IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005650
First-tier Tribunal No: HU/51404/2021
IA/05302/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 March 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

ABID HUSSAIN
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Moffatt of Counsel
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

Heard at Field House on 6 March 2023

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan. He is aged 43 having been born on 4 July 1979. He appealed against the decision of the Respondent dated April 2021, refusing his human rights claim for leave to remain in the UK on the basis of his family life with his partner, Imtiaz Begum Hussain.

2. The Respondent:

   (1) considered that paragraph EX.1.(b) of the Immigration Rules did not apply as the parties were not registered as married according to

British Law and had failed to provide evidence to show that they had resided together in a relationship akin to marriage for 2 years or more,

(2) did not accept that there were insurmountable obstacles (in accordance with paragraph EX.2 .of Appendix FM) to family life with his partner continuing outside of the UK in Pakistan,

(3) did not consider that there were exceptional circumstances which would render refusal a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for the appellant, his partner, a relevant child or other family member, and

(4) did not consider that there were any exceptional circumstances in the appellant's case.

3. He appeals against the decision of First-tier Tribunal Malcolm, promulgated on 21 September 2022, dismissing the appeal.

Permission to appeal

4. Permission was granted by Upper Tribunal Judge Sheridan on 28 December 2022 for the following reasons:

> "1. It is arguable that the judge's consideration of the appellant's Chikwamba argument (in paragraph 124) was deficient because of a failure to give reasons to explain why he was satisfied that the public interest in the appellant's temporary removal outweighed the disruption to his family and private life of temporarily leaving the UK to apply for entry clearance.
>
> 2. All grounds can be pursued."

The First-tier Tribunal decision of 21 September 2022

5. Judge Malcolm made the following findings:

> "98. The appellant's immigration history has been clearly set out. The Appellant and his wife gave evidence that they thought having married the appellant could then submit an application to the Home office (sic) and he would be given status.
>
> 99. The Appellant's wife is a British citizen, her cultural background however is similar to the appellant, however the appellant's wife has never lived in Pakistan, having only visited following the death of her first husband.
>
> 100. Evidence was given by both the appellant and his wife of threats made to them by his wife's brothers (the evidence being that they did not approve of the marriage).

101. In particular evidence was given of an incident a few weeks earlier when the appellant was assaulted by his wife's brother with a report having been made to the police.

102. There was an undated record of a police report however this it has to be assumed related to an earlier incident as it was referred to in the appellant's statement which was prepared in November 2021. Whilst both the appellant and his wife relied heavily on the threats from her brothers there was no indication that any actions taken by the brothers had resulted in police intervention. Further evidence was also given of threats made through other parties, I found this evidence to be somewhat vague.

103. The parties have been living together since August 2020, even accepting the evidence of the appellant and his wife at its highest there were some difficulties with her brothers in 2020, vague threats made through others and an incident a few weeks ago at his mother- in law's house when the appellant came face to face with one of his wife's brothers. Having given careful consideration to all available evidence I did not consider that this evidence was supportive of a finding that the appellant was at risk from his wife's family.

104. Reliance was placed on this as the one of his wife's brothers has returned to Pakistan with the appellant giving evidence that he accordingly was fearful of return to Pakistan also that he feared his former wife's family). I was not satisfied that the evidence indicated that the appellant would be at risk in Pakistan either from his wife's family or his former wife's family.

105. Following the sad circumstances of the death of his wife's first husband I accept that Mrs Hussain has given a great deal of support to her children. Evidence of this was given by her daughter Zainab. However Zainab also gave evidence that on graduation later this year she will be moving away (and accordingly will not be able to assist her mother with her grandmother or her uncle). Whilst evidence was given that she required the continuing support of her mother I considered it reasonable to assess this could be given from abroad (given that she will no longer be in the family home) should Mrs Begum require to accompany the appellant to Pakistan.

