Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14401/2018

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Thursday 25 April 2019	**On Monday 13 May 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

[IA]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Berry, Counsel instructed by Wesley Gryk, Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was not made by the First-tier Tribunal. No anonymity order was sought by the Appellant. However, this decision contains sensitive, detailed information about the medical condition of the Appellant's partner and identification of the Appellant could lead to identification of his partner. For that reason, I have considered it appropriate to make an anonymity order of my own motion. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This

direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 15 February 2019, I found an error of law in the decision of First-tier Tribunal Judge NMK Lawrence promulgated on 4 October 2018. I therefore set aside that decision. There were two appeals before the First-tier Tribunal Judge. In relation to the first, an appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA appeal"), I re-made the decision in the Appellant's favour. I will need to return to that below.

2. In relation to the second, I found that the First-tier Tribunal Judge had erred in his conclusion that there was no valid appeal before him. I therefore gave directions for a resumed hearing before me in order to determine the appeal. This appeal is therefore against the Respondent's decision dated 28 June 2018 refusing the Appellant's human rights claim and application for leave to remain as the husband of a British citizen.

3. In relation to the EEA appeal, the Respondent was the losing party. The Respondent sought permission to appeal my decision in the EEA appeal which application I refused on 18 March 2019. The Respondent has renewed that application to the Court of Appeal.

4. On 29 March 2019, the Appellant requested an adjournment of the hearing in this appeal. He did so on the basis that, if the Respondent's application for permission to appeal my decision in the EEA appeal fails, this appeal would be academic and would be withdrawn. It could not be withdrawn however whilst the Respondent's application was ongoing. Furthermore, the letter drew attention to the Appellant's intention to apply for pre-settled status under Appendix EU to the Immigration Rules ("the Rules") which was expected to be fully in force from 30 March 2019. The Appellant, as the family member of a qualifying British citizen under that appendix, would be entitled to make an application which would be likely to succeed. Once again, it was pointed out that, if the Appellant obtained recognition of his status in that way, this appeal would become academic.

5. I refused the adjournment by decision dated 5 April 2019. A copy of that decision is annexed hereto for ease of reference. I did so on the basis that it was not clear at that stage whether the Respondent intended to seek permission to appeal my decision in the EEA appeal and the application was therefore premature. Further, the application under Appendix EU would be a "new matter" and could have no relevance to this appeal, not least because the Respondent has yet to make a decision on any such application.

6. At the outset of the hearing before me, Mr Berry repeated the Appellant's application for an adjournment on the same basis as previously but relying on the updated information that the Respondent has now renewed his application for permission to appeal my decision in the EEA appeal. He also informed me that the Appellant could not yet make the application under Appendix EU as the necessary forms are not yet available. Although he accepted that this would be a new matter and not directly relevant to this appeal, he said that the Appellant's entitlement to rely on EU law rights (which remains disputed by the Respondent) is relevant to the Article 8 ECHR issues at play in this appeal. The Appellant says that he is lawfully entitled to be in the UK in reliance on his EU law rights. He may not be entitled to rely on those rights directly when the case is considered under Appendix FM to the Rules but his entitlement to reside in the UK is relevant to Article 8 ECHR when that is considered outside the Rules and particularly in relation to the Respondent's case that the Appellant and his husband could return to Spain together in order for the Appellant to seek entry clearance or the Appellant could return to Pakistan for the same purpose. The application for an adjournment was made on a pragmatic basis to avoid the waste of the Tribunal's time.

7. Whilst the Appellant's desire to avoid wasting the Tribunal's time is to be commended, I indicated to Mr Berry that I intended to refuse the adjournment because I could not understand how it could be said to be in the Appellant's or his husband's interests to put the appeal off to another day. The Respondent is unlikely to give the Appellant a residence permit until the Respondent's application to the Court of Appeal is resolved. That could take some time. The timing of an application under Appendix EU is similarly uncertain whereas, if I were to decide this appeal in the Appellant's favour it may give him a swifter resolution of his right to remain in the UK. I therefore refused the adjournment and the hearing proceeded.

