Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01472/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 September 2018	**On 11 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MS JACKY THANDO AHOBELE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Allen, Counsel, instructed by Paul John and Co
For the Respondent: Ms L Kenn, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the remaking decision in the appeal of Ms Ahobele following my decision, promulgated on 5 July 2018, that the First-tier Tribunal had materially erred in law and that its decision should be set aside. That error of law decision is annexed, below.

2. In essence, I concluded that the judge erred in respect of two issues: the first relating to whether there were insurmountable obstacles to the Appellant's partner going to live with her on a permanent basis in South Africa; second, that the question of whether in the alternative the Appellant could be expected to return to South Africa alone and make an entry clearance application (the Chikwamba point) had not been

adequately addressed. One relevant matter that I felt needed additional evidence was whether the Appellant's partner's service in the British Army was relevant to one or both of these issues.

3. To this end I issued a direction to the Appellant for any further evidence to be duly submitted. In the event, a bundle was served on the Respondent and filed with the Upper Tribunal in advance of the resumed hearing. Much of the evidence contained therein was before the First-tier Tribunal. However at pages 13-13A of the bundle there is a letter dated 9 July 2018 from the partner's Commanding Officer in the Royal Welsh Regiment, Major Edward Willcox. I will return to the significance of this evidence below. In light of the First-tier Tribunal's conclusions and my error of law decision the issues now before me are essentially as follows.

   (a) Whether there are insurmountable obstacles in the way of the Appellant's partner going to live with her on a permanent basis in South Africa.

   (b) If there are whether in any event the Appellant should be expected to return to South Africa alone and make an entry clearance application to re-join her partner in the United Kingdom.

4. These issues fall to be assessed under the ambit of Article 8 outside the context of the Immigration Rules. This is because as at the date of the human rights claim (that being 8 April 2015) the Appellant and her partner had not lived together for two years. As a result the partner could not be considered a "partner" within the meaning of GEN.1.2 of Appendix FM to the Rules. On that basis alone the Appellant could not, and cannot, succeed with reference to the Rules themselves (insofar as satisfaction thereof would be determinative of the Article 8 claim).

The evidence now before me

5. In addition to the new bundle mentioned previously, I have the Respondent's bundle and the bundle that was before the First-tier Tribunal. Both the Appellant and her partner attended the hearing but neither were called to give evidence.

Submissions

For the Appellant

6. Ms Allen made the following points. There were no suitability issues in this case. Whilst the partner was not a "partner" for the purposes of Appendix FM as at the date of the human rights claim, he was as at the time of the First-tier Tribunal hearing and remains so now. This was a long-term relationship, with cohabitation since 2015. The partner was a serving soldier in the British Army. In light of the clear findings of the First-tier Tribunal judge and the evidence as a whole, all of the relevant requirements under Appendix FM could be satisfied save for the Appellant's own immigration status.

7. On the issue of insurmountable obstacles, Ms Allen relied heavily on the fact of the partner's army service. For him to follow the Appellant to South Africa would entail

him leaving the army. In light of the letter from Major Willcox there would be a year-long notice period. Although a waiver of some of this time was a possibility, there was no guarantee of this. In addition, Ms Allen submitted that there would be a significant impact on the British Army if the partner left his service. He had a specialist role in his battalion and his departure would have an adverse impact both on the army and on the taxpayer who would have to pay for the recruitment and retraining of somebody else. In that sense the impact of leaving would go beyond that on the partner himself.

8. In respect of the Chikwamba point, Ms Allen submitted there were no sensible reasons to expect the Appellant to pursue this route. The only gap in the satisfaction of the Rules is now the Appellant's immigration status. In terms of the public interest, the point made about the British Army was relevant here as well.

For the Respondent

9. Ms Kenny submitted that the partner did not hold a particularly senior rank in the army. His position was not comparable to that of, for example, an A&E consultant: he was more akin to a junior doctor with some specialist skills. She submitted that there would not be a serious impact on the army as a whole. There would not be insurmountable obstacles to the partner going to live in South Africa with the Appellant. There had been separation of the couple in the past when the partner had been overseas as part of his service. The public interest in this case was strong and counted against the Appellant because of her immigration history. It would not be disproportionate to expect the Appellant to go back to South Africa and make an entry clearance application if indeed there were insurmountable obstacles to her partner going to reside there on a permanent basis.

The Appellant's reply

10. In reply, Ms Allen emphasised the fact that the Appellant had in fact had leave to remain in the United Kingdom between 2002 and 2005 and had maintained contact with the Respondent thereafter. She reiterated the importance of the partner's role in the army.

