



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-003753

First-tier Tribunal No: HU/02968/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 14 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**FAISAL MEHMOOD**  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Azmi instructed by Wright Justice Solicitors.

For the Respondent: Mr Gazge, a Senior Home Office Presenting Officer.

**Heard at Birmingham Civil Justice Centre on 6 April 2023**

**DECISION AND REASONS**

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Andrew ('the Judge') promulgated on 1 July 2022, in which the Judge dismissed his appeal against the refusal dated 13 May 2021 of his application for leave to remain in the United Kingdom on the basis of his relationship with his unmarried partner. The appeal was pursued on human rights grounds only.
2. The Judge had the benefit of hearing oral evidence from the appellant and his partner and considering the documentary evidence before setting out her findings of fact.
3. The Judge noted the appellant and his partner are cousins who had met previously in Pakistan and again in the United Kingdom in May 2012. The Judge records that the relationship began in August 2013 and the appellant and his partner underwent an Islamic marriage ceremony on 27 January 2018.
4. At [12] the Judge finds the appellant cannot meet the eligibility requirements of Appendix FM because he is an overstay although all remaining aspects of Appendix FM were accepted as being met.
5. The Judge found there was a genuine and subsisting relationship between the appellant and his partner and set out the correct self-direction she needed to

consider as whether there were insurmountable obstacles to their family life continuing outside the UK.

6. The Judge at [14] sets out the definition in paragraph EX2 of the term 'insurmountable obstacles'.
7. The Judge sets out the core of the appellant's evidence in relation to his circumstances in his home village in Azad Kashmir which was not found to be the relevant test, as the Judge found the appellant and his partner did not need to return to his village, and there was nothing to show they could not settle in an urban area such as Islamabad or Lahore. The Judge records having raised that matter with the appellant's representative who stated the Judge should consider return to the appellant's home village, which the Judge correctly noted was not the test [16].
8. The Judge records being told it will be impossible for the partner to go to Pakistan due to her medical condition but noted limited evidence in relation to the same and found at [18] that there was nothing at all before the Judge to show the partner was not able to access treatment for her conditions in Pakistan. The Judge in fact finds on the balance of probabilities that the partner will be able to obtain treatment and medication for her various conditions in Pakistan.
9. The Judge took into account the partners evidence regarding her employment but did not find that argument amounted to establishing very significant difficulties and found the partner was not a stranger to Pakistan as she is of Pakistani heritage and has visited Pakistan in the past [21].
10. The Judge finds there was nothing before her to establish that the appellant could not obtain employment in Pakistan or anything to show anything other than he is a fit and healthy young man with sufficient language of his home country, in which he has relatives. Though the Judge had not been asked to consider paragraph 276ADE, she indicates the appellant would be enough of an insider on his return [22].
11. The Judge concludes that the appellant could not meet the requirements of paragraph EX1(b) and thereafter went on to consider the appeal pursuant to article 8 ECHR from [24].
12. The Judge adopted a structured approach finding that as the appellant is an overstayer she was required to place only very limited weight on his private and family life in the UK. The appellant's initial lawful entry to the UK was as a visitor. The Judge accepted the appellant speaks English and appears to be financially independent, which were neutral factors, and that on the balance of probabilities the partner was aware of the appellant's lack of immigration status when their relationship was formed and when they were married.
13. The Judge considered the proportionality of expecting the appellant to return to Pakistan to apply to re-enter lawfully, noting that the appellant may be able to meet the requirements of the Immigration Rules [30] but concludes that cases such as Chikwamba could be distinguished, that the appellant is an overstayer with no reason why he should be permitted to jump the queue, and that it had not been made out he could not return to Pakistan and make an application from there. The Judge balanced the impact upon the partner and finds there was nothing in the evidence to persuade her that there will be unjustifiably harsh consequences and finds that the refusal is proportionate [34] and therefore dismissed the appeal.
14. The appellant sought permission to appeal arguing that the decision was not proportionate and seeking to set out again his arguments in support of the appeal.
15. Permission to appeal was granted by a Designated Judge of the First-tier Tribunal the operative part of the grant being the following terms:

Permission to appeal will be granted only if there is an arguable error of law in the Judge's decision. The express grounds disclose no arguable error of law. Since the permission application has been prepared by the Appellant in person I have considered the entirety of the Judge's decision to see if it readily discloses an arguable error of law.

At paragraphs 5 and 14 of her decision, the Judge correctly refers to the relevant test under Article 8 of the European Convention when assessing an application for leave outside the Immigration Rules.

However, at paragraph 15 she states that the test means that family life must be "pretty much impossible and a significant degree of hardship or inconvenience would not meet the test". She also noted that the Respondent had accepted that the Appellant met all the requirements of the relevant Immigration Rules except that he was an overstayer and had no leave. The Judge did not refer to ss.117A-D Nationality, Immigration and Asylum Act 2002 as amended and arguably failed to address the possibility described at paragraph 51 of *R (Agyarko) v SSHD* [2017] UKSC 11. For these reasons I find there is an arguable error of law in the Judge's decision and permission to appeal is granted.