ISSUES

8. The Respondent does not take issue with the genuineness of the Appellant's relationship with his British citizen husband, [PN]. It was also common ground before me that the minimum income threshold under Appendix FM to the Rules does not apply because [PN] is in receipt of disability benefits. It was accepted though that the Appellant cannot meet the eligibility requirements of Appendix FM to the Rules because of his immigration status. Although Mr Tufan submitted that there was an insufficiency of documentary evidence to meet Appendix FM-SE to the Rules (so that the Appellant could not succeed on the five-year' route), the issue between the parties is a narrow one in relation to the eligibility requirements under Appendix FM, namely whether paragraph EX.1(b) of Appendix FM is met. That turns on whether there are "insurmountable obstacles" to family life between the Appellant and [PN] continuing outside the UK. That in turn focusses on whether they could continue that family life in Spain where they lived previously, it being accepted that, as a gay couple, they could not continue that family life in Pakistan.

9. Outside the Rules, the Respondent's position is that the Appellant could return to Pakistan and obtain entry clearance to return as [PN]'s husband and that it would not be disproportionate for him to do so. Similarly, the Appellant and [PN] could return to Spain and obtain entry clearance for the Appellant from there.

EVIDENCE

10. I heard oral evidence from the Appellant and [PN]. I also have before me a bundle of documentary evidence from the Appellant to which I refer below as [AB/xx]. Mr Berry also handed in a medical report dated 4 September 2018 in relation to [PN]'s medical condition which had been omitted from the bundle. Mr Tufan did not object to the admission of that evidence.

The Appellant's Evidence

11. The Appellant has provided a written statement dated 4 September 2018 ([AB/3-8]. He adopted that statement in evidence.

12. The Appellant met [PN] in January 2015 through an online website for gay men. They met up in China where the Appellant was studying at that time. After he completed his degree, the Appellant moved to Spain where [PN] was then living. They married there on 22 July 2016. The Appellant came to the UK with [PN] on 15 January 2017, but they did not remain long term and returned to Spain. [PN] returned to the UK in about April or May 2017. The Appellant arrived here to join him on 9 May 2017.

13. [PN] has various medical complaints which I set out in more detail below. He attended the hearing in a wheelchair. The Appellant provides [PN] with emotional and physical support. He also supports the couple financially because he has found work in the housekeeping department of a hotel in Chelsea and [PN] is unable to work. In terms of caring for [PN], the Appellant prepares food and medicines for him before the Appellant goes to work. He also helps [PN] with showering. When the Appellant is not working, he takes [PN] out. The Appellant also accompanies [PN] to medical appointments. He checks on [PN] regularly throughout the day by phone and, if [PN] does not answer, he goes straight home to ensure that [PN] is alright.

14. When asked about obstacles to their family life continuing in Spain, the Appellant said that they could not do so due to [PN]'s ill-health. Although those problems existed when the couple lived in Spain, the problems had got worse. Although healthcare was available in Spain it was not to the same standard as in the UK. In Spain, a doctor would attend, prescribe medication and then leave. [PN] was now receiving appropriate care. The Appellant was also unable to find work in Spain and, since [PN] was unable to work, the couple were struggling financially. The Appellant confirmed that he continues to hold a residence card as [PN]'s family member which would allow him to work in Spain. That expires in 2021.

15. When asked why he could not return to Pakistan to seek entry clearance as [PN]'s spouse under the Rules, the Appellant said that he could not leave [PN] even for one day. Amongst other conditions, [PN] has type 1 diabetes. He is prone to having "hypo" attacks and if the Appellant were not there to check on him, [PN] could go into a coma. The Appellant also thought that, if he returned to Pakistan, his family in Pakistan might try to force him into marriage with a girl which he did not want.

[PN]'s Evidence

16. [PN] has provided a written statement dated 4 September 2018 ([AB/9-12]). He adopted that statement in evidence.

17. Before he met the Appellant, [PN] had been married to a woman when he was young, but they were divorced. He then had a long-term male partner for twelve years, but he had died. [PN] confirmed the circumstances in which the Appellant says they met (see above).

