



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

Case No: UI-2022-003599

First-tier Tribunal No: HU/50520/2020  
IA/00422/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 26 March 2023**

**Before**

**UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

**SAIRA HUSSAIN**  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Slatter, Counsel instructed by Addison and Khan Solicitors  
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

**Heard at Field House on 23 January 2023**

**DECISION AND REASONS**

1. The appellant is appealing against a decision of Judge of the First-tier Tribunal Ghandi ("the judge") dated 5 July 2022 dismissing her appeal against the respondent's decision dated 11 September 2020 to refuse her human rights claim.
2. The appellant is a citizen of Pakistan who was born on 31 December 1985. She has lived in the UK without leave since 2005, when she entered the country unlawfully. She is married to a British citizen. Her husband's mother, who has significant health difficulties and requires care, lives with her and her husband.

3. The appellant claims that removing her from the UK would breach article 8 ECHR. This claim was previously considered – and rejected – by a First-tier Tribunal judge (“the previous judge”) in a decision dated December 2018.

#### The decision of the previous judge

4. The previous judge accepted that the appellant had a family life in the UK engaging article 8(1) with her husband. However, although the judge found that the appellant had a close relationship with her husband’s family including in particular her mother-in-law (with whom she lived), she did not accept that this amounted to family life for the purposes of article 8(1).
5. The previous judge considered whether there would be insurmountable obstacles to the appellant’s relationship with her husband continuing in Pakistan. She concluded that there would not. She was also satisfied that the appellant would not face significant obstacles reintegrating in Pakistan.
6. In her assessment of proportionality under article 8, the previous judge attached significant weight to the appellant’s immigration history (entering the UK illegally and never having a lawful basis to be in the UK). In accordance with section 117B(4) of the Nationality, Immigration and Asylum Act 2002, the previous judge attached little weight the appellant’s private life and family life, as these had been established when she was in the UK unlawfully.
7. With respect to the appellant’s mother-in-law, the previous judge found that the appellant cooked and cleaned for, and provided support to (for example by attended medical appointments) her mother-in-law but that this was a matter of choice as the appellant’s mother in law had a large extended family who could make other arrangements for her care. The previous judge also noted that the appellant’s relationship with her mother-in-law was established when the appellant had no right to be in the UK.

#### The decision of the judge

8. The judge observed that the issues before him were the same as those before the previous judge, although there was some new evidence to support the appellant’s case.
9. The judge considered whether, pursuant to EX.1 of Appendix FM, the appellant and sponsor would face insurmountable obstacles continuing their relationship in Pakistan. He concluded that they would not. Amongst other things, he found that they would have a home and be able to obtain work in Pakistan.
10. The judge then considered, in accordance with paragraph 276ADE(1)(vi), whether the appellant would face very significant obstacles integrating in Pakistan. The judge concluded that she would not.
11. The judge then considered article 8 outside the Rules. The judge accepted that family life exists between the appellant and her husband. However, he rejected the argument that there was family life between the appellant and her mother-in-law. The judge stated in paragraph 45:

The appellant has not shown that the circumstances as set out in [the previous judge’s decision] have changed. I find, for the reasons set out below, as well as the reasons given by [the previous judge], that there

are other family members who live close by who could look after the appellant's mother-in-law albeit she and the rest of the family may have a preference for the appellant to look after her. I therefore find that the ties between the appellant and her in-laws, including her mother-in-law, are not over and above the normal emotional ties between adult relatives.

12. The judge found that the appellant's poor immigration history weighs heavily against her in the proportionality assessment.
13. Although the judge rejected the argument that family life for the purposes of article 8 ECHR exists between the appellant and her mother-in-law, he nonetheless considered, in the proportionality assessment, how the appellant's mother-in-law might be affected by the appellant's removal. The judge found that there was no reason why her numerous family members in the UK could not take care of her and make the necessary arrangements to organise support if the appellant was no longer able to assist her. The judge noted that the evidence of family members was not up to date. The judge had regard to a recent letter (dated 4 May 2022) from the GP of the appellant's mother-in-law where the GP commented on the vital support provided by the appellant. The judge observed that the GP did not say that if the appellant was not present no one else could take over her role. The judge noted an earlier GP letter (dated 27 August 2019) stating that no other family members were available to care for the appellant. The judge stated that this is not repeated in the more recent letter and that it was not explained how the GP would be in a position to know this other than being told by the appellant or her in-laws. The judge found that, because of the other family members available to help the appellant's mother-in-law, her health would not deteriorate if the appellant had to leave the UK.
14. One of the arguments advanced by the appellant was that it would be disproportionate to expect her to leave the UK in order to apply for entry clearance when that application would inevitably succeed. The judge addressed this argument briefly in paragraph 72, stating:

Although Ms Allen states that this is a [*Chikwamba v SSHD* [2008] UKHL 40] type case because the appellant meets the Immigration Rules, in my view the appellant does not, for the reasons stated above. There is therefore no reason why she could not return to Pakistan and apply for any identity documents that she required and then make an application for entry clearance.

#### Grounds of appeal and submissions

15. Ground 1: Ground 1 submits that the judge, when considering the application of the *Chikwamba* principle, erred by failing to consider the appellant's argument that she would meet the Immigration Rules were she to apply for entry clearance from abroad. Mr Slatter argued that the reference to the appellant not meeting the Immigration Rules in paragraph 72 is a reference to the Rules concerning a grant of leave from within the UK, not those concerned with a grant of entry clearance. He submitted that it is the latter that are relevant to a *Chikwamba* argument.
16. Mr Whitwell, relying on the recent Court of Appeal decision *Alam & Anor v Secretary of State for the Home Department* [2023] EWCA Civ 30, argued that *Chikwamba* did not assist the appellant. He gave two reasons: first, it was far

from certain that the appellant would succeed in an application for entry clearance. Second, the evidence did not, on any view, establish that temporarily relocating to Pakistan in order to apply for entry clearance would be disproportionate given that only little weight to be given to the appellant's private and family life in the UK.

17. Ground 2: This ground concerns a discrepancy in the evidence about the whereabouts of the appellant's passport. Mr Slatter accepted at the hearing that there did appear to be a discrepancy and did not pursue this ground.
18. Ground 3: Ground 3 submits that it was not rationally open to the judge to find that the appellant and her mother-in-law do not enjoy a family life within the meaning of article 8 ECHR given, in particular, the appellant's role caring for her mother-in-law.
19. Mr Whitwell submitted that the previous judge found that there was no family life between the appellant and no evidence had been submitted to show that the circumstances had materially changed since that decision. He argued that it follows from this that the judge's approach was consistent with *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* \* [2002] UKIAT 00702. He also submitted that this is a rationality challenge and the appellant has not established that the high threshold of irrationality has been met.
20. Ground 4: In this ground it is argued that the judge erred by not adequately assessing the effect of the appellant's removal on her mother-in-law. It is contended that the judge failed to take into account all of the relevant evidence and did not make findings about the extent of the care the appellant provides. Mr Slatter also submitted that the judge failed to make a finding on whether the appellant's mother in-laws health would deteriorate as a consequence of the appellant's removal. He submitted that these factors are relevant to whether temporary disruption of the family life enjoyed between the appellant and her mother-in-law is disproportionate, which should have been considered in the context of the appellant's *Chikwamba* argument.
21. Mr Whitwell argued that it is evident from the decision that the effect on the appellant's mother-in-law was given full consideration. He submitted that the conclusion of the judge was one that was open to him and that this is no more than a disagreement.

### Analysis

22. The appellant argued before the First-tier Tribunal that it would not be proportionate under article 8 ECHR to remove her to Pakistan given that, if she were to make an application for entry clearance from Pakistan, that application would be bound to succeed. To support this argument she relied on *Chikwamba*, a 2008 House of Lords decision that is frequently cited to support the proposition that if a person residing in the UK unlawfully would be certain to be granted leave to enter by making an application from outside the UK there might not be a public interest in her removal.
23. The scope of *Chikwamba* was considered recently by the Court of Appeal in *Alam*. The Court of Appeal stated:

106. In *Chikwamba*, the Secretary of State met a very strong article 8 case by relying on an inappropriately inflexible policy. The decision

does not in my view decide any wider point than that that defence failed. There are three other matters that should be borne in mind when it is cited nowadays.

i. The case law on article 8 in immigration cases has developed significantly since *Chikwamba* was decided.

ii. It was decided before the enactment of Part 5A of the 2002 Act. Section 117B(4)(b) now requires courts and tribunals to have 'regard in particular' to the 'consideration' that 'little weight' should be given to a relationship which is formed with a qualifying partner when the applicant is in the United Kingdom unlawfully.

iii. When *Chikwamba* was decided there was no provision in the Rules which dealt with article 8 claims within, or outside, the Rules. By contrast, by the time of the decisions which are the subject of these appeals, Appendix FM dealt with such claims. Paragraph EX.1 of Appendix FM provided an exception to the requirements of Appendix FM in article 8 cases if the applicant had a relationship with a qualifying partner and there were 'insurmountable obstacles' to family life abroad.

