**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/25987/2016

**THE IMMIGRATION ACTS**

| **Heard at Glasgow** | **Decision & Reasons Promulgated** |
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| **On 12 April 2019** | **On 25 April 2019** |

**Before**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**BUSHRA BIBI**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr McGuire, Counsel instructed by McKenzie Solicitors
For the Respondent: Mr M Mathews, Senior Presenting Officer

**DECISION AND REASONS**

**1.** The appellant, who is a citizen of Pakistan, has been granted permission to appeal the decision of Designated Judge of the First-tier Tribunal Murray, who for reasons given in her decision dated 13 June 2018, dismissed the appellant's appeal on human rights grounds against the Secretary of State's decision dated 26 October 2016 refusing her human rights application based on her relationship to her partner Yaqoob Yousaf, a British citizen. It was contended by the Secretary of State that, with reference to the provisions of Appendix FM (being the immigration status requirements), the appellant would need to meet the requirements in EX.1. It was not considered that there were insurmountable obstacles to the family life continuing outside the UK. As to the appellant's private life,

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it was considered that there would not be very significant obstacles to her integration in Pakistan.

**2.** The appellant had married Yaqoob Yousaf on 16 March 2007 in Pakistan. She had been granted permission to visit the United Kingdom the same year and thereafter she moved to Dubai with her spouse to live in 2008, where she applied for spouse visa. That was refused, but nevertheless she was granted a visit visa on which she arrived in the United Kingdom in 2008 and came and went for periods of time between then and 2015 as a visitor. On 7 August 2015, the appellant applied to remain as a partner which was refused with certification under section 94. Judicial review proceedings ensued. On 30 December 2015 the appellant submitted the further FLR(M) application that had led to the respondent's refusal.

**3.** Judge Murray dismissed the appeal. In a detailed decision she recorded the evidence and accepted that the appellant was an overstayer because of exceptional circumstances relating to her health. She did not accept that this has led to an inability for her to fly to Pakistan which had been a factor the appellant had relied on. The judge observed that the appellant's husband had now been in the United Kingdom for a number of years but that she had not been staying with him permanently apart from the period since 2015. She did not expect Mr Yousaf to give up his business in the United Kingdom and go to live in Pakistan with the appellant as this was "unnecessary".

**4.** The judge then proceeded to consider the case under the rules. At paras [58] to [61] she set out her reasons for not accepting that either the provisions in Appendix FM or paragraph 276ADE had been met:

> "58. I am going to consider the application under the Rules. First of all I am looking at Appendix FM and note that the appellant is suitable. When she made her most recent further leave to remain application she had 3C leave and Counsel's argument is that she therefore was not applying as a visitor when she made this application but she did not fall into a category which entitled her to be granted further leave to remain in the United Kingdom. I accept that she meets the financial requirements based on the payslips and bank statements on file belonging to her husband and I have noted that she has sat an English language test and she spoke English at the hearing. I find it strange that she sat the ESOL exam in 2011 if she had no intention of, in the future, applying for leave in the United Kingdom as something other than a visitor. Her evidence is that her husband only decided in 2015 that he wanted to stay in the United Kingdom.
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> 59. I do not accept Counsel's argument relating to Appendix FM and find that she cannot succeed on this basis. I do not find that there are insurmountable obstacles to family life with her partner continuing outside the UK. He has a job here that he enjoys, is doing it well and is helping others but if necessary he could go to live and work in Pakistan. He is a British citizen but this does not mean that the appellant cannot return to Pakistan and make a spousal application and she can then come to the United Kingdom

on a legal basis. The appellant has been married for 11 years and between 2008 and 2015 she was travelling between Pakistan and the UK and spent many months away from the UK.

60. I accept that the appellant's husband is British and there are no credibility issues relating to his mother's and brother's health and disability. If the appellant is not there however, her brother-in-law has carers and has overnight respite care a few days a week. I accept that the appellant probably has a good relationship and a bond with her mother-in-law and her brother-in-law, but there are other avenues of care available and ongoing. Her husband states that he is in the United Kingdom to care for his mother and brother and he will still be here if she returns to Pakistan to make a spousal application.

