Neutral Citation Number: [2023] EWCA Civ 30

Case Nos: CA-2021-000112 and CA-2022-000372

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Upper Tribunal (Immigration and Asylum) Chamber
Upper Tribunal Judge Smith
HU/10354/2019 and PA/06610/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 January 2023

Before:

LORD JUSTICE PETER JACKSON
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE SNOWDEN

- -

Between:

SHAH MD JAHANGIR ALAM
and
ATAUR RAHMAN — **Appellants**

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

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- -

Zane Malik KC and Mazharul Mustafa (instructed by **Imran Hossain (Kalam Solicitors)**) for the **Appellants**
William Hansen (instructed by **Tanya Robinson (The Treasury Solicitor)**) for the **Respondent**

Hearing date: 22 November 2022

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Approved Judgment

This judgment was handed down remotely at 11 am on 19 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. The Appellants, Shah Md Jahangir Alam ('A1') and Ataur Rahman ('A2') appeal, with permission granted by Coulson LJ and Newey LJ respectively, from determinations of the Upper Tribunal (Immigration and Asylum) Chamber ('the UT') which dismissed their appeals from determinations of the First-tier Tribunal ('the F-tT'). The F-tT had dismissed the appeals of each appellant from decisions of the Secretary of State. In A1's case, the UT held that there was no error of law in the F-tT's determination, and upheld it. The UT held in A2's case that the F-tT had erred in law, set aside the determination of the F-tT, re-made it, but nevertheless dismissed the appeal.

2. Both appellants entered the United Kingdom for avowedly temporary purposes (in 2007) and have lived in the United Kingdom unlawfully for many years after the expiry (in January 2008 and April 2009 respectively) of their leave. Each wishes, despite that, to stay in the United Kingdom, relying on a relationship with a British citizen wife or partner which started and/or continued when they were here unlawfully, to the knowledge of the wife/partner.

3. In these appeals A1 and A2 were represented by Mr Malik KC and Mr Mustafa. Mr Hansen represented the Secretary of State. I thank counsel for their written and oral submissions.

4. Paragraph references are to the determinations of the UT or the F-tT in each appeal, as the case may be, or, if I am considering an authority, to paragraph numbers of that authority.

5. The main issue on these appeals is whether the decision of the House of Lords in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40; [2008] 1 WLR 1420 now has any, and if so, what, bearing on the issues which tribunals have to consider when appellants who have been in the United Kingdom unlawfully for many years resist their removal on article 8 grounds, when the fact-finder has decided that they can continue their family life abroad. A1 also has leave to argue that the F-tT erred in law in holding that there were no insurmountable obstacles to the continuation of his family life in Bangladesh.

6. For the reasons given in this judgment, I have reached five conclusions. Three are matters of general principle. The others concern the present appeals.

    i. The decision in *Chikwamba* is only potentially relevant on an appeal when an application for leave to remain is refused on the narrow procedural ground that the applicant must leave the United Kingdom in order to make an application for entry clearance.
    ii. Even in such a case, a full analysis of the article 8 claim is necessary. If there are other factors which tell against the article 8 claim, they must be given weight, and they may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance.

iii. A fortiori, if the application is not refused on that procedural ground, a full analysis of all the features of the article 8 claim is always necessary.
iv. Neither tribunal erred in law in its approach to *Chikwamba*.
v. The F-tT did not err in law in the case of A1 by applying the test of 'undue harshness' rather than the test of 'insurmountable obstacles'.

The relevant statutory provisions

7. Section 82(1) of the 2002 Act gives a person a right of appeal to the F-tT where the Secretary of State has refused a human rights or protection claim made by him. That right of appeal is subject to the exceptions and limitations specified in Part V of the 2002 Act (section 82(3)). Section 84 provides for the grounds of appeal, and section 85 for the matters which the tribunal must consider on such an appeal.

8. Part 5A of the 2002 Act was inserted by the Immigration Act 2014. It applies when a court or tribunal has to decide whether a decision under the Immigration Acts is a breach of article 8 and therefore would be unlawful under section 6 of the Human Rights Act 1998 ('the HRA') (section 117A(1)). In considering the public interest question, a court or tribunal 'must (in particular) have regard - (a) in all cases to the considerations listed in section 117B, and (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C' (section 117A(2)). The 'public interest question' is whether an interference with article 8 is justified under article 8(2) (section 117A(3)).

9. Section 117B is headed 'Public interest considerations applicable in all cases'. It lists five considerations.
   i. The maintenance of effective immigration control is in the public interest.
   ii. It is in the public interest that people who ask to enter, or to stay in, the United Kingdom, are able to speak English (for two stated reasons).
   iii. It is in the public interest that such people are financially independent (for two similar reasons).
   iv. 'Little weight should be given' to a private life, or to a relationship with a qualifying partner, which is established when a person is in the United Kingdom unlawfully.
   v. 'Little weight should be given' to a private life or to a relationship formed with a qualifying partner when a person's immigration status is precarious.

10. 'Qualifying partner' is defined in section 117D. It means a partner who is a British citizen or 'who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see section 33(2A) of that Act)'. Section 33(2A) defines a person as being settled if he is 'ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain'.

The Immigration Rules (HC 395 as amended)

11. At the time of these appeals, the relevant provisions of the Immigration Rules (HC 395 as amended) ('the Rules') dealt with article 8 in two broad ways. Appendix FM contained provisions which explained what conditions an applicant had to satisfy in order to get leave to remain under the Rules on the grounds of his family or private life.

Paragraph EX.1 of Appendix FM provided an exception to the requirements of Appendix FM if the applicant had a relationship with a 'qualifying partner' and there were 'insurmountable obstacles' to continuing that relationship abroad. A 'qualifying partner' included a partner who was a British citizen. Those provisions were introduced with effect from July 2012.

The main authorities

Chikwamba

12. The appellant in *Chikwamba* was a national of Zimbabwe. She arrived in the United Kingdom in 2002 and claimed asylum. The Secretary of State refused her claim but decided not to remove her because conditions in Zimbabwe had got worse. The Secretary of State removed nobody to Zimbabwe for about two and a half years. In September 2002 she married another Zimbabwean who had been granted asylum in the United Kingdom. She had known him since she was a child. The Secretary of State refused her article 8 claim based on her marriage. In April 2004 they had a daughter. Her appeals against that decision were dismissed by the Immigration Appeal Tribunal, essentially on the ground that in accordance with the Secretary of State's relevant policy she should return to Zimbabwe and apply for entry clearance from there, and that a relatively short separation from her husband (who could not be required to leave the United Kingdom), did not breach article 8.

13. This Court dismissed the appellant's appeal. The House of Lords allowed it, for reasons given by Lord Brown, with whom the other members of the Appellate Committee agreed. Lord Scott added some reasons of his own, which were not adopted by any other member of the Committee. Lord Brown rejected the appellant's argument that the statutory predecessor of what is now a human rights appeal could never be dismissed on the basis that the appellant ought properly to leave the United Kingdom and to apply for entry clearance from abroad (paragraph 34).

14. He then considered the circumstances in which 'it may be appropriate and proportionate' to dispose of an appeal on that ground. That was 'altogether more difficult' (paragraph 35). In paragraph 37 he quoted the Secretary of State's relevant policy. This stated (in short) that it was likely to be proportionate to require a family to be separated for a short time while one spouse left the United Kingdom and applied for entry clearance. Lord Brown speculated that the purpose of the policy might be to deter people from coming to the United Kingdom without entry clearance by subjecting them to 'the very substantial disruption of their lives involved in returning them abroad' (paragraph 41).

15. He did not consider that 'such an objective is in itself necessarily objectionable'. That course would be reasonable and proportionate in some cases. He described *R (Ekinci) v Secretary of State for the Home Department* [2003] EWCA Civ 765; [2004] Imm AR 15 (in which the appellant had 'an appalling immigration history' and would only have had to travel to Germany and to wait for about a month) as such a case. The reason why the appellant had come to the United Kingdom would be relevant, as would any delay by the Secretary of State, and the 'prospective length and degree of family disruption involved…'. An entry clearance officer abroad might be in a better position to make an informed decision. If the policy might result in a second human rights appeal with the

appellant abroad and unable to give live evidence, that would be a less good reason to apply the policy (paragraph 42).