11. At the end of the hearing I reserved my decision.

Relevant findings of fact

12. Based on the favourable findings made by the First-tier Tribunal and the Respondent's position on the evidence in the hearing before me, I make the following findings.

13. I have no hesitation in finding that the Appellant has been in a genuine and subsisting relationship with her partner, a British citizen, since 2012 and that they have cohabited since 2015. I find that the Appellant herself is a qualified dental nurse but has not been allowed to practice as such due to her precarious immigration status. I find that the Appellant did have leave in this country between 2002 and 2005, as shown by the relevant evidence before me, and that she made at least two

applications to the Respondent prior to the latest in 2015. To that extent there is no question that she hid herself away, used aliases, or in some other way aggravated the fact of her overstaying.

14. Turning to the Appellant's partner I find that he has been a serving member of the British Army since the beginning of 2011. There is no doubt that he has an exemplary service record and that having already served for a considerable period of time he intends to continue to serve the United Kingdom beyond the expiry of his current period of engagement, that being 2023. I find that the partner holds the rank of Lance Corporal in his regiment.

15. Based on his own unchallenged evidence and the important letter from Major Willcox, I find that the partner has acquired particular specialist skills in the field of logistics and driving qualifications over the course of time. I accept the clear evidence from Major Willcox that the impact on his particular sub-unit's structure would be "very significant". I draw what I consider to be a perfectly reasonable inference from this that recruiting and training a suitable replacement would have considerable resource implications. Even if Ms Kenny's comparison with the partner's role to that of a junior doctor with specialist expertise were accurate (of which I have some doubts), it is very clear that a great deal of time, effort and expense will have gone into bringing the partner to the standard at which he now stands, in the same way that a junior doctor goes through many years of specialist and expensive training (not to mention additional specific expertise in a narrow field of medicine, for example) before reaching a suitably qualified and experience level.

16. I find that if the partner did wish to leave his service voluntarily, which is a possibility insofar as the army rules are concerned, there would be a year-long notice period. I accept that the possibility of waiving part of that period exists, but there is no evidence before me to indicate that such a waiver is guaranteed or, if one is agreed, how much time off the period would result from this.

17. I find that the partner's earnings are, and always have been, more than sufficient to meet the minimum income threshold under Appendix FM. I find that the Appellant speaks perfectly good English.

Conclusions

18. As mentioned previously the Appellant cannot satisfy all of the requirements of the Rules. Primarily this is because her partner could not have been considered a "partner" for the purposes of Appendix FM because the period of cohabitation had not been for at least two years prior to the date of the human rights claim in April 2015. This conclusion is not of course the end of the matter.

19. I go on to consider Article 8 outside the context of the Rules, bearing in mind their obvious significance and also the need for the Respondent's decision to strike a fair balance between the Appellant's rights on the one hand and the public interest on the other.

20. There is quite clearly a family life in this case as between the Appellant and her partner. They have been in a relationship now for many years and have been cohabiting for the past three.

21. The Respondent's decision constitutes a sufficiently serious interference so as to engage Article 8.

22. There is no issue as to the decision under appeal being in accordance with the law and that it pursues a legitimate aim.

23. So to proportionality. I have taken full account of section 117B of the NIAA 2002 and relevant case-law, including Agyarko [2017] UKSC 11 and TZ (Pakistan) [2018] EWCA Civ 1109.

24. The following factors weigh in the Respondent's favour. The public interest is of course a significant factor in its own right, and the maintenance of effective immigration control is certainly in play in this appeal (although so too is another aspect of the public interest, see below). The Appellant's unlawful status in the United Kingdom since 2005 and her inability to meet the Rules (specifically because of the "partner" issue) also count against her: both carry considerable weight.

25. On the other side of the balance sheet rest factors favourable to the Appellant. As of now, the Appellant does meet all of the substantive requirements of the Rules save for the immigration status criterion under E-LTRP.2.2(b) of Appendix FM (I note here that the Respondent has never suggested that the evidential requirements under Appendix FM-SE could not be met. Given the nature of the partner's "employer", it would be close to perverse to have raised any objection).

