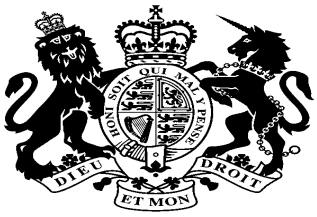

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09649/2019_P

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing on 23 September 2020

Decision and Reasons Promulgated: On 28 September 2020

Before:

UPPER TRIBUNAL JUDGE GILL

Between
Mr Rezaul Hoque Al-Mahmud
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

This is a decision on the papers without a hearing. The appellant consented to the decision being made on the basis of written submissions. The respondent did not advance any submissions whether a decision could appropriately be made on the papers. The documents described at para 5 below were submitted. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 7-19 below. The order made is set out at para 97 below. *(Administrative Instruction No. 2 from the Senior President of Tribunals).*

Representation (by written submissions):
For the appellant: Zahra & Co Solicitors.
For the respondent: Mr T Melvin, Senior Presenting Officer.

DECISION

1. The appellant, a national of Bangladesh born on 31 July 1984, appeals against a decision of Judge of the First-tier Tribunal Bannerman (hereafter the "Judge") who, in

a decision promulgated on 18 October 2019 following a hearing on 19 September 2019, dismissed his appeal on human rights grounds (Article 8) against a decision of the respondent of 17 May 2019 to refuse his application of 4 December 2018 for leave to remain on human rights grounds (Article 8). The appellant had applied for leave to remain on the basis of his right to his family life with his wife, Ms Hasina Khanom, a British Citizen (hereafter the "sponsor").

2. Permission to appeal was granted by a Judge of the First-tier Tribunal (the "permission judge") in a decision signed on 6 February 2020.

3. On 21 April 2020, the Upper Tribunal sent to the parties a "*Note and Directions*" issued by Upper Tribunal Judge O'Callaghan. Para 1 of the "*Note and Directions*" stated that, in light of the need to take precautions against the spread of Covid-19, Judge O'Callaghan had reached the provisional view, having reviewed the file in this case, that it would be appropriate to determine questions (a) and (b) set out at para 1 of his "*Note & Directions*", reproduced at my para 5(i)(a) and (b) below, without a hearing. Judge O'Callaghan gave the following directions:

    (i) Para 3 of the "*Note and Directions*" issued directions which provided for the party who had sought permission to make submissions in support of the assertion of an error of law and on the question whether the decision of the First-tier Tribunal ("FtT") should be set aside if error of law is found, no later than 14 days after the "*Note and Directions*" was sent to the parties; for any other party to file and serve submissions in response, no later than 21 days after the "*Note and Directions*" was sent to the parties; and, if such submissions in response were made, for the party who sought permission to file a reply no later than 28 days after the "*Note and Directions*" was sent to the parties.

    (ii) Para 4 of the "*Note and Directions*" stated that any party who considered that despite the foregoing directions a hearing was necessary to consider questions (a) and (b) may submit reasons for that view no later than 21 days after the "*Note and Directions*" was sent to the parties.

4. Judge O'Callaghan issued further directions dated 28 May 2020 (sent on 20 June 2020) and 8 July 2020 (sent on 16 July 2020).

5. In response to Judge O'Callaghan's directions, the Upper Tribunal has received the following:

    (i) On the Secretary of State's behalf, a document entitled: "*Respondent's Written Submissions/Rule 24 Reply*" dated 1 May 2020 from Mr Melvin, submitted to the Upper Tribunal under cover of an email dated 2 May 2020 timed at 15:55 hours.

    (ii) On the appellant's behalf, the following:

        (a) A letter dated 5 May 2020 from Zahra & Co Solicitors, submitted to the Upper Tribunal under cover of an email of the same date timed at 15:29 hours.

        (b) A letter dated 24 June 2020 from Zahra & Co Solicitors, submitted to the Upper Tribunal under cover of an email of the same date timed at 19:59 hours.

        (c) A letter dated 23 July 2020 from Zahra & Co Solicitors.

