



IN THE UPPER TRIBUNAL

Case No: UI-2022-005297

IMMIGRATION AND ASYLUM
CHAMBER

First-tier Tribunal No:
HU/58054/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On

22 June 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

HUSSAIN SHEIK

(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson , Counsel, instructed by S Satha and Co Solicitors

For the Respondent: Mr S Whitwell, Senior Presenting Officer

Heard at Field House on 9 June 2023

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the appellant's appeal against the respondent's refusal of his human rights claim.
2. By a decision issued on 24 April 2023, a panel (comprising Upper Tribunal Judge Norton-Taylor and Deputy Upper Tribunal Judge Symes) concluded that the First-tier Tribunal had erred in law when allowing the appellant's appeal. The full error of law decision is annexed to this re-making decision. In summary, the panel concluded that the judge had failed to take any, or any adequate, account of material factors weighing against the appellant's case when conducting the assessment of whether there were exceptional circumstances.
3. The panel preserved certain findings of primary fact made by the First-tier Tribunal. In essence, these went to the genuineness of the appellant's same-sex relationship with Mr M Khan, which had been a matter of dispute between the parties and had been the subject of adverse findings in a previous appeal in 2019. The findings preserved by the panel held that the relationship was genuine and subsisting and had been for approximately 10 years. The First-tier Tribunal's conclusion on insurmountable obstacles was not preserved because this constituted an evaluative assessment, not a finding a primary fact.
4. The appellant's case continues to be put forward on the basis that he and Mr Khan cannot go and live together in India. This is due in part to their sexuality, but also with reference to their caring role for Mr Khan's very elderly father, and the appellant's lengthy residence in the United Kingdom.

The issues

5. The preserved findings of fact have not been undermined by any subsequent evidence and they continue to stand.
6. There is no dispute that Mr Khan, a French citizen, has settled status in the United Kingdom, having been granted indefinite leave to remain under the EUSS in 2020.
7. A previous allegation of deception made against the appellant in respect of a Tier 1 application was not pursued by the respondent before the First-tier Tribunal. No evidence had been produced to support the allegation. That was not a live issue before the First-tier Tribunal. There are no suitability issues.
8. The appellant has been an overstayer since 2014 and was therefore unable to meet the immigration status requirement under E-LTRP.2.2 of Appendix FM to the Immigration Rules (the Rules).
9. The core issues are therefore:
 - (a) Whether the appellant can satisfy EX.1 (together with EX.2) of Appendix FM: are there insurmountable obstacles to the undisputed family life with Mr Khan continuing outside of the United Kingdom;
 - (b) If there are not, whether there are exceptional circumstances in this case, pursuant to GEN.3.2 of Appendix FM
 - (c) If there are not, whether there are any relevant considerations not considered under (b) which would render removal of the appellant disproportionate.
10. There has been no suggestion by the respondent that the appeal should not succeed on Article 8 grounds if the appellant can satisfy the relevant Rules: TZ (Pakistan) [2018] EWCA Civ 1109 and see also Caguitla (Paragraphs 197 and 199) [2023] UKUT 00116 (IAC).

The evidence

11. By way of documentary evidence, I have before me the bundles provided by each party before the First-tier Tribunal, a supplementary appellant's bundle, indexed and paginated 1-29, and separate witness statements for the appellant and Mr Khan, dated May 2022.
12. The appellant and Mr Khan attended the hearing and both gave oral evidence in English. Unfortunately, there were no updated witness statements, as they should have been (a point fairly accepted by Mr Richardson). Mr Whitwell took no objection to Mr Richardson covering certain relevant issues in-chief. In all the circumstances, I deemed it fair and appropriate to permit this. Mr Whitwell conducted relevant cross-examination.
13. The oral evidence is a matter of record and I do not propose to summarise it here. I will address relevant aspects of that evidence when setting out my findings of fact, below.