16. The Secretary of State in a Rule 24 response dated 13 September 2022 writes:

2. The respondent opposes the appellant's application for permission to appeal.
3. Permission was granted on the following basis namely that (i) whether the Judge applied the correct assessment in considering Article 8 leave outside the rules.
4. It is submitted that the grounds are merely seeking to re-argue the case.
5. Notwithstanding the views expressed in the grant of permission at paragraphs 5 and 13-15 of the determination the Judge clearly sets out matters under consideration in this appeal and the test to be applied. In addition, at paragraph 12 the acknowledges that the SSHD accepts the appellant meets the requirements of appendix FM but not eligibility due to being an overstayer.
6. From Paragraph 16 the Judge considers the appellant and his partner returning Pakistan and finds that the sponsor would be able to obtain medical treatment if she were to return with the appellant and that the appellant would be able to gain employment. These findings are open to be made based on the evidence provided.
7. From Paragraph 29 the Judge considers the central issue in this appeal and whether the individual facts outweigh the appellant being an overstayer. Having considered the evidence the Judge is entitled to conclude that if the appellant was to return the sponsor would have assistance in his absence and that no children are involved in this appeal.

17. Before the Upper Tribunal Mr Azmi sought leave to amend the grounds to include a ground asserting the Judge failed to assess the factors regarding insurmountable obstacles in a cumulative way. Mr Gazge did not object and leave to amend was granted.

## **Discussion**

18. The reference in the grant of permission to appeal to [51] of *Agyarko* comes within the part of that judgement where the issue of precariousness is being discussed. The full text of this section is in the following terms:

### *Precariousness*

49. In *Jeunesse*, the Grand Chamber said, consistently with earlier judgments of the court, that an important consideration when assessing the proportionality under article 8 of the removal of non-settled migrants from a contracting state in which they have family members, is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be

“precarious”. Where this is the case, the court said, “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” (para 108).

50. Domestically, officials who are determining whether there are exceptional circumstances as defined in the Instructions, and whether leave to remain should therefore be granted outside the Rules, are directed by the Instructions to consider all relevant factors, including whether the applicant “[formed] their relationship with their partner at a time when they had no immigration status or this was precarious”. They are instructed: Page 20 “Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK.” That instruction is consistent with the case law of the European court, such as its judgment in *Jeunesse*. As the instruction makes clear, “precariousness” is not a preliminary hurdle to be overcome. Rather, the fact that family life has been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affects the weight to be attached to it in the balancing exercise.
51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*.
52. It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control. This point was made by Lord Bingham and Lord Brown of Eaton-under-Heywood in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] AC 1159, paras 15 and 37. It is also illustrated by the judgment of the European court in *Jeunesse*. 53. Finally, in relation to this matter, the reference in the instruction to “full knowledge that their stay here is unlawful or precarious” is also consistent with the case law of the European court, which refers to the persons concerned being aware that the persistence of family life in the host state would be precarious from the outset (as in *Jeunesse*, para 108). One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.
19. It was held in *Agyarko* [2017] UKSC 11 that a court or tribunal had to decide whether the refusal to grant leave to remain was proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State’s policy, expressed in the rules and instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are “insurmountable obstacles” or “exceptional circumstances” as defined. “The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with

- precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control”.
20. That is the approach adopted by the Judge. I find no merit in the submission the Judge failed to consider adequately the public interest prevalent in this appeal. It is settled law the Judge was not required to set out each and every aspect of the evidence in the determination and although Mr Azmi focused upon the finding of the Judge at [32], that there was no reason why the appellant should jump the queue, a reading of the determination as a whole shows that that was not the only reason why the Judge dismissed the appeal. The Judge found the appellant could not satisfy the requirements of the Immigration Rules and the Secretary of State had established removal was proportionate.
  21. In Jeunesse v the Netherlands (Application 12738/10) the European Court of Human Rights stated that in principle Contracting States have the right to require aliens seeking residents on their territory to make the appropriate request from abroad. They are thus under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory.
  22. The Judge referred to the decision in Chikwamba v Secretary of State the Home Department [2008] UKHL 40 ('Chikwamba') in which the House of Lords considered the issue of queue jumping in the context of the need for an applicant to return to her country of origin to apply for entry to join her refugee spouse under the Immigration Rules. It was found that in deciding whether a general policy of requiring people such as the appellant in that case to return to apply for entry in accordance with the rules was legitimate and proportionate in a particular case, it was necessary to consider what the benefits of the policy were. Whilst acknowledging the deterrent effect of the policy the House of Lords queried the underlying basis of the policy in other respects and made it clear that the policy should not be applied in a rigid, Kafkaesque manner. The House of Lords went on to say that it would be “comparatively rarely, certainly in family cases involving children” that an Article 8 case should be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad.
  23. Since that decision, and indeed the decision of the Supreme Court in Agyarko, part 5A of the Nationality, Immigration and Asylum Act 2002 has come into force as has Appendix FM of the Immigration Rules.
  24. In the case of R (on the application of Chen) v Secretary of State the Home Department (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC) it was held:
    - (i) That Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to rejoin family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case law concerning Chikwamba v SSHD [2008] UKHL 40.
    - (ii) 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 (per Burnett J, as he then was, in R (Kotecha and Das v SSHD) [2011] EWHC 2070 (Admin)). However, where a failure to comply in

a particular capacity is the only issue so far as the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the Rules.

