IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003281

First-tier Tribunal No: HU/52913/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 30 December 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Stephen Mark Adams
(NO ANONYMITY DIRECTION MADE)

Applicant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr L. Garrett, Counsel, instructed by Sabz Solicitors LLP
For the Respondent: Ms S. Cunha, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 10 December 2024

DECISION AND REASONS

1. It has been found, as a matter of fact, that the appellant in these proceedings was assured by a Home Office official that he could apply for leave to remain as the spouse of a British citizen from within the United Kingdom, while present on a visitor's visa. Acting on that advice, the appellant relocated to the UK, arriving on a visitor's visa. The official's advice was plainly wrong, and the appellant's presence in the United Kingdom as a visitor was, in the event, fatal to his application for leave to remain under Appendix FM of the Immigration Rules. The application was refused as a human rights claim and the appellant. These proceedings concern the appellant's appeal against that decision.

2. The central question for my consideration is whether, having been given that assurance, it would be unjustifiably harsh to expect the appellant to return to Australia, the country of his nationality, in order to make an application for entry clearance?

Factual background

3. The above question arises in the context of the appellant's appeal against a decision of the Secretary of State dated 1 May 2022 to refuse a human rights claim he made in the form of an application for leave to remain under Appendix FM. The appellant's appeal against that decision was originally heard and allowed by First-tier Tribunal Judge Lester ("Judge Lester") by a decision dated 11 November 2022. The appeal was heard under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

4. The Secretary of State appealed to this tribunal.

5. By a decision promulgated on 9 September 2024, a panel of the Upper Tribunal held that the decision of Judge Lester involved the making of an error of law, and set it aside, with certain findings of fact preserved, including the finding set out at para. 1, above. A copy of the error of law decision is annexed to this decision.

Factual background

6. The appellant is a citizen of Australia. He was born in 1952. He is married to MH, a British citizen. From 1984 to 2021, they lived together in Australia. During the Covid-19 lockdown, they decided to relocate to the United Kingdom, primarily to be closer to MH's family. They relied in good faith on advice they received from the Home Office, and relocated to the UK in early November 2021. The appellant applied to regularise his status on 30 November 2021 from within the UK. The application was refused. The appellant could not meet the immigration status requirement, although he met all other requirements. He would not face insurmountable obstacles to continuing his relationship with MH in Australia, and nor would he face very significant obstacles to his own integration, the Secretary of State concluded.

7. The appeal before Judge Lester focussed on (1) whether the appellant and MH would face "insurmountable obstacles" to their relationship continuing in Australia, (2) whether the appellant would face "very significant obstacles" to his integration there, and (3) whether there were any broader circumstances such that it would be unjustifiably harsh for the appellant to be removed. Judge Lester allowed the appeal on issues (1), (2) and (3). In allowing the Secretary of State's appeal, the Upper Tribunal concluded that the judge erred in relation to issues (1) and (2), for the reasons set out in that decision.

8. It was in the context of issue (3) that the judge reached the (unchallenged) finding that the appellant and MH had been assured by a Home Office official of their ability to make an in-country application. In setting aside the decision of Judge Lester, the panel concluded that it could not be sure that the judge would have allowed the appeal on the basis of issue (3) alone, had he not erred in relation to issues (1) and (2). That was a finely balanced decision, so much so that the panel indicated that its preliminary view was that the appeal could be allowed on the papers without a further hearing. See para. 29 of the error of law decision:

> "We consider that a key point in the appeal is the preserved finding of fact that the appellant travelled to the UK to make an in-country application for leave to remain as a spouse as a result of erroneous advice given to him by the Home Office. The appellant's evidence in that regard was unchallenged before the First-tier Tribunal, and there has been no challenge to the judge's findings of fact reached pursuant to it. Had the appellant remained in Australia and made an out-of-

> country application, it seems highly likely that it would have been granted, given that the sole barrier to the appellant succeeding under the Appendix FM five year partner route was the immigration status requirement. We are therefore of the preliminary view that that erroneous assurance, along with the passage of time that has now elapsed since the appellant's arrival in the UK and the determination of this matter by the First-tier Tribunal, the appellant's health conditions and those of his husband, and the distance of travel that would be required to return to Australia in order to make an out of country application that would be bound to succeed, is, notwithstanding the apparent lack of insurmountable obstacles, capable of amounting to exceptional circumstances that would render the appellant's removal unjustifiably harsh in the particular circumstances of this case."