61. Counsel also states that the requirements of paragraph 276ADE(1)(vi) are satisfied but I do not find there are very significant obstacles to the appellant's integration into Pakistan if she returns to make an application to return to the United Kingdom. At present she receives painkillers and physiotherapy for her medical condition. Her last review and MRI scan was quite a number of months ago and there is nothing before me to indicate that the medical treatment in Pakistan, such as she is receiving in this country, will not be available or will be inaccessible in Pakistan. She can continue with her physiotherapy exercises there and she can take painkillers there. Her husband can support her application to return to the United Kingdom. I do not find that paragraph 276ADE(1) is satisfied. She lived and worked in Pakistan until 2007 and she has family there."

**5.** The judge then turned to Article 8 and set out her reasoning as follows:

"62. I have now to consider Article 8 outside the Rules. This appellant has never been in the United Kingdom in any category other than precarious. She has always come and gone between Pakistan and the United Kingdom. For her to go back to Pakistan and make her application would be no different to what she has been doing in the past. Based on her immigration history it would not be disproportionate for her to return to the Pakistan and make her application as a spouse and return.

63. I accept that the appellant is in a genuine subsisting relationship with her husband. I accept that he does not want to relocate in Pakistan as he is a British citizen with an established life in the United Kingdom and has an elderly mother and disabled brother here. Counsel submits that the appellant meets the requirements or at least the spirit of the Rules. I find that her claim does not satisfy the Rules and that is what is important. Counsel refers to disruption if she has to leave the United Kingdom to go to Pakistan but this is what she has been doing since 2008. It is accepted by both parties that she has no legal right to be in the United Kingdom and it is accepted by both parties that she has sought to regularize her stay but has not been able to. I find that when she recovered from her operation she should have returned to Pakistan and from there made the relevant application.

> 64. I do not find that this is an exceptional case or that the decision will have a devastating effect on her relationship with her husband and his family. When Article 117B is considered and when the appellant's rights are weighed against public interest, this is an appellant who should have returned to Pakistan and cannot meet the terms of the Rules. This must go against her in any proportionality assessment. Her stay has always been precarious, she has always been aware that she was not entitled to remain in the United Kingdom without obtaining a different type of visa. Again when public interest is considered the appellant has had medical treatment in the United Kingdom and there is no evidence that she has paid for this treatment herself. She may have but this has not been shown to me. She seems to be receiving ongoing treatment from the National Health Service and this is being funded by the public purse."

**6.** And finally concluded at [65]:

> "65. I find that the appellant and her husband are intelligent people and are aware of what should be done and what is right in this case. I find that her claim cannot succeed under Article 8 outside the Rules as public interest succeeds over her rights."

**7.** The grounds of challenge are discursive and unnecessarily so. Deputy Upper Tribunal Judge Jordan has accurately summarised their effect in granting permission on a renewed application to the Upper Tribunal as follows:

> "1. Paragraphs 40 to 51 contain a summary of the submissions made by counsel for the appellant in support of the contention that it was disproportionate to require the appellant to return to Pakistan to seek entry clearance. These submissions seem largely correct as a factual summary of the evidence. She developed a spinal tumour which prevented her returning to Pakistan within the period of her visit visa. The judge accepted that this amounted to exceptional circumstances.
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> 2. The judge found that the appellant met the requirements of Appendix FM save for insurmountable obstacles to family life continuing outside the United Kingdom. She accepted there were no credibility is[sues] in relation to the evidence her husband gave as to his mother and his brother's health and disability. She found however that the appellant should have returned to Pakistan and made the relevant application there. The implication is that, had she done so, she would have succeeded.
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> 3. It is arguable that the judge did not properly evaluate the reduced strength of the public interest in requiring her to leave the United Kingdom given the exceptional circumstances in her remaining as an overstayer and the implication that such an application would succeed."

**8.** Mr McGuire acknowledged the lengthy and discursive nature of the grounds and considered that the grant of permission by UTJ Jordan amounted to a restricted grant based on paragraph [3] of the grant of

permission with reference to the proportionality exercise. He did not seek to argue other grounds although he thought that consideration of paragraph [3] might nevertheless require consideration of other aspects raised in the grounds. He did not consider the challenge to be one of irrationality but a misdirection by the judge resulting in an excessive weight having been given to the public interest with specific reference to paragraph [64] of her decision.

**9.** The relevant ground of challenge therefore was in paragraph [7] which addresses the Article 8 assessment and identifies error which I summarise using the same paragraph lettering:

(a) The finding that this was not an exceptional case was contradicted by the acceptance of the exceptional circumstances that had led to the appellant being an overstayer.

