There are two categories of case in which an identified error of law by the FTT or the Upper Tribunal might be said to be immaterial: if it is clear that on the materials before the tribunal any rational tribunal must have come to the same conclusion or if it is clear that, despite its failure to refer to the relevant legal instruments, the tribunal has in fact applied the test which it was supposed to apply according to those instruments."

50. When applied to the present appeal, I accept the submissions made by Mrs Masih that the respondent had not challenged the FtT decision at [56-57] to allow the appeal on the alternative basis " outside the Rules" with reference to the findings made at [48] and the evidence overall (see paragraphs 56-57 of the FtTJ's decision. Therefore, she submitted that the FtTJ's findings on exceptionality were unchallenged and remained undisturbed and the decision of the FtT ought to stand.

51. Whilst the respondent challenged the FtTJ's assessment of the issue of whether there were " insurmountable obstacles" to satisfy EX1(b) (see paragraph 8 of the grounds), there was no reference to challenging the decision to allow the appeal on the alternative basis set out at paragraphs [56]-[57]. Ms Petterson submitted that the failure to properly deal with EX1 would undermine the decision. I would accept that the issue of insurmountable obstacles and the factual circumstances would be relevant to the assessment outside of the Rules but there was no challenge to the assessment made of paragraph 48 and the appellant's ability to meet the Rules on that alternative basis.

52. Even if the grounds could be read as a challenge to the overall decision, I am not satisfied that the FtTJ erred in law in allowing the appeal.

53. There is no dispute as to the applicable law. The only ground of appeal available to the appellant is that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. If Article 8 is engaged, as on the facts of this appeal, the Tribunal may need to look at the extent to which an appellant is said to have failed to meet the requirements of the rules, because that may inform the proportionality balancing exercise that must follow.

54. The appellant's ability to satisfy the immigration rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

55. Furthermore, the judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 confirms that the fact that the immigration rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules.

56. In general terms, , the test for an assessment outside the IR is whether a " *fair balance*" is struck between competing public and private interests. This is a proportionality test: *Agyarko* (ibid) paragraphs [41] and [60]; see also *Ali* paragraphs [32], [47] - [49]. In order to ensure that references in the IR and in policy to a case having to be " *exceptional*" before leave to remain can be granted, are consistent with Article 8, they must be construed as not imposing any incremental requirement over and above that arising out of the application of an Article 8 proportionality test, for instance that there be " *some highly unusual*" *or* "*unique*" factor or feature: *Agyarko* (ibid) paragraphs [56] and [60].The proportionality test is to be applied on the " *circumstances of the individual case*": *Agyarko* (ibid) paragraphs [47] and [60] applying the public interest considerations set out at Part 5A and s117A-B of the 2002 Act.

57. When applying those principles to the assessment of the evidence, there was no dispute that the relationship and financial requirements were met as set out in the decision at [48]. Furthermore, in the light of the FtTJ's assessment of the issue of suitability ("the ETS point") which was in favour of the appellant, it was open to the FtTJ to consider as a weighty factor, the refusal of the appellant's in time partner extension application of the 9 March 2016 under the five year route (which carried no right of appeal and), which resulted in him becoming an overstayer. This had been based on the same deception allegation which the FtTJ did not find to have been proved.

58. Whilst the FtTJ did not make any further reference to this at [48], I accept Mrs Masih's submission that the Judge's finding is consistent with the respondent's position taken in the Court of Appeal case of Khan & Ors v Secretary of State for the Home Department [2018] EWCA Civ 1684 on TOEIC/ETS cases (cited at paragraph

9 of the skeleton argument before the FtT). At [37] (iii) the Court stated : '*In all cases, the Respondent confirms that in making any future decision he will not hold any previous gap in leave caused by any erroneous decision in relation to ETS against the relevant applicant, and will have to take into account all the circumstances of each case.*'

59. When applied to this particular appeal, save for the period of overstaying which had resulted from the erroneous ETS decision (which had been found subsequently to not be made out by the FtTJ), the appellant would have met the Immigration Rules, having made an in time extension application under the 5 year partner route made in 2016. The FtTJ gave consideration to this at [56] where he made an express reference to his findings at [48]. Ms Petterson on behalf of the respondent accepted that the factual circumstances relating to the refusal of the application in 2016 were correct and that in the light of the appellant's successful challenge to the ETS issue, she could not argue that the decision in Khan (as cited) could not apply.

60. Thus, in the light of this, I am satisfied that the FtTJ was entitled to conclude that the public interest was outweighed on the particular factors of this appeal.

61. In addition, the FtTJ was entitled to take account of the factors which had identified in the earlier paragraphs, relating to the circumstances in Pakistan for the couple. This included the likely conditions for the appellant's spouse in that country, whereas a British citizen of Indian origin, having converted to Islam from Sikhism, would be at risk of discrimination and stigmatisation. The respondent did not seek to challenge the expert report found at pages 12-37 of the appellant's bundle which referenced a number of issues, including their inter-faith marriage and the FtTJ accepted the expert evidence contained in that report (see [51]). The FtTJ also accepted the evidence of the appellant and his spouse, both of whom he found to be consistent and credible witnesses (see [50]). They had given an account in their evidence that when she visited Pakistan in 2013, she found it difficult to adjust to the culture and traditions and was not accepted by the appellant's family. Her evidence was summarised by the FtTJ at [51] and he accepted that on her visit, her liberal attitude made it difficult to adjust; she was not allowed to sit together with her husband or to hold his hand and they were not allowed to eat to together. Alongside the other issues identified in the report, the stigmatisation, social harassment , lack of work opportunities without any support networks, language problems and the problems with accessing IVF, when taken together cumulatively, it was open to the FtTJ to find that the public interest was outweighed on the particular facts of the appeal.

62. The question whether the decision of the FtTJ 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 as to the relevant law and assessing the evidence on a rational and lawful basis.

63. Consequently, I have reached the conclusion that the decision reached by the FtTJ was one reasonably open to him when assessing the evidence provide in this appellant's particular circumstances.

64. For those reasons, I am not satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law. I therefore dismiss the appeal. The decision of the FtTJ to allow the appeal shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision shall stand.

Signed *Upper Tribunal Judge Reeds*

Dated 6 August 2020

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