The parties' submissions

14. Mr Whitwell and Mr Richardson customarily concise and helpful submissions on the relevant evidence and its application to the legal framework with which I am concerned. I am grateful to both representatives for their assistance.
15. I intend no disrespect by not setting out their respective arguments in any detail here. As with the oral evidence, I will refer to relevant points later in my decision.
16. In essence, Mr Whitwell submitted that, in all the circumstances, there were no insurmountable obstacles to the appellant and Mr Khan both going to live in India. Alternative sources of care could be found for Mr Khan's father. The couple's sexuality would not present an insurmountable obstacle, alone or in combination with other factors. There are no aspects of the appellant particular characteristics which met any of the relevant legal thresholds.

17. Mr Richardson emphasised the need to take a cumulative view of all relevant considerations. The two most important of these were the couple's sexuality and their ability to live an openly gay life in India, together with the particular caring arrangements in relation to Mr Khan's father.

Findings and conclusions

18. In making the relevant findings of fact, I have considered the evidence as a whole. My particular focus has been on the evidence deemed to be relevant to the legal issues, as referred to me by the parties.
19. There has been no discernible challenge to the evidence of the appellant and Mr Khan in respect of their respective witness statements and oral evidence. In any event, I found their evidence to be consistent, plausible, and ultimately credible in all material respects. There was no relevant exaggeration. There was internal consistency and consistency as between each other's evidence. There were certain aspects of the oral evidence which I found to be compelling in nature; for example, the appellant's obvious difficulties in trying to contemplate life back in India and he and Mr Khan's attachment to, and concern for, the latter's elderly and very frail father.
20. The appellant Mr Khan have been in a genuine relationship now for approximately 11 years. They have been able to live openly in this country during that time. I am entirely satisfied that they would wish to do so in India.
21. I have considered the country information contained in the respondent's CPIN, "India: Sexual orientation and gender identity and expression", version 4.0, published April 2021. Section 6 of the document relates to state attitudes and treatment of gay men. There is evidence to show that the police arrest and harass individuals and at times seek to extract bribes. Perhaps more relevantly in the circumstances of the

present case, the section on societal treatment of gay men paints a difficult picture. There is said to be “widely held anti-gay sentiment”. LGBTI people are reported to face “widespread societal discrimination and violence, particularly in rural areas.” There are reports of gay couples being prevented from using certain facilities and services, including transport. Evidence indicates that there are real problems with discrimination in employment.

22. Mr Whitwell relied on the CPIN summary, which refers to the country guidance decision in MD (same-sex oriented males) India CG [2014] UKUT 00065 (IAC) and states that its conclusions remain relevant. I have taken account of the guidance contained therein. In essence, same-sex orientation is socially unacceptable and progress is slow. Some gay men suffer ill-treatment, extortion, harassment and discrimination from the general population. There is discrimination in many aspects of their lives, including education, work and public spaces. However, there is no general risk of persecution and individuals can in general internally relocate to a major urban area where there are activist and support networks.
23. Mr Richardson confirmed that the appellant was not relying on familial hostility in this case. It is somewhat unclear to me whether the appellant’s family is accepting of his sexuality, or whether this position is simply a realistic acknowledgement that, even if there were hostility, the appellant and Mr Khan could potentially live away from family home. Either way, this does not detract from the appellant’s case because his ability to live with Mr Khan in an openly gay relationship would quite clearly involve very much more than hypothetically residing in his family home on a long-term basis. Some familial support would only go so far.
24. With all of the above in mind, I conclude that there is no generalised risk of serious harm in India such that the couple’s sexuality would, in and of itself, amount to an insurmountable obstacle. However, I also conclude that the societal attitudes towards openly gay couples, even in urban areas, is more likely than not to present the appellant and

Mr Khan with significant difficulties in respect of their day to day lives. In saying this, I have particular regard to the fact that they would wish to live openly, as they have been for the last 11 years in the United Kingdom. It is more likely than not that they would face, at least, significant discrimination in respect of employment opportunities, the use of certain facilities and services, and in addition there is a probable risk of verbal abuse and harassment, if not physical attacks. This all amounts to a very significant consideration.

