Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10354/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On Thursday 27 May 2021	**On 22 June 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR SHAH MD JAHANGIR ALAM

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M West, Counsel instructed by Kalam solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Obhi promulgated on 29 October 2019 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 30 May 2019, refusing his human rights claim founded on Article 8 ECHR based on the Appellant's family life. The Appellant is married to a British national, Ms Sharmin Khatun.

2. The Appellant is a citizen of Bangladesh. He came to the UK on 17 July 2007 with entry clearance as a visitor. He overstayed following the expiry of his leave. He applied in 2012 to remain based on his family and private life. That application was refused with no right of appeal. A further application made in 2018 was similarly refused and his claim certified as being clearly unfounded. Following a judicial review challenge, the refusal was maintained by the decision under appeal, but the Appellant was given a right of appeal.

3. The Judge accepted that the Appellant's relationship with Ms Khatun is genuine. She also accepted that the couple meet the requirements of the Immigration Rules ("the Rules") with the exception of the provisions as to the Appellant's immigration status. She did not accept that there would be insurmountable obstacles to family life being continued in Bangladesh. Accordingly, she concluded that paragraph EX.1 of Appendix FM to the Rules ("Paragraph EX.1") was not met. The claim therefore failed under the Rules. Outside the Rules, balancing the interference with the rights of the Appellant and Ms Khatun against the public interest, the Judge concluded that the Respondent's decision was not disproportionate. Accordingly, the claim also failed outside the Rules.

4. The Appellant appealed initially on two grounds as follows:

   Ground one: The Judge failed to consider the Appellant's claim under Article 8 in the context of whether he would succeed were he to return to Bangladesh to obtain entry clearance. That claim was based on the principle first enunciated in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 ("Chikwamba").
   Ground two: The Judge failed to provide adequate reasons for her findings under Paragraph EX.1.

5. Permission to appeal was refused by Upper Tribunal Judge Martin as a First-tier Tribunal Judge on 10 March 2020 in the following terms so far as relevant:

> "... 2. The grounds are without merit.
>
> 3. The grounds challenge the judge's reasoning and findings under Article 8. The judge considered the case under Appendix FM and found, for detailed reasons, that there were no insurmountable obstacles to the appellant integrating in Bangladesh nor any very significant obstacles to family life continuing in Bangladesh. On the facts that is unsurprising. The Judge also considered Article 8 outside the Immigration Rules and applying appropriate case law and s.117 of the Immigration and Asylum Act 2002 found the appellant's removal proportionate.
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> 4. This case was one where the appellant could have had no realistic expectation of success having overstayed and thus in the UK unlawfully when he commenced his relationship and there being no real obstacles to the couple living in Bangladesh.
>
> 5. Neither the grounds nor the Decision and Reasons disclose any arguable error of law."

6. The Appellant renewed on grounds one and two as set out above. He added an additional ground as follows:
Ground three: The Appellant relied on a "new matter" which was not raised before either the Respondent or Judge Obhi. The Appellant pointed out that the Upper Tribunal in Birch (Precariousness and mistake; new matters) [2020] UKUT 86 (IAC) ("Birch") decided that the prohibition on raising a new matter contained in section 85 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") did not apply to proceedings in the Upper Tribunal. That prohibition is confined to the First-tier Tribunal. The "new matter" relied upon is that Ms Khatun is said to be a NHS worker and therefore a key worker during the Covid-19 pandemic. It is said that she is a frontline worker. The Appellant submits that this alters the balance outside the Rules and also impacts on the Paragraph EX.1. issue as it is said that Ms Khatun cannot now reasonably be expected to follow the Appellant to Bangladesh.

7. Permission to appeal was granted on grounds one and two only by Upper Tribunal Judge Keith on 1 June 2020. He expressly refused permission on ground three on the basis that "the 'new matter' in that ground is only relevant on a remaking decision". His reasoning reads as follows (so far as relevant):

> "... 3. While consideration of ground (3) only appears to be arguably relevant to a remaking decision (see Birch (precariousness and mistake; new matters) [2020] UKUT 00086 (IAC) (at [19]) the FtT arguably erred in relation to ground (1) in failing to make a finding in relation to whether the appellant did or did not satisfy the rules for entry clearance, having raised the issue at [25]. The FtT also further arguably erred in explaining what was said to be the gap in evidence needed to make an assessment in relation to the spouse's personal history at [33].
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> 4. Ground (3) does not identify any error of law and so permission in relation to the error of law challenge is refused."

Judge Keith reached a provisional view that it would be appropriate for the error of law issue to be determined on the papers. He invited written submissions from both parties.

8. The Respondent submitted an extensive Rule 24 reply on 28 August 2020 ("the Rule 24 Reply"). I will come to the substance of that reply when dealing with the competing arguments below. The Appellant provided further written submissions dated 31 August 2020 ("the Further Submissions") which are also considered below. Although neither party suggested that it would not be possible to determine the error of law issue on the papers without a hearing, Upper Tribunal Judge Blum reviewed the file on 8 January 2021 and determined that it would be appropriate to consider that issue at an oral hearing to be heard by remote means.