16. The Secretary of State's policy seemed to apply to all article 8 cases, whether or not the Rules also applied. Lord Brown was surprised that the Secretary of State did not appear to have relied on the policy in two recent appeals to the House of Lords (paragraph 43). He did not suggest that the Secretary of State should apply the policy routinely. His view was that it was only 'comparatively rarely, certainly in family cases involving children', that an article 8 appeal should be dismissed on the ground that it would be proportionate and more appropriate to require the appellant to apply for entry clearance from abroad (paragraph 44).

17. His conclusion was that 'No one apparently doubts that, in the longer term, this family will have to be allowed to live together here'. He asked, rhetorically, whether it could really be said that effective immigration control required the appellant and her daughter to go back to Zimbabwe '(perhaps at taxpayer's expense)', when returns there had been suspended, where conditions were 'harsh and unpalatable', and only for a few months, before returning at her own expense to resume her family life which in the 'meantime will have been gravely disrupted'. He said that there was only one right answer to his rhetorical question (paragraph 46).

Decisions of this Court to which Chikwamba was relevant

VW (Uganda) v Secretary of State for the Home Department

18. There were two appellants in *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5; [2009] INLR 295. The first appellant, a Ugandan national, was an overstayer. She formed a relationship with a partner when she had no leave to remain. They had a child. The Secretary of State refused her application for leave to remain on article 8 grounds. In the first appeal, the immigration judge had decided that the appellant's removal would not be disproportionate on two grounds: there were no insurmountable obstacles to family life in Uganda and it would be open to the appellant to apply for entry clearance from abroad.

19. The second appellant had come to the United Kingdom from Kenya where, having fled Somalia, he had been living for ten years with his spouse and six children. His application for asylum was refused, but he was given exceptional leave to remain in the United Kingdom. His family applied for entry clearance to join him. The Secretary of State refused the application.

20. The main issue on the appeals was whether the Asylum and Immigration Tribunal ('the AIT') had erred in law in asking whether there were 'insurmountable obstacles' to family life abroad, or not. This Court held that the question of proportionality, rather, depended on a judgment about what was reasonable in all the circumstances. This Court dismissed the first appeal on the ground that the test which had been applied was not, in substance, a test of insurmountable obstacles.

21. In the first appeal, this Court held that the AIT had not sufficiently recognised the flaws in the decision of the immigration judge. It did not explain why it was reasonable for the whole family to go to Uganda (paragraph 35). Sedley LJ, giving a judgment with

which the other members of this Court agreed, held that the appellate authority had erred in law.

22. In a passage on which A1 and A2 relied, Sedley LJ noted (at paragraph 43) that the Secretary of State had, 'in the past…urged that there is relatively little hardship in breaking up a family by removal where the removed spouse can immediately apply for entry clearance on return'. He referred to *Chikwamba*. That decision 'for reasons which it is not necessary to reproduce here, has called a halt to this false logic. The likelihood of return via entry clearance should not ordinarily be treated as a factor rendering removal proportionate; if anything, the reverse is the case.'

23. In paragraph 49 he considered the question whether or not the first appeal should be remitted to the AIT. The second appellant submitted that her removal would be so 'plainly disproportionate' that her appeal should succeed outright. Sedley LJ said that the decision in *Chikwamba* tipped the scales in the appellant's direction. The appellate authority had declined to speculate on the question whether the appellant would be given entry clearance if she applied for it on her return to Uganda. Sedley LJ said 'the likelihood that the appellant will eventually secure entry clearance in order to return…, far from diminishing the claim to remain, is capable, in a case such as this, of strengthening it'.

24. His conclusion was that despite elements which could tell against the article 8 claim, 'the enforced break-up of this family – the more so, not the less, if the break-up is only temporary, is not justified by the legitimate demands of immigration control'. She was no more than a failed asylum seeker, her partner did not have a job, but he was the child's joint carer, and the United Kingdom was his home. 'Above all consideration is owed to a child who is a British citizen, and who, whatever was to follow her mother's removal, would be the principal sufferer. In the end there is only one right answer' (paragraph 50).

Hayat v Secretary of State for the Home Department

25. The appellant in the first appeal in *Hayat v Secretary of State for the Home Department* [2012] EWCA Civ 1054; [2013] INLR 17 was the Secretary of State. The applicant was a citizen of Pakistan. He had leave to remain in the United Kingdom as a post-study worker. The Secretary of State refused his application to vary that leave for leave to remain as the partner of citizen of Pakistan who had leave to remain as a student. The Rules provided that in order to succeed in an application for leave to remain as a partner of a student, the applicant must have leave to remain in that capacity. On his appeal, the F-tT held that he should leave the United Kingdom and apply for entry clearance from Pakistan, and that the decision in *Chikwamba* did not require otherwise.

26. The appellant in the second appeal entered the United Kingdom as a student. His leave to remain was extended as leave to remain as the spouse of a student. The marriage then broke down. He left home just before his leave to remain expired. His application for further leave to remain as a student was refused on the grounds that he did not satisfy the requirements of the relevant provision of the Rules. The F-tT decided that it was not disproportionate to require the appellant to return to Mauritius. The UT upheld the decision of the F-tT. On his appeal to this Court, he argued that the only reason for this

requirement was a procedural one, that is, to apply for entry clearance, and that it was contrary to the decision in *Chikwamba* to require him to do that.

27. Elias LJ, giving a judgment with which the other members of this Court agreed, said that the appeals concerned the 'proper scope and application of …*Chikwamba*…' (paragraph 1). He then analysed the decision in *Chikwamba*. He said that the article 8 claim in *Chikwamba* was particularly strong. A preliminary assessment of the merits of an article 8 claim may be relevant to whether a policy of requiring an application for entry clearance should be enforced. Often the merits would not be clear without careful assessment of the facts, which would therefore be relevant to whether the policy should be enforced or not. A dogmatic adherence to such a policy in other cases might also be a disproportionate interference with article 8 (paragraph 17).

28. It might seem odd, he observed, that article 8 could be infringed by an unjustified insistence that the applicant return home to make an application, even if a subsequent refusal of the application would not. That is because an interference with family life must be justified. A requirement to comply 'with formal procedures may be insufficient to justify even a temporary disruption to family life. By contrast, a full consideration of the merits may readily identify features which justify a refusal to grant leave to remain' (paragraph 18).

29. In paragraph 26 he added that *Chikwamba* 'provides that at least where Art 8 is engaged, the decision maker should not, absent some good reason, fail to engage with the merits and dismiss the claim on the ground that the application should be made from abroad'.

30. He then considered three later decisions of this Court. He summarised their effect in seven propositions (paragraph 30).

    i. If an applicant who does not have entry clearance makes an article 8 claim, dismissing that claim on the procedural ground that policy requires him to apply for entry clearance from abroad, may be, but is not always, an interference with family life which is sufficient to engage article 8, particularly if there are children.
    ii. If there is an interference with article 8, it will be disproportionate to enforce such a policy unless there is a sensible reason for doing so.
    iii. Whether it is sensible depends on the facts. Various factors are potentially relevant.
    iv. When there is an interference with article 8 and there is no sensible reason for enforcing the policy, the decision maker should decide the article 8 claim on its merits, despite the fact that the applicant does not have entry clearance.
    v. It will not be appropriate for this Court, having decided that the tribunal has interfered disproportionately with article 8 rights by enforcing the policy, to make the article 8 decision for itself unless there is only one right answer.
    vi. Nothing in *Chikwamba* was intended to change the way in which the courts should approach substantive article 8 issues.
    vii. The cases do not say so, but if there is no sensible reason to require an applicant to leave the United Kingdom and to apply for entry clearance from abroad, the fact that he has not done so should carry no weight in the article 8 balance.