9. The panel proposed to remake the decision on the papers, allowing the appeal, subject to the submissions of the parties.

10. The Secretary of State objected. By submissions dated 30 September 2024, the Secretary of State contended that the judge's findings on issue (3) were not, in isolation, a sufficient basis for the appeal to be allowed. The panel thus gave directions for the appeal to be listed for a further hearing, and the matter was listed before me, sitting alone, on 10 December 2024 in Cardiff.

The law

11. The sole ground of appeal is that it would be unlawful for the purposes of section 6 of the Human Rights Act 1998 for the appellant to be removed to Australia.

12. The essential question for my consideration is whether it would be disproportionate for the purposes of Article 8(2) of the European Convention on Human Rights for the appellant to be removed. That issue is to be assessed primarily by reference to the Immigration Rules and also outside the rules. The relevant rules in these proceedings and paragraph 276ADE(1)(vi) (very significant obstacles to integration) and para. EX.1 of Appendix FM (insurmountable obstacles).

13. In relation to Article 8 outside the Rules, there are a range of statutory public interest considerations which I must take into account, see section 117B of the 2002 Act. The burden of establishing that Article 8 is engaged is the appellant's.

14. There is in these proceedings no dispute that it is engaged. It is for the Secretary of State to establish that any interference with the appellant's Article 8 rights would be proportionate within the terms of Article 8(2). The Secretary of State does so by pointing to the requirements of the Immigration Rules and the statutory considerations contained in section 117B. Taken together and applied to these proceedings, that analysis means that in practice, the appellant bears the burden to the balance of probabilities standard of demonstrating that the requirements of the Immigration Rules are met or that it would be unjustifiably harsh on some other basis for him to be removed from the United Kingdom.

Resumed hearing

15. It was against that background that the resumed hearing took place before me, sitting alone. Ms Cunha opposed the appeal until the conclusion of the hearing. Towards the end of her closing submissions, she conceded that the appeal should, in fact, be allowed.

16. Since Ms Cunha's concession came at the conclusion of the hearing, I will record the result I would have reached of my own motion, in any event.

The resumed hearing in the Upper Tribunal

17. I heard oral evidence from the appellant and from MH. Each was cross-examined by Ms Cunha. She explored their resources and the extent to which they would be able to continue their relationship together in Australia. She probed the circumstances of the assurance received on the telephone. While Mr Garrett initially objected on the basis that issue (3) represented preserved findings of fact, I found the answers given by the appellant and MH to be illuminating and compelling. Each gave a coherent, detailed and consistent account of the circumstances that led to them seeking to find out from the Home Office what they had to do in order to obtain leave to enter and remain for the appellant. Both were credible witnesses. Their evidence on this issue fortified the preserved finding of fact in relation to issue (3). I should observe that, in the summer of 2021, the Secretary of State issued a number of assurances arising from the impact of Covid-19 based restrictions. It is entirely plausible, and I consider credible, that the appellant was given the (bad) advice that he claims to have acted upon in good faith.

Removal would be unjustifiably harsh

18. MH experiences a number of challenging health conditions. He is not well. MH is his carer. One of the reasons for the move to the UK was so that MH could be near his British family when the appellant's health needs become more severe, and his caring responsibility towards him increases. Their mutual commitment to each other was evident and moving.

19. In the time that has elapsed since the appeal before Judge Lester, the appellant's health has continued to deteriorate; he lives with a number of conditions, the details of which do not need to be set out in this public-facing document. While I do not consider that his health conditions are such that the couple would face insurmountable obstacles to their relationship continuing in Australia, or that the appellant would face "very significant obstacles" to his integration in Australia, his health is a significant factor. When viewed against the background of the incorrect Home Office assurance about his ability to make an in-country application upon his arrival, the appellant's health acquires a new significance.

20. The appellant and MH have also established a significant private life presence in the United Kingdom. They were supported by many glowing references from members of their local community and singing group. They are valued members of the community and, despite the appellant's health conditions and the uncertainty they have been living with, they have integrated well in the three years for which this issue has been ongoing.