9. So it was that the hearing came before me. The hearing took place via Microsoft Teams. The hearing was attended by representatives for both parties as above and by the Appellant and Ms Khatun who appeared separately as she was, as I understand it, at work. There were no major technical problems affecting the conduct of the hearing.

10. In addition to the written submissions to which I have referred above and the core documents in the appeal, I had before me the Appellant's bundle before the First-tier Tribunal (to which I refer hereafter as [AB/xx]), Mr West's skeleton argument as before the First-tier Tribunal and the Respondent's bundle.

11. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION

12. Mr West confirmed that he did not pursue ground three on the basis that he accepted that the "new matter" there raised could only be relevant on re-making as confirmed by the Tribunal in Birch. It stands to reason that a Judge's decision can only be challenged as containing an error of law on the basis of evidence and arguments put before him or her (unless the new arguments are ones which could be said to be ones which the Judge should have raised of his or her own volition which is not the case here). I therefore deal only with grounds one and two. However, I deal with those grounds in reverse order. That is because the Judge's reasoning in relation to the claim under the Rules is relevant to the reasoning and in particular the public interest when one comes to look at the claim outside the Rules.

Ground Two

13. Although the way in which this ground was initially summarised was on the basis of an inadequacy of reasoning, a procedural point was raised concerning the Judge's approach to the evidence. It was said that the Judge held against the Appellant and Ms Khatun an evidential insufficiency which should have been raised with them as a concern if that were to be the basis of the Judge's findings. The written and oral submissions therefore focussed on this issue rather than the failure to provide reasons.

14. I begin with the Judge's reasoning on the Paragraph EX.1. issue at [19] to [21] of the Decision as follows:

> "19. The appellant cannot meet the Immigration Rules as he entered the United Kingdom on the basis of a visit visa, undertaking to return home when the visa expired but failed to do so. Under the Immigration Rules, even where he is in the UK illegally, if he has a subsisting relationship with a British national, he may be granted permission to remain if he meets the requirements of the exception at EX.1 of the Immigration Rules. In order to do so he has to show that there are insurmountable obstacles to him returning to live in his country of origin. The appellant invites me to find that to be the case here. He claims that he is now in a relationship with a British national, a young woman whose parents originate from Bangladesh so she is of Bangladeshi ethnicity, but who is herself estranged from her family and has been a Looked After Child by the local authority on the basis that her parents were unable to care for her. I do not know the circumstances of her coming into care, save that it happened when she was 13

years of age. I note from a letter dated the 27 October 2015 written by her key worker Ning Sun that she married the appellant on the 22 October 2013 '*despite being advised by professionals not to go ahead with the marriage*', and that she remained in local authority care after her marriage until she was 18 years of age. She moved into semi-independent accommodation on the 1 June 2015 and the appellant was allowed to have contact with her on two nights a week at that flat. The letter states that she has *'matured a lot, managing her relationship and continuing her further education.'* There is nothing more recent from the local authority or from her foster carer. I do not know why she was advised not to marry the appellant, in 2013 she would have been aged just 16 years. She was at that time particularly vulnerable and probably still is. The letter does not explain how and why she came into care, whether it was because she was beyond the care of her parents through challenging behaviour or whether there were allegations of abuse. I do not know whether she was subject to a care order or whether she was looked after under Section 20 of the Children Act 1989 with the consent of her parents. I know very little about the appellant's wife. Although I am invited to find that the appellant gives her stability, I cannot make such a finding in the absence of more detailed information about the appellant's wife and how and why she came into care, why she was counselled against a marriage. The fact that she married at the age of 16 years, a man who did not initially tell her that he was in the UK illegally, and someone who is 11 years older than her, causes me some concern. On the face of it they are very different, she does not even speak the language as fluently as he does, she has been brought up in a white English foster home during her teenage years, although she is from a Bangladeshi family; again I make the point that I simply do not know enough about the appellant's wife.

20. I note from the appellant's statement at paragraph 14 that he met Ms Khatun on Facebook in 2012. At that point she would have been 15 years, and he was 26 years of age.

21. I am invited to find that as a result of Ms Khatun's background and status of a looked after child, it would be impossible for her to live with her husband in Bangladesh. For the reasons which I give in the preceding paragraph, I simply do not know enough about her. On the face of it, she has chosen to marry someone who is from Bangladesh, and who has not had the same upbringing as herself, she appears to have immersed herself into his culture, so although she is a young woman who was born in the UK, she has already culturally adapted to the appellant's culture and language. I do not accept that living in Bangladesh would be unduly harsh for her based on the information that I have. In relation to the appellant he is now 32 years of age. He is familiar with the culture and although many members of his family are in the UK, there are also family members in Bangladesh. There is no reason why he cannot apply for entry clearance if he wishes to return and provide the evidence to the respondent that would be required from any appellant seeking to enter the UK. The appellant claims in his statement at paragraph 17 that his wife's support network are in the UK; however the fact that she has no contact with her birth family, was a looked after child and her closest relationship is with a former foster carer suggests that in reality she does not have the support network that he alludes to."