106. In addition to her employment, evidence was also given of the care which the appellant's wife gives to both her mother and her brother, with the appellant's mother requiring more assistance at present due to a recent injury. Whilst I accept the assistance given by the appellant's wife (and the appellant) to her mother, if the appellant's wife were not available to provide this assistance there are other family members in the UK (including the appellant's step children) and assistance could also be given by social services.

107. The position of the appellant's wife's brother, who suffers from schizophrenia, also requires to be considered. I accept the evidence given of the close relationship of Mrs Hussain and her brother and of the assistance given. Again however there are other family members (her daughter gave evidence of her inability to help out with her grandmother and uncle in the future when she carries out her intended

move from London on graduation), which I considered indicated that there is assistance given by or available to be given by other family members if Mrs Hussain chooses to accompany her husband to Pakistan. Mrs Hussain is in full time employment, her brother does not live in her household therefore it is clear that whilst Mrs Hussain provides assistance and support this support is not 24/7.

108. I have given careful consideration to this evidence but I am not satisfied on the available evidence that there is exceptional dependency between Mrs Hussain and her brother such that Article 8 is engaged.

109. I have given consideration to paragraph EX.1 (and in particular EX.1.(b)). The terms of paragraphs EX.1. and EX.2. are as follows: -

> EX.1. This paragraph applies if
>
> (a)
>
> (i) the applicant has a genuine and subsisting parental relationship with a child who-
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and
>
> (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave, or humanitarian protection, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

110. Having given careful consideration to the terms of Section EX and in particular EX.2. I do not consider that if the appellant’s partner

moves with him to Pakistan that this would entail very serious hardship for either the appellant or his wife and accordingly I do not consider that the test of insurmountable obstacles in terms of EX.1.(b) is met.

111. In respect of private life consideration has been given to Paragraph 276ADE of the Immigration Rules which is as follows:

> "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

112. I find that the appellant has not lived continuously in the UK for at least 20 years and accordingly sub-Paragraph (iii) does not apply nor do Sub-Paragraphs (iv) and (v).

113. Accordingly the only part of Paragraph 276ADE(1) on which he could rely would be 276ADE(1)(vi) where consideration requires to be given as to whether there would be very significant obstacles to the appellant's integration into the country to which he would have to go if required to leave the UK.

114. In giving consideration to Paragraph 276ADE(1)(vi) I require to consider whether there would be very significant obstacles to the appellant's integration into life in Pakistan if he were required to leave the UK.

115. The appellant has spent the majority of his life in Pakistan. By his own evidence he has family members in Pakistan. It was his evidence that he would struggle to find suitable employment opportunities in Pakistan. He is clearly familiar with life in Pakistan. As set out he has

family members there and whilst he considers that he would have difficulty in obtaining employment, whilst there may be some difficulties for the appellant in re-establishing a life for himself in Pakistan, I do not consider that such difficulties as he could encounter would meet the test of very significant obstacles.

116. I find that the appellant does not meet the requirements of the Immigration rules. I require to consider if there is anything which has not already been adequately considered in the context of the Immigration Rules which could lead to a successful Article 8 claim.

117. Article 8 of the European Convention on Human Rights states:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

118. In a case where removal is resisted in reliance on Article 8 Razgar sets out the following separate questions to be to determined:-

> a. Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private life or (as the case may be) family life?
>
> b. If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> c. If so, is such interference in accordance with the law?
>
> d. If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> e. If so, is such interference proportionate to the legitimate public end sought to be achieved? In coming to a decision account has been taken of the public interest considerations in sections 117A, 117B and 117D of part 5A of the Nationality, Immigration and Asylum Act 2002.

The provisions of section 117B are as follows:-

> 117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.

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

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

(b) are better able to integrate into society.

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

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

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

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

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

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

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

119. This is not an exclusive list of the factors to be taken into account.

120. I find that the consequences of the removal of the appellant to Pakistan would potentially engage Article 8, and that any such interference would be in accordance with the law because there is in place a legislative framework for the decision under appeal which is accessible to those likely to be affected by the decision. I find that the interference by the respondent would have the legitimate aim of the maintenance of effective immigration controls and of public confidence in their maintenance. The issue would be whether or not the extent of the interference would be proportionate to that aim. It is for the respondent to show that such is the case.