21. In light of the above factors, the appellant's return would, I find, be unduly harsh, given the assurance he received and acted upon in good faith, to expect a man living with the number of health conditions that he does to return to Australia to make an application that would, I find, be bound to succeed, and which he was previously (if incorrectly) assured that he could (and did) make from within the United Kingdom.

22. As I observed at the hearing, the circumstances of these proceedings did not entail a situation of the sort said to be at play in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, and later consider in authorities such as *Alam v Secretary of State for the Home Department* [2023] EWCA Civ 30. In a 'classic' *Chikwamba* scenario, there is usually no suggestion of an incorrect assurance being given by an official of the Secretary of State about the ability of a person to make an in-country application that was acted on in good faith by an applicant, to their detriment. That unchallenged finding of fact, which represented the starting point for my own analysis, and which was underlined by the compelling evidence of the appellant and MH, throws the approach in those authorities in to sharp relief.

23. I also consider that there is a public interest trade-off which is to the Secretary of State's benefit. Had the appellant applied from outside the United Kingdom, he would have been on the five year route to settlement, and would by now have completed three of those five years. If this appeal is allowed on the basis set out above, the appellant will most likely be on the ten-year route to settlement (although the question of implementation is a matter for the Secretary of State, not this tribunal). This distinction is important because it reflects the beneficial impact of following the correct route, thereby reflecting one facet of the statutory public interest in the maintenance of effective immigration controls for the purposes of section 117B(1) of the 2002 Act.

24. Accordingly, once I had heard the entirety of the evidence and submissions in the case, my preliminary view as set out in the error of law decision became my settled view. Despite the Secretary of State's initial objection to resolving the proceedings on that basis, Ms Cunha, no doubt also having had the same benefit of hearing the live evidence and Mr Garrett's submissions as I did, plainly arrived at the same view.

Appeal allowed

25. I find that it would be unduly harsh, and therefore disproportionate for the purposes of Article 8(2) ECHR, for the appellant to be removed, in the unique and particular circumstances of this case. The factors weighing in favour of the appellant outweigh the public interest in the maintenance of effective immigration controls for the purposes of section 117B(1) of the 2002 Act for the reasons set out above.

26. This appeal is allowed.

Postscript

27. The appellant and MH both sought to clarify in their evidence before me that their finances were not as buoyant as this tribunal had assumed in the error of law decision. The money referred to at para. 20 of the decision was in fact the same money, from the proceeds of the sale of their Australian home, which was later transferred to the United Kingdom. It should not, therefore, be double counted. In any event, the large international transfer has now been spent on the purchase of their home, and as no longer at the bank and in hand. I make that correction. It does not affect the analysis of Judge Lester's decision since, on any view, they are in a relatively healthy financial position.

Notice of Decision

The appeal of the Secretary of State against the decision of Judge Lester. The decision is set aside.

I remake the decision, allowing the appeal on human rights grounds, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 December 2024

ANNEX ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003281

First-tier Tribunal No: HU/52913/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
UPPER TRIBUNAL JUDGE HOFFMAN
UPPER TRIBUNAL JUDGE RASTOGI

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

STEPHEN ADAMS
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Z Young, Senior Home Office Presenting Officer
For the Respondent: Ms I Knight, Counsel instructed by Sabz Solicitors LLP

Heard remotely at Field House on 8 August 2024

DECISION AND REASONS

1. We will refer to the parties as they were before the First-tier Tribunal even though it is the Secretary of State who is the appellant before the Upper Tribunal. Therefore, Mr Adams will be referred to as the appellant and the Secretary of State as the respondent.

2. The appellant is a citizen of Australia and was born in 1952. He has been in a relationship with a British national, Mr Michael Hester, since 1984 and they have been married since 2012. The appellant entered the UK on a visit visa on 3 November 2021 and on 30 November 2021 he made an application for leave to remain as a spouse of a British citizen. However, that application was refused by the respondent on 1 May 2022. The respondent found that the appellant met all

of the requirements for leave to remain as a spouse under Appendix FM to the Immigration Rules except for the immigration status requirement set out in paragraph E-LTRP.2.1(a) because he was present in the UK with leave to enter as a visitor.