THE ISSUES

6. I have to decide the following issues (hereafter the "*Issues"*),

   (i) whether it is appropriate to decide the following questions without a hearing:

      (a) whether the decision of the Judge involved the making of an error on a point of law; and

      (b) if yes, whether the Judge's decision should be set aside.

   (ii) If yes, whether the decision on the appellant's appeal against the respondent's decision should be re-made in the Upper Tribunal or whether the appeal should be remitted to the FtT.

WHETHER IT IS APPROPRIATE TO PROCEED WITHOUT A HEARING

7. In their letter dated 5 May 2020, Zahra & Co Solicitors state that they understand the approach taken by the Upper Tribunal in inviting submissions. In their letter dated 24 June 2020, they confirmed that the appellant consents to the "*error of law proceeding by written submissions*". In their letter dated 23 July 2020, they confirmed that the appellant consents to *the "error of law*" being considered on the submissions already made.

8. The respondent has not made any submissions on the question whether it is appropriate for the Upper Tribunal to proceed to decide the Issues without a hearing.

9. I do not rely upon the mere fact that the appellant has consented to the Upper Tribunal proceeding to decide the Issues without a hearing or the mere fact that the respondent has not made any submissions as factors that, in themselves, justify proceeding without a hearing. I have considered the circumstances for myself.

10. I am aware of, and take into account, the force of the points made in the dicta of the late Laws LJ at para 38 of Sengupta v Holmes [2002] EWCA Civ 1104 to the effect, inter alia, that "*oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge*"; Keene LJ at para 47 of Sengupta v Holmes concerning the impact that oral submissions may have on the decision-making process; paras 35 and 48 respectively of the judgments of Lord Bingham and of Lord Slynn in Smith v Parole Board [2005] UKHL 1; the dicta at para 17(3) of Wasif v SSHD [2016] EWCA Civ 82 concerning the power of oral argument; the dicta in the decision in R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256 to the effect that justice must be done *and* be seen to be done; and the dicta at para 8 of R (Siddiqui) v Lord Chancellor and others [2019] EWCA Civ 1040 to the effect that it is an "*undeniable fact that the oral hearing procedure lies at the heart of English civil procedure*", to mention just a few of the cases in which we have received guidance from judges in the higher courts concerning the importance of an oral hearing.

11. I am aware of and have applied the guidance of the Supreme Court at para 2 of its judgment in Osborn and others v Parole Board [2013] UKSC 61.

12. The appeal in the instant case is not complicated, albeit that the grounds are discursive. Given that my decision is limited to the Issues, there is no question of my making findings of fact or hearing oral evidence or considering any evidence at this stage.

13. In addition, I take into account the seriousness of the issues in the instant appeal for the appellant. He has applied for leave to remain on the basis of his family life with his wife. Article 8 claims are matters of some importance, albeit not of the same level of seriousness as, for example, protection claims.

14. I have considered all the circumstances very carefully and taken everything into account, including the overriding objective.

15. Taking a preliminary view at the initial stage of deciding whether it is appropriate and just to decide the Issues without a hearing, I considered the Judge's decision, the grounds and the submissions before me. I was of the view, taken provisionally at this stage, that the assessment of the Issues in the instant case is not complicated notwithstanding the number of grounds I have extracted from the appellant's grounds of appeal. The Judge's decision is straightforward. I kept the matter under review throughout my deliberations. However, at the conclusion of my deliberations, I was affirmed in the view I had taken on a preliminary basis.

16. Whilst I acknowledge that the Tribunal is now listing some cases for face-to-face hearings and using technology to hold hearings remotely in other cases where it is appropriate to do so, the fact is that it is not possible to accommodate all cases in one of these ways without undue delay to all cases.

17. Of course, it is impermissible, in my view, to proceed to decide a case without a hearing if that course of action would be unfair in the particular case. If it would be unfair to proceed to decide an appeal without a hearing, it would be unfair to do so even if there would be a lengthy delay in order to hold a hearing face-to-face or remotely or even if there is a consequent delay on other cases being heard. The need to be fair cannot be sacrificed.