31. Elias LJ held that the focus of the F-tT in the first appeal was on three things which went to the substantive merits of the article 8 claim, and were relevant to the question whether it was in any event legitimate to require the applicant to leave the United Kingdom and to apply for entry clearance. They were that neither the applicant nor his wife had any expectation of a right to remain, family life could continue in Pakistan and that any period of separation would be short. Elias LJ held that all three were relevant to the article 8 balance. The UT had erred in law in holding that the only factor against the article 8 claim was that the applicant had not applied for entry clearance. 'On the contrary, there were cogent factors justifying the conclusion that article 8 was not infringed by requiring the appellant to return to Pakistan' (paragraph 52). He allowed the first appeal.

32. In the second case, Elias LJ held that the UT's approach was that the Secretary of State had not refused leave on the ground that the appellant should leave the United Kingdom and apply for entry clearance, and the F-tT had not based its decision on a requirement to leave the United Kingdom and to apply for entry clearance as a student, but rather, on the ground that it was reasonable for him to return to Mauritius and to continue his private life there. *Chikwamba* had been introduced in argument by the appellant's representative, and the F-tT had rejected the argument that it was relevant.

33. One of the grounds of appeal was that the only real reason why the appellant was being sent back to Mauritius was a procedural one; that is, so that he should apply for entry clearance, an application which, it was submitted, was bound to succeed. That would be to impose 'a wholly unnecessary and formal requirement which achieves no legitimate objective so far as immigration control is concerned' (paragraph 80). Elias LJ held that that was a mis-reading of the F-tT's decision. The F-tT did not make its decision on 'a procedural basis at all'. The F-tT considered the merits of the article 8 claim, and rejected it. The F-tT did 'a full proportionality assessment considering the merits of the claim. *Chikwamba* has no application in those circumstances' (paragraph 81). This Court dismissed the second appeal.

Other decisions of this Court

34. The parties referred to *R (Kaur) v Secretary of State for the Home Department* [2018] EWCA Civ 1423. I do not consider that that case sheds any light on the issues in this case, because this Court did not, in that appeal, give the respondent permission to argue a point based on *Chikwamba* (paragraphs 71 and paragraph 72). Its passing observations on that decision (paragraphs 44 and 45) are therefore obiter. Moreover, it is not clear why, in paragraph 44, this Court referred to the decision of the UT in *Hayat*, which was overturned by this Court (see paragraphs 27-35, above).

35. A1 relied on a comment in *TZ (Pakistan) v Secretary of State for the Home Department* [2018] EWCA Civ 1109, in which, in passing, in paragraph 28 of a judgment with which the other members of this Court agreed, Sir Ernest Ryder, the Senior President of Tribunals, referred briefly to *Chikwamba.* That reference was not essential to his reasoning, and is not relevant to the arguments in this case.

36. Finally, A1 relied on paragraph 28 of *Parveen v Secretary of State for the Home Department* [2018] EWCA Civ 932. The main issue on that appeal was whether the

Secretary of State had erred in law in not giving the appellant leave to remain outside the Rules. She had entered lawfully on a spousal visa, but had not renewed that visa, and applied for leave to remain some 13 years later. Her application had very little information in it. Underhill LJ, with whom the other members of this Court agreed, dismissed the appeal. In paragraph 27, he listed the information which would have enabled the Secretary of State properly to consider a claim outside the Rules, and which was missing from the application. In paragraph 28 he commented that the appellant would not necessarily have to 'tick all the boxes'. He added, 'However, if she can do so it seems to me that she would have a very strong case. It is hard to see how it could be right to insist on the empty but disruptive formality of leaving the country in order to correct a venial administrative error made thirteen years previously: see *Chikwamba* … and the subsequent authorities'. Again, this observation was not part of this Court's reasons for dismissing the appeal, and sheds no light on the issues in these appeals.

Decisions of the UT considering Chikwamba

Thakral v Secretary of State for the Home Department

37. In *Thakral v Secretary of State for the Home Department* [2015] UKUT 00096 (IAC) the UT dismissed the applicant's application for judicial review of the Secretary of State's refusal of her application for leave to remain as a spouse. She did not dispute that the Secretary of State was entitled to refuse her application under the Rules, but contended that it was unlawful because the Secretary of State did not consider the application of *Chikwamba* to her case. Nicol J, giving the judgment of the UT, applied paragraph 30 of *Hayat*. He held that *Chikwamba* did not apply, because the Secretary of State had not refused leave on the procedural ground that the appellant should leave the United Kingdom and apply for entry clearance. The Secretary of State had, on the contrary, considered, and rejected, the substance of the article 8 claim.

Younas v Secretary of State for the Home Department

38. The appellant in *Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 00129 (IAC) was a citizen of Pakistan. She arrived in the United Kingdom pregnant, with leave to enter as a visitor, in 2016. When that leave was about to expire, she applied for leave to remain on the grounds that she was 30 weeks pregnant and had been advised that it was not safe for her to travel because she had had miscarriages in the past. She gave birth to a daughter who is a British citizen. The daughter's father was a British citizen who had two sons from an earlier relationship. She then varied her application to an application relying on her family life with her partner and their daughter. The Secretary of State refused that application.

39. On the appeal, the Secretary of State accepted that there were insurmountable obstacles to the continuation of family life outside the United Kingdom and it would not be reasonable or proportionate for the family to be separated indefinitely. She contended that the appellant was expected to leave the United Kingdom and travel to Pakistan to apply for entry clearance. The narrow issue on the appeal was whether her temporary removal from the United Kingdom was proportionate. The appellant contended that she would not be able to satisfy the requirements for entry clearance, and her appeal should be allowed because her removal would result in the permanent separation of the family. She also argued that if (contrary to her primary case) she would get entry clearance, her removal would be disproportionate because she met the requirements of

the Rules, because, relying on *Chikwamba*, there was no public interest in her removal, as her application for entry clearance was certain to succeed, and because it would not be reasonable to require her daughter to leave the United Kingdom even for a short period.

40. The UT found that A would be able to re-enter the United Kingdom within four to nine months of her removal (paragraph 70). The UT rejected the argument that the appellant was entitled to leave to remain under the Rules (paragraphs 72-77).

41. The UT then considered the argument based on the decision in *Chikwamba*. It cited paragraph 44 of the judgment in *Chikwamba* and paragraph 51 of *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; [2017] 1 WLR 823. The Secretary of State described three aspects of the public interest which would be served by the appellant's removal (paragraph 81). In paragraph 83, the UT said that neither decision supported the argument that 'there cannot be a public interest in removing a person from the UK who would succeed in an entry clearance application'. Whether there would be such an interest would depend on an assessment of the facts (paragraphs 85 and 86). The UT also referred to *Hayat* (paragraph 87) and to paragraph 45 of *Kaur*. Both supported that approach.

42. The UT then noted that *Chikwamba* was decided before the commencement of Part 5A. Those provisions did not refer to a person whose application for entry clearance was likely to succeed. An applicant who relied on *Chikwamba* had to address the relevant considerations listed in section 117B (paragraph 90).

43. The UT said that the appellant had entered as a visitor, even though her real intention was to stay in the United Kingdom with her partner, and had stayed in the United Kingdom despite saying in her application in 2016 that she would leave after six months. The public interest in her removal was strong, and was not significantly lessened by the fact that she would be granted entry clearance in due course (and see further, the more detailed reasoning in paragraph 98).

Decisions of the Supreme Court referring to Chikwamba

44. The decision in *Chikwamba* has been referred to in two decisions of the Supreme Court: *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799 and *Agyarko*. Part 5A of the 2002 Act was not in force at the relevant times. The Supreme Court considered the article 8 claims in those cases against the background of a recent change to the Rules, in July 2012, which, for the first time, made express provision in the Rules for the treatment of article 8 claims by decision makers. Some of those provisions were similar to the provisions of Part 5A.