18. [PN] went to Spain to live in 1995. He had permanent residence there. He left Spain in either April or May 2017. He was unable to recall the precise date. [PN] confirmed that he could probably have applied for citizenship in Spain but had not done so. He continues to own a property in Spain which he is renting out subject to a twelve months' lease.

19. Rather than summarising [PN]'s medical complaints, I refer to what he says in his statement about those as follows:

> "[7] We [he and the Appellant] were happy together but my health was starting to deteriorate in Spain. Not only had I had a heart attack, but I was having increasing problems with my feet. This had been going on for the last six years. I had to stop work in 2012 because I could no longer drive anymore and I worked in the car business.
> [8] My family (two brothers and sister) were urging me to come home because of my failing health. It was clear I was not getting the treatment I needed and they thought it was essential that I came back to the United Kingdom. I tried to stick it out but I eventually realised that they were right and I needed to come back to the United Kingdom. Things were going from bad to worse especially with my feet.
> [9] When I arrived in the United Kingdom, I went to see the doctor and was quickly admitted to hospital. It became clear to them that my health was very poor and that action was needed.
> [10] In May 2018, I had two amputations. They also diagnosed me with chronic kidney disease (this had been mentioned in Spain but nothing had been done). They have stated that they are now dealing with my kidneys.
> [11] In July 2018, I had two more amputations and had four stents put in my leg.
> [12] My heart disease continues but is not causing me any new difficulties at present.
> [13] I have to continually deal, though, with my diabetes. I frequently have "hypos" as I call them which is when my blood sugar goes very low.

> [14] Since I have been back to the United Kingdom, I have had I think approximately 12 admissions to hospital. In fact, when our solicitor kindly agreed to take on our case free to help us in a very difficult time, he had to come and see me in St Thomas' Hospital because I was there at the time."

[PN] confirmed in oral evidence that his medical treatment is ongoing. He is due to have his right foot amputated and is waiting for an appointment letter which he expects soon.

20. [PN] confirmed the Appellant's evidence about what the Appellant does for him. Although [PN] has siblings in the UK, they live in the West Midlands and have their own families. He could not expect them to provide the sort of care which the Appellant provides presently.

21. In his statement, [PN] sets out what he says are the obstacles to the couple continuing their family life in Spain as follows:

> "[22] I do not know how we would survive at present in Spain because [IA] does not speak Spanish and has never been able to find work there despite the fact that we lived there for some time. It would be the same again if we were in Spain. The most important thing, though, is that I need the NHS. They are doing everything they can for me and I am grateful. I need to remain in the UK for this reason and need [IA] with me as he is my support. The health system in Spain could not support me. When I first started to have problems in 2007 related to my diabetes, the service was not as good as the UK but it was okay. Since then, as the problems with my health mounted, and the service has deteriorated and my health problems were not dealt with properly in Spain. It is because it became so desperate that we came back to the UK, my home country. As I explain above, as soon as I got here the NHS has started to deal with my health issues. The combination of my very poor health, the lack of proper assistance in Spain and [IA]'s inability to find work, meant that it is necessary for us to be in the UK."

Other Evidence

22. There is no other witness evidence on which the Appellant relies. Dealing first with [PN]'s medical condition, there are two short letters in the bundle at [AB/86-87] and [AB/88-89] from St Thomas' Hospital and [PN]'s GP respectively which confirm what [PN] says about his various medical conditions (see above). I have already referred to the further letter admitted in evidence which is written by Dr Piya Sen Gupta, Consultant at St Thomas' hospital. That sets out [PN]'s various medical conditions as follows:

> " Type 1 diabetes 1974
> - Recurrent hypoglycaemia
> - Ischaemic heart disease with previous myocardial infarct and coronary artery stents 2009
> - Peripheral vascular disease with recurrent foot infections, osteomyelitis:
> - Right transmetatarsal amputation 2011
> - Left 5th toe amputation 2015
> - Left 2nd and 3rd toe amputation on 16th May 2018

    - Non-displaced fracture of left 3rd metatarsal June 2018
    - Left 2nd, 3rd, 4th metatarsal amputation on 1st July 2018
- Nephrotic range proteinuria, under investigation for nephrotic syndrome – Aug 2018 active
- Chronic kidney disease, previously admission with hyperkalaemia and acute kidney injury relating to sepsis, contrast nephropathy (Aug 2017)
- Atrial fibrillation intermittent
- Primary hypothyroidism since 1980s
- Iron deficiency anaemia
- Previous alcohol excess
- Smoker."