25. Mr Whitwell did not suggest that the couple should seek to conceal their relationship once in India and in my view, he was right to take that position. A requirement or need to conceal their identity would, of itself, amount to an insurmountable obstacle within the meaning of EX.1 and EX.2.
26. On the evidence, I accept that Mr Khan's father is 95 years old and has resided in the United Kingdom for over 30 years. I find that his wife passed away in February 2020. It is implicit in his evidence that his wife had been his primary carer prior to her passing. I find that to be the case.
27. I find the contents of the GP's letter, dated 9 May 2023, to be reliable. I adopt the description of Mr Khan's father as being "severely frail elderly housebound". This is consistent with the father's witness statement of May 2023 (in respect of which there has been no challenge) and the evidence of the appellant and Mr Khan.
28. On the basis of the credible evidence, I find as follows. The appellant and Mr Khan moved into the father's home soon after the death of his wife in February 2020 and they have resided there ever since. The father is wholly dependent on the appellant and Mr Khan for all of his personal care needs, including: getting out of bed; washing; going to the toilet; preparing food; taking essential medication; and moving around the home. The appellant and Mr Khan have been trained by a physiotherapy team to ensure safe handling of the father, who is obese. I find that the personal care requirements are in effect 24 hours a day, 7 days a week.

29. I find that Mr Khan currently works three nights a week at a bakery, having reduced this from four nights about six months ago in order to devote more time to caring for his father. I accept that the appellant undertakes all caring responsibilities when Mr Khan is at work. In respect of any periods when both the appellant and Mr Khan have to be absent from the home, I accept their evidence that they use a camera and mobile telephone application to 'keep an eye' on the father.
30. Taken as a whole, the evidence clearly shows that there is a very strong bond between the father and Mr Khan, and indeed to an extent the appellant as well. I am not aware of the amount of input Mr Khan had on his father's care prior to February 2020, but it is clear that it has been Mr Khan, together with the appellant, who have provided all of the necessary care thereafter. I find as a fact that the father has expressly stated that he would not want anyone else to take the place of Mr Khan and the appellant in terms of his care.
31. Mr Whitwell submitted that there were alternative sources of care for Mr Khan's father. On the particular facts of this case, I find that there are currently no realistic alternatives in terms of the provision of appropriate care, taking account not only of practicalities but also the emotional needs of the father. I base this on the following reasons.
32. Firstly, I find that Mr Khan has two brothers residing in the United Kingdom, the elder of which lives relatively near to the father. However, I accept the evidence that the elder of the two is in his 70s and has had a stroke, making it unrealistic for him to provide any relevant care. I accept that the younger brother does not have a good relationship with the father and has only visited him once in the previous six months. The prospects of this brother providing, entirely or partially, the significant level of care required is remote.
33. Secondly, I find that Mr Khan has two sisters living in the United Kingdom. They live relatively close to the father. I accept that as a matter of cultural norms, it is for the sons to look after parents in old age. I

accept that the sisters have their own families and had not in fact provided any relevant care to the father thus far. I also accept Mr Khan's evidence that the sisters have medical conditions which would make caring duties difficult. In all the circumstances, I am prepared to accept that, as with Mr Khan's brothers, there is no realistic prospect of appropriate care being provided by the sisters.

34. Thirdly, the evidence indicates that social services have had some involvement with the father previously. I accept that they provided the father with some physiotherapy sessions, but these ceased due to lack of progress. At present, the father does not have a carer from social services because of the appellant's and Mr Khan's presence.

35. When questioned by Mr Whitwell, the appellant told me that social services had been contacted about additional help and that they said that any carers would only be able to attend the father for a "few hours" a day. The local authority thought that it would be better for family members to look after the father, an understandable position in light of the limited resources experienced by social services in general. I accept that evidence.