26. The partner's army service is very important and I shall return to this, below.

Evaluative judgment on proportionality

27. It is necessary to consider the question of "insurmountable obstacles" (see paragraphs 30 and 34 of TZ (Pakistan)). I conclude that such obstacles do not exist in this case, albeit this is by a narrow margin. Having to leave the army would clearly be a very difficult decision for the partner to take: he would be giving up his career. I take into account the fact that he would be leaving the country of his nationality. Although the partner has previously raised a fear of going to South Africa because of potentially being singled out as a former British soldier. This point has not been pursued before me. I conclude that there would not be a risk to the partner. A final matter is the notice period. I have accepted that it is a year's duration. However, there is a strong possibility that some of it would be waived. I appreciate that this is not guaranteed, but I am looking at probabilities, not certainties. Further, there is merit to Ms Kenny's submission that the Appellant and her partner have been separated for fairly significant periods in the past because of the latter's army service. Whilst the circumstances of a separation during a notice period would not be entirely the same, this factor would not, in all the circumstances, represent a very significant difficulty.

28. Thus, on an approach focused solely upon the individuals concerned, as I read EX.1 of Appendix FM to require, the obstacles that clearly would face this couple cannot be said to be "insurmountable", even on a cumulative basis.

29. This conclusion goes to inform my assessment of whether there are exceptional circumstances in this case. The absence of insurmountable obstacles means that the considerable weight attributable to the public interest in maintaining immigration control is not diminished by reference to the Rules.

30. Having said that, I have concluded that this is a case in which there are exceptional circumstances. These relate squarely to the partner's service with the British Army.

31. As I mentioned during the hearing, it seems to me as though another facet of the public interest is the defence of the United Kingdom and the wellbeing, as it were, of its armed forces. It would be very difficult for the Respondent to suggest that the ordinary woman and man "in the street" (or indeed on the modern equivalent of the Clapham Omnibus) would disagree with that proposition.

32. Here, a British national serving soldier with particular expertise and someone who is quite clearly extremely valued by his unit, would be forced to leave his post to the serious detriment to the army. His service has involved him acquiring particular expertise within the context of his unit, skills that if lost would, in the view of his Commanding Officer have a "very significant" impact. In this sense the consequences of leaving the United Kingdom relate not only to the partner himself, but to the British Army as well. Whilst it is true that the partner does not hold a senior rank or have responsibilities of a wider nature, it is in my view the case that each particular nut and bolt of the army goes to ensure that the whole machine works as well as possible.

33. This is a factor which can, and in my view does, weigh very heavily in the Appellant's favour. Indeed, it represents an exceptional or very compelling circumstances, notwithstanding the absence of insurmountable obstacles in respect of the partner as, I stress, an individual.

34. In my view the Respondent has failed to appreciate the overall significance of the partner's role in the service of this country. In a sense, one aspect of the public interest has not been tallied up with another.

35. Finally, I to the Chikwamba point. I bear in mind the issue of whether there is a sensible reason here for the Appellant to go back to South Africa alone and apply for entry clearance in order to re-join her partner in the United Kingdom. In light of all the circumstances I can see no such reason. All of the substantive requirements of Appendix FM are now met, save for the obstacle of the Appellant's immigration status. In my view an entry clearance application would be certain (if not certain, very close to it) to succeed if made.

36. Taking into account everything discussed above, I conclude that this is a case involving circumstances sufficiently exceptional to raise it well above and beyond a "standard" Article 8 claim. On this basis I conclude that the Respondent's decision

does not strike a fair balance and that this is one of the rare cases in which an appeal on Article 8 grounds outside the context of the Rules.

Notice of Decision

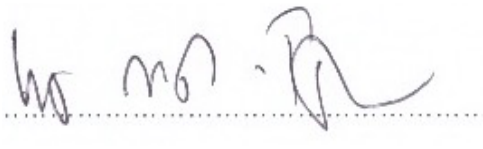
The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by determining that the Respondent's refusal of the Appellant's human rights claim is unlawful under section 6 of the Human Rights Act 1998, with reference to Article 8 ECHR.

The appeal is therefore allowed.

No anonymity direction is made.

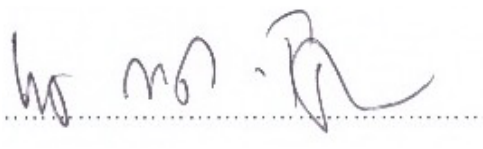
Signed  Date: 7 October 2018

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a reduced fee award of £70.00. Although the Appellant has succeeded, the material evidence from the partner's Commanding Officer only came late in proceedings.