121. I accept that the appellant has family life and private life in the UK. Private life established by the appellant has been established at a

time when his immigration status has at best been precarious. There has also been a period when the appellant did not have lawful leave to remain in the UK (between March 2019 and December 2020), during which time the appellant and his wife married.

122. Ms Moffat has set out in her Skeleton Argument that if the appellant required to return to Pakistan to make an application for entry clearance it is more likely than not that such an application would be successful with reliance being placed on the Chikwamba principle.

123. I have given consideration to the relevant caselaw and in particular the case of Younas (which again is referred to in Ms Moffat's Skeleton Argument).

124. I consider the fact that an application for entry clearance by the appellant is more than likely to succeed is not sufficient to outweigh the public interest in requiring the appellant to return to Pakistan to make an entry clearance application.

125. I have given careful consideration to all relevant factors in considering the proportionality of the decision which has been made.

126. I have given careful consideration to all of the available information and evidence and in carrying out the necessary balancing exercise, I do not consider that the appellant's circumstances outweigh public interest considerations nor do I consider that the evidence as presented allows me to find that there are exceptional circumstances which would render refusal a breach of Article 8 of ECHR because it would result in unjustifiably harsh for the appellant or his wife or another family member.

127. I accordingly find that the appellant's appeal cannot succeed outside of the requirements of the Immigration Rules."

The Appellant's grounds

6. Ms Moffatt's grounds asserted:

"(1) Flawed assessment of proportionality

5. In finding that Article 8 was not violated 'outside of the Rules', the Determination fails properly or at all to: (i) quantify the public interest on R's side of the scales; and (ii) to consider, with reference to the quantum of weight on the public interest side of the scales, A's individual circumstances in determining whether temporary removal will disproportionately interfere with the Article 8 rights engaged.

6. As is clear from the Upper Tribunal's most recent consideration of the relevance of the so-called 'Chikwamba principle' to proportionality under Article 8, Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC), if Article 8 is engaged by temporary removal from the UK (which in this case was accepted by the Judge (Determination at [121]) and it is determined that an application for entry clearance from abroad will be granted on the balance of probabilities (which also appears to be accepted by the Judge (Determination at [124])), it is then necessary first to consider

how much weight (if any) should be attached to the public interest in removing a person who can re-enter taking into account a person's immigration history ([95]-[98]); and secondly to consider, with reference to the quantum of weight on the public interest side of the scales, whether temporary removal will disproportionately interfere with the Article 8 rights engaged taking into account the individual circumstances ([99]).

7. Having identified that Article 8 was engaged and that a hypothetical entry clearance application was more likely than not to succeed, the Judge failed to take either of the steps required by the Younas case cited above (see Determination at [116]-[127]). As to the question of how much weight should be attached to the public interest, the Judge merely cited, in the context of identifying legitimate aims under the Razgar test, the generic public interest considerations of 'maintenance of effective immigration controls and of public confidence in their maintenance,' thereby failing to attribute any quantum of weight. By contrast, in Younas, the court compared a 'venial administrative error' that led to overstaying (which would result in there being no public interest in temporary removal) with multiple examples of an intent to deceive immigration officers in Mrs Younas' case which resulted in a finding of strong public interest in removal (Younas at [96]-[98]). In failing to identify how much weight should be attributed to the public interest (eg strong / moderate / low / none), the Judge was then unable to complete the final stage required under the Younas case, namely the balance sheet consideration in which factors specific to the particular appellant's facts are weighed against the weight of the public interest in that particular case. The Determination merely asserts that A's circumstances do not outweigh the public interest considerations without explaining why or enumerating any of those circumstances relevant to the proportionality of temporary relocation.