36. In my view, the reality of the position if Mr Khan left the United Kingdom would be that father would have to go into residential care. It is highly unlikely that social services would be able to provide 24-hour live-in carers. Even if such an arrangement was possible, on my findings the father unwilling to receive relevant personal care from strangers. It is highly likely that he would suffer genuine and significant distress not only as result of Mr Khan's departure, but also the arrival of carers to live in his home.

37. If residential care was provided by social services it would have significant public funding consequences, as well as causing significant distress to the father. As regards privately-funded residential care, it appears to me on the evidence as a whole that this would not be feasible on a medium to long-term basis (taking account of the father's advanced years). In any event, the significant distress likely to be caused to the

father by Mr Khan's departure and then being moved out of his own home would, in my view, strongly militate against such an arrangement in terms of it being both necessary and appropriate.

38. It has not been suggested by the respondent that the father could go with the appellant and Mr Khan to live in India. There is no realistic prospect of that occurring at all..
39. It was readily apparent at the hearing that Mr Khan in particular was conscious of what in my judgment is an extremely difficult choice hanging over him: to stay with his father and be separated from his long-term partner; or to leave his father behind in very uncertain circumstances in order to continue family life with the appellant. It was also apparent that the appellant regarded the prospect of leaving Mr Khan's to be distressing. This was entirely consistent with his own close bond with the father and also his concern for Mr Khan's emotional well-being.
40. In summary, the father's circumstances are a very significant consideration in my assessment.
41. The appellant has resided in the United Kingdom since 2009 and was here with leave until June 2014. The total period of residence is significant. This does count in his favour, albeit to a relatively limited extent in the assessment of insurmountable obstacles. He came to this country at the age of 25, he speaks relevant languages, and has extended family in India. The educational achievements acquired in this country would in principle be likely to assist him on return to India, although what I have said about sexuality, above, would in practice effectively negate any real advantage. I accept that living away from India for approximately 14 years, in the context of being able to live openly as a gay man in this country, is a relevant consideration in the overall assessment.
42. I accept that the appellant is still taking anti-depressant medication, but this does not represent a significant factor in the assessment of insurmountable obstacles. His condition is not, I find,

currently particularly debilitating and appropriate medication would in all likelihood be available in India. Having said that, a return to India would be likely to exacerbate his condition to an extent.

Conclusions on insurmountable obstacles

43. I now bring all of the considerations discussed above together and apply them to the undoubtedly stringent threshold set by EX.1 and EX.2, which provide in so far as relevant:

“(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 protection status, 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.”

44. The phrase “insurmountable obstacles” has been considered in a number of the authorities, but for present purposes I direct myself to Lal v SSHD [2019] EWCA Civ 1925; [2020] WLR 858, at [35]-[37]:

“35. Mr Malik submitted that “insurmountable obstacles”, as that phrase is defined in EX.2. of Appendix FM, can take two forms: first, a very significant difficulty which would be literally impossible to overcome, so it would be impossible for family life with the applicant’s partner to continue overseas (for example, because they would not be able to gain entry to the proposed country of return); or second, a very significant difficulty which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could be overcome but to do so would entail very serious hardship for one or both of them. This submission reflects the current guidance for officials published on 23 September 2019, “Family

Policy: Family Life (as a partner or parent, private life and exceptional circumstances)", version 3.0. We accept that it is an appropriate explanation of the effect of paragraph EX.2. and accordingly of what is meant by "insurmountable obstacles" in paragraph EX.1.(b) of Appendix FM.

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).

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."

45. Cumulatively, I am satisfied that the relevant factors combine to satisfy the stringent test imposed by EX.1 and EX.2. The three central

considerations in my assessment are the likely circumstances to be faced by the couple in India, the extremely difficult choice faced by Mr Khan in respect of his father's care and future well-being, and the impact on the father, and in turn Mr Khan, if the father was in fact left in the United Kingdom. I do not regard the second consideration is being simply subjective in nature: it is not simply a matter of what Mr Khan believes is an insurmountable difficulty. Rather, the dilemma is sufficiently difficult on an objective view: on the facts of this case, the hypothetical 'reasonable person on the street', as it were, would in my judgment deem the choice to be very difficult indeed.