Signed  Date: 7 October 2018

Deputy Upper Tribunal Judge Norton-Taylor

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01472/2015**

THE IMMIGRATION ACTS

Heard at Field House
On 26 June 2018

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MS JACKY THANDO AHOBELE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Allen, Counsel, instructed by Paul John & Co Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Seelhoff (the judge), promulgated on 16 March 2018, by which he dismissed her appeal against the Respondent's refusal of her human rights claim, dated 8 June 2015. This appeal has a history to it, having initially been dismissed by another First-tier Tribunal Judge back in October 2016. A challenge to that decision was successful and by a decision dated 5 June 2017 a Deputy Upper Tribunal Judge found there to be errors of law, set the decision aside and remitted it back to the First-tier Tribunal.

2. In essence, the Appellant's case is and always has been as follows. She is in a genuine relationship with a serving member of the British Army. Although she has been a long-term overstayer in this country she asserted that she should be granted leave to remain on the basis of her relationship and that her partner could not be expected to go and live with her in South Africa, nor that she should be expected to go back to that country and make an entry clearance application.

The judge's decision

3. At [28] the judge accepts that the Appellant was indeed in a genuine and subsisting relationship with her partner. When considering the Article 8 claim in the context of the Rules the judge quite rightly found that the period of cohabitation immediately preceding the making of the human rights claim in April 2015 had not exceeded two years. Therefore, her partner could not be considered a "partner" within the meaning of GEN.1.2(iv) of Appendix FM to the Rules, (see [30]). The judge then goes on to consider the matter outside of the context of the Rules. He finds that the couple had in fact been cohabiting since May 2015. In considering whether there were insurmountable obstacles in the path of the partner going back with the Appellant to live in South Africa the judge rejects the suggestion that he would face any problems as a result of him having gained his British nationality and thereby losing his original South African nationality. Later in the same paragraph the judge says the following:

> "I accept that the Sponsor would have to give up his job with the British Army in order to return to South African live with his partner but this cannot be said to be an insurmountable obstacle rather it is a very significant inconvenience and would breach his army contract but that is not enough to reach the threshold."

4. The judge then looks at paragraph 276ADE(1)(vi) and concludes that there would be no very significant obstacles to the Appellant herself reintegrating into South African life.

5. The judge turns to the issue of proportionality. He finds that there were no suitability issues in the case and that the eligibility requirements of the Rules would be satisfied if an entry clearance application were made. He then goes on to find that the couple could "easily meet the income requirements" given that the partner's salary was well in excess of the £18,600 required by Appendix FM. In considering Section 117B of the NIAA 2002 the judge states that he was attaching "minimal" weight to the private and family life of the Appellant given that her time in this country had been as an overstayer for many years. The judge took the view that the Appellant could return to South Africa and apply for entry clearance. This, he concluded, would have "minimal practical consequences" for the Appellant's family life with her partner. On this basis the appeal was dismissed.

The grounds of appeal and grant of permission

6. For the purposes of the appeal before me it is only really grounds 1 and 2 that have any relevance. The first ground asserts that the judge failed to deal adequately or at all with the Chikwamba issue before him, namely that there was no good reason why

the Appellant should return to South Africa to make an entry clearance application given that on the judge's findings she would satisfy the relevant Rules. Reference is made to paragraph 51 of Agyarko [2017] UKSC 11.

7. Ground 2 challenges the judge's approach to the issue of insurmountable obstacles outside the context of the Immigration Rules.

8. Permission to appeal was granted by First-tier Tribunal Judge Osborne by a decision dated 25 April 2018. He comments that it was arguable that the judge had applied the "wrong test" to the established family life of the Appellant.

The hearing before me

9. Ms Allen dealt with ground 2 first. With reference to [33] of the judge's decision she submitted that by adopting the phrase "very significant inconvenience", he had seemingly conflated the test of very significant difficulties with whether there would be an inconvenience only. It was difficult to discern, she submitted, what threshold the judge had in fact applied. She also raised the issue of the judge's finding that the partner's relocation to South Africa would breach his army contract. It was unclear what the judge meant by this precisely, and there was no evidence to indicate what the consequences of this breach might be. It appeared as though the judge had taken this point for himself. Given that he had done this, he had failed to explain what such a breach would entail for a serving British soldier.

10. Moving on to ground 1 and the Chikwamba issue, Ms Allen relied on the judge's findings as to the ability of the Appellant to meet the relevant Immigration Rules should an entry clearance application be made now (strictly speaking, as at the date of the hearing before the judge). She submitted that once the judge had made these favourable findings, the ability to meet the Rules must have a direct bearing on the weight attributable to the family life. She referred me to the decisions in Rhuppiah [2016] EWCA Civ 803, Agyarko, and TZ (Pakistan) [2018] EWCA Civ 1109 and to paragraph 3 of the grant of permission. The judge had failed to factor in this point when assessing the weight to be attached to the family life when concluding that that weight was "minimal" (see [37]). In addition, Ms Allen submitted that given the favourable findings in relation to a putative entry clearance application, the judge had failed to explain why there was any sensible reason for requiring the Appellant to go back and make such an application.