Hesham Ali

45. Hesham Ali was a failed asylum seeker. He began a relationship with a British citizen in 2005. In 2006 he was convicted of a serious criminal offence and became liable to automatic deportation under section 32(5) of the UK Borders Act 2007. The Supreme Court dismissed the appellant's appeal. The Secretary of State made a decision to deport the appellant. He appealed. The F-tT dismissed his appeal, but the UT held that the F-tT had erred in law. New provisions in the Rules dealt with the position of offenders such as the appellant, but the UT decided not to take them into account. This Court

allowed the appeal of the Secretary of State and that decision was upheld by the Supreme Court. The Supreme Court held that the tribunal should attach considerable weight to the general assessment of proportionality which the Secretary of State had made in the Rules. The case was remitted to the UT.

46. Lord Reed gave a judgment dismissing the appeal, with which all the members of the court agreed except Lord Kerr. In the course of a general review of the Strasbourg cases about article 8 claims, he considered first, whether it was useful to distinguish, in this context, between the positive and negative obligations imposed by article 8. He decided that it was not (paragraph 31). The question, whether the obligation was positive or negative, was 'whether a fair balance had been struck' (paragraph 32). He then considered the factors which are relevant to the deportation of foreign offenders. One of those was whether the continuation of family life in the United Kingdom was uncertain (paragraph 33).

47. He added that whether or not the continuation of family life in the United Kingdom was uncertain 'may be a more complex question than may appear at first sight'. If a person was living unlawfully in the United Kingdom when a 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 unlawfully may be, in some situations, of limited practical importance when translated into the context of UK immigration law: see for example, *Chikwamba* …' (paragraph 34). He added, in paragraph 35, that, while the Strasbourg court had given guidance about the factors which are relevant, it 'has acknowledged that the weight to be given to the competing factors, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level…' (paragraph 35).

Agyarko

48. The two appellants in *Agyarko* were overstayers. Each then formed a relationship with a British citizen. Each then applied to remain in the United Kingdom on article 8 grounds. The Secretary of State refused each application. Neither application could succeed under the Rules, and there were no exceptional circumstances which would have warranted a grant of leave outside the Rules. In the first appeal the Secretary of State had decided, applying paragraph EX.1 of Appendix FM, that there were no insurmountable obstacles to the continuation of family life outside the United Kingdom. In the second, she had wrongly concluded that the appellant had provided no evidence that she and her partner lived at the same address. Each appellant applied for judicial review of the decision in her case. The UT refused permission to apply for judicial review: in the second case recognising that the appellant had provided such evidence, but deciding, instead, that there were no insurmountable obstacles to the continuation of family life outside the United Kingdom.

49. Lord Reed, giving a judgment with which the other members of the Supreme Court agreed, listed the issues on the appeal in paragraph 39. They concerned the correct approach to article 8 to the removal of a non-settled migrant, and the interpretation of the relevant provisions of the Rules. They did not include any issue relating to the decision in *Chikwamba*.

50. He said that the relevant Strasbourg case showed that a number of factors are relevant to the proportionality of the removal of a non-settled migrant. They include the extent to which family would be ruptured, the extent of ties with the contracting state, whether there were insurmountable obstacles to family life elsewhere, and whether there are factors of immigration control which support exclusion (paragraph 40).

51. The reference in paragraph EX.1 of Appendix FM to the Rules to 'insurmountable obstacles' had to be interpreted sensibly, by reference to the decisions of the Strasbourg court. It meant very serious difficulties which could not be overcome, or which entailed very serious hardship. Only where that stringent test was satisfied would a migrant who was not settled in the United Kingdom get leave to remain under the Rules. If the test was not met, it would not be disproportionate to refuse leave to remain under the Rules (paragraphs 43-48).

52. Family life which had been established in the knowledge that one partner's presence in the United Kingdom was unlawful or precarious was to be given less weight than family life formed when the partner was lawfully in the United Kingdom. In such cases, a very strong claim was required to outweigh the public interest in immigration control. Leave to remain might be granted outside the Rules in exceptional circumstances, but such circumstances had to be compelling and to produce unjustifiably harsh results which would make removal disproportionate. Both cases involved precarious family life and neither appellant had shown the Secretary of State that there were insurmountable obstacles to the continuation of family life outside the United Kingdom.

53. In paragraph 51, Lord Reed made some observations about the significance of the unlawfulness or precariousness of an appellant's presence in the United Kingdom. He said that '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, the weight of public interest in his removal will 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*…'

54. He held (again) that whether the obligation owed by the Secretary of State was positive or negative, the question was whether a fair balance had been struck (paragraph 60).

A decision of the Supreme Court about Part 5A

55. The appellant in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536 entered the United Kingdom in 1997 with leave. She became an overstayer in 2010. She had regular contact with her uncle and his family in the United Kingdom. She received free board and lodging from a friend and an allowance from her father. She applied for indefinite leave to remain in 2010. The Secretary of State refused her application. In deciding her appeal, the F-tT applied Part 5A of the 2002 Act. It dismissed her appeal, holding that her status in the United Kingdom had been precarious (see section 117B(5)) so that it was bound to attach little weight to that, that her proficiency in English was a neutral factor and that she was not financially independent. That decision was upheld by the UT and by this Court. Before the appeal was heard, she had lived in the United Kingdom for 20 years and so became entitled to

ILR under the Rules. The Supreme Court nevertheless decided to hear the appeal because it raised important issues.

56. Lord Wilson, with whose judgment the other members of the Court agreed, said that the primary question posed by the appeal was the meaning of 'precarious' in section 117B(5) of the 2002 Act. The status of any person with leave to remain which is time-limited is precarious (paragraph 44). The F-tT had been right to find that A's presence in the United Kingdom was precarious (paragraph 45).

57. In paragraph 36, Lord Wilson quoted paragraph 45 of the judgment of Sales LJ (as he then was) in the judgment of this Court in that case. It described the parties' agreement that Part 5A was intended to provide a structure for the consideration of article 8 claims which 'produces in all cases a final result which is compatible with, and not in violation of, article 8'. Lord Wilson added that this was still agreed and was correct. In so far as the legislation was intended to produce such a result, it was necessary to find, somewhere a degree of flexibility 'no doubt limited'.

58. He then considered how the two 'considerations' described in sections 117A(2)(a) and 117B(5) should be interpreted. The parties agreed that section 117A(2) was clear: it acknowledged that section 117B 'cannot put decision-makers in a strait jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of "little weight" itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above'.

59. The Court's definition of 'precarious' meant section 117B(5) would apply to many applicants who relied on their private life, but section 117A(2)(a) 'necessarily enables their applications occasionally to succeed'. Lord Wilson quoted paragraph 53 of the judgment of Sales LJ. It is 'possible, without violence to the language to say' that the general guidance 'may be overridden in an exceptional case by particularly strong features of the private life in question'. As the appeal was now academic it was unnecessary for the Supreme Court to decide whether or not Sales LJ was right that there were no such features in the appellant's private life.

The facts and the relevant determinations in the present cases

A1

The F-tT

60. The F-tT recorded that A1 was a national of Bangladesh. He was born on 1 April 1986. He was married to Ms Sharman Khatun. She was born on 19 July 1997 and is a British citizen. He first came to the United Kingdom on 17 July 2007 with entry clearance as a visitor and with permission to remain until 3 January 2008. He overstayed. He made an application for leave to remain in 2012 which was refused, with no right of appeal, in 2013. He made a further application on 3 February 2018 on article 8 grounds. The Secretary of State refused that application and certified it as clearly unfounded. A1 applied for judicial review of that decision. The Secretary of State maintained that decision but on 30 May 2019, the Secretary of State gave A1 an in-country right of appeal.

61. A1 appealed to the F-tT. The F-tT noted that A1's appeal was on human rights grounds only and that the relevant provisions of the Rules were Appendix FM and paragraph 276ADE (paragraph 2). The F-tT was also required to consider sections 117A-D of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') (paragraph 5) 'in relation to the private rights of an individual who claims that a decision of the Secretary of State will breach their private and family life'.