18. There are cases that can fairly be decided without a hearing notwithstanding that the outcome of the decision may not be in favour of the party who is the appellant. In the present unprecedented circumstances brought about by the coronavirus pandemic, it is my duty to identify those cases that can fairly be decided without a hearing.

19. In all of the circumstances, having considered the matter with anxious scrutiny and having considered the overriding objective and the guidance in the relevant cases including in particular Osborn and others v Parole Board, I concluded that it is appropriate, fair and just for me to exercise my discretion and proceed to decide the Issues without a hearing, for the reasons given in this decision.

QUESTIONS (A) AND (B) - WHETHER THE JUDGE ERRED IN LAW

The appellant's Article 8 claim

20. The appellant arrived in the United Kingdom on 13 June 2009 as a student. He had leave to remain as a student until 30 September 2014. He has remained unlafwully since then.

21. The appellant met the sponsor in March 2017. They were married in August 2017.

22. The sponsor lived in Bangladesh from birth until 2010. She is now a British citizen. As at the date of the hearing before the Judge, she was pregnant with a due date in February 2020.

23. On the evidence before the Judge, the appellant had family in Bangladesh. His mother, brother and sister were living in Bangladesh (para 23 of the Judge's decision). The sponsor has a brother and two sisters in the United Kingdom. Her parents and another brother live in Bangladesh (para 40 of the Judge's decision). She visited Bangladesh twice in 2013 and once in 2015 for 3 or 4 weeks staying with family on each occasion (para 41 of the Judge's decision). The appellant returned to Bangladesh for 4 weeks in 2012 (para 25).

24. Besides relying upon his right to his family life with his wife, the appellant also relied upon his private life said to have been developed in the UK since his arrival.

25. The appellant's Article 8 claim was also based on difficulties that it is said he will experience on reintegrating in Bangladesh, including difficulties in relation to treatment for his mental health condition. At the hearing before the Judge, the respondent's representative accepted that the problems relating to the appellant's health were "*well-documented"* (para 51 of the Judge's decision).

The respondent's decision

26. The respondent refused the appellant's application for reasons which may be summarised as follows:

    (i) As the appellant had not paid a litigation debt of £320, he did not meet the eligibility suitability requirement under Section S-LTR.

    (ii) He did not meet the eligibility relationship requirement under paras E-LTRP.1.1-1.12.

    (iii) He did not meet the eligibility immigration status requirement because his leave as a student expired on 30 September 2014 and he has therefore been living in the United Kingdom without valid leave for 4 years 2 months.

    (iv) There were no very significant obstacles to his reintegration in Bangladesh and therefore he did not meet the requirements of para 276ADE(1)(vi) of the Immigration Rules. Paras 276ADE(1)(iii)-(v) did not apply.

    (v) He did not qualify under the 10-year partner route or the 10-year private life route.

    (vi) There were no exceptional circumstances and therefore he did not meet the requirements of para GEN.3.2 of Appendix FM.

The Judge's decision

27. By the date of the hearing before the Judge, the appellant had paid his litigation debt.

28. At the hearing before the Judge, the respondent's representative no longer disputed the appellant's relationship with his wife (para 42 of the Judge's decision). However, he maintained that the appellant did not satisfy the immigration status requirement.

29. Before the Judge, the appellant's representative submitted that the appellant met all of the requirements under the Immigration Rules except for his immigration status, that he could only get out of that difficulty if he meets the requirements of EX.1 but he was not able to do so. He therefore submitted *"… so the appeal was not proceeding under EX.1 and therefore this should be a procedure outside the Rules*" (paras 60 and 83 of the Judge's decision).

30. The appellant's representative referred the Judge to the judgments in Chikwamba v SSHD [2008] UKHL 40 and R (Agyarko) v SSHD [2017] UKSC 11 (paras 72-73 of the Judge's decision). The Judge was referred, in particular, to paras 49-53 of Agyarko.

31. It was submitted on the appellant's behalf that the appellant now satisfied the suitability requirements. With regard to the eligibility relationship requirements, his wife is a British citizen. Her income was above the threshold of £18,600, as evidenced by the letter on page 48, the payslips at pages 40-47 and the bank statements at 49-80. He meets the English language requirement because he has a UK degree, as evidenced by the document at page 130 of the appellant's bundle (paras 69-70 of Judge's decision).