11. Ms Isherwood emphasised the fact that the Appellant had been an overstayer since 2005. She submitted that the judge's use of the phrase "very significant inconvenience" was not a material error. She accepted that the judge had made favourable findings in respect of a possible entry clearance application and its prospects of success.

Decision on error of law

12. As I announced to the parties at the hearing, I conclude that there are material errors of law in the judge's decision.

13. Beginning with the Chikwamba point, I do note that there is no reference in the judge's decision to any of the relevant cases dealing with this point. That of course is not fatal and does not necessarily disclose an error of law, but it is perhaps unfortunate. In any event I agree with Ms Allen's submission that once the judge had made the favourable finding in respect of satisfaction of the Rules in a hypothetical entry clearance application, he should then have factored this into the subsequent conclusions in the following ways.

14. First, when assessing the weight attributable to the Appellant's family life in the United Kingdom, the fact that she would be able to meet the requirements of the Rules was a relevant consideration (see for example paragraphs 28-34 of TZ, and 51 of Agyarko). We know from Rhuppiah that the usual reduction in weight in cases of precarious family life is not a fixity: the ability of an individual to show that they could meet the relevant requirements of the Rules as at the date of hearing would be at least a relevant factor when considering what weight should be attached to that family life.

15. Second, if, as the judge has found, it is said that the Appellant could meet all the relevant requirements of the Rules, at least as at the date of hearing, it seems to me as though the Chikwamba point has then to be addressed. It is true that the threshold may be fairly demanding in respect of the need to show that a potential entry clearance application would stand a very strong (if not certain) prospect of success if made (see paragraph 51 of Agyarko and paragraph 45 of Kaur [2018] EWCA Civ 1413). This would not be decisive, but it does call for adequate consideration. In my view the judge has failed to engage with the issue that was live given what he had already found in relation to the ability of the Appellant to meet the relevant Rules.

16. I turn to the insurmountable obstacles issue. With hesitation, I conclude that there is a material error of law here as well. With due respect to the judge it is unfortunate that he has employed a rather confusing phrase in [33], namely "very significant inconvenience". I have of course endeavoured to read the phrase sensibly and in the context of the decision as a whole. However, the fact remains that on the one hand inconvenience, even very serious inconvenience, will not be enough to show the existence of insurmountable obstacles. On the other hand, very significant difficulties would meet the relevant threshold. Here, the judge has conflated the two, leaving the reader unclear as to what test has in fact been applied. Whilst I would readily accept that the South African nationality issue was not capable of amounting to an insurmountable obstacle, it is less clear the same would apply to a serving British soldier having to "give up his job" and then breach an army contract by relocating. On the face of it, such an eventuality *could* be viewed as really very significant indeed. In short, the overall assessment lacks clarity.

17. In light of the above I set the judge's decision aside.

Disposal

18. I appreciate that this appeal has already been remitted once and I do not propose to follow a similar course. This matter will be retained in the Upper Tribunal. In the usual course of events I would have expected to go on and remake the decision on

the evidence before me. However, the issue of a possible breach of the army contract by the partner if he were to go and live in South Africa requires further evidence. It is unfortunate that the Appellant's representatives have failed to adduce this evidence at this stage, but it is of importance to this case and I am willing to adjourn the appeal for a resumed hearing before me in due course in order that relevant, and clear, evidence can be provided. Ms Isherwood did not object to this. To this end, I will issue directions, below.

Notice of Decision

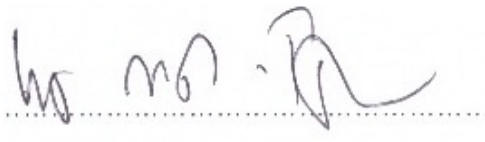
The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I adjourn this appeal for a resumed hearing before me in due course.

Directions to the parties

1. **The Appellant shall file with the Upper Tribunal and serve on the Respondent a consolidated bundle of evidence relied on, including evidence relating to the partner's service in the army, and the consequences of any breach of his contract of service. This bundle shall be filed and served no later than 21 days before the resumed hearing.**

No anonymity direction is made.



Signed Date: 1 July 2018

Deputy Upper Tribunal Judge Norton-Taylor