62. The F-tT correctly observed that the burden of proof was on A1 and that the standard of proof was a balance of probabilities (paragraph 6). The F-tT heard evidence from A1 and his wife. They both gave evidence in English (paragraph 8). A1's case was that he was married to a British citizen who was born and raised in the United Kingdom. She had a good job. Her income exceeded the minimum financial requirement for entry clearance under the Rules. She was born in the United Kingdom and had no connection with Bangladesh and did not want to move there. A1 submitted that there were insurmountable obstacles for them. His wife had been in the care system. The Secretary of State had a 'duty of care' to A1 and his wife. He had not lived in Bangladesh for 12 years and would not be able to live there now (paragraph 10).

63. The Secretary of State argued that A1's case had been considered under the Rules. A1 still had cultural and linguistic links with Bangladesh (paragraph 11). He had lived there for most of his life. The Secretary of State accepted that there was a genuine and subsisting relationship between A1 and his wife. The Secretary of State did not accept that there were insurmountable obstacles to the couple's living in Bangladesh. His wife had not lived in Bangladesh but A1 would be able to help her to adapt in the same way that he had adapted to the United Kingdom (paragraph 12). The Secretary of State did not accept that there were exceptional circumstances (paragraph 13).

64. The F-tT summarised the oral evidence (paragraphs 14-16). A1 had overstayed because he preferred the United Kingdom to Bangladesh, and, after he got married, he had wanted to live with his wife, whom he had met in 2012. He could not afford to apply for leave earlier. He had no 'money support' and was not allowed to work. He could not leave and apply for entry clearance because he could not abandon his wife and she could not live without him.

65. A1's wife had always lived in the United Kingdom. She still had her job. She was in touch with her foster parents, whom she saw once a month. Her foster mother was very supportive. She speaks to her on the phone or goes to meet her for dinner. Her birth family live in the United Kingdom but she does not speak to them. She only has contact with her husband's family (paragraph 15). When she first met A1 she knew he was from Bangladesh but not that he was here unlawfully. He told her 'afterwards, but she was okay with it'. She was concerned about his being in the United Kingdom unlawfully, but 'thought that there was a way of him staying in the UK because of their relationship' (paragraph 16).

66. The F-tT recorded the submissions in paragraphs 17 and 18. The Secretary of State submitted that A1 did not meet the requirements of the Rules and that he had abused the visit visa rules. Under the 2002 Act, the public interest required that he should return and make an application for entry clearance for settlement purposes. There were no exceptional circumstances and his appeal should be dismissed (paragraph 17). A1 submitted that he met the requirements of Appendix FM at the date of the hearing.

There were insurmountable obstacles to return to Bangladesh. A1's wife had been born in Tower Hamlets and had been in the care system for six years. She had only just got some stability in her life. It would be unkind to expect her to move. There were exceptional circumstances. The F-tT was invited to consider paragraph 33 of *Agyarko*. The wife's circumstances were set out in a letter from her social worker. There was no public interest in returning A1 to Bangladesh (paragraph 18).

67. The F-tT set out its findings of fact and reasons in paragraphs 19-33. A1 could not meet the Rules. He came to the United Kingdom on a visit visa, had promised to leave at the end of his visit, and had not done so. He could, nevertheless, be granted leave to remain under the Rules, even though he was in the United Kingdom illegally, if he met the requirements of paragraph EX.1 of Appendix FM of the Rules, including the requirement of insurmountable obstacles (paragraph 19). A1 relied on his relationship with his wife, whose parents originated from Bangladesh, but who was estranged from her parents. She had been in care because her parents could not look after her. The F-tT did not know why she had been taken into care; she had been 13.

68. The only material from the local authority was a letter from A1's wife's key worker, dated 27 October 2015. It showed that she had married A1 on 22 October 2013, 'despite being advised by professionals not to go ahead with the marriage'. She had stayed in care after her marriage until she was 18. She was in semi-independent accommodation from 2015 and A1 was allowed to have contact with her on two nights a week. There was nothing more recent from the local authority or from A1's foster carer. The F-tT did not know why A1's wife had been advised not to marry him. She was just 16 when she married. She was particularly vulnerable then 'and probably still is'. The F-tT could not make a finding, as invited to by A1, that he gave her stability, without a lot more information. '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'. She added, 'On the face of it, they are different, she does not even speak the language as fluently as he does, she had 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 do not know enough about [A1's] wife' (paragraph 19).

69. According to A1's statement he met his wife on Facebook in 2012, when she would have been 15, and he was 26 (paragraph 20). The F-tT did not know enough about A1's wife to find that she would not be able to live in Bangladesh. She appeared to have immersed herself in A1's culture, despite not having had the same upbringing as A1. She had been born in the United Kingdom but had 'already culturally adapted to [A1's] culture and language'. The F-tT did not accept that living in Bangladesh would be 'unduly harsh' for her, 'based on the information that I have'. A1 was now 32. He was familiar with the culture, and while there were members of his family in the United Kingdom, there were also some in Bangladesh. 'There is no reason why he cannot apply for entry clearance if he wishes to return and provide the evidence to [the Secretary of State] that would be required from any appellant seeking to enter the UK'. The F-tT was not persuaded by the assertion that A1's wife's support network was in the United Kingdom. The facts that she had no contact with her birth family, had been in care and her closest relationship was with a former foster carer suggested that 'in fact she does not have the support network that he alludes to' (paragraph 21).

70. The F-tT then considered the case outside the Rules under article 8, by reference to the questions posed in *Razgar v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368. The only reasons A1 gave for staying in the United Kingdom were that he did not want to return to Bangladesh after his visa expired, and his relationship with his wife. A1's representative argued that little weight should be given to A1's illegal presence in the United Kingdom and 'to consider, whether, as at the date of this hearing, he meets [the Rules] and if he does to find that as he is certain to get entry clearance, there is little point returning him to Bangladesh'. There was support for that argument in *Agyarko* and in *Hesham Ali*. A1 argued that his wife met the maintenance requirement and that he had passed the English language test. He therefore met the requirements of the Rules, and so should be granted leave to remain, as there was no public interest in requiring someone to return simply to be granted entry clearance once they have returned (paragraph 24).

71. In paragraph 25, the F-tT noted that it would have to assess the financial information. It referred again to its concerns about the relationship (paragraph 25). The F-tT then quoted section 117B of the 2002 Act (paragraph 26). In paragraph 27, the F-tT said that it was required by the Rules to give 'little weight to a relationship formed with a qualifying partner at a time when [A1] was in the United Kingdom unlawfully'. The F-tT then referred again to *Agyarko*, and to the discussion, based on the Strasbourg cases, of insurmountable obstacles and the degree of hardship involved in returning to a country of origin. The F-tT had explained why there were no insurmountable obstacles to A1's return to Bangladesh (paragraph 28).

72. The F-tT mentioned the relevance of the British citizenship of the spouse, by reference to paragraph 36 of *Agyarko*. The F-tT also cited paragraph 57 of *Agyarko*, in which the Supreme Court said, among other things, that 'The critical issue will generally be whether, giving due weight to the strength of the public interest in …removal, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control' (paragraph 28). In a footnote, the F-tT observed that paragraphs 51 and 52 of *Agyarko*, to which there is a cross-reference in paragraph 57, lists, among other things, 'the strength of an application under the Rules'. In paragraph 29, the F-tT quoted paragraph 57 of *Agyarko*, which, again, refers to 'insurmountable obstacles'. The F-tT's summary was that 'Ultimately' A1's private rights had to be balanced against the public interest (paragraph 31).

73. The F-tT considered whether there were any 'compelling circumstances'. It was argued that A1's wife was earning enough to meet the requirements of the Rules and that A1 spoke English. The F-tT had considered whether this was 'a *Chikwamba* situation'. The F-tT referred to paragraph 51, the relevant passage in *Agyarko*, underlining the word 'certain'.