23. The letter goes on to refer to the extent of the treatment which [PN] has received since returning to the UK as follows:

> "[PN] has had multiple frequent (generally once to twice a week) outpatient visits since April 2017 to the Diabetes Centre for foot health reviews. There have been 70 such appointments to the Diabetes Centre and additionally there have been 6 appointments with surgical appliances for special footwear, appointments with 5 additional appointments to cardiology, chest and endoscopy departments. He has also had multiple admissions including the following:
>
> - 18th to 20th April 2017 with a foot infection that responded to antibiotic treatment
> - 13th June 2017 with hypoglycaemia
> - 17th to 18th July 2017 for angiogram and angioplasty of left leg with stents to the superficial femoral artery and anterior tibial artery
> - 24th to 26th August 2017 with renal impairment and hyperkalaemia
> - 15th to 16th January 2018 with angioplasty to left anterior tibial artery
> - 19th to 20th April 2018 with a foot infection treated with antibiotics
> - 14th to 25th May 2018 with wet gangrene of the left foot including toe amputations of the left 2nd and 3rd toes
> - **21st June 2018 to 12th July 2018 it was during this admission that I had met [PN]. I reviewed him on ward rounds including on 9th July 2018. He underwent 2nd and 3rd toe amputation on 1st July 2018. It was also during this admission I had met [PN]'s partner, [IA] on some of these ward rounds**
> - 23rd July to 25th July 2018"

24. Dr Gupta provides the following summary and prognosis in relation to [PN]'s medical condition:

> "**Summary**
> [PN] is a 61 year old man with longstanding diabetes that is insulin treated with a significant vascular disease burden including coronary heart disease and ischaemic heart disease as well as the multiple co-morbities listed with multiple medications also. Unstable glycaemic control including hypoglycaemia is also an on-going issue. He has had a difficult to treat left foot infection requiring multiple surgical procedures including amputation but his foot and leg continue to be at risk given persisting oedema, likely as a result of renal disease but under investigation. Since 2017, his mobility has declined.

> He is independent in walking slowly with a stick but this is for short distances. He uses a wheelchair outside his home sometimes. He reports needing assistance with getting dressed, showered and with cleaning – he is likely to need this given his postural hypotension and ongoing foot issues. He says it is his partner [IA] who has been assisting him.
> **Management plan:**
> He needs continued regular multidisciplinary foot team input including diabetes and podiatry care and, unless the leg swelling improves, it will be difficult to fully heal his left foot, which continues to be at risk. His prognosis is difficult to predict but he already has a significant burden of vascular disease along with longstanding type 1 diabetes, unstable glycaemic control and renal dysfunction, this will likely impact on his overall morbidity and mortality, particularly in the context of an active and recurrent foot infection."

25. The Appellant's bundle includes some documentation in relation to his and [PN]'s income. Those show that [PN] is in receipt of £145.35 per week, personal independence payment from 9 April 2018. He is also in receipt of £127.15 per week, employment and support allowance from 13 April 2018. The Appellant's P60 for the tax year 2017/18 shows that he earned a total of £5084 but it is not clear when he began employment in that year. The most recent payslips in the bundle date from April to July 2018 and show fluctuating weekly earnings ranging from £181.29 to £461.20.

SUBMISSIONS

26. Mr Tufan pointed out the high threshold which applies to paragraph EX.1 of Appendix FM to the Rules. The term "insurmountable obstacles" is defined at EX.2 as meaning "the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner." Mr Tufan submitted that the difficulties of the couple living in Spain as they had before returning to the UK were insufficient to reach that threshold.