3. According to the unchallenged evidence of the appellant, he had made the application from within the UK because, prior to leaving Australia, he and his husband had called the Home Office to seek advice. They spoke to a person called Albert who informed them that the appellant would be able to submit an application for leave to remain as a spouse from within the UK. It is unclear why Albert provided them with that erroneous information. He may have been mistakenly relying on a temporary measure put in place by the respondent during the Covid-19 pandemic that applied to people already in the UK on limited leave to remain and who had been affected by travel restrictions. In any event, the appellant and Mr Hester relied upon the information given to them by Albert and travelled to the UK.

4. The appellant subsequently exercised his right of appeal to the First-tier Tribunal against the respondent's decision of 1 May 2022. His appeal was heard by First-tier Tribunal Judge Lester ("the judge") sitting in Newport on 23 September 2022. In a decision promulgated on 11 November 2022, Judge Lester allowed the appellant's appeal on Article 8 ECHR grounds.

5. In reaching his decision, the judge found that there were extensive practical matters to the appellant and his husband from returning to Australia. The judge made reference to medical, emotional and financial issues. The judge found that on return to Australia, the appellant and his husband would have nowhere to live and would be unable to obtain accommodation for themselves. Furthermore, they would not, he found, be able to call upon the assistance of their social circle in Australia. The judge also took into account that the only basis that the appellant's application for leave to remain was refused was because he was present in the UK as a visitor. The judge made findings that the only reason the appellant had made his application from within the UK was because he had been misinformed by the Home Office that this was possible. In conclusion, the judge found that there were insurmountable obstacles to the appellant and his husband's family life continuing abroad and very significant obstacles to the appellant re-establishing his private life in Australia. The judge also made reference to there being exceptional circumstances to the case. The judge therefore found that because the appellant met the requirements for leave to remain under the Immigration Rules, his removal from the UK would amount to a disproportionate interference with his rights under Article 8 of the European Convention on Human Rights ("ECHR").

6. The respondent sought permission to appeal the decision of the First-tier Tribunal on 17 November 2022. In summary, the respondent raises the following two grounds:

    a. **That the First-tier Tribunal failed to resolve a conflict of fact in finding that the appellant and his husband had nowhere to live and no means to obtain accommodation if they returned to Australia.** The respondent submits that the judge failed to take into account evidence before him that showed the appellant and his husband had £274,000 in their bank account. It is also argued that the judge failed to give reasons as to why the appellant's "limited social circle in

Australia" which consisted of family members could not assist the appellant and his husband if necessary.

b. **That the First-tier Tribunal failed to give reasons.** The respondent argues that the judge failed to explain why the appellant could not use the funds available to him to ameliorate any difficulties he might face in obtaining accommodation and support. Furthermore, the respondent states that the judge had failed to explain why, when healthcare was free in Australia, the appellant's health was a barrier to his return.

7. Permission to appeal to the Upper Tribunal was granted on both grounds by First-tier Tribunal Judge Grey on 13 December 2022.

8. The matter now comes before us to determine whether the First-tier Tribunal has erred in law and, if so, whether any such error was material and whether the decision of the First-tier Tribunal should be set aside.

Submissions – Error of Law

9. Ms Young relied upon the grounds of appeal. She submitted that in finding that the appellant and his husband would have nowhere to live in Australia, the judge had failed to have regard to the appellant's bank statements which, she said, clearly demonstrated a sufficient amount of money to obtain accommodation on return. In response to a point raised in the appellant's skeleton argument dated 7 August 2024 that argued the bank statements had not been expressly referred to in either the decision of 1 May 2022 or the respondent's review before the First-tier Tribunal, Ms Young submitted that the statements had been included by the appellant in his bundle of evidence and the contents were highly relevant to the issue of whether the appellant could re-establish himself on return to Australia. While Ms Young acknowledged that the evidence of the appellant and his husband was that they had sold a property in Australia and bought a new one in the UK, she argued that it was open to them to do this in reverse. Furthermore, she argued, the judge had failed to explain why the appellant's social circle in Australia, named in his application for leave to remain, would be unable to support the couple on return. Ms Young said that the judge had failed to give adequate reasons addressing these points.

10. Turning to the second ground, Ms Young submitted that when making findings on the insurmountable obstacles to the appellant and his husband re-establishing their family life in Australia, the judge failed to give any reasons as to why their savings, pension and friends and family could not provide support to them and that this too amounted to a material error of law.