15. The Respondent deals with ground two at [9] to [11] of the Rule 24 Reply. She says that the grounds "misconstrue the point made by the FTTJ". Having referred to [19] of

the Decision as set out above, the Respondent goes on to submit that "[t]he burden of proof remained on the appellant to provide evidence to support his case". The Respondent submits that the Judge "is simply commenting on the limits of the evidence relied upon in supporting the claim that the wife, due to her history/background, could not live in Bangladesh". The Respondent therefore asserts that there is no procedural error. The Respondent also points to the finding made at [21] of the Decision that the evidence did not show that it would be unduly harsh for Ms Khatun to live in Bangladesh, which finding it is said is not challenged and to the repetition of that finding when the claim is considered outside the Rules.

16. The Appellant in the Further Submissions repeats the point that, "[i]f the FTTJ proposed to take issue with this aspect of the appeal as being a gap in the evidence then the FTTJ ought properly to have given the appellant/the Sponsor wife an opportunity to clarify/give evidence on that issue". It is also said that the Judge failed to identify the gaps in the evidence. Mr West submitted orally that there was evidence in the statement of the social worker which supported the Appellant's case.

17. Given the way in which ground two has been developed, it is appropriate to begin with the way in which the Appellant argued his case before Judge Obhi and the evidence which was presented to her. Mr West's skeleton argument sets out the Appellant's case on this issue at [13] to [16] as follows:

> "13. The appellant's wife is a British national and was born in London. She has lived her entire life in the UK. She has never held any other nationality. She has never been to Bangladesh and nor does she speak or write the language.
>
> 14. The appellant's wife gives details at paragraph 6 of her witness statement dated 7 October 2019 about how she was in the care system between the ages of 13 and 19 due to a previous abusive relationship. She has lived in numerous foster placements and is a vulnerable individual (see pages 24-25 of AB). She is only 22 years of age at present.
>
> 15. She was furthermore in full-time and permanent employment with Look Ahead Care, Support and Housing working as a Support Worker. Her annual gross salary from her employment was £20,280. She now works for Tower Hamlets community intervention service earning £21,944 per annum (see page 163-164 of AB). The appellant's wife performs a vital public service.
>
> 16. There are, on the balance of probabilities, insurmountable obstacles to the appellant and his wife continuing their family life in Bangladesh for those reasons."

18. It cannot sensibly be suggested that the fact of Ms Khatun being a British national and having lived in the UK for her entire life nor her age are factors which of themselves demonstrate that there would be insurmountable obstacles to her living in Bangladesh. Those are factors common in these sorts of cases. As is pointed out by the Supreme Court in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 ("Agyarko") at [33] by reference to the Court of Appeal's judgment "[t]he mere facts that …. is a British citizen, has lived all his life in the United Kingdom and has a job here - and hence might find it difficult and might be reluctant to relocate to …to continue their family life there - could not constitute insurmountable obstacles to

his doing so." In any event, Judge Obhi took into account at [19] to [21] of the Decision those factors including Ms Khatun's limited ability to speak the Appellant's language.

19. The focus of the Appellant's case in relation to EX.1 was Ms Khatun's vulnerability as a former looked after child. That is the case which the Judge considered at [19] of the Decision.

20. As to the evidence on this issue, paragraphs [3] to [5] of Ms Khatun's statement at [AB/7-8] deal with the factors which I have already mentioned – her citizenship of the UK, her ties to this country and the problems which she would face in relocating specifically in relation to her medical condition (asthma), lack of familiarity with the country and inability to speak or write the language.

21. Ms Khatun moves on at [6] of her statement to deal with the relevance of her former care as follows:

> "I am individual who was born and brought in the United Kingdom. I was under social service from the age of 13 till the age of 19. I lived in care in the United Kingdom. I do not speak to my biological family. I had lived in lots of foster placement due to the relationship breaking down. Due to this I am very wary of relationships and have felt I never fitted in anywhere until I met my husband. My husband has always made me feel the sense of belonging somewhere and his family have done the same and made me part of the family. I have come very far in life due to my husband as he supported me throughout her relationship together. My husband has kept on pushing me to become strong independent women and helped me back into studying. I am currently studying and complete my level 3 in Health and Social Care. After this I will like to become a mental health nurse. I am trying to work hard and provide for this country by becoming a civil servant and I feel SSHD should take this case into special consideration."

I am bound to observe that the focus of this paragraph is on the benefit to Ms Khatun of the relationship with the Appellant rather than where the relationship is to be continued.

22. Turning then to the other evidence mentioned in Mr West's skeleton argument (as set out above) and in his oral submissions, that is contained in a letter dated 27 October 2015 from Ning Sun dated 27 October 2015 (at [AB/24-25]) which reads as follows:

> "My name is Ning Sun and I was the allocated Social Worker for Miss Sharmin Khatun … from March 2013 till 19/07/2015 when Sharmin turned 18 years old.
>
> I am writing to confirm that Miss Khatun had Islamic marriage with Mr Alam on 22/10/2013 despite being advised by professionals not to go ahead with the marriage.
>
> Miss Khatun remained in the Local Authority's care after her Islamic marriage till she turned 18. She stayed at her foster placement for 4 nights a week; and she stayed overnight with Mr Alam for 3 nights a week. On a whole, Miss Khatun has matured a lot managing her relationship and continuing her further education.
>
> Miss Khatun moved to a semi independent accommodation on 01/06/2015 at …Mr Alam is allowed to have overnight stays twice a week at her flat.
>
> If you have further questions about this matter, please do not hesitate to contact me."