46. In essence, if the couple went to India together in order to continue their family life they would both have to face the societal problems related to their sexuality. At the same time, Mr Khan (and to a lesser extent, the appellant) would have to live with the separation from the father in the circumstances I have described, above. That situation would amount to very significant difficulties for Mr Khan and, albeit by a narrow margin, the appellant as well. The only way for Mr Khan to overcome these difficulties would be to remain in the United Kingdom and be separated from the appellant. That would effectively negate the strong family life that they have enjoyed for over a decade. The prospect of Mr Khan visiting the appellant in India is remote due to the absence of appropriate alternative care for the father (his previous trip to India occurred in 2015 before the death of his mother).

47. It follows from the above that the appellant satisfies EX.1 and is thereby entitled to succeed in his appeal on Article 8 grounds.

Conclusions on exceptional circumstances

48. In the event that it was found that my conclusion on insurmountable obstacles was wrong because, for example, the choice faced by Mr Khan was deemed to constitute only a subjective consideration, I go on to reach an alternative conclusion based on exceptional circumstances.

49. GEN.3.2(2) of Appendix FM provides as follows:

“(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.”

50. This necessarily imposes a higher threshold than insurmountable obstacles because one only arrives at a consideration of exceptional circumstances if EX.1 cannot be satisfied.

51. I have directed myself to what was said by the Supreme Court in Agyarko v SSHD [2017] UKSC 11; [2017] 1 WLR 823, at [57]-[60]. Ultimately, the question is whether a fair balance has been struck between the competing interests. I take into account the mandatory considerations set out in section 117B NIAA 2002, as amended.

52. All of the findings in respect of insurmountable obstacles are to be read across to the assessment of exceptional circumstances.

53. If one were to regard Mr Khan’s choice as being purely subjective in nature and thus irrelevant to the insurmountable obstacles assessment, it would nonetheless be relevant to the exceptional circumstances test. Even on a subjective level, the choice would in my judgment be extremely difficult and deserving of considerable weight.

54. The societal discrimination likely to be faced by the appellant (and Mr Khan if he were to follow the appellant) in India represents a significant consideration.

55. I take account of the rights of Mr Khan and his father. It is undoubtedly the case that there is a strong family life between father and son. Separating Mr Khan from the appellant would be a very significant interference with their family life. Separating Mr Khan from his father

would be a significant interference with that close relationship. The impact on them both would be substantial.

56. The appellant's length of residence in the United Kingdom is relevant, but only carries relatively limited weight.
57. The public interest is, in general terms, undoubtedly strong.
58. That the appellant is, on this alternative scenario, unable to satisfy the requirements of Appendix FM is clearly relevant and deserving of considerable weight.
59. I take full account of the fact that the appellant has been an overstayer since 2014 and prior to that was only in the United Kingdom on a precarious basis. The appellant's private life is to be given little weight. Having said that, his relationship with Mr Khan was established at a time when he had leave to remain, albeit his status was precarious, a factor which I take account of as well.
60. The appellant has been in receipt of NHS treatment and that constitutes a degree of reliance on public funds. I take that into account.
61. If it were to be suggested that the appellant should return to India and make an appropriate entry clearance application from there (I record here that no such suggestion was in fact made by the respondent), I see real merit in Mr Richardson's answer to this. The current arrangements for Mr Khan's father are dependent on Mr Khan and the appellant working together to provide the round-the-clock care. Mr Khan is only able to work the night shifts because the appellant remains at home. If the appellant were to return to India, albeit temporarily (I accept that service standards indicate that an application could take approximately 24 weeks to decide, excluding any potential appeal against a refusal), it is highly likely that Mr Khan would have to give up his employment in order to provide the appropriate care to his father. This in turn would have a significant impact on Mr Khan and the father because they would be less, or no, household income. It is likely that there would consequently be an impact on public funds in terms of benefits. Even if savings could be utilised, the loss of

employment would still be a significant impact on Mr Khan. In all the circumstances, I would regard a temporary separation as being likely to have disproportionate consequences.