25. The Court of Appeal considered this issue further in the case of R (on the application of Paramjit Kaur) v Secretary of State the Home Department [2018] EWCA Civ 1423 in which it was found that the Chikwamba principle requires a fact specific assessment in each case, that it would only apply in a very clear case, and even then would not necessarily result in a grant of leave to remain.
26. The assertion the Judge has compartmentalised the evidence is without merit. The submission failed to establish artificial separation in the manner in which the Judge considered the individual elements relied upon by the appellant in support of his appeal, as set out in the determination, and the overall conclusion that the appeal was dismissed. Mr Azmi was asked what else the Judge was supposed to do in the determination other than identify the issues she had been asked to look at, make finding upon those issues, and set out her overall conclusion having analysed the same, as she did. The structure of the determination is in accordance with that of nearly every case written by judges in the immigration Tribunal's. The Judge properly defined the term insurmountable obstacles and examined whether the reasons put forward by the appellant and his partner satisfied the test. The Judge concluded it did not. Whilst the appellant may disagree with this conclusion the grounds do not establish it is outside the range of those reasonably available to the Judge on the evidence.
27. In relation to the submission that expecting the appellant to return to Pakistan to make an application was not proportionate, and that the Judge did not adequately consider the ability of the appellant to satisfy the rules, I find this submission without merit in establishing material legal error.
28. The Judge did not find that the appellant was 'otherwise certain', to use the phrase in [51] of Agyarko, to satisfy the requirements for re-entry as a spouse if he applied from Pakistan, but that he may be able to [30]. That will require a proper examination of any application made from Pakistan by an Entry Clearance Officer.
29. The Judge at [9] noted there was no skeleton argument from the appellant's representative who indicated, in any event, that reliance was being placed upon paragraph EX of Appendix FM and the claim there were insurmountable obstacles and very significant difficulties that will be faced by the appellant and his partner and return to Pakistan which could not be overcome. This is the issue of the Judge adequately dealt with in the determination.
30. It is important to remember that the primary finding of the Judge is that the family life the appellant enjoys with his partner can be continued outside the United Kingdom. There will therefore be no breach of Article 8 on the basis of their family life together. Whilst the grounds argue the Judge should have focused only on life in the village such as submission has no merit. The specific wording of EX.1 is whether the appellant had established insurmountable obstacles to family life continuing outside the UK. The Judge's finding is that it was reasonable for family life to continue in Pakistan. That has not been shown to be a finding outside the range of those reasonably available to the Judge on the evidence.
31. The Judge's secondary finding is that the appellant could return to Pakistan and make the application to enter the UK legally. That does not undermine the primary finding but also has not been shown to be a finding outside the range of those reasonably available to the Judge on the evidence.
32. It is settled law that '*When determining an appeal that removal would breach ECHR rights, the Tribunal is required to determine the relevant factual issues for*

*itself on the basis of the evidence before it, albeit giving proper consideration and weight to any previous decision of the defendant authority'* [MS \(Pakistan\) v. Secretary of State for the Home Department \[2020\] UKSC 9 \(18 March 2020\)](#).

33. It is not relevant that another judge may not make this decision. What is relevant is that the Judge considered the evidence with the required degree of anxious scrutiny, has made findings which a reader of the decision is able to understand supported by adequate reasons. Whilst the appellant and his partner in their witness statements are highly critical of the Secretary of State's view that there are no insurmountable obstacles and that the appellant could return to Pakistan to apply, the grounds fail to establish that the Judge's decision is outside the range of findings available to her on the evidence and has not been shown to be either irrational or unlawful.
34. The UK has a margin of appreciation in relation to Article 8 ECHR and those it admits to its territory it is within that that the decision appealed against arises. It is also important to record that Article 8 ECHR does not entitle a person to choose where they wish to live.
35. The Court of Appeal has made it abundantly clear that appellate judges, including themselves, should not interfere with a decision of a judge below unless a genuine legal error material to the decision has been made out. I do not find on the basis of the evidence, decision, grounds, grant of appeal, or oral submissions made before me, that the same has been established. Accordingly, I dismiss the appeal.

### **Notice of Decision**

36. There is no material error of law in the decision of the First-tier Tribunal. The determination shall stand.

**C J Hanson**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**6 April 2023**