74. In A1's favour were the facts that he was in a relationship with his wife and that she could maintain him. The F-tT placed 'due weight' on her time in care. She claimed to have no contact with her birth parents but the F-tT did not know enough about her past. The fact that she had been in care did not, as A1 had suggested, make her 'abnormal'. The F-tT repeated its concerns about the advice that she should not marry A1. 'The information presented by [A1] is selective'. Against A1's interests were his 'blatant disregard…' for the undertaking he had given the Entry Clearance Officer when he had

come to the United Kingdom. Such behaviour 'undermines the immigration system and creates a mistrust of genuine visitors' (paragraph 33).

75. The F-tT's conclusion was: 'I am satisfied that [A1's] private rights are not such that the wider public interest should be set aside. There is a public interest in reminding [A1] and others in his position that there are Article 8 compliant rules in relation to family life, and that if he wishes to make his 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 from those who comply with the law.'

The UT

76. The UT held that there was no error of law in the determination of the F-tT. I have therefore concentrated on the reasoning of the F-tT and need say little about the reasoning of the UT. The grounds of appeal for which the UT gave permission were, first, that the F-tT had failed to consider whether, if A1 returned to Bangladesh, his application for entry clearance would succeed (by reference to *Chikwamba*), and second, that the F-tT had given inadequate reasons for its conclusions on paragraph EX.1 (paragraphs 4 and 7). There was no ground of appeal which argued that there was no evidence for any specific findings of the F-tT, or that any of those findings was perverse.

77. As the UT recorded, ground 2 changed into a procedural fairness ground, rather than a reasons challenge, which the UT considered and rejected in paragraphs 16-34.

78. The UT noted that the F-tT dealt with the *Chikwamba* point when considering A1's case outside the Rules '(as she was obliged to do)'. The F-tT had directed itself correctly about the approach to a claim outside the Rules (paragraphs 37 and 38). A1 relied on paragraph 51 of *Agyarko*. The context was the discussion by the Supreme Court of the weight to be given to precarious family life and its recognition that the public interest in removal 'might' be reduced from 'very considerable' to one which would not require removal (paragraph 41). The issue for the F-tT was whether the public interest required removal 'taking into account all factors' (paragraph 42). It went too far to assert that if a foreign national was certain to get entry clearance, the public interest would not require removal. It was one of the potentially relevant factors as *Agyarko* and *Hesham Ali* made clear (paragraph 47). The UT referred to several cases, including *Younas* (paragraph 50). That made clear that 'the *Chikwamba* principle is merely part of an overall consideration of where the public interest lies in a particular case' (paragraph 51).

79. The UT accepted that the F-tT did not make a finding about whether the financial requirements of the Rules were met. That was because the F-tT did not need to (paragraph 53). The Secretary of State had not suggested that A1 did not meet the requirements of the Rules; but had decided, rather, that family life could be continued in Bangladesh, and so paragraph EX.1 was not met, and removal would be proportionate. Contrary to A1's apparent suggestion (skeleton argument, paragraph 17) I do not understand the UT to have found, in paragraph 53, that it was 'certain' that A1 would be given entry clearance if he left the United Kingdom and applied for it. The UT did find that he could be required permanently to leave the United Kingdom without

any breach of article 8. It would then be a matter for him to decide whether or not to apply for entry clearance. Whether or not he would be granted entry clearance, the public interest had to be considered as a whole. The F-tT had taken the *Chikwamba* point into account. Having balanced the relevant factors and decided that public interest favoured removal, there was no need for the F-tT to make any findings about whether A1 would qualify for entry clearance (paragraph 56).

A2

The F-tT

80. A2 is a citizen of Bangladesh, born on 8 November 1976. He entered the United Kingdom in 2007 on a working visa. In 2010, the Secretary of State refused his application for leave to remain on human rights grounds. The Secretary of State reconsidered that decision and refused the application for a second time in 2015. A2's appeal rights were exhausted in April 2017. He claimed asylum in 2017 and the Secretary of State refused that application on 18 October 2018. A2 appealed. The F-tT dismissed his appeal in 2018 ('the 2018 determination'). A2's appeal rights were exhausted in May 2019. He made further submissions on 13 May 2019. The Secretary of State refused those in a decision dated 21 June 2019. He appealed to the F-tT.

81. As the UT recorded (paragraph 9), A2's wife is originally from Bangladesh and comes from the same area as A2. She left Bangladesh in 2009 to marry a Mr Ali, who was living in the United Kingdom. He died on 9 January 2013. She met A2 soon afterwards. They married on 2 April 2014. The UT also found (paragraph 19) that her family in Bangladesh lived in the same area as A2's home.

82. A2 gave evidence at his appeal to the F-tT. His wife attended the hearing but did not give evidence, as, in A2's view, she was not able to do so clearly and coherently (paragraph 9 of the F-tT's determination). A2 abandoned his asylum claim at the hearing (paragraph 10). A2's case was that he was caring for his wife, who had various health problems (paragraph 11). She could not move to Bangladesh because of those, and because she had been in the United Kingdom since 2009, and had no connection with Bangladesh. A2 accepted in cross-examination that he had various relations in Bangladesh (his mother, brother and sister) and that his wife's mother and sister, with whom she was in regular contact, were also there (paragraph 12). His wife had recently visited Bangladesh for four weeks and had done so before they were married (paragraph 13). He did not have a business now. He was cross-examined about the 2018 determination, which said that he was still running the business. '…he was unclear about that and…was unable to recollect what he said at the previous appeal.'

83. The F-tT referred to the medical evidence about A2's wife (paragraphs 15-18).

84. The F-tT held that, taken on its own, A2's position would not 'engage his human rights'. His private life was 'contingent upon having been in this country for a number of years with a precarious immigration status' (paragraph 22). 'The burning issue' was whether if A2 returned to Bangladesh that would make his wife's condition so much worse that it would interfere with her family life. There was no evidence that, if A2 returned to Bangladesh, his wife would stay in the United Kingdom. She would probably get better if she went to Bangladesh with A2. The Secretary of State's decision was proportionate.

The UT

85. A2 appealed against the determination of the F-tT on three grounds, in short (paragraph 3).

    i. The F-tT's conclusion that there were no insurmountable obstacles to family life in Bangladesh was irrational.
    ii. The F-tT erred in speculating about the circumstances which the couple would face in Bangladesh.
    iii. The F-tT erred in not applying the decision in *Chikwamba*.

86. The F-tT refused permission to appeal, but the UT granted it on all grounds (paragraphs 4 and 5). In a determination promulgated on 26 August 2020, the UT held that there was an error of law in the determination of the F-tT, and decided to re-make the decision. A2 was allowed to argue all three grounds of appeal, despite the UT's provisional view that some were not strong (paragraphs 11-21). The UT observed that it was not clear that the *Chikwamba* point had been argued in the F-tT (paragraph 20).

87. There was then a hearing at which A2 was represented. The UT took the 2018 determination as its starting point, but as there was up-to-date medical evidence, considered the issues on the basis of the recent evidence (paragraph 18).

88. In the 2018 determination, the F-tT had accepted that the relationship between A2 and his wife was genuine and subsisting 'even though it was entered into so that [A2] could stay in the UK'. The F-tT was told, in 2018, that A2's wife 'communicated regularly with her mother and sister in Bangladesh'. The F-tT found, in 2018, that A2's wife could get the treatment she needed in Bangladesh. Her main problem in 2018 was that she was having fertility treatment. She also suffered from anxiety and depression. She had diabetes and complications. The only medical evidence in 2018 was a letter from her GP (paragraph 19). A2 ran a stationery shop in Bangladesh which was still operating, the F-tT found, in 2018. His mother, sister and brother were still living there. Another brother was said to be in Saudi Arabia. He spoke to his mother every day.