62. The appellant speaks good English and has not been reliant on public funds in terms of benefits.

63. Weighing up the competing factors, I conclude that there are exceptional circumstances in this case. The appellant and/or Mr Khan would suffer unjustifiably harsh consequences as a result of the appellant being removed to India. In other words, his removal would not strike a fair balance between the competing factors. I have reached this conclusion by a relatively narrow margin, but that is beside the point.

64. The appellant's appeal succeeds on this alternative basis.

Anonymity

65. There has been no application for an anonymity direction and I see no basis on which one should be made in any event.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

The decision in this appeal is re-made and the appeal is allowed.

**H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 12 June 2023**

ANNEX: THE ERROR OF LAW DECISION

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

Case No: UI-2022-005297

First-tier Tribunal No:
HU/58054/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE SYMES**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**HUSSAIN SHEIK
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Ms S Cunha, Senior Presenting Officer

For the Respondent: Mr D Coleman, Counsel, instructed by S Satha & Co Solicitors

Heard at Field House on 6 March 2023

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of Hussain Sheik, a citizen of India born 16 April 1984, on the basis of its conclusion that the refusal of his application for permission as the same-sex partner of Mohammed Khan, a French citizen, was disproportionate to the private and family life with which it interfered.
2. The immigration history is not disputed. Mr Sheik entered the UK on February 2009 as a student with leave extended until July 2011; and was then granted leave as a post-study worker until July 2013, though a further application was refused in June 2014. An EEA residence card application (based on his present relationship) of 15 October 2015 was subsequently refused later that year and a resulting appeal dismissed on 8 January 2019, the Tribunal not accepting that the relationship was a genuine one. An application on human rights grounds of 1 September 2016 was refused, following a reconsideration, on 26 November 2021, and it is against that decision that the appeal to the First-tier Tribunal was brought. The Secretary of State's refusal was based on her conclusion that the relationship was not established as genuine and subsisting, and as it was not accepted that Mr Sheik faced very significant obstacles to integration in India or that his departure would be unjustifiably harsh.
3. Mr Sheik's witness statement sets out that he successfully studied for a Masters in Biochemistry in the UK and then set up his own business, applying for a Tier 1 Entrepreneur visa, which the Home Office took over two years to process. He had met Mr Khan and begun a relationship in September 2011, they began to cohabit in late 2012. He could not return to India without hope of securing employment and living independently. Mr Khan had lived in the UK for 20 years and worked full-time.
4. The First-tier Tribunal departed from the findings of its predecessor as to the relationship's genuineness given there was now evidence available from an independent witness, Mr Mohammed, who had known the couple for many years. Mr Khan's 95-year old father also gave evidence which it found supportive of the relationship's genuineness. However the Tribunal did not accept that there were insurmountable obstacles to the couple's relocation to India - the only UK tie relied on was Mr Khan's support for his aged father, a matter which "was not explored in sufficient detail"; nor would Mr Sheik face very significant obstacles to integration in India given that he could presumably make use of his Biotechnology qualification there (he admitted not having enquired into the possibility of such employment in India) and could live in his parents' family home.
5. Considering the case, as it put it, outside the Immigration Rules, the First-tier Tribunal analysed matters by reference to the Chikwamba

principle as interpreted in Younas (section 117B(6)(b); Chikwamba; Zambrano) Pakistan [2020] UKUT 129 (IAC) as which emphasised the need for a structured assessment of proportionality, assessing whether a temporary stay abroad to pursue an entry clearance application was apposite having regard to the statutory reminder in s117B(1) that the maintenance of effective immigration control is in the public interest. It did not find that a short-term removal would be disproportionate given there were no children involved and that Mr Khan could remain living and working in the UK during the application's currency to support his father if he chose not to relocate temporarily to India. Given it was now established that this was a genuine relationship, and that the Secretary of State had accepted in the refusal letter that all other aspects of the Rules were satisfied, there was no foreseeable obstacle to the application's success. The third question was whether there was any public interest in requiring Mr Sheik to depart the UK, bearing in mind that he had entered the UK and established his relationship with Mr Khan during his period of lawful residence here, so that s117B(4) NIAA 2002 did not apply. Given this feature of his immigration history the Tribunal concluded that the interference with family life was disproportionate to the public interest sought to be defended.