23. As Judge Obhi points out, that letter was, by the time of the hearing before her, about four years' old. There was no up-to-date evidence, presumably because Ms Khatun no longer had a dedicated social worker. There was no evidence from any of Ms Khatun's foster carers. The evidence was therefore to the effect that Ms Khatun had been in care (without providing any detail as to the reasons or any vulnerability arising from those reasons), that she had entered into a relationship with the Appellant (albeit contrary to the advice of those supporting her) and that, since the relationship, she had (consistently with her own statement) matured a lot. None of that evidence points to why Ms Khatun's previous care status should impact on her ability to move to another country to remain with her husband. Moreover, all of that evidence is reflected in what is said by the Judge at [19] of the Decision.

24. Mr West submitted at one point that it was difficult to challenge what was said at [19] of the Decision directly because there is a lack of any finding. That is to misunderstand the nature of the Judge's task which is to assess the evidence by relevance to the test which applies rather than to make individual findings of fact, particularly where, as here, there is no issue taken with credibility.

25. The Appellant does not dispute that he bears the burden of demonstrating the strength of his family life with Ms Khatun and the extent of the interference with that family life. It is not suggested that it is not for him to show that there are insurmountable obstacles to family life continuing in Bangladesh. As I have already observed, the evidence about the relevance of Ms Khatun's former status is dealt with in her statement by reference to the impact of her relationship rather than how moving to Bangladesh would affect her for that reason. Leaving that aside, the Appellant and Ms Khatun were putting forward a case that her former status was relevant to their ability to move their family life to Bangladesh. It was for them to provide the evidence that this is so.

26. The Appellant puts his case on ground two as being a breach of procedural fairness on the basis that the Judge should have put her concerns about lack of information to him or Ms Khatun. However, fairness has to be considered in context. The Appellant and Ms Khatun were alive to the issues at stake. They had legal professional help in putting together and presenting their evidence. If Mr West (who represented the Appellant before Judge Obhi) had concerns that the evidence did not fully reflect the nature of the Appellant's case, it was open to him to ask the Judge to permit supplementary questions. It was not for the Judge to put questions to elicit relevant evidence.

27. The cases on which the Appellant relies in his grounds are not on point. The case of Secretary of State for the Home Department v Maheswaran [2002] EWCA Civ 173 ("Maheswaran") concerned an issue of fact where credibility was in doubt. So much is evident when [4] of the judgment (as relied upon by the Appellant) is read with what is said at [5] and [6] of the judgment as follows:

> "4. Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a

proper opportunity to deal with the point. Adjudicators must bear this in mind. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the tribunal indicates that it is minded to take that course. Cases can occur when fairness will require the reopening of an appeal because some point of significance – perhaps arising out of a post hearing decision of the higher courts – requires it. However, such cases will be rare.

5. Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that 'least said, soonest mended' and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds.

6. The requirements of fairness are very much conditioned by the facts of each case. This has been stressed in innumerable decisions – see the many citations to this effect in *Rees v Crane* [1994] 2 A.C.173. We have no doubt that the claimant's submission is framed in terms which are far too wide and in words which are not to be rigidly applied to every situation. Whether a particular course is consistent with fairness is essentially an intuitive Judgment which is to be made in the light of all the circumstances of a particular case – see *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 *per* Lord Mustill at p.560D. …"

[my emphasis]

28. The points made by the Court of Appeal in Maheswaran have no bearing on this case. As I have already pointed out, the task for the Judge was to assess the evidence in the context of the issue she had to decide and not to make findings of fact save where such were relevant. In this case, no issue was taken with the credibility of either the Appellant or Ms Khatun. The Judge was simply assessing the evidence based on the facts as relied upon being true. As I have already said, and as is mirrored in the Court of Appeal's judgment in Maheswaran, fairness depends on context.

29. Similarly, the case of Re D [1995] UKHL 17 ("Re D") is not relevant. The Appellant places reliance on [7] of the judgment as follows:

"My Lords, it is a first principle of fairness that each party to a judicial *process* shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer. The requirement of openness is particularly important in proceedings for adoption, not only because it may lead to the deprivation of parental rights, in the self-

> centred meaning of that word, but because a successful application to adopt brings about a total rupture of the mutual relationship of responsibility and dependency which is the essence of the parental bond. The unique character of the relationship which the parent will lose, and the generally irreversible nature of the loss, make it specially important that in simple fairness to the parent he or she is aware of anything which may tend to bring it about. There is more to it than this, however, since fairness to a parent is a reflection of fairness to the child. The erasure of the bond with the natural parent and the creation of an entirely new set of responsibilities and dependencies shared with the adopters is an event of critical importance in the life of the child, whose paramount welfare demands that such a momentous step is taken only after a process which is as fair and thorough as can be devised."
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> [my emphasis]

30. Re D concerned a point which had been taken against the appellant of which she had no knowledge based on material which she had not seen. That is not this case. Here the Appellant and Ms Khatun were the ones providing the evidence put before Judge Obhi. They had control over and were responsible for making out their case. If, with the benefit of the legal assistance they had throughout, they did not adequately evidence their case that was not because of any error made by the Judge.