8. The failures to follow the steps set out in the Younas case and, therefore, to articulate the weight of the public interest and the factors on each side of the balance scales made it impossible for A to understand why he lost. In an anxious context such as Article 8 ECHR, generic reference to having considered all relevant circumstances is insufficient, particularly in circumstances in which there were no adverse credibility findings.

9. The errors are material because, with reference to the discussion in Younas (cited above) at [95]-[98], the degree of culpability and deception on the part of an appellant is relevant to determining how much weight should be attached to the public interest. In the instant case, there were no adverse credibility findings and, therefore, there is no indication that that his account of the domestic violence which led to his losing his entitlement to settlement as the spouse of his ex-wife, and the mental ill health that resulted, was rejected (see A's statement para 5, AB1/2 and medical evidence AB1/20-43). Whilst R had previously rejected A's application for ILR based on domestic violence, no tribunal had previously ruled on the merits (judicial review being procedural in nature) and, therefore, it was incumbent on the Judge to consider A's evidence of the unfortunate circumstances that led him to overstay and make a clear finding were she to reject A's account. It cannot be said, therefore, that the public interest in removal would self-evidently be so high as to render the error immaterial.

10. Equally by failing to identify the factors on A's side of the balance scales, the Judge was not able properly to conclude that they were outweighed by the public interest. Whilst the Judge had, at an earlier stage in her Determination, dismissed any 'risk' to A in Pakistan, in the absence of any adverse credibility findings she appeared to accept that A and Mrs Hussain had been subject to the actions of her family members and those of his ex-wife so as to make, as was submitted, the situation facing A (and Mrs Hussain) in Pakistan as, at the very least, inhospitable. Equally, whilst finding that care of Mrs Hussain's infirm mother and mentally unwell brother could be undertaken by others, she did not make any express rejection of their evidence as to the devastating consequences for their well-being of Mrs Hussain and A's absence. The Judge also failed to consider the length of separation were Mrs Hussain to remain in the UK whilst A applied for entry clearance. These were all relevant factors that required consideration under consideration of the proportionality of temporary relocation.

11. In short, therefore, the case law cited above makes clear that the consideration of proportionality where temporary separation is envisaged requires specific consideration to be given to the weight of the public interest and the interests of those affected. The Determination's failure to do so, renders its assessment of proportionality fatally flawed.

(2) Application of incorrect test to the question of the existence of family life between Mrs Hussain and her adult brother

12. Further or alternatively, the Judge applies the incorrect test to find that Article 8 is not engaged between adult family members. At [108] of the Determination, the 5 Judge finds that she is 'not satisfied on the available evidence that there is exceptional dependency between Mrs Hussain and her brother such that Article 8 is engaged.' This is the incorrect test as the Court of Appeal in the case of Uddin v The Secretary of State for the Home Department [2020] EWCA Civ 338 makes clear (see summary of findings at [40]: '…(i) The test for the establishment of Article 8 family life in the Kugathas sense is one of effective, real or committed support. There is no requirement to prove exceptional dependency.') Despite recording A's submissions correctly summarising the test as expressed in Uddin (Determination at [87]), by applying a standard of exceptional dependency the Judge failed to apply the correct test in making her findings on A's case.

13. The error is material as it cannot be said that it would not be open to a judge to find that the correct test of 'effective, real or committed support' would be met in this case such as to find the existence of family life between Mrs Hussain and her brother, who suffers with Paranoid Schizophrenia. A relies on the evidence of Mrs Hussain's brother (see statement, paras 3, 5, 7-8 AB2/44-45) as to the nature of her support of him in combination with the medical evidence as to his condition (AB1/16).