89. The UT summarised the evidence in A2's two witness statements, his wife's witness statement, and two letters from her GP, and a letter and a report from a 'speciality doctor', Dr Hajamohideen (paragraphs 21-62). A2 was cross-examined. The documents did not show that A2 could not resume an interest in the stationery shop on return. The UT rejected A2's evidence which suggested otherwise (paragraphs 29 and 30). The fact that A2 had a platinum credit card suggested that he had access to more money than he was prepared to admit (paragraph 31). That was relevant to the situation he would face in Bangladesh (paragraph 32). It was not suggested that A2's wife could not get treatment in Bangladesh for her physical ailments (paragraph 34). One issue was whether the UT should revisit the conclusion in the 2018 determination that she could be treated for anxiety and depression in Bangladesh (paragraphs 35 and 36).

90. The UT disregarded A2's wife's assertions that she had lived in the United Kingdom all her life and that she had only lived in Bangladesh for 'a short time', for the reasons given in paragraph 39. Her statement had to be translated for her, so she still spoke Bengali '(and presumably, little English)' (paragraph 40). Both she and her first husband were from Bangladesh. She had family ties in Bangladesh, and none in the United Kingdom. She would have more family support in Bangladesh than in the

United Kingdom (paragraph 40). Given her age, it was 'unrealistic' to suggest that she would receive any better treatment for her fertility problems in the United Kingdom than in Bangladesh (paragraph 42).

91. The medical evidence did not deal with the impact on the mental health of A2's wife of returning to Bangladesh with him (paragraphs 62, 70, 71). The hearing was in August 2021, but none of the medical evidence was later than September 2020. There was no evidence about what, if any, treatment she was being given at the date of the hearing (paragraph 64). The issue for the UT was whether there were insurmountable obstacles preventing her from returning to Bangladesh with A2 (paragraph 66). That phrase was not to be understood literally, but it is 'a high threshold of significant difficulties or very serious hardship…' (paragraph 72). There would not be very significant obstacles to her integration in Bangladesh (paragraphs 75-76). There was limited support in the evidence for the submission that she would face social stigma on her return which would affect her ability to integrate (paragraph 77).

92. The UT did not need to deal with aspects of A2's case which he had already withdrawn (paragraph 79). There was no evidence that the Covid-19 pandemic would materially affect A2 or his wife in Bangladesh (paragraph 80). The UT accepted that in 14 years A2 might have lost contact with his friends in Bangladesh, but there was no evidence that he and his wife had any friends in the United Kingdom, either. They might be in a better situation in Bangladesh, as both had family there (paragraph 81). Whether or not A2 could work in his former business, there was no evidence that he could not work in Bangladesh. He was brought up there, could speak the language and was apparently healthy (paragraph 82). Having considered all the factors in the round, the UT could not conclude, on the evidence, that there were insurmountable obstacles to family life in Bangladesh.

93. The UT then considered article 8 outside the Rules (paragraphs 84-92). The UT found it difficult to see how *Chikwamba* could apply to the facts. A similar argument had been rejected in *Agyarko*. 'It is difficult to see how, if the couple could be expected to relocate permanently to Bangladesh to continue their family life, a temporary interference could be disproportionate'. A2's wife was not obliged to go to Bangladesh, but the situation was very different from *Chikwamba*, in which the appellant's husband could not be expected to go to Zimbabwe because he was a refugee from there. It was for A2's wife to choose whether she went to Bangladesh with A2, whether permanently, or for a short period, while he applied for entry clearance. It was reasonable to expect her to do so (paragraph 85).

94. The UT summarised the difficulties which A2 and his wife would face if they went to Bangladesh (paragraph 87). The UT then considered section 117B. A2 was here unlawfully when he began his relationship with his wife. The UT could therefore only give A2's family life little weight, but accepted that 'little weight' did not mean 'no weight'. The UT gave some weight to the fact that A2 had been in the United Kingdom for 14 years or so. But the couple had no family here and there was no evidence that they had any friends. They would have family support in Bangladesh and A2 would be able to work (paragraph 88). There was no evidence that A2 or his wife spoke English. A2 gave evidence through an interpreter and had she given evidence, his wife would have needed one too. She had to use a bilingual support worker to engage with the

health service (paragraph 89). A2 could probably support himself in the United Kingdom but that was a neutral factor: *Rhuppiah* (paragraph 90).

95. The public interest in immigration control was a weighty factor. A2 had been in the United Kingdom for about 14 years, but had only had leave to remain until 2009. He had been here ever since without leave. He could not satisfy the Rules. The maintenance of effective immigration control was in the public interest. It required the removal of those who were in the United Kingdom without leave and who could not meet the requirements of the Rules (paragraph 91). The UT balanced the factors for and against A2 and concluded that the public interest outweighed the interference with A2's private and family life (paragraph 92).

The grounds of appeal

A1

96. There are two grounds of appeal.
    i. The UT 'misapplied the principle in *Chikwamba*' and 'erred as to its relation to the public interest considerations in section 117A-B of' the 2002 Act.
    ii. The F-tT erred in law in concluding that there were no insurmountable obstacles to A1's removal to Bangladesh.

A2

97. AR has permission to argue one ground of appeal only. It is the same as A1's ground 1.

The submissions

98. A1 made the ambitious submission (skeleton argument, paragraph 4) that his 'protracted immigration history is of no material relevance to this appeal'.

99. He further submitted that if he left the United Kingdom and applied for entry clearance, he would be given it, even though, as an overstayer, he cannot get leave to remain on an application from inside the United Kingdom. *Rhuppiah* shows that section 117B is flexible. It should be applied in accordance with 'the *Chikwamba* principle', which is that an appeal should be allowed if 'there is no criminality or other seriously aggravating feature and if it is certain that the applicant will succeed in an application for entry clearance…'

100. A1 cited Lord Scott's speech in *Chikwamba* (with which, I repeat, none of the other members of the Appellate Committee agreed), paragraph 34 of *Hesham Ali*, paragraph 51 of *Agyarko*, and paragraph 45 of *Kaur*. A1 also relied on *VW (Uganda)* and *Hayat* for the contention that 'requiring a person to leave the United Kingdom and apply for entry clearance from abroad becomes the exception rather than the rule', and on *TZ (Pakistan) v Secretary of State for the Home Department* at paragraph 28 and *Parveen v Secretary of State for the Home Department* [2018] EWCA Civ 932, also at paragraph 28.

101. On ground 1, A1 submitted that the F-tT and the UT erred in law in their approach to section 117B because they did not understand its flexibility. They should have

concluded that there was no public interest in dismissing A1's appeal when, if he were to leave the United Kingdom and to apply for entry clearance, he would be certain to be given it.

102. On ground 2, A1 made six attacks on the reasoning of the F-tT.

i. Its finding in paragraph 21 that A1's wife had immersed herself in his culture was inconsistent with a finding in paragraph 19 that she did not speak the language as fluently as he does and had been brought up in a white English foster home during her teens.
ii. That finding is perverse and inadequately reasoned. There was no evidence to support it.
iii. The F-tT applied the wrong test. In paragraph 21, it did not accept that life in Bangladesh would be 'unduly harsh' for A1's wife. That test applies in deportation cases (section 117C(5)). It is much more stringent than the insurmountable obstacles test.
iv. The F-tT failed 'to have any or any proper regard of' its finding in paragraph 19 that A1's wife was vulnerable.
v. There was 'simply no cause for concern' about the circumstances of A1's marriage to his wife. The age difference was irrelevant to the issues.
vi. In applying the insurmountable obstacles test, the F-tT failed to follow the steps suggested by this Court in paragraph 36 of *Lal v Secretary of State for the Home Department* [2019] EWCA Civ 1925; [2019] EWCA Civ 1925; [2020] 1 WLR 858.

A2

103. A2 submits that paragraph 85 of its determination shows that the UT misunderstood *Agyarko*. It erred in concluding that *Chikwamba* cannot apply if the couple can be expected to continue their family life abroad. Like A1, he relies on paragraph 6 of Lord Scott's speech in *Chikwamba*, and paragraphs 34 and 51 of *Hesham Ali* and of *Agyarko*, respectively. If a person was in the United Kingdom unlawfully when the relationship was formed, but 'would have been permitted to reside here lawfully if an application were made from abroad, the latter point should be taken into account'. It should be taken into account in that if the applicant 'were otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, there might be no public interest in his or her removal'. There were no aggravating features in A2's case, and it was 'a very clear case'.