107. Those three points mean that *Chikwamba* does not state any general rule of law which would bind a court or tribunal now in its approach to all cases in which an applicant who has no right to be in the United Kingdom applies to stay here on the basis of his article 8 rights. In my judgment, *Chikwamba* decides that, on the facts of that appellant's case, it was disproportionate for the Secretary of State to insist on her policy that an applicant should leave the United Kingdom and apply for entry clearance from Zimbabwe

24. The Court of Appeal went on to find in paragraph 113 that:

*Chikwamba* is only relevant if the Secretary of State refuses an application on the narrow procedural ground that the appellant should be required to apply for entry clearance from abroad. It does not apply here, because the Secretary of State did not so decide.

25. In this appeal, the appellant's application was refused for various reasons: absence of insurmountable obstacles to the relationship continuing in Pakistan under para. EX.1; absence of very significant obstacles to integration under para. 276ADE(1)(vi); and absence of exceptional circumstances under para. GEN 3.2. It was not refused on the narrow procedural ground that the appellant should be required to apply for entry clearance from abroad. Accordingly, this is not a case where *Chikwamba* has any relevance. The judge therefore did not err by rejecting the appellant's *Chikwamba* argument.

26. I now turn to the judge's consideration of the appellant's relationship with her mother-in-law. The evidence establishes - and the judge accepted - that the appellant lives with, is close to, and provides care to her mother-in-law. Some judges might have concluded, based on these findings, that there is family life between the appellant and her mother-in-law engaging article 8 ECHR. But, equally, others might have concluded the opposite. Having applied the correct test (in para. 45 the judge referred to the test as being whether the ties between the appellant and her mother in law were "above the normal emotional ties

between adult relatives”) and having had regard to all of the material evidence before him, the judge reached a conclusion that was not outside the range of reasonable conclusions. The judge therefore did not err in finding that there was not family life engaging article 8 between the appellant and her mother-in-law. Moreover, the judge was entitled to take into consideration that the previous judge did not accept that family life is engaged and that there was no evidence before him indicating a material change in circumstances since the previous judge’s decision.

27. Even if I am wrong and the appellant is correct that the judge fell into error by not accepting that family life between the appellant and her mother-in-law exists, any such error would be immaterial. The appellant’s relationship with her mother in law was established at a time when the appellant was in the UK unlawfully. Although the appellant’s relationship with her mother-in-law is not covered by section 117B(4) of the 2002 Act (which requires little weight to be given to a relationship with a “qualifying partner” established when the person is in the UK unlawfully), it is well established that a relationship established when a person is in the UK unlawfully should ordinarily be given little weight. See *Rajendran (s117B - family life)* [2016] UKUT 00138 (IAC).
28. The appellant argued before the First-tier Tribunal that her removal would have a very significant negative impact on the wellbeing and health of her mother-in-law. If the judge had accepted that this would be the case, that might have justified attaching more than little weight to the relationship despite the appellant’ immigration status when it was established. However, the judge made a clear finding that the appellant’s mother-in-law has a large family in the UK who could effectively step into the role currently undertaken by the appellant. The judge was entitled to reach this conclusion; indeed, it is difficult to see how any judge could have reached a different conclusion given that the appellant’s mother-in-law lives in close proximity to multiple close family members who clearly are concerned about her health and wellbeing: see paragraphs 54 -62 of the decision where the judge made findings that were clearly open to him about the support available to the appellant’s mother-in-law from her family in the UK.
29. Accordingly, for the reasons set out above, I am satisfied that the grounds of appeal do not identify a material error of law.

### **Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of a material error of law and stands. The appeal is dismissed.

**D. Sheridan**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**6.2.2023**