32. It was therefore submitted on the appellant's behalf that *"there was no interest in the enforcement of immigration control to require him to go back to apply for entry clearance"* (para 74).

33. The Judge found that the respondent's decision was proportionate. He gave his reasons at paras 76-94 of his decision, stating, inter alia, that he had considered all of the evidence and the cases of Chikwamba and Agyarko as well as other cases that he mentioned at para 78.

34. At para 79, the Judge referred to the appellant having "*somewhat of a cavalier attitude to matters of immigration control …".* He said that he took from the appellant's evidence that *"he felt that he had some form of 'trump card' in having the relationship with his partner who is pregnant".*

35. In view of the grounds, it is necessary to quote paras 76-94 of the Judge's decision where he gave his reasons for concluding that the respondent's decision is proportionate.

> "My Findings
>
> 76. I have given very careful consideration to all of the evidence put before me in this case, both written and oral.
>
> 77. In this case parties were agreed, at least in part, that this was a matter that should be dealt with by way of proportionality.
>
> 78. Having examined the authorities and rules I agree with both parties that this is a matter that has to be looked at outside the rules as the Appellant did not qualify under Appendix FM 276ADE and having been referred by parties to the cases of Chikwamba, Agyarko, MM Lebanon UKSC 2017,

Section 117A of the Nationality, Immigration & Asylum Act 2002 and to the case of Rhuppiah 2018 UKSC58, as well as Section 117B and other aspects of the Rules, I considered them all.

79. I have to say that the Appellant had somewhat of a cavalier attitude to matters of immigration control stating on two occasions that he would (1) be wasting his time going back to Bangladesh and (2) that the British law would not separate he and his wife. I took from his evidence that he felt that he had some form of 'trump card' in having the relationship with his partner who is pregnant. However, there is no trump card to be played in any particular case and an unborn child or a pregnant partner should never be treated as such. His character as well was somewhat undermined by a period of time when he remained in the United Kingdom with no legitimate or lawful immigration status, and that he patently did not advise his now partner of his lack of immigration status in the first few several meetings between them, even though he has now told her of the situation.

80. There is of course no dispute as to the relationship between he and his partner or the fact that she is now pregnant and due to give birth next year.

81. There seems to be no argument that he had not paid his immigration fees and that is the reason why the Respondents had considered that he had failed to meet suitability under S-EC.3.1. although those have now been paid and were apparently paid before today's hearing.

82. Of course I'm looking at the situation as it pertains now and find that he remains in his relationship, that he has his roots in Bangladesh having lived there most of his life as did his wife before she came to the United Kingdom but she now has citizenship here, albeit that her parents and a sibling are still in Bangladesh where she lived and integrated for the majority of her life.

83. I consider Mr Hussain to be correct to argue that this is a matter that must be considered outside the rules and that the issue of proportionality applies.

84. Of course Agyarko provides us with considerable assistance in looking at the weight to be applied to individual factors and to the proportionality argument that I am considering.

85. The Appellant and his partner speak English, the Appellant is reliant on his partner's income but she is in employment and is a UK citizen. He has some mental health problems which are confirmed.

86. He could be treated in Bangladesh, he has provided no evidence at all to state that cannot be the case and Bangladesh has a healthy health system which he could access.

87. The Appellant commenced this family life with his partner when his immigration status was precarious. There is family, indeed his wife's family, in Bangladesh who could support him and his wife will not be forced to go to Bangladesh, though conceivably she could should she choose to do so. She is pregnant but the baby is not due for some months. The Applicant could make an application from abroad.

88. I have no difficulty in concluding that Article 8(1) is engaged and in this case there is a family life gateway with family life in both countries. I use a balance sheet approach looking at whether he should have been granted discretionary leave to remain, or should be returned to Bangladesh.

89. I look to balance the evidence and the relevant factors on an accumulative basis and ask how the fair balance should be struck between competing individuals interests and the public interest, applying the proportionality test and reference to Agyarko of course therein. There are facts to weigh in the other cases I was referred to and I consider them and how they play in these particular circumstances.