31. Nor can it be said that the Judge failed to consider the evidence put forward or to provide adequate reasons for her assessment. As I have already pointed out, if anything, the Judge has taken into account the fact of Ms Khatun's former care status as reason why she might not be able to move to Bangladesh even where that is not reflected in the evidence itself. She has provided reasons which are adequate to explain why she did not accept that this factor (and the others relied upon) amounted to an insurmountable obstacle to the Appellant and Ms Khatun relocating to Bangladesh.

32. For the sake of completeness, I also deal with the point made at [37] to [42] of the grounds that, when considering the test under Paragraph EX.1 at [19] of the Decision, the Judge has erred by considering only the obstacles to the Appellant's return and not those impacting on Ms Khatun.

33. Although the Judge says at [19] of the Decision that the Appellant "has to show that there are insurmountable obstacles to him returning to live" in Bangladesh, it is evident that what follows is considering only the position of Ms Khatun. That is unsurprising since the impact on Ms Khatun was at the heart of the Appellant's case as recorded at [18] of the Decision. I do not accept that the use of the words "unduly harsh" at [21] of the Decision reflect any error of law. Those words import the same high threshold as "very significant difficulties" or "very serious hardship". Whilst ideally the Judge should have used the same wording as in Paragraph EX.2, this does not amount to any misdirection in law. The Judge has explained at [21] of the Decision why the situation which Ms Khatun would face in Bangladesh (her cultural adaptation and availability of support from the Appellant and his family to adapt as well as the

lack of evidence of any ties beyond the Appellant in the UK) does not meet the threshold. There is no inadequacy of reasoning.

34. For those reasons, there is no error of law disclosed by ground two.

Ground One

35. I move on then to ground one which was the main focus of Mr West's submissions before me.

36. The Judge summarised the Appellant's submissions in relation to the Chikwamba principle at [24] and [25] of the Decision as follows:

> "24. The appellant does not wish to return to Bangladesh. The only reason he gives for wanting to stay in the UK, apart from the fact that he decided in 2007 when his visa expired that he was just not going to return, is his relationship with his wife. Mr West invites me to place little weight on the fact that he is in the UK illegally and to consider whether, at the date of this hearing, he meets the Immigration Rules and if he does to find that as he is certain to get entry clearance there is little point in returning him to Bangladesh. In considering the case of both Agyarko and Hesham Ali there is support for this argument. I am invited to find that the appellant's wife can demonstrate through the letter from her employer that she meets the maintenance requirement of a minimum salary of £18600 per annum and that he has passed the English language test and hence he meets the rules and so should be granted leave to remain, as there is no public interest in requiring someone to return simply to be granted entry clearance once they have returned.
>
> 25. In order for me to be satisfied that this is the case, I would have to assess the financial information provided in this case by reference to Appendix FM-SE. In addition to that, I have concerns about the relationship to which I have referred earlier in this decision."

37. I begin by observing that the Judge considered the Chikwamba issue when assessing the Appellant's outside the Rules (as she was obliged to do). As such, the finding that Paragraph EX.1 was not met and therefore that the Appellant could not satisfy the Rules was relevant to the Judge's consideration also of this issue. Indeed, the Judge noted as much at [28] of the Decision when recording what was said by the Supreme Court in Agyarko. The Judge also recorded at [27] of the Decision that she was required to place little weight on a relationship formed with a qualifying partner at a time when the appellant was in the UK unlawfully" (as is required by Section 117B of the 2002 Act – "Section 117B"). I will come on to the importance of those factors below when considering the case-law.

38. It is also important to note, as did the Judge at [31] of the Decision, that, when assessing the claim outside the Rules, the context involves a "balancing exercise between the private rights of the appellant and the public interest". That self-direction is entirely consistent with the approach advocated by the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 ("Hesham Ali").

39. The Judge dealt with that balancing exercise at [32] and [33] of the Decision as follows:

> "32. I have considered whether there are any compelling circumstances in this case. I am invited to find that the sponsor is now earning sufficient money to maintain them both and that they meet the requirements of the Immigration Rules in relation to maintenance and in relation to the appellant speaking English. I have considered whether this is a Chikwamba situation, as the case of Agyarko stated clearly that in a case in which there was little point in returning an individual simply to force them to make an entry clearance application which was going to be successful, or to use the words from Agyarko if an applicant, 'even if residing in the UK unlawfully – was otherwise certain to be granted leave to enter at least if an application were made from outside the UK, then there might be no public [interest] in his or her removal'.
>
> 33. In applying the guidance from the case law, and in carrying out a balancing exercise I note the following. In the appellant's favour is that he appears to be in a subsisting relationship with Ms Khatun, who is able to maintain him. I place due weight on the fact that she has been a looked after child and claims to have no contact with her birth relatives, but as I have commented above, I just do not know enough about her history to make an assessment of the circumstances of her past and her marriage. The fact that she has been a looked after child, does not, as the appellant suggests in his statement make her 'abnormal'. The comment in the social worker's statement about her being advised against the marriage is concerning. The information presented by the appellant is selective. Against his interests is the fact that he has blatantly disregarded the undertaking given to the ECO when he came to the UK, namely that he would return to Bangladesh when his visa expired. As Ms Lambert pointed out, such behaviour undermines the immigration system and creates a mistrust of genuine visitors. I am satisfied that the appellant's private rights are not such that the wider public interest should be set aside. There is a public interest in reminding the appellant and others in his position that there are Article 8 compliant rules in relation to family life, and that if he wishes to make a family life in the UK, he can do so, by making the same applications as others in his position; there is nothing exceptional in his case which entitles him to be treated differently to those who comply with the law."