6. The Secretary of State appealed on the grounds that the First-tier Tribunal had had no regard to Mr Sheik's English language facility or financial independence as per s117B NIAA 2002, failed to address the elevated test required for an appeal to succeed when the Immigration Rules were not satisfied, failed to demonstrate any "unjustifiably harsh" consequences of the immigration decision, and failed to have regard to the precariousness of Mr Sheik's residence.
7. Ms Cunha submitted that the Secretary of State's fundamental complaint with the decision was the failure to weigh non-compliance with the Immigration Rules as a distinct factor in the balance; additionally the First-tier Tribunal's approach now needed to be assessed in the light of the recent decision of Alam [2023] EWCA Civ 30.
8. Mr Coleman argued that the First-tier Tribunal had come to a decision that was within the range of reasonable responses to the evidence before it; the Upper Tribunal would be wrong to interfere with a decision simply because of points of disagreement falling short of true legal errors.
9. We reserved our decision.

Findings and reasons

10. The Nationality Immigration and Asylum Act 2002 at s117B addresses Article 8 and "public interest considerations applicable in all

cases”; it emphasises that financial independence and English language proficiency are likely to promote integration and reduce any burden on taxpayers, and states, materially:

“(1) The maintenance of effective immigration controls is in the public interest.

...

(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.”

11. Lord Reed in Agyarko [2017] UKSC 1 §70 addressed the threshold that needed to be crossed in cases of precarious immigration status where the Immigration Rules were not otherwise met:

“... the court has to bear in mind that this was a case of precarious family life, and that therefore, having regard to the Strasbourg case law, a very strong or compelling claim was required to outweigh the public interest in immigration control. The court has also to give due weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain under the partner route brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. There was no evidence placed before the Secretary of State on which a conclusion that there were insurmountable obstacles to relocation in Ghana could reasonably have been reached. There was nothing to suggest that there were "exceptional circumstances" as defined in the Instructions, that is to say, circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate.”

12. Now the Immigration Rules themselves include a test, where there are no “insurmountable obstacles” to removal from the UK, requiring consideration of whether the immigration decision’s consequences are “unjustifiably harsh” (GEN3.2). The Court of Appeal in Lal [2019] EWCA Civ 1925 at §68 contrasted this phrase, when it still resided in Home Office policy, against the “insurmountable obstacles” criterion, noting that “The essential difference (reflected in the word “unjustifiably”) is that the latter test requires the tribunal not just to assess the degree of hardship which the applicant or their partner would suffer, but to balance the impact of refusing leave to remain on their family life against the strength of the public interest in such refusal in all the circumstances of the particular case.”

13. In Alam, Laing LJ explains that the considerations found determinative in Chikwamba were highly fact specific and that the Court of Appeal and Supreme Court judgments touching on the point do no more than indicate that where an entry clearance application is certain to succeed, requiring an applicant to depart from the UK to comply with that formality might be disproportionate; all relevant public interest factors must be considered bearing in mind that the absence of insurmountable obstacles to life abroad and the precariousness of immigration status when forming a relationship are relevant and weighty factors; usually Chikwamba will only be relevant where the Secretary of State has raised it as the sole point of refusal; the legal framework has moved on since Chikwamba given the s117B NIAA 2002 factors as well as a bespoke family life Appendix that does not reference the Chikwamba principle. In sum §107: “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”.