27. Outside the Rules, Mr Tufan drew attention to what was said by the Supreme Court in Agyarko v Secretary of State for the Home Department [2017] UKSC 11 about the test to be met in order to show that removal would be disproportionate. The impact on a person's family life must be unjustifiably harsh. Again, he submitted that the evidence did not show that this test was met.

28. Mr Tufan also submitted that the Appellant could be expected to return Pakistan in order to obtain entry clearance as [PN]'s husband. He drew attention to the Tribunal's decision in R (oao Chen) v Secretary of State for the Home Department (Appendix FM – *Chikwamba* temporary separation- proportionality) IJR [2015] UKUT 00189 (IAC) and the guidance there given as follows:

> *"(i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which*

there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40.

(ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das v SSHD [2011] EWHC 2070 (Admin)).

(iii) In an application for leave on the basis of an Article 8 claim, the Secretary of State is not obliged to consider whether an application for entry clearance (if one were to be made) will be successful. Accordingly, her silence on this issue does not mean that it is accepted that the requirements for entry clearance to be granted are satisfied."

29. Mr Tufan did not dispute the medical evidence and accepted that this showed that [PN] suffers from a number of complaints. Mr Tufan submitted that it was clear that [PN] has family in the UK with whom he is in contact and who could support him whilst the Appellant was out of the UK. [PN]'s evidence about this amounted only to an assertion that he did not wish to unduly burden his family. In any event, if needs be, [PN] could rely on help from social services who would be under an obligation to assist as [PN] is a British citizen.

30. Mr Berry submitted that the couple were only able to have the quality of life they have presently because they are in the UK. The evidence was that the standard of treatment in Spain is not as good as in the UK. That was the reason they had moved to the UK. The healthcare which [PN] is receiving in the UK would be disrupted by a move even if that were only temporary (if the couple were to return to Spain for the Appellant to apply for entry clearance - assuming he could do so from there).

31. This submission gave rise to further discussion whether the couple could return to Spain in any event. The evidence is that [PN] left Spain in either April or May 2017. [PN] could not remember the precise date. However, he was in receipt of medical treatment in the UK in April 2017. It is not clear whether the Appellant entered with [PN] or came after he had entered. At the latest, however, [PN] came back to the UK on 9 May 2017. The couple have not returned to Spain since. As Mr Berry pointed out, [PN] would lose his entitlement to permanent residence on, at the latest, 9 May 2019 by reason of a two year' absence. Although the Appellant still has a valid residence permit for Spain, he would only be able to return to work there as [PN]'s family member and therefore only if [PN] remained a qualified person. [PN] is unable to work any longer.

32. Furthermore, as Mr Berry pointed out, there are other obstacles to the Appellant working in Spain as there were when the couple lived there before. The Appellant does not speak Spanish and was unable to find a job.

33. Mr Berry therefore submitted that paragraph EX.1(b) of Appendix FM is met. There are very significant difficulties to relocation to Spain whether permanently or temporarily. The suggestion that the Appellant could return to Pakistan to get entry clearance is even more fanciful. Clearly, [PN] would be unable to accompany him there. There would be disruption to [PN]'s health if the Appellant were required to go back to his home country alone in order to get entry clearance.

34. When considering the "public interest question" outside the Rules, as Mr Berry pointed out, Section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") is relevant. He submitted that the Appellant does not have an adverse immigration history. He entered with a valid EEA residence card. I have accepted (as did the First-tier Tribunal Judge) that the Appellant is entitled to a residence card under the EEA Regulations also in the UK. As such, the Appellant is lawfully present in the UK. Although Mr Berry accepted that other factors in Section 117B were neutral, he pointed out that the Appellant speaks English (he gave his evidence in English and is fluent) and that the couple does not have recourse to public funds. [PN] is in receipt of benefits to which he is entitled by reason of his disability. The Appellant is working in order to provide further financial support.

35. In any event, the interference with the couple's family life could not be justified due to what Mr Berry described as the "egregious consequences" in particular for [PN]. Mr Berry submitted that this is one of those rare cases where there would be a violation of Article 8 ECHR even if the Appellant cannot meet the Rules.