The Secretary of State

104. The Secretary of State submitted that *Hayat* shows the limited extent to which *Chikwamba* may be relevant: only if the application is refused on the narrow procedural ground that the applicant should leave the United Kingdom and apply for entry clearance, and, that even in such a case, it is necessary fully to assess the strength of the applicant's article 8 case. There is no trace in Part 5A of the wide '*Chikwamba* principle' for which the appellants contend. In both appeals, the article 8 case overall was weak, and the tribunals were entitled to dismiss the appeals on the basis that those weak article 8 cases were outweighed by the public interest in maintaining immigration control.

105. On ground 2 in A1's appeal, the Secretary of State submits that Coulson LJ was right to suggest, in his remarks when he gave permission to appeal, that the answer was that the F-tT was entitled to make the findings which it did make.

Discussion

Ground 1

106. In *Chikwamba*, the Secretary of State met a very strong article 8 case by relying on an inappropriately inflexible policy. The decision does not in my view decide any wider point than that that defence failed. There are three other matters that should be borne in mind when it is cited nowadays.

i. The case law on article 8 in immigration cases has developed significantly since *Chikwamba* was decided.
ii. It was decided before the enactment of Part 5A of the 2002 Act. Section 117B(4)(b) now requires courts and tribunals to have 'regard in particular' to the 'consideration' that 'little weight' should be given to a relationship which is formed with a qualifying partner when the applicant is in the United Kingdom unlawfully.
iii. When *Chikwamba* was decided there was no provision in the Rules which dealt with article 8 claims within, or outside, the Rules. By contrast, by the time of the decisions which are the subject of these appeals, Appendix FM dealt with such claims. Paragraph EX.1 of Appendix FM provided an exception to the requirements of Appendix FM in article 8 cases if the applicant had a relationship with a qualifying partner and there were 'insurmountable obstacles' to family life abroad.

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

108. Four aspects of Lord Brown's reasoning are also significant.

i. He rejected the submission that an appeal could never be dismissed on the ground that the appellant should be required to leave the United Kingdom and apply for entry clearance from abroad. Instead, he recognised that it could be proportionate in some cases for the Secretary of State to insist on removal for that purpose.
ii. His view was that the appellant's family would 'have to be allowed to live together here' eventually.
iii. It was not feasible for family life to be established in Zimbabwe because the appellant's husband was a refugee from Zimbabwe.
iv. He was sceptical about the value to be put on the public interest in immigration control in that case.

109. Only two of the decisions of this Court on which the appellants rely (*VW (Uganda)* and *Hayat*) were decided by reference to *Chikwamba*. The other decisions are cases in

which comments were made about *Chikwamba*, but those comments were not part of this Court's decision. The observations about *Chikwamba* which have been made by the Supreme Court are also comments which were not part of the Court's decision. Neither comment goes further than to say that, if an application for entry clearance is certain to succeed, that might make removal disproportionate.

110. The core of the reasoning in *Hayat* is that *Chikwamba* is only relevant when an application for leave is refused on the narrow procedural ground that the applicant must leave and apply for entry clearance, and that, even then, a full analysis of the article 8 claim is necessary. If there are other factors which tell against the article 8 claim, they must be given weight, and may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance. I consider that, in the light of the later approach of the Supreme Court to these issues, the approach in *Hayat* is correct. A fortiori, if the application for leave to remain is not refused on that narrow procedural ground, a full analysis of all the features of the article 8 claim is always necessary.

111. I do not consider that the reasoning in *VW (Uganda)*, to the extent that I can understand it, binds this Court. First, the Rules and the statutory background were different then. Second, the Supreme Court has now recognised that the insurmountable obstacles test is the right test, so the premise of Sedley LJ's analysis is wrong. Third, having applied the wrong test, Sedley LJ left hanging in the air the question whether (applying his test) it was reasonable for the family to continue its family life in Uganda. It must be supposed that he thought that it was not necessary to ask that question if it was disproportionate to require the first appellant to leave the United Kingdom and to apply for entry clearance; and that that was decisive of the article 8 claim, but he does not spell out that step in his reasoning, and it is clearly a wrong step, for the reasons which I have just given.

112. The two present appeals, subject to A1's ground 2, are both cases in which neither appellant's application could succeed under the Rules, to which courts must give great weight. The finding that there are no insurmountable obstacles to family life abroad is a further powerful factor militating against the article 8 claims, as is the finding that the relationships were formed when each appellant was in the United Kingdom unlawfully. The relevant tribunal in each case was obliged to take both those factors into account, entitled to decide that the public interest in immigration removal outweighed the appellants' weak article 8 claims, and to hold that removal would therefore be proportionate. Neither the F-tT in A1's case nor the UT in A2's case erred in law in its approach to *Chikwamba*.

113. Moreover, the Secretary of State did not refuse leave in either case on the ground that the appellant should leave the United Kingdom and apply for entry clearance. I accept Mr Hansen's submission, based on *Hayat*, that *Chikwamba* is only relevant if the Secretary of State refuses an application on the narrow procedural ground that the appellant should be required to apply for entry clearance from abroad. It does not apply here, because the Secretary of State did not so decide. *Chikwamba* is irrelevant to these appeals. I also reject the appellants' submission that the UT determination in *Younas* was wrong; in *Younas* and in *Thakral*, the UT's approach was correct.

114. *Rhuppiah* does not help the appellants. Even if there is some flexibility in section 117B and section 117B(4)(b), there is, on the findings which the tribunals were entitled to

make, no exceptional positive feature of the claim of either appellant which could enable it to succeed. There is, moreover, in each case (and subject to ground 2 in A1's case), a further negative factor, that is, that family life could continue abroad.

Ground 2

115. I will take A1's six points in turn.

i. The findings in paragraphs 21 and 19 are not inconsistent. A person can immerse herself in a culture while not speaking the relevant language as fluently as a person whose mother tongue it is.

ii. A1 does not have leave to argue that there was no evidence to support the findings in paragraphs 19 and 21. In the absence of a challenge to those findings at the appropriate time (that is, when A1 applied for permission to appeal from the F-tT to the UT), I must assume that there was evidence to support both findings. Moreover, it cannot be said that the UT erred in law in not accepting a challenge to the F-tT's findings which A1 did not have leave to make.

iii. The F-tT did use the phrase 'unduly harsh' in paragraph 21. In the context of its reasoning as a whole, which I have summarised at length, I consider that this phrase was an isolated slip, and that the F-tT in substance applied the right test. The F-tT used the phrase 'insurmountable obstacles' six times (paragraphs 10, 12, 18, 19, 28 and 29), and the phrase 'unduly harsh' only once.

iv. This argument is hopeless. The F-tT clearly took into account its finding that A1's wife was vulnerable. It is trite law that the weight to be given to a relevant factor is for the decision maker, subject to *Wednesbury*.

v. The F-tT was entitled to express its concerns about the circumstances in which the relationship had been formed, against the advice of A1's wife's social worker, at a time when she was in care and vulnerable, when A1 had not initially told her that he was in the United Kingdom unlawfully, and in the light of the significant age difference between the couple. There is in any event, nothing in the reasoning of the F-tT which shows that those justified concerns were a significant element in its decision.

vi. The F-tT's approach to the application of the insurmountable obstacles test is unimpeachable. The test uses ordinary language, and has been authoritatively explained by the Supreme Court in paragraph 60 of *Agyarko*. The F-tT quoted extensively from *Agyarko*. I do not consider that the F-tT's failure to refer to *Lal* is an error of law.

Conclusion

116. For those reasons I would dismiss both appeals.

Lord Justice Snowden

117. I agree.

Lord Justice Peter Jackson

118. I also agree.