40. The Appellant's ground one relies on the exposition of the Chikwamba principle by the Supreme Court in Agyarko. The Judge set out her understanding of that judgment at [28] of the Decision. The Appellant places reliance on [51] of the judgment in Agyarko as follows:

> "51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department.*"

41. It is important to note however the context in which this is said. This paragraph appears in the context of consideration of the importance of the precariousness of the foreign national's status at the time of application and the importance of the parties' knowledge about that status. At [49] of the judgment, the Supreme Court pointed out that the ECtHR, in its case law, places importance on that knowledge as a relevant consideration because family life has been developed in the knowledge by the parties that the foreign national spouse might not be entitled to stay. As the Supreme Court there observed, the Grand Chamber had said that "[w]here this is the case, the court said, 'it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8'." The Supreme Court was making the point that the relative importance of this factor might be diminished from a level of being "very considerable" to one where the public interest did not require removal. The Respondent has emphasised in the Rule 24 Reply the Supreme Court's use of the word "might".

42. I recognise that in this case, the Judge accepted that Ms Khatun was not aware from the outset that the Appellant was in the UK unlawfully. Her evidence, recorded at [16] of the Decision, is that she knew initially that he was from Bangladesh but not that he was here unlawfully. However, he told her afterwards and "she was okay with it". It is there recorded that "she was concerned about him being in the UK unlawfully but that she thought there would be a way of him staying in the UK because of their relationship." However, the issue for the Judge was whether the public interest required removal taking into account all factors. Indeed, the Judge recognised that point in her citation of [57] of the judgment in Agyarko at [29] of the Decision.

43. The Appellant also places reliance in the grounds on what is said by the Supreme Court in Hesham Ali as follows:

> "34. It is, however, necessary to bear in mind that whether the continuation of family life in the UK is uncertain may be a more complex question than it might appear at first sight. For example, where a person was residing in the UK unlawfully at the time when the relationship was formed, but would have been permitted to reside here lawfully if an application were made from outside the UK, the latter point should be taken into account. That example illustrates how the distinction between settled migrants and aliens residing in the host country unlawfully may be, in some situations, of limited practical importance when translated into the context of UK immigration law (see, for example, *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40; [2008] 1 WLR 1420)."

44. That passage also has to be read however in context of what precedes it as follows:

> "33. Considering next the factors which should be taken into account, those mentioned in the *Boultif* line of cases have a bearing on the proportionality of the deportation of foreign offenders, whether they are settled migrants or not. Where they are not settled migrants, it will also be necessary to have regard to the factors mentioned in *Jeunesse,* so far as relevant and not already taken into account: notably, whether there are insurmountable obstacles or major impediments in the way of the family living in the country of origin of the alien concerned; whether there are factors of immigration control, such as a history of breaches of immigration law; and whether the family life was created at a time

> when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. Those factors were mentioned in *Jeunesse* in a context where family life was relied on to defeat immigration control at the point of admission to the host country. But it is also relevant to consider, in the context of liability to deportation because of criminal behaviour, whether the offender has a bad immigration history, or whether there are major impediments to continuing family life in his country of origin, or whether family life was established in the knowledge that, because of the immigration status of one of the persons involved, its continuation in the UK was uncertain. If that were not so, the perverse consequence would follow that these matters would be liable to carry greater weight if a non-offender were sought to be removed on account of his irregular immigration status than if an offender with the same immigration status were sought to be removed on account of serious criminal conduct."

45. Hesham Ali was a deportation case; hence the reference to the need to have regard to the same factors as arise in a non-deportation case. As the Supreme Court later pointed out in Agyarko, as I have noted above, the precariousness of family life is one factor to be weighed in the balance. The other is whether family life could be continued in the foreign national's country of origin. That consideration is now expressly stated in Paragraph EX.1. In this case, the Judge had found that the Appellant was unable to satisfy Paragraph EX.1 because family life could be continued in Bangladesh. That was not the situation in Chikwamba where the appellant's husband was a recognised refugee from Zimbabwe and could not be expected to return there with his wife. Overall, as I have already observed, the Chikwamba issue is one factor to be dealt with alongside others when assessing the public interest in removal and how that is to be balanced against the interference with family life.

46. The Appellant's grounds also refer to the Court of Appeal's judgment in VW (Uganda) v Secretary of State for the Home Department [2009] EWCA Civ 5 at [43] where Sedley LJ described as "false logic" the Respondent's submission that, if the foreign national is bound to be granted entry clearance on an application to return, this renders removal disproportionate (in essence because the family separation will be temporary only). Sedley LJ observed that the opposite was likely to be true (because the public interest would not bear so much weight). Again, though, that has to be read in the context of the argument which was being put forward rather than supporting any general proposition of law that the public interest does not require removal where a person is likely or even certain to succeed on an application to return.