(3) Failure to take account of material evidence

14. Further or alternatively, when assessing whether family life under the Rules was breached (EX.1) as well as the engagement of Article 8 and proportionality 'outside of the Rules', the Determination fails to take account of relevant evidence, namely:

15. First, in finding that the care for Mrs Hussain's mother and brother could be replicated by other family members (such as Mrs Hussain's other children) or social services (Determination at [107]-[108]), the Determination fails to take account of their evidence of the emotional dependency specifically on Mrs Hussain which is at odds with the Judge's finding that the identity of the carer could be interchangeable. In particular, Mrs Hussain's brother's evidence, which was not rejected by the Judge, refers to the 'tremendous hardship' he would face without his sister's care and explains that his relationship with his sister has been very close since childhood and it is her physical proximity and ability to 'know…exactly what to say' which helps to keep him stable (statement, §5, AB2/45). Given that the brother's medical condition is described in the medical evidence as severe, at risk of relapsing and requiring close monitoring, it was 6 incumbent on the Judge to take account of the relevance of the identity of the carer rather than simply the care itself (which, the Judge correctly finds, is not 24/7).

16. Secondly, whilst making a finding that A would not be at 'risk' in Pakistan, she appeared to accept the evidence of the actions of Mrs Hussain's family members and A's ex-wife's family towards A and Mrs Hussain ([103]). The acrimony evident from that evidence was relevant to the proportionality of requiring A and Mrs Hussain to go to Pakistan (either temporarily or permanently). Whilst the Judge had found that they would not face risk (in the sense of persecution or serious harm which, in any event, were not pursued by A), the evidence disclosed physical violence and threats that were relevant to proportionality and the test under EX.1.

17. The Judge made no findings that A (or any of the witnesses) were not credible and did not reject their evidence, accordingly, the failure to consider relevant aspects of their evidence renders the assessment of the test under EX.1 and proportionality flawed. The errors are material as it cannot be said that the evidence that was not taken into account is incapable of affecting the outcome.."

Rule 24 notice

7. The rule 24 notice stated:

"3. When considering the issue of proportionality, the FTTJ had already had clear regard to the immigration history of the appellant set out at [3-5] and in further detail at [13]. Having entered on a spouse EC, that relationship broke down at the end of 2015, and thus any basis of his leave to remain in the UK effectively ended but despite this he remained in the UK. A subsequent application made 6 months after his EC expired, under the domestic violence route was refused.

4. Reference is again made to the immigration history at [98] when findings are made, and a detailed consideration is clearly made as to the effect on the wider family if the wife of the appellant were to leave the UK.

5. Further, the FTTJ found that the appellant was not at risk from the wife's family or former wife's family either in the UK or Pakistan [102-105]. Having found that the application failed under EX1 and 276ADE [116], the FTTJ when addressing the issue of proportionality directs himself to have regard

to the factors already considered [116] and any other relevant matters [125]. Express regard is had to the formation of the relationship whilst the appellant did not have lawful leave to remain [121] and the requisite provisions within S117B.

6. Whilst the FTTJ did not expressly allocate a category of weight (strong/moderate/low/none) as suggested in the grounds, Younas does not suggest that a specific measurement has to be identified as to the issue of weight. Having found that the application failed under the Rules, and having taken in to account the absence of status since 2018, and the formation of the relationship at this time- the FTTJ was entitled to give weight to these matters within a proportionality assessment. This much was recently approved in Alam & Anor v Secretary of State for the Home Department [2023] EWCA Civ 30 (19 January 2023) (bailii.org). For the reasons given, the FTTJ was entitled to find that these were matters that outweighed any Article 8 claim including the prospect of a successful EC application.

7. Whilst the FTTJ did not expressly reject the witness evidence as not credible, a plain reading of the decision shows that the evidence was considered to be both vague, and not supportive of a claim to be at risk."

Oral submissions

8. Ms Moffatt said in addition to the grounds set out above regarding ground 1 that:

(1) the Rule 25 notice at paragraph 5 cannot be right as proportionality outside the Rules cannot be exhausted by proportionality within the rules.

(2) EX1 and paragraph 276 ADE do not answer an outside the Rules case.

(3) There was no explanation to enable the Appellant to understand why he had lost.