DISCUSSION AND CONCLUSIONS

36. As I have already explained, the only issue for me to consider within the Rules is whether there are "insurmountable obstacles" to family life continuing outside the UK. The Respondent accepts that this could not be continued in Pakistan. Given the position for gay men in that country, that concession is obviously correctly made. The question is therefore whether there would be such obstacles to family life continuing in Spain.

37. I accept of course that the couple were living in Spain before they returned to the UK. They did so between 2016 and 2017. [PN] had lived there for two decades previously. Although the Appellant was unable to find work in Spain, that could not in and of itself amount to a very significant obstacle sufficient to meet the threshold. I also accept that [PN] owns a property in Spain. That is said to be rented out but, if that were the only obstacle, I would not find the threshold to be met.

38. However, in this case there is the more important factor of [PN]'s health condition. Again, I accept that the evidence shows that [PN] was receiving treatment in Spain. However, the evidence before me shows that [PN]'s condition is deteriorating, and he is suffering from even more health problems than at the time of his return. Treatment in Spain was said to be of a lower standard than in

the UK. It is clear from the medical evidence that [PN] is highly dependent on the care which he receives from the NHS in the UK. It is not reasonable to expect him to return to Spain. He is a British citizen and entitled to look to the NHS for his care.

39. I recognise that the threshold for "insurmountable obstacles" is a very high one. However, having regard in particular to [PN]'s multiple health problems and the care which he needs and receives in the UK, I am satisfied that the threshold is met in this case. I do not repeat the medical evidence which I have set out above. That evidence is the foundation for my conclusion in this regard.

40. Moreover, there is an additional problem in this case concerning the status of [PN] and the Appellant in Spain. As I have set out above, [PN] left Spain on 9 May 2017 at the very latest. Although I have to look at the situation at the date of the hearing which may have been less than two years after [PN] left Spain (although the exact date is unclear), it is unrealistic to leave out of account that [PN] would not automatically be entitled to return to Spain relying on his permanent residence. He would lose that entitlement after 9 May 2019 (and therefore at the date when this decision is written). Although the Appellant still has a valid residence permit, he would only be entitled to re-enter Spain in reliance on that permit as the family member of [PN] who would once again have to show that he is a qualified person. Since [PN] is unable to work and therefore is not economically active, [PN] would not satisfy that definition and it is therefore unlikely that the Appellant would be entitled to enter. That is not a decisive point in itself. My conclusion that there are insurmountable obstacles is for the reasons already given. However, it is an additional obstacle to family life continuing in Spain.

41. In light of my finding that EX.1(b) of Appendix FM is met, I do not strictly need to go on to consider the position outside the Rules. It follows from the foregoing reasons that I consider it to be unjustifiably harsh for the Appellant and [PN] to live permanently outside the UK. On a temporary basis, the Appellant could be expected to return to Pakistan to obtain entry clearance. He would have to do so alone. [PN] could not be expected to go with him. I accept that there is limited evidence about [PN]'s family. It is not suggested that he is estranged from his siblings and they obviously care about him as it was their influence which persuaded [PN] that he ought to come back to the UK. [PN]'s evidence was that he would not wish to burden them with his care. It may be that he would have to go to live with them whilst the Appellant was out of the UK because of the need for around the clock care. The evidence is not that they could not care for him.

42. However, I am persuaded by Mr Berry's submission that it would still be disproportionate to require the Appellant to follow that course. As Mr Berry submitted, and I accept, the Appellant is not in the UK unlawfully. He has a residence permit given to him by the Spanish authorities as the family member of a British citizen who had permanent residence in Spain. The Respondent disputes the Appellant's entitlement to remain in the UK under the EEA

Regulations but I and the First-tier Tribunal Judge both decided that the Respondent was wrong in his argument. As Mr Berry also submitted, and I accept, it appears that, once the settlement scheme under Appendix EU to the Rules is brought into force, the Appellant will be able to succeed under that scheme because the regulation on which the Respondent relies in his argument in the EEA Appeal is not required to be met for that scheme.