90. In this case exceptional circumstances does not, as the case is disclosed, mean unusual or unique and of course his wife's health is a little precarious because she is pregnant and there is an unborn baby's life to consider as well.

91. As a country the United Kingdom is entitled to control of its borders and of course in this case family life has been attained and then continued and established in the full knowledge that continuing it in the United Kingdom was precarious.

92. The Appellant's wife has supportive family in the United Kingdom, not just the support of the Appellant and I balance the strength of public interests in the removal against the impact on his family life.

93. I do not find that exceptional circumstances apply in this case. I acknowledge that the lady is pregnant and will go on to give birth to what everyone would hope would be a healthy baby, but at this time and in the circumstances of this case that I find taking account of the sections, rules and cases referred to, I find that the Respondent's decision is not incompatible with Article 8, the Appellant can relocate to Bangladesh, will have wider family support there and is well aware of the culture there, he will have healthcare there and his case is neither very strong or compelling. It is certainly not exceptional. I do take account of course of Section 117A and Section 117B (even taking account of the letter from Zahra & Co Solicitors where they take responsibility for not advising the Appellant of the consequence of not paying the fees) but the fact is of course that he didn't pay the fees. His medical records are brief.

94. Naturally I have taken into account the letters in support of his wife and the factor of her abusive relationship in Bangladesh but Bangladesh is a populous country and she would have the support of her husband if she chooses to go there, though I am not suggesting she requires to consider that. The disturbance to she and her husband's family life is proportionate and the decision justified in the circumstances of this case. Taking account of the Razgar questions the Appellant is similarly unsuccessful in my consideration of the evidence and the weighing of proportionality against the factors in this case, there is interference but it is proportionate."

The grounds

36. The permission judge considered that the grounds hint at, but do not in terms allege, bias. I do not agree. They plainly do allege bias, in my view, given the final sentence of para 6 of the grounds (quoted at para 38(ii) below).

37. The appellant's "*error of law*" submissions rely upon para 5 of the decision of the permission judge. At para 5 of his decision, the permission judge said that it was arguable that the Judge had erred in law by failing to make findings on whether the appellant met or would, in a future application for entry clearance, meet the requirements of the Immigration Rules; and in turn whether the public interest

required the appellant's removal in light of the circumstances illustrated in Chikwamba.

38. The grounds are written in a somewhat unhelpful and discursive way. I have extracted from them the grounds as set out below (the numbering of the grounds is mine). I make no apology for any overlap in paras (i)-(viii) below.

(i) Ground 1: The Judge's finding that "*the appellant had somewhat of a cavalier attitude to matters of immigration control*" was irrational. I take this ground from para 5 of the grounds which contends that the appellant's belief that "*British law would not separate him from his wife"* cannot in any sensible way be interpreted as *"cavalier"*.

(ii) Ground 2: Para 4 of the grounds contends that the Judge's assessment of proportionality was "*coloured by his negative and unfounded assumption of the appellant's attitude*" to immigration control as "*cavalier*". Para 5 of the grounds contends that the Judge "*pejoratively described the appellant using such language … only goes to illustrate that he was determined to dismiss the appeal without a proper and objective examination of its merit".* As this latter allegation is linked to the Judge's assessment of the appellant having a "*somewhat cavalier attitude towards matters of immigration control*", I treat it as part of ground 2 as opposed to ground 3. Paras 4 and 5 of the grounds read:

> "4. It is most unfortunate that the judge should begin by characterising the appellant's attitude to immigration control as "cavalier": see para 79 of the determination. Reading the entirely of this paragraph, it seems that this was done with the intent to portray the appellant as someone who has abused this country's immigration law, yet the only law that he broke was to remain here beyond his leave. Whilst the seriousness of this breach is not to be diminished, it is not on its own sufficient to exclude the appellant from this country. This was not the respondent's view either. The appellant submits that the judge's assessment of the proportionality of his exclusion has been coloured by his negative and unfounded assumption about the appellant's attitude.
>
> 5. It is assumed that the judge's charactarisation of the appellant's attitude as cavalier stems from his evidence recorded at paragraph 27 of the determination. It is respectfully submitted that the appellant's belief that British law would not separate him from his wife cannot in any sensible way be interpreted as cavalier. That the judge pejoratively described the appellant using such language, it is respectfully submitted, only goes to illustrate that he was determined to dismiss the appeal without a proper and objective examination of its merit."
>
> (my emphasis)