(4) Whilst the relationship was formed when had no leave in explained in S117(b), and little weight should be given to his private and family life as explained in Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, relevant to that and the quantum of weight were factors including the inhospitable reception in Pakistan as his credibility on that was not dismissed.

(5) The problem finding substitute carers for her brother and mother should be looked at in the public interest scale weighing exercise.

(6) As the immigration history was not controversial in that he had been granted a spouse visa, the relationship had broken down, he had made a Domestic Violence claim, he had no leave from 2018, and he had mental health issues due to the marital breakdown, these should have been considered by the Judge in the level of culpability in the Appellant overstaying.

(7) Regarding Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 the facts in this case were more like Parveen v Secretary of State for the Home Department [2018] EWCA Civ 932 where that Appellant overstayed and the Court of Appeal found that there was no public interest in requiring her to leave. This contrasts with Younis where deception was practised on entry.

(8) The Alam point at paragraph 161 was a narrow procedural ground which is not the case here. At time of application, the Appellant could not meet the Rules. By time of appeal they were married [77, 78] determination. Matters have moved on from the decision. Alam takes this case no further forward.

(9) There was not therefore a high public interest in requiring him to leave, and no proper balance sheet assessment.

9. Regarding ground 2 and 3, Ms Moffatt added nothing material to the written grounds.

10. Mr Clarke submitted regarding ground 1 that in some respects Alam is on all fours with this appeal. The Respondent is entitled to a margin of appreciation. The public interest considerations have been set by Parliament post Chikwamba. This is different from Chikwamba as there is no finding in this appeal that the Appellant has to be able to live her, and it is not a refugee appeal. We now have EX1 and s117 (b)(1). Regarding Alam, this appeal was not dismissed on a narrow procedural ground. The fact an application is likely to succeed from abroad does not outweigh public interest considerations. The Appellant could still lose if he applies for entry clearance. As explained in Hayat v Secretary of State for the Home Department [2012] EWCA Civ 1054, the approach is not a black letter one.

11. Mr Clarke submitted that ground 2 is misconceived. All the Judge does is quote from the Respondent's policy relied on by the Appellant. Exceptional dependency is the wrong test. The Judge considered the rules and, then Article 8 outside the rules. The separation from family members must be unusual or exceptional. The Judge identified what was argued and made findings. As explained in R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11 at paragraph 46, the respondent is entitled to have Rules.

12. Mr Clarke submitted that ground 3 is simply a disagreement with the Judges findings and misconceived. The Judge found that family members already assist. That finding was not challenged. A family member going abroad does not undermine that finding. Pakistan has a population of 230,000,000 people. How does a finding that the family poses no risk impact on proportionality.

13. MS Moffatt responded regarding ground 1 that Alam does not change anything. Chikwamba bites as the Respondent argued on narrow legal

grounds. The Alam gateway was passed. Regarding ground 2 this was not a rules based assessment. Regarding ground 3 there was evidence of the family in Pakistan and the type of life the Appellant could expect there.

Discussion

14. Permission to appeal was granted on 28 December 2022. Alam was promulgated on 19 January 2023 and, contrary to the submission of Ms Moffatt, provides further clarification on the issues contended for by Ms Moffatt and significantly weakens any merit they may have had.

15. We are satisfied there is no material error of law identified in ground 1 for these reasons. Lady Justice Laing notes in Alam that:

> "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.
>
> 108. Four aspects of Lord Brown's reasoning are also significant.
>
> i. He rejected the submission that an appeal could never be dismissed on the ground that the appellant should be required to leave the United Kingdom and apply for entry clearance from abroad. Instead, he recognised that it could be proportionate in