11. Ms Knight relied upon her skeleton argument. Relying on the case of JR (Jamaica) v SSHD [2014] EWCA Civ 477, she submitted that the Upper Tribunal should not readily assume that the judge had misdirected himself in law just because not every step of his reasoning was fully set out in his decision. Furthermore, relying on VV (grounds of appeal) Lithuania [2016] UKUT 00053 (IAC), Ms Knight argued that the respondent was required to show that any matters not addressed by the judge were raised as a substantial issue by the parties at the hearing which, she said, was not the case here. The bank statements had not been raised by the respondent, Ms Knight argued, and the judge was being criticised for not taking into account two pages in a bundle that was over a 100 pages long. Ms Knight submitted that the judge had provided adequate reasons at [10] for his findings regarding the appellant's health. While

Ms Knight accepted that the judge did not set out in detail the evidence he heard from the appellant and his husband, there was, she said, an understanding about the evidence that he heard and why it was sufficient to meet the insurmountable obstacles threshold. Regarding the purported failure to take into account the appellant's finances and social circle, Ms Knight said that the judge accepted the evidence of the appellant and his husband and that they would have no means to obtain accommodation in Australia. What was clear, Ms Knight argued, was that the couple met all the requirements of the Immigration Rules except for the immigration status requirement. However, the appellant had been given incorrect advice by the Home Office before he travelled to the UK. This was clearly a very strong case, Ms Knight argued, and any person looking at it would agree with the judge's decision on insurmountable obstacles and very significant obstacles under paragraph 276ADE(1)(vi) of the Immigration Rules. Ms Knight said that the respondent did not argue that the judge came to any unsustainable findings and the key point was that the respondent had not demonstrated that any errors were material to the decision.

12. In reply, Ms Young submitted that the substantive issue in the appeal before the First-tier Tribunal was insurmountable obstacles and the bank statements clearly touched on that. It was obvious, she said, from the decision letter and the respondent's review that the respondent did not accept that there were any insurmountable obstacles in this case. The judge was therefore obliged to have regard to all of the evidence before him, including the bank statements. The judge's failure to consider the evidence before him and reach an adequately reasoned conclusion did amount to a material error of law, she argued.

Conclusions – Error of Law

13. Before setting out our conclusions, we first say something about the way the decision of the First-tier Tribunal sets out the issues in the appeal before it. Rather than simply summarising the relevant issues and arguments before him, pages 2 to the start of page 6 of the First-tier Tribunal's decision consist of the judge having cut-and-pasted the entirety of the appellant's grounds of appeal and the respondent's review. While that does not affect the lawfulness of the decision, we would make it clear that the judge's approach is not one that we would endorse. The parties and the Upper Tribunal will have access to the written pleadings and it is rarely, if ever, helpful for a First-tier Tribunal decision to contain lengthy or, as here, entire reproductions of these.

14. Turning to the substantive issues before us, for the following reasons, we are satisfied that the decision of the First-tier Tribunal does contain material errors of law.

15. The judge's key findings are set out at [10] to [16]. Many of these paragraphs consist of just one sentence. At [10], the judge says as follows:

> 10. The oral evidence from the appellant and sponsor explained and amplified the medical evidence provided. They set out clearly, credibly and in detail the extensive practical matters which clearly amounted to insurmountable obstacles and I find accordingly. They were frank and open in describing medical issues, emotional issues and financial issues all of which I find who [sic] are part of my conclusion of insurmountable obstacles.

16. At [11] and [12] the judge deals with the appellant's failure to meet the requirements of the Immigration Rules based on one criterion as well as the circumstances surrounding the appellant and his husband's move to the UK.

17. At [13] the judge says:

> 13. They sold their house in Australia at a loss to be able to come to the UK. They have a limited social circle remaining in Australia and as part of my finding in relation to insurmountable obstacles I note that they would not be able to call upon any assistance if they returned. They would have nowhere to live and on their own evidence would have no means to be able to obtain accommodation.