(iii) Ground 3: In view of the final sentence of para 6 of the grounds, I characterise ground 3 as follows: "*The Judge was biased*". Para 6 of the grounds reads:

> 6. The judge's highly emotive description of the appellant seeing his pregnant wife as a "trump card" is not only irrational, but is unfair treatment of his evidence. The appellant was asked whether, when he decided to marry his wife, he was aware of the consequence of being here illegally, to which he replied that he was thinking that British law will not separate him from his wife. To leap from the appellant's expression of his state of mind,

> pre-marriage, to a view by the judge that the appellant saw his unborn child as a "trump card", is extra ordinary. Any reasonable person reading these comments is likely to think that the judge was predisposed to finding reasons to dismiss the appellant's appeal."
>
> (my emphasis)

(iv) Ground 4: The Judge misapprehended the evidence at para 93, where he said he had taken into account a letter from Zahra & Co Solicitors in which they took responsibility for not advising the appellant of the consequence of not paying the litigation debt. This was said to be "*truly alarming*" because there was no such letter from Zahra & Co Solicitors who have only been acting for the appellant since July 2019 whereas the litigation debt arose in September 2015. The letter in question came from the appellant's former solicitors.

(v) Ground 5: The Judge failed to consider and apply Chikwamba, Agyarko, R (MM (Lebanon)) v SSHD [2017] UKSC 10 and Rhuppiah v SSHD [2018] UKSC 58. The Judge failed to explain what these cases decided and their relevance to the issues that he had to decide. He said at para 84 that Agyarko provided considerable assistance in looking at the weight to be applied to individual factors, but failed to say what those factors were, nor did he deal with the appellant's submission that the interests of immigration control would not be served by his removal when on return he is likely to be successful in obtaining a spouse entry clearance (para 8(i) of the grounds).

(vi) Ground 6: The Judge's "*evaluation of the submissions and caselaw… does not show any clarity in thinking or serious engagement with the submissions* (para 3 of the grounds).

Referring to the mistake that is the subject of ground 4, para 8(ii) of the grounds contends that the fact that the Judge made "*such a mistake on an issue of such fundamental importance exemplifies his treatment of all of the issues and the evidence in the case generally. He touches of [sic] everything to give the impressions [sic] that he has them in mind, but does not examine them with any seriousness"* (para 8(ii) of the grounds). The Judge *"merely paid lip service to the submissions before him without properly engaging with the submissions and evaluating the evidence to assess whether the appellant is able to make a case outside the Immigration Rules"* (para 9 of the grounds).

(vii) Ground 7: The Judge failed to resolve material matters, that is, whether the appellant satisfies the suitability requirement, the relationship requirement, the financial requirement and the English language requirement. A reasonable reader would not be able to establish whether the Judge had resolved the question whether the appellant satisfied the eligibility suitability requirement in S-LTR 4.4 of Appendix FM in his favour (paras 8(i) and 8(iv) of the grounds). In view of para 51 of Agyarko, the question whether or not the appellant is likely to obtain entry clearance from abroad is *"decisive to the success or failure of his appeal"* (para 8(iv) of the grounds).

(viii) Ground 8: A reasonable appellant will not be able to comprehend why he lost his appeal and how the judge dealt with the submissions made (para 3 of the grounds).

Submissions

39. In their submissions, Zahra & Co Solicitors helpfully state that the ground that the appellant really wishes to emphasise is para 5 of the grant of permission (see my para 37 above). Although the appellant relies on the remainder of the grounds, para 5 of the grant of permission represented his main challenge.

40. No further substantive submissions were made on the appellant's behalf in the letters dated 5 May 2020, 24 June 2020 and 2 July 2020 from Zahra & Co Solicitors.