47. That brings me on to Mr West's somewhat surprising oral submission which could be summarised as being that in any case where a foreign national is certain to obtain entry clearance if an application is properly made, then the public interest would not require removal. That goes too far. It is merely one of the factors which may need to be considered depending on the circumstances (as the Supreme Court's judgments in Agyarko and Hesham Ali make clear).

48. Mr West relied in this regard on the judgment of Turner J in R (oao Shuai Zhang) v Secretary of State for the Home Department [2013] EWHC 891 (Admin) ("Zhang").

That was a judicial review challenge and not an appeal. As such, the Judge was there considering only whether the Respondent's decision was unlawful applying public law principles rather than deciding the Article 8 issue for himself. The factual context is also important as the Judge was there considering a blanket requirement under the Rules for a person in the applicant's situation to return to her home country in order to "switch" status. That is the context in which the Judge made the observation that it would "be rare indeed" that removal would be proportionate. The applicant in that case was a person who had remained in the UK with lawful status which was extant when she formed her family life. The absence from the UK would be, on the Respondent's own argument, temporary only which the Judge considered to be relevant to the public interest in removal (as had Sedley LJ in VW (Uganda)). That is not this case. Here, the Appellant is here unlawfully, has entered into his family life with Ms Khatun when he knew that he had no right to be here, and the Judge has found that family life can be expected to be continued in Bangladesh (such that a permanent absence from the UK could be enforced without a breach of Article 8 ECHR).

49. VW (Uganda) and Zhang are cases which pre-date not only both of the Supreme Court judgments to which I have made reference but also the statutory requirement for Judges to have regard to the public interest factors in Section 117B. The public interest factors to which a Judge is bound to have regard include not only the precariousness of the family life but also the public interest in the maintenance of effective immigration control.

50. The Respondent for her part relies on this Tribunal's decision in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC) ("Younas"). She cites in the Rule 24 Reply paragraphs [78] to [90] of the Decision. I do not need to set out paragraphs [78] to [84] which are largely concerned with what is said in Chikwamba and Agyarko. I have already dealt with what is said in those cases. I have regard however to paragraphs [85] to [90] which make reference to other cases about the extent of the application of the Chikwamba principle as follows:

> "85. If, as the appellant claims, the principle of *Chikwamba* is that, irrespective of individual circumstances, there is no public interest in requiring a person to leave the UK simply in order to make a successful application for entry clearance, then the individual circumstances of an appellant (including issues such as the difficulties they might face on return) would be irrelevant. All an appellant would need to show is that he or she would succeed in the application from abroad as that would be sufficient to establish that there is no public interest in removal (and therefore removal is disproportionate). The difficulty with this interpretation of *Chikwamba* is that it does not explain why Lord Brown engaged in a detailed consideration of the individual and particular circumstances of the appellant (specifically, that the conditions in Zimbabwe were 'harsh and unpalatable', her husband could not accompany her and she would need to bring to Zimbabwe - or be separated from - her child). These factors, which form part of Lord Brown's reasoning to support his conclusion that there was not a public interest in the appellant's removal, would have been irrelevant if all that mattered was that the appellant would be granted entry clearance.

86. The appellant's interpretation of *Chikwamba* also ignores the analysis of Lord Brown at paragraphs 41-42 where he made clear that in some cases there will be a public interest in removing (and it will not be disproportionate to remove) a person from the UK even though they will be granted entry clearance when applying from abroad. He noted that the appellant in *R (Ekinci) v SSHD* [2003] EWCA Civ 79 (a person with an appalling immigration history who would only be required to travel to Germany for one month for a decision on his application) was such a person. In addition, he identified factors relevant to both whether there is public interest in removal (a person's immigration history) and whether temporary removal would be disproportionate (the prospective length and degree of family disruption, and the circumstances in the country of temporary return).

87. The Court of Appeal, when interpreting *Chikwamba*, has been clear that the case does not stand for the proposition that it is sufficient, in order to resist removal under article 8 ECHR, for an appellant to show that he or she would succeed in an entry clearance application. In *Secretary of State for the Home Department v Hayat (Pakistan)* [2012] EWCA Civ 1054, for example, the Court of Appeal upheld a First-tier Tribunal decision that removal would be proportionate, even though an entry clearance application would succeed. Elias LJ found at para. 52 that the individual circumstances of the case (where separation would be short, family life could continue outside the UK, the appellant had no legitimate expectation of a right to remain, and the consequences of separation would be far less serious than that in *Chikwamba*) were such that ' there were cogent factors justifying the conclusion that Article 8 was not infringed by requiring the appellant to return to Pakistan.'

88. Mr Lindsay drew our attention to a more recent Court of Appeal judgment in which the *Chikwamba* principle was considered: *Kaur, R (on the application of) v Secretary of State for the Home Department* [2018] EWCA Civ 1423. The appellant's argument raising the *Chikwamba* principle was not ultimately decided by the Court but the nature of the principle was discussed. Holroyde LJ noted that the facts in *Chikwamba* were 'stark'. At paragraph 45 he stated:

> 'I have quoted in paragraph 26 above the passage in which Lord Reed (at paragraph 51 of his judgment in *Agyarko*) referred to *Chikwamba*. It is relevant to note that he there spoke of an applicant who was 'certain to be granted leave to enter' if an application were made from outside the UK, and said that in such a case there *might* be no public interest in removing the applicant. That, in my view, is a clear indication that the *Chikwamba* principle will require a fact-specific assessment in each case, will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain.'