18. At [14], the judge finds that the appellant quickly made his application for leave to remain after he arrived in the UK and then, in an unnumbered paragraph, that there would be a potential breach of Article 8 ECHR if the appellant had to return to Australia. At [15], the judge finds "that there would be on justifiably [sic] harsh consequences" and, at [16], that "all of the same evidence establishes very significant obstacles for the purposes of paragraph 276 ADE(1)(vi) [sic], and also exceptional circumstances". Then, under the heading "Proportionality Assessment", the judge finds that the appellant meets the requirements of the Immigration Rules and therefore this is "positively determinative" of the case in accordance with of TZ (Pakistan) v SSHD [2018] EWCA Civ 1109. The judge does not expressly say which requirements of the Immigration Rules the appellant meets, but he is presumably referring to paragraph 276ADE(1)(vi) as well as paragraph EX.1(b) of Appendix FM.

Ground 1: Failure to resolve conflicts of fact

19. While the respondent pleads this ground as a failure to resolve conflicts of fact, in actual fact the alleged error of law is a failure to take into account a relevant consideration.

20. The respondent argues that the judge failed to have regard to the evidence of the money available to the appellant and his husband when finding at [13] that they "had nowhere to live" in Australia and "no means to be able to obtain accommodation". While Ms Knight argued that the bank statements were not raised in the refusal decision or the respondent's review and therefore the judge was under no obligation to take them into account, we accept Ms Young's submission that it was clearly an issue before the tribunal about whether there were any insurmountable obstacles to the appellant and his husband continuing their family life in Australia. We find that the appellant and his husband's financial means was plainly a relevant consideration for the Tribunal when assessing whether they could accommodate themselves on return. Furthermore, as Ms Young submitted, the appellant had included the bank statements himself in his appeal bundle and he therefore must have believed that it was important to draw these documents to the Tribunal's attention. The British bank account showed an available balance of over £270,000GBP in late 2021. The Australian account showed a balance of over $500,000ASD at a similar time. These are not inconsiderable sums of money yet there is no indication from reading [10] to [16] of the First-tier Tribunal's decision that the judge took them into account. Alternatively, if the judge did take these sums into account, he gave inadequate reasons for dismissing their relevance. In principle, such considerable financial resources would be capable of throwing the judge's findings that the appellant and his husband would face insurmountable obstacles to their relationship

continuing in Australia, or that the appellant personally would face very significant obstacles, into sharp relief. We therefore find that the judge's failure to take into account the appellant's finances when considering insurmountable obstacles amounted to a material error of law.

Ground 2: Failure to give adequate reasons

21. Regarding the alleged lack of reasons in the First-tier Tribunal's decision, Ms Knight argued before us that the judge's findings were based on an "understanding" of what he had heard in oral evidence. However, we satisfied that the judge did make a further material error of law by failing to provide sufficient reasons for finding that the insurmountable obstacles test was met. While it is of course appropriate for a judge to place significant weight on the oral evidence heard by the tribunal, that does not absolve the judge of the requirement to give reasons. In the present case, the judge errs in failing to provide any explanation at [10] about what exactly the "extensive practical matters" were that "clearly amount to insurmountable obstacles". Neither does the judge explain what the appellant and his husband said in oral evidence regarding their "medical issues, emotional issues and financial issues" that also satisfied him that there were insurmountable obstacles to them continuing their family life in Australia.

22. Regarding the appellant's health, the judge provides no reasons why this was a factor relevant to the insurmountable obstacles assessment, especially given that the appellant was receiving free healthcare in Australia before he came to the UK. The judge fails to explain why the appellant would be unable to access that treatment again or otherwise explain what the adverse consequences (if any) to his health might be on return.

23. We also find that the judge made a material error of law by failing to provide adequate reasons in relation to his finding at [13] that there would be a lack of support from friends and family in Australia. Ms Young drew our attention to the appellant's application for leave to remain (at page 19 of the respondent's First-tier Tribunal bundle) in which the appellant says that he has two nieces and a nephew, as well as their respective families, in Australia as well as listing five close friends living in Melbourne. While the judge refers at [13] to the appellant's social circle as being "limited", he does not say that it is non-existent. Moreover, he fails to give any reasons at all for his finding that the appellant and his husband would be unable to call on the support of family and friends if they returned to Australia. There is also a lack of reasons at [13] about why the appellant and his husband would have "no means to able to obtain accommodation" in Australia given the evidence before him of the money available in the appellant's bank accounts.

24. We are therefore satisfied that the judge made material errors of law by, first, failing to have regard to the bank statements before him and, second, failing to give adequate reasons as to (a) why the appellant would be unable to rely on the considerable funds available to him in his bank accounts to find accommodation in Australia; (b) why the appellant could not, if required, draw on the support of his social circle in Australia; and (c) why the appellant's health was an obstacle to his removal, especially given that free healthcare is available to him in Australia.