> some cases for the Secretary of State to insist on removal for that purpose.
>
> ii. His view was that the appellant's family would 'have to be allowed to live together here' eventually.
>
> iii. It was not feasible for family life to be established in Zimbabwe because the appellant's husband was a refugee from Zimbabwe.
>
> iv. He was sceptical about the value to be put on the public interest in immigration control in that case…
>
> 109. The core of the reasoning in *Hayat* is that *Chikwamba* is only relevant when an application for leave is refused on the narrow procedural ground that the applicant must leave and apply for entry clearance, and that, even then, a full analysis of the article 8 claim is necessary. If there are other factors which tell against the article 8 claim, they must be given weight, and may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance. I consider that, in the light of the later approach of the Supreme Court to these issues, the approach in *Hayat* is correct. A fortiori, if the application for leave to remain is not refused on that narrow procedural ground, a full analysis of all the features of the article 8 claim is always necessary."

16. We agree with Ms Moffatt that EX1 and paragraph 276ADE do not answer an outside the Rules appeal. We are satisfied that the proportionality considerations were undertaken by the Judge in the correct framework. The Judge was fully aware of the Appellant's immigration history. The fact that it differed from that in Younis where deception was practised does not mean the Judge materially erred as none of the factors individually or cumulatively reduce the culpability in the Appellant's overstaying. He had no leave, and no cogent reason to fear returning to Pakistan, as the Judge gave cogent reasons at paragraphs 100 to 104 for finding that the Appellant had failed to establish he was at risk from his ex-wife or her family here or in Pakistan which fatally undermines the submission regarding an alleged inhospitable reception in Pakistan.

17. The Judge gave cogent reason for finding that the various family members here including the Appellant's brother-in-law who suffers from schizophrenia could be suitably provided for at paragraphs 105 to 106. The Judge was aware that this may require assistance from social services and did not need to state that this may be a factor in the public interest question as that was inherent in her saying that assistance from a public authority may be required. She did not need to identify on whose side that factor fell as it was neutral as it was available which falls on the side of the Respondent and at a cost to the public which falls on the side of the Appellant. The finding on dependency at paragraph 108 was open to her.

18. This case is not on all fours with Parveen. The fact that in Parveen it was found there was no public interest in removing that Appellant, does not mean that the Judge materially erred in law in finding that in this appeal

there was such a public interest. The Judge directed herself to all relevant factors. Younas does not suggest a specific weight measurement is to be ascribed to each factor considered.

19. The public interest considerations have been set by Parliament post Chikwamba. This is different from Chikwamba as there is no finding in this appeal that the Appellant has to be able to live her, and it is not a refugee appeal. We now have EX1 and s117 (b)(1). The Judge set out both at paragraph 109 and 118 respectively and gave cogent reasons for her findings principally in paragraph 115. This appeal was not dismissed on a narrow procedural ground. The fact an application is likely to succeed from abroad does not outweigh public interest considerations. The Appellant could still lose if he applies for entry clearance.

20. We are satisfied there is no material error of law identified in ground 2 for these reasons. The Judge considered the rules and, then Article 8 outside the rules. The separation from family members must be unusual or exceptional and here the Judge made findings available on the evidence that it was not. The Judge identified what was argued and made findings. As explained in Agyarko at paragraph 46:

> "…the Rules are not simply the product of a legal analysis: they are not intended to be a summary of the Strasbourg case law on article 8. … they are statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests. They are designed to operate on the basis that decisions taken in accordance with them are compatible with article 8 in all but exceptional cases. The Secretary of State is in principle entitled to have a policy of the kind which underpins the Rules. … the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The margin of appreciation of national authorities is not unlimited, but it is nevertheless real and important."

21. We are satisfied there is no material error of law identified in ground 3 for these reasons. It is simply a disagreement with the Judge's findings. The Judge found that family members already assist at paragraph 106 and 107. That finding was not challenged. A family member going abroad does not undermine that finding.

Notice of Decision

22. There was no material error of law in the decision of First-tier Tribunal Judge Malcolm.

Laurence Saffer

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 March 2023

TO THE RESPONDENT- FEE AWARD

As we have dismissed the appeal, we make no fee award.

Laurence Saffer

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 March 2023

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.