(b) The reasoning regarding the frequency of the appellant's journeys was perverse given that she was an overstayer who had used the NHS and was assisting with the care of her husband's elderly mother and disabled brother.

(c) The reference in [63] and [64] as to the Rules not being satisfied was inconsistent with the judge's earlier observation that she saw no reason why entry clearance would not be accepted.

(d) Repetition of the point in (c) above but with reference to authorities including *Chikwamba* [2008] UKHL 40.

(e) The issue of payment for medical treatment had been raised for the first time without the opportunity of the appellant responding and thus procedurally unfair.

(f) Inadequate account taken of the contribution by the appellant's husband with reference to *UE (Nigeria) & Ors v SSHD* [2010] EWCA Civ 975.

(g) The above errors materially impugn the judge's conclusion it would not be disproportionate.

2. Mr McGuire submitted that in general, the appellant and witnesses were found to be credible and the only reason why the application failed under the Rules was with reference to "very significant obstacles". The explanation by the appellant why she could not return was relevant to the public interest and he argued the judge had taken an inconsistent approach as to whether the appellant met the requirements of the Rules. He placed reliance on *Chikwamba* and argued that too reduced the weight to be given to the public interest which was not static. He nevertheless acknowledged that the test of insurmountable obstacles was a high one.

3. By way of response, Mr Matthews submitted that it was clear the starting point was the appellant's lack of success under the Rules by reference to EX.1. With the judge having found no insurmountable obstacles this was a reflection of where the public interest stood. As to the specific points taken in ground 7, as to (a) there no contradiction and as to (b) the judge

was entitled to take the appellant's travel history into account. A point in relation to paragraph 320(7) had not been taken by the Secretary of State (in relation to medical reasons). Mr Mathews continued with reference to (c) that the judge's observation that the appellant did not satisfy the Rules was different from her earlier conclusion that there was no reason why entry clearance would not be accepted. As to (d), sensible reasons had been given by the judge why the appellant should apply by reference to the outcome under the Rules and that it would not be disproportionate for the couple to live in Pakistan. In relation to (e) no evidence had been offered to show that the cost of treatment had been paid by the appellant.

4. Mr McGuire acknowledged that there was no evidence available to show that the appellant had paid for her NHS treatment but understood it had arisen out of an emergency for which treatment would be provided.

5. Both Mr McGuire and Mr Matthews accepted that in the event that I found error and set aside the decision, they would rely on what they had already said in a re-making. No new evidence had been lodged nor had application been made for it to be adduced.

6. I explained to the parties in the course of their submissions that I would be having regard to the decision of the Court of Appeal in *TZ (Pakistan) v SSHD* [2018] EWCA Civ 1109 and referred in the hearing to paragraph [34] of the judgment of the Senior President of Tribunals:

> "34. That leaves the question of whether the tribunal is required to make a decision on Article 8 requirements within the Rules i.e. whether there are insurmountable obstacles, before or in order to make a decision about Article 8 outside the Rules. The policy of the Secretary of State as expressed in the Rules is not to be ignored when a decision about Article 8 is to be made outside the Rules. An evaluation of the question whether there are insurmountable obstacles is a relevant factor because considerable weight is to be placed on the Secretary of State's policy as reflected in the Rules of the circumstances in which a foreign national partner should be granted leave to remain. Accordingly, the tribunal should undertake an evaluation of the insurmountable obstacles test within the Rules in order to inform an evaluation outside the Rules because that formulates the strength of the public policy in immigration control '*in the case before it*', which is what the Supreme Court in *Hesham Ali* (at [50]) held was to be taken into account. That has the benefit that where a person satisfies the Rules, whether or not by reference to an Article 8 informed requirement, then this will be positively determinative of that person's Article 8 appeal, provided their case engages Article 8(1), for the very reason that it would then be disproportionate for that person to be removed.
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> 35. I suggested at [19] that there exists a structure for judgments in the FtT where Article 8 is engaged. That was referred to by Lord Thomas in *Hesham Ali* at [82 to 84] and recommended by him. I strongly endorse his recommendation. Although there is no obligation in law for a tribunal to structure its decision-making in

> any particular way and it is not an error of law to fail to do so, the use of a structure in the judgments in these appeals would almost certainly have avoided the appeals, given that the ultimate conclusion of the tribunals was correct. To paraphrase Lord Thomas: after the tribunal has found the facts, the tribunal sets out those factors that weigh in favour of immigration control – 'the cons' – against those factors that weigh in favour of family and private life – 'the pros' in the form of a balance sheet which it then uses to set out a reasoned conclusion within the framework of the test(s) being applied within or outside the Rules. It goes without saying that the factors are not equally weighted and that the tribunal must in its reasoning articulate the weight being attached to each factor."