25. We have reflected on the remaining aspects of the judge's reasoning. The most detailed parts of the judge's analysis ([12] to [14]) focussed primarily on what he described as the "only flaw" in the appellant's case being the fact that he made

the application from within the UK rather than before his arrival. There has been no challenge to that part of the judge's reasoning, nor his findings that such advice was given. We have considered whether that finding was, in isolation, sufficient to merit the judge's findings at [15] and [16] that there would be unjustifiably harsh consequences for the appellant, and exceptional circumstances, respectively. We do not consider that those findings are capable of surviving as stand-alone findings. They were reached in the context of the judge's analysis of the insurmountable and very significant obstacles issues. While the findings of fact which led to those aspects of the judge's evaluative assessments concerning the unjustifiably harsh and exceptional circumstances issues have not been challenged, we conclude that the core evaluative assessments reached by the judge at [15] and [16] are very likely to have been infected by the judge's failure to have regard to the evidence concerning the appellant's healthy financial situation and the considerable resources that would be available to him in the event he were to return to Australia.

26. We cannot say that the judge's conclusions would have been the same had he not made those errors. Ultimately, we find that the judge's errors infected his findings not only in relation to the insurmountable obstacles test under paragraph EX.1(b), but also in relation to the very significant obstacles test under paragraph 276ADE(1)(vi) and exceptional circumstances outside of the Immigration Rules and, as a consequence, the judge's application of the Article 8 proportionality balance. We therefore set aside the decision of the First-tier Tribunal.

27. There has been no challenge to the judge's findings of fact at [12] that the appellant and his husband had been misinformed by the Home Office about the ability to make an in-country application for leave to remain as a spouse, that the appellant's failure to meet the immigration status requirement of Appendix FM was "the only flaw in their case", that they had made all efforts to do everything properly in relation to the visa applications, and that they are not medical tourists. We therefore preserve those findings.

Remaking the decision

28. In the light of the preserved findings of fact, the nature and extent of the findings of fact required to remake the decision are not such that it would be appropriate to remit this matter to the First-tier Tribunal, applying paragraph 7.2(b) of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*. Bearing in mind the overriding objective to decide cases fairly and justly, avoiding delay so far as is compatible with the proper consideration of the issues, we consider that we should remake the decision in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

29. We consider that a key point in the appeal is the preserved finding of fact that the appellant travelled to the UK to make an in-country application for leave to remain as a spouse as a result of erroneous advice given to him by the Home Office. The appellant's evidence in that regard was unchallenged before the First-tier Tribunal, and there has been no challenge to the judge's findings of fact reached pursuant to it. Had the appellant remained in Australia and made an out-of-country application, it seems highly likely that it would have been granted, given that the sole barrier to the appellant succeeding under the Appendix FM five year partner route was the immigration status requirement. We are therefore of the preliminary view that that erroneous assurance, along with the passage of time that has now elapsed since the appellant's arrival in the UK and the

determination of this matter by the First-tier Tribunal, the appellant's health conditions and those of his husband, and the distance of travel that would be required to return to Australia in order to make an out of country application that would be bound to succeed, is, notwithstanding the apparent lack of insurmountable obstacles, capable of amounting to exceptional circumstances that would render the appellant's removal unjustifiably harsh in the particular circumstances of this case.

30. Subject to the representations of the parties, in particular the respondent, it is our preliminary view that we should remake the decision of the First-tier Tribunal on the papers by allowing the appeal on the basis set out above. Accordingly, we give directions below for the parties to make further submissions on that issue, within 14 days of being sent this decision. Upon the expiry of that 14 day period, the Upper Tribunal will decide whether, and if so how, to remake the decision, in light of the matters set out above.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

The decision will be remade in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, in accordance with the directions set out below.

It is the preliminary view of the Upper Tribunal that the appeal may be remade and allowed on the papers for the reasons given at paragraph 29, above. The parties are directed to file and serve, **within 14 days**, any submissions addressing that issue, after which the Upper Tribunal will determine how to proceed to remake the decision, including whether an oral hearing will be necessary and whether any further directions will required.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3rd September 2024