43. Accordingly, when Article 8 ECHR is considered outside the Rules, the maintenance of effective immigration control does not weigh in the balance against the Appellant. Neither can it be said that the Appellant's family life has been formed whilst here unlawfully which is also relevant to the weight to be given to the public interest when balanced against the interference to the Appellant's (and [PN]'s) family life which would arise from even a temporary interference with that family life by requiring the Appellant to return to Pakistan to obtain entry clearance. There is no other public interest requiring the Appellant's removal. He speaks English. The couple will not be relying on public funds other than those to which [PN] is entitled in any event by reason of his disability. Those matters are neutral but do not weigh against the Appellant in this case.

44. For those reasons, I would also have found that the interference with the Appellant's family life occasioned by removal is disproportionate when that is considered outside the Rules. However, my primary finding is that the Appellant is able to meet paragraph EX.1(b) of Appendix FM to the Rules and entitled to succeed on that basis.

45. Accordingly, I find that the Respondent's decision to refuse the Appellant leave to remain constitutes a disproportionate interference with the Appellant's family life and is therefore unlawful under section 6 of the Human Rights Act 1998. I therefore allow the appeal against the refusal of the human rights claim.

DECISION

The appeal is allowed. The Respondent's decision is unlawful under section 6 of the Human Rights Act 1998.

Signed Dated: 9 May 2019

Upper Tribunal Judge Smith

APPENDIX: ADJOURNMENT DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14401/2018

THE IMMIGRATION ACTS

Before
UPPER TRIBUNAL JUDGE SMITH

Between

IA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ADJOURNMENT DECISION

1. The Appellant has applied by letter dated 3 April 2019 for an adjournment of a hearing before me on 25 April 2019 which is a resumed hearing in order to re-make a decision on the Appellant's appeal against the refusal of a human rights claim dated 28 June 2018 ("the Human Rights Appeal). The Human Rights Appeal was dismissed by First-tier Tribunal Judge NMK Lawrence on the basis that there was no valid appeal. At [9] and [10] of my decision promulgated on 13 February 2019 ("the Decision") I found there to be an error of law in that regard and gave directions including as to whether the Appellant wished to continue with the Human Rights Appeal. The reason for those directions is because, by the Decision, I also found no error of law in the First-tier Tribunal's decision allowing a separate appeal against the refusal to issue a residence card (EA/00402/2018) ("the EEA Appeal"). I therefore upheld the First-tier Tribunal decision in relation to that appeal.

2. The Appellant accepts that if he succeeds in the EEA Appeal, there would be little point in pursuing the Human Rights Appeal. However, the Respondent has sought permission to appeal to the Court of Appeal against the Decision in relation to the EEA Appeal. I refused permission to appeal by a decision sent on

18 March 2019. The Appellant asks for an adjournment of the hearing on 25 April 2019 to await a decision by the Respondent whether to apply for permission to appeal to the Court of Appeal against the Decision in the EEA Appeal. The Respondent's deadline in this regard is on or about 15 April 2019 and therefore at least a week before the hearing before me. The Respondent's position should therefore be evident before the hearing is to take place.

3. In any event, I do not agree that this has any bearing on the Human Rights Appeal. Although the human rights claim is predicated on the same relationship as the application for a residence card, and the grounds in this regard include that to require the couple to relocate to Spain offends EU law, otherwise the two cases are separate and relate to separate appeals. Although I accept that to proceed with the Human Rights Appeal might ultimately be pointless if the Respondent fails in his appeal against the Decision relating to the EEA Appeal, that is not good reason to adjourn the hearing.

4. The Appellant also seeks to adjourn on the basis that he has now made or is now making an application under the EU Settlement Scheme. However, that can have no bearing on the Human Rights Appeal. Any application does not give rise to a right of appeal until determined. Further, it is unquestionably a "new matter" which would therefore require the Respondent's consent to be pursued. I doubt such consent would be forthcoming in circumstances where an application remained pending but, in any event, a hearing would probably be required to canvas this with the Respondent. The hearing on 25 April could be used for such purpose if appropriate.

5. For those reasons, I refuse the application for an adjournment. The hearing on 25 April 2019 will proceed as listed.

Signed Dated: 5 April 2019
Upper Tribunal Judge Smith