7. In my judgment this is precisely the approach that was taken by Judge Murray. I have set out her reasoning verbatim which shows that she left none of the evidence out in terms of her findings in relation to the Rules and reached findings on the facts rationally open to her without error in concluding that the insurmountable obstacles test had not been satisfied. She then correctly proceeded to consider the case by reference to Article 8. The weight which she gave to the public interest was properly open to her and I do not find her conclusions were perverse (an aspect which has not been alleged) or that error was made in her assessment of the facts by giving excessive weight to a particular factor or overlooking a piece of the evidence. Specifically in respect of the contribution that the appellant's partner makes, she concluded her decision with an observation at [66]:

> "66. I have noted the evidence of the 2 other witnesses who clearly admire what the sponsor does in the United Kingdom and both have been helped by him but their evidence does little to strengthen the appellant's claim."

8. In his response to Mr Matthews' submissions Mr McGuire explained that the more he considered this case the more fortified he was that it came within the scope of *Chikwamba*. In my judgment despite the eloquence with which the submission was made, it is not sustainable. The application of the *Chikwamba* principle was considered by the Court of Appeal in *SSHD and R (on the application of Paramjit Kaur)* [2018] EWCA Civ 1423. At [71ff] Holroyde LJ explained:

> "71. Mrs Kaur is seeking (in relation to *Chikwamba*) to argue a point which could have been but was not raised below, and in relation to which the court below would have received evidence and made findings of fact. In such circumstances, in accordance with the principle stated in that passage, she requires not only the extension of time which she has obtained but also permission to argue this fresh point. It is relevant to consider what the position would be if the order below had been expressed (as it might have been) in different terms, such that Mrs Kaur would have sought a formal variation of part of it if she succeeded on the new *Chikwamba* point. In that situation, she would have been required to file an appeal notice in order to raise her new point, and this court would have been able to consider whether permission

should be given to argue that new point. It would to my mind be highly unsatisfactory if this court had no control over the raising and arguing of that new point simply because the form of the order made below permits Mrs Kaur to raise the point by way of a Respondent's Notice rather than an appeal notice. For reasons which will become apparent, I would exercise the court's discretion to refuse permission to argue this fresh point."

9. At [43] to [45] Holroyde LJ observed:

"43. It must however be noted that the facts in *Chikwamba* were striking. The claimant was a Zimbabwean national. In June 2002 her asylum claim and leave to enter were refused. Her removal was however suspended because of deteriorating conditions in Zimbabwe. She then married a Zimbabwean man who had earlier been granted asylum in this country, and in April 2004 a daughter was born to them. In November 2004 the bar on forced removals to Zimbabwe was lifted. The claimant appealed against the Secretary of State's refusal of her claim that removal to Zimbabwe would breach her Article 8 right to respect for her family life. The issue was whether she should be required to return to Zimbabwe in order to apply from there for permission to rejoin her husband. It was accepted that he could not return to Zimbabwe. It was found by the adjudicator that conditions in Zimbabwe would be "harsh and unpalatable". The facts were such that the claimant would have "every prospect of succeeding" if she made an application from Zimbabwe for permission to re-enter and remain in this country. However, if the claimant had to return to Zimbabwe her child would either have to face those unpalatable conditions for a time, or be separated from her mother. In those circumstances, Lord Brown said at paragraph 46:

> "is it really to be said that effective immigration control requires that the claimant and her child must first travel back (perhaps at the taxpayers' expense) to Zimbabwe, a country to which the enforced return of failed asylum seekers remained suspended for more than two years after the claimant's marriage and where conditions are 'harsh and unpalatable', and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the United Kingdom to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer."