89. The Upper Tribunal considered the *Chikwamba* principle in *R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM - Chikwamba - temporary separation - proportionality)* IJR [2015] UKUT 189 (IAC). Upper Tribunal Gill observed that Lord Brown was not laying down a legal test when he suggested in *Chikwamba* that requiring a claimant to make an application for entry clearance would only 'comparatively rarely' be proportionate in a case involving children, and that in all cases it will be for the individual to demonstrate, through evidence, and based on his or her individual circumstances, that temporary removal would be disproportionate.

> 90. *Chikwamba* pre-dates Part 5A of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act'), which was inserted by the Immigration Act 2014. Section 117A(2) of the 2002 Act provides that a court or tribunal, when considering 'the public interest question,' must have regard to the considerations listed in section 117B (and 117C in cases concerning the deportation of foreign criminals, which is not relevant to this appeal). The 'public interest question' is defined as 'the question of whether an interference with a person's right to respect for private and family life is justified under article 8(2)'. There is no exception in Part 5A of the 2002 Act (or elsewhere) for cases in which an appellant, following removal, will succeed in an application for entry clearance. Accordingly, an appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the 2002 Act including section 117B(1), which stipulates that 'the maintenance of effective immigration controls is in the public interest'. Reliance on *Chikwamba* does not obviate the need to do this."

51. The final two sentences of [90] of the decision in Younas are repeated in [1] of the headnote for which the case is reported. What is said in that paragraph is consistent with my observations above concerning VW (Uganda) and Zhang. The other cases mentioned in the decision for the most part post-date those judgments. The citation at [88] of the decision reflects the Respondent's reliance on the use of the word "might" in the Supreme Court's judgment in Agyarko. The point made at [85] of the decision undermines Mr West's wider submission that removal in circumstances where an appellant would be certain to obtain entry clearance is the exception rather than the rule (my paraphrase). As the decision in Younas makes clear, the Chikwamba principle is merely part of an overall consideration of where the public interest lies in a particular case.

52. This brings me on to the way in which the Judge dealt with the Chikwamba issue in this case and the Appellant's criticism of her reasoning.

53. I accept that the Judge did not make a finding whether the financial requirements of the Rules were met, having recorded the Appellant's submissions on that point as set out at [25] of the Decision (as cited above). However, that is because she did not need to for reasons I will come to. In any event, as Mr Tufan pointed out, the Respondent had not taken issue in the decision under appeal with any of the requirements of the Rules. The Respondent expressly accepted that the Appellant met the Rules in relation to financial eligibility and English language. She also accepted the genuineness of the relationship with Ms Khatun. She had concluded however that family life could be continued in Bangladesh, that Paragraph EX.1 was not therefore met and for that reason removal would be proportionate.

54. As I have pointed out, the Judge correctly considered the Chikwamba issue as one of the factors which was relevant to the overall proportionality balance. She had recorded the Appellant's submission as being that the Appellant would be certain to meet the Rules. However, due to his immigration status, she had found that he could not meet the Rules. The Judge had found that the Appellant did not meet Paragraph

EX.1. As such, under the Rules, he could be required to leave the UK permanently without any breach of Article 8 ECHR. It would thereafter be a matter for him whether to apply to re-enter the UK as Ms Khatun's husband or whether they should remain in Bangladesh. The Judge also placed emphasis on the word "certain" in her citation from Agyarko at [32] of the Decision (that word is not emphasised in the Supreme Court's judgment). As I have already recorded, the Supreme Court in Agyarko had made the point that, even where a grant of entry clearance might follow, that only "might" impact on the public interest. It is not necessarily the case. The public interest has to be considered as a whole.

55. The relevance of the Chikwamba principle was therefore one of the factors which the Judge considered at [33] of the Decision when assessing the public interest in removal. She there noted the importance of the Appellant's unlawful immigration status in the context of the public interest. He had overstayed his leave having told an entry clearance officer that he intended to return to Bangladesh on the expiry of that leave. She had already noted the precariousness of family life and the relevance of that and the finding that the family life could be continued in Bangladesh. For that reason, the Judge concluded, in the final sentence of [33] of the Decision that the public interest legitimately required that the Appellant return to Bangladesh to make an application as any other spouse in his position and if the couple chose not to return to live in Bangladesh permanently.

56. Having placed the Chikwamba principle alongside other factors favouring the public interest in removal and concluded that it did not alter the public interest balance for removal, there would be no point in making any findings whether the Appellant would qualify for entry clearance were he to make an application to return as Ms Khatun's spouse.

57. For that reason, the Judge did not err in her consideration of the Chikwamba principle and its application in this case. Ground one does not disclose any error of law.

CONCLUSION

58. For the foregoing reasons, I am satisfied that there is no error of law in the Decision. I therefore uphold the Decision with the result that the Appellant's appeal remains dismissed.

DECISION

The Decision of First-tier Tribunal Judge Obhi promulgated on 29 October 2019 does not involve the making of an error on a point of law. I therefore uphold the Decision.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 17 June 2021