14. Laing LJ also summarised the effect of Younas §38-43: namely that a return abroad to seek entry clearance leading to a period of four to nine months abroad would not be disproportionate where the visitor route had been abused.

15. Furthermore, relevantly to the instant appeal and essentially applying the approach in Agyarko in the Chikwamba context, Laing LJ observed at §112:

“The two present appeals ... are both cases in which neither appellant's application could succeed under the Rules, to which courts must give great weight. The finding that there are no insurmountable obstacles to family life abroad is a further powerful factor militating against the article 8 claims, as is

the finding that the relationships were formed when each appellant was in the United Kingdom unlawfully.”

16. That then is the relevant legal framework. Moving to the issue in hand, we do not think the grounds of appeal relating to English language proficiency or financial independence have any force. It was not in truth disputed that the Appellant was supported by his partner (and was thus financially independent in the Rhuppiah sense) and the refusal letter had in fact identified his proficiency in English as a factor suggestive of an ability to integrate in India. However the other matters relied on do strike home.
17. The authorities cited above demonstrate the need to distinctly take account of certain features of a migrant’s history and present circumstances. Particularly relevant here was Mr Sheik’s significant overstaying, for which no particularly cogent reason seems to have been advanced, his precarious residence, and the fact there were no insurmountable obstacles to the couple’s relocation abroad. All of this combined such that only a compelling case would carry the day for him.
18. However the First-tier Tribunal does not identify this feature of the legal landscape. The nearest it comes to it is its statement that “in making the assessment ... Agyarko ... has confirmed that the test is one of exceptional circumstances which means circumstances that would result in unjustifiably harsh consequences for the individual to make the refusal disproportionate.” However, that self-direction did no more than identify the field of enquiry, and clearly fails to identify the requirement to give distinct weight to the need to demonstrate a compelling case where the appeal cannot succeed under the mainstream Immigration Rules. The Tribunal's reasoning reads as if a straightforward balancing exercise has taken place, whereas a weighted balance applies, given the Appellant’s precarious immigration status and failure to meet the mainstream partner Immigration Rules. That is a distinct error of law, and the well-known principle of appellate restraint cited by Mr Coleman does not enter the equation.
19. This is not an appeal where the effect of the error of law below has been to deprive a party before the FtT of a fair hearing. We accordingly consider that it is appropriate to retain the matter in the Upper Tribunal for a continuation hearing.

Decision

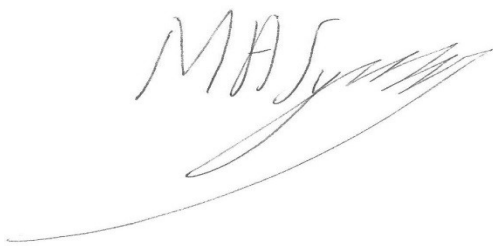
1. The First-tier Tribunal made a material error on a point of law.

2. We set aside its decision.
3. The findings of fact at paragraphs 26-33 of the First-tier Tribunal's decision are preserved.
4. The appeal is retained in the Upper Tribunal for a resumed hearing in due course.

Directions to the parties (Mr Sheik continues to be referred to as the Respondent)

- (a) The Respondent is to file and serve an index of all material that was before the First-tier Tribunal and is additionally to provide copies of the witness statements that were before that Tribunal (the originals are missing from the Upper Tribunal's file) **within 28 days of the date this error of law decision is sent out;**
- (b) The Respondent is to file and serve any further witness statements and other evidence he wishes to rely upon (bearing in mind the First-tier Tribunal's observation as to the paucity of material relating to the Respondent's elderly father's care arrangements) **within 28 days of the date this error of law decision is sent out;**
- (c) **At the same time as complying with directions (a) and (b),** the Respondent is to confirm with the Upper Tribunal whether an interpreter will be required for the resumed hearing and, if so, the relevant language.

Signed:

A handwritten signature in black ink, appearing to read 'M.A.S. Symes', with a long horizontal flourish underneath.

Deputy Upper Tribunal Judge Symes

Dated: 10 March 2023