44. I note that in *Hayat v SSHD* [2011] UKUT 444 (IAC), Upper Tribunal (Lord Menzies and UT Judge PR Lane, as he then was) said:

> "23. The significance of Chikwamba, however, is to make plain that, where the only matter weighing on the respondent's side of the balance is the public policy of requiring a person to apply under the rules from abroad, that legitimate objective will usually be

> outweighed by factors resting on the appellant's side of the balance.
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> 24. Viewed correctly, the Chikwamba principle does not, accordingly, automatically trump anything on the State's side, such as a poor immigration history. Conversely, the principle cannot be simply "switched off" on mechanistic grounds, such as because children are not involved, or that (as here) the appellant is not seeking to remain with a spouse who is settled in the United Kingdom."
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> With every respect to the Upper Tribunal, I do not think that Lord Brown's words in *Chikwamba* justify the inclusion of the word "usually" in paragraph 23 of their decision.
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> 45. I have quoted in paragraph 26 above the passage in which Lord Reed (at paragraph 51 of his judgment in *Agyarko*) referred to *Chikwamba*. It is relevant to note that he there spoke of an applicant who was "certain to be granted leave to enter" if an application were made from outside the UK, and said that in such a case there *might* be no public interest in removing the applicant. That, in my view, is a clear indication that the *Chikwamba* principle will require a fact-specific assessment in each case, will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain."

10. It cannot be said that the appellant's case was a very clear case for the grant of entry clearance despite the judge observing at [57] that she could see no reason why the explanation by the appellant for overstaying would not be accepted.

11. The decision in *Kaur* is also of assistance in understanding the meaning of "insurmountable obstacles". At [23] Holroyde LJ explained and cited *Agyarko:*

> "23. Since the decision of the Deputy Judge in this case, the meaning of "insurmountable obstacles" has been definitively stated by the Supreme Court in *Agyarko*. Lord Reed, with whom the other Justices of the Supreme Court agreed, referred to *Jeunesse v The Netherlands* (2015) 60 EHRR 17, GC, saying:
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> "42. In *Jeunesse*, the Grand Chamber identified, consistently with earlier judgments of the court, a number of factors to be taken into account in assessing the proportionality under Article 8 of the removal of non-settled migrants from a contracting state in which they have family members. Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were "insurmountable obstacles" in the way of the family living in the country of origin of the non-national concerned, and whether there were factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion: para 107.

> 43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer ... 'Insurmountable obstacles' is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119."

24. Lord Reed went on to refer, at paragraph 44, to the fact that the July 2012 version of the Rules (which was applicable in that case, and is applicable in this) did not define the expression "insurmountable obstacles". With effect from July 2014, however, Appendix FM was amended by the addition of paragraph EX.2, which states –

> "For the purposes of paragraph EX.1(b) 'insurmountable obstacles' means 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."

25. Lord Reed concluded that that definition was consistent with the meaning given to the phrase by the decisions of the European Court of Human Rights. He therefore concluded that the meaning of the phrase under the 2012 version of the Rules was the same as it is now under paragraph EX.2. He continued:

> "45 By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case in which such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in 'exceptional circumstances', in accordance with the Instructions: that is to say, 'in circumstances in which

> refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate'."

12. By way of conclusion I am satisfied that Judge Murray reached her conclusions on the obstacles to the family life established by the appellant continuing outside the United Kingdom in the real world of the possibility that she would apply in Pakistan to return to the United Kingdom. With specific reference to paragraph [7] of the grounds, I see no contradiction in the direction by the judge at [64] and the reference to exceptional circumstances in [55]. The test under Article 8 is not one of exceptionality and it is clear that the judge used the term to describe a situation out of the ordinary. The judge was entitled to take account of the history of journeys between the United Kingdom and Pakistan by the appellant and gave sustainable reasons why any deficiency in the care of her husband's elderly mother and disabled brother would be filled. It was rationally open to the judge to express a positive view in relation to the eventual success of the application but it was not for her to decide that it would definitely succeed. As part of the proportionality exercise the judge was entitled to refer to the cost of the NHS treatment being a factor. I have quoted paragraph [66] above indicating that the judge also took into account the positive contribution that the appellant's husband is making.

13. I am not persuaded that Judge Murry erred on the basis of the ground of challenge argued before me. This appeal is dismissed.

Signed Date 18 April 2019

UTJ Dawson
Upper Tribunal Judge Dawson