41. I shall refer to the submissions of Mr Melvin in my assessment, to the extent that I consider it necessary to do so.

Assessment

Ground 1

42. Ground 1 can be disposed of briefly. I have labelled it as a rationality challenge because it is contended that *"the appellant's belief that British law would not separate him from his wife cannot in any sensible way be interpreted as cavalier"".* However, given that the Judge said that the appellant had said on two occasions in his evidence that he would be wasting his time going back to Bangladesh and that *"British law"* would not separate him from his wife notwithstanding that he had entered into his relationship with his wife knowing that he was present in the United Kingdom unlawfully, I simply cannot see how it can be said that it was irrational for the Judge to describe the appellant's attitude towards the United Kingdom's legitimate interest in immigration control as "*cavalier"*.

43. In reality, ground 1 is simply a disagreement with the Judge's assessment of the appellant's evidence. I therefore reject ground 1.

Ground 2

44. Ground 2 concerns the terms in which the Judge described the appellant's attitude at para 79 of his decision. Although quoted at my para 35 above, I quote again the relevant part of para 79 for convenience:

> "I have to say that the Appellant had somewhat of a cavalier attitude to matters of immigration control stating on two occasions that he would (1) be wasting his time going back to Bangladesh and (2) that the British law would not separate he and his wife."

45. Para 4 of the grounds contends that the Judge used the phrase "*cavalier attitude to immigration control*" with the intent to portray the appellant *"as someone who has abused this country's immigration law, yet the only law that he broke was to remain here beyond his leave*".

46. The implication in para 4 of the grounds is that the appellant has only breached the immigration laws of the United Kingdom in a minor way. However, the fact is that a person who has remained in the United Kingdom without leave has indeed breached immigration law. As at the date of the hearing before the Judge, the appellant had remained in the United Kingdom unlawfully for a period of just under 5 years. This

period of unlawful residence cannot, on any reasonable view, be described as a minor infringement of the immigration laws of this country, albeit I accept that the transgression is not as serious as, for example, in the case of a person who takes on a false identity in order to obtain leave to remain.

47. More importantly, whilst para 4 of the grounds looks backwards towards the appellant's past and contends that his breach of the United Kingdom's immigration law was minor, it is clear that the Judge was in fact referring to something else, i.e. that the appellant believed that the law would not separate him from his wife, with the implication that he believed that he would be allowed to remain in the United Kingdom notwithstanding that he and the sponsor had entered into their relationship at a time when he and the sponsor both knew that he had no right to be in the United Kingdom and therefore could not have had any legitimate expectation of being permitted to enjoy their family life in the United Kingdom.

48. Judges are charged with the responsibility of assessing the individuals who give evidence before them. Given that the Judge saw and heard the appellant give oral evidence and that he said that the appellant had said twice that he would be wasting his time returning to Bangladesh and that *"British law"* would not separate him from his wife, I simply cannot see how it can be said that the Judge's assessment of the appellant's attitude towards immigration control was unfounded, as contended at para 4 of the grounds.

49. On any reasonable view, the Judge was right to think that an inference could legitimately be drawn from the appellant's evidence that he was confident that the state's interest in immigration control would be accorded little weight compared with his own circumstances. In describing the appellant's attitude towards immigration control as "*cavalier*", he was merely giving his assessment of the appellant as a witness.

50. For all of the above reasons, I reject the contention that the Judge *"pejoratively described the appellant using such language*". There is no basis whatsoever for the suggestion that the Judge chose the words he used to describe the appellant's attitude towards immigration control pejoratively.

51. In summary, therefore, para 4 of the grounds is, in part, misconceived (see para 47 above) whilst the remainder of para 4 and the whole of para 5 of the grounds amount to no more than mere disagreement with the Judge's assessment of the appellant as a witness.

52. I therefore reject ground 2.

Ground 3

53. This is the ground that, in effect, alleges bias. This ground concerns the following sentences in para 79 of the Judge's decision:

> "I took from his evidence that he felt that he had some form of 'trump card' in having the relationship with his partner who is pregnant. However, there is no trump card to be played in any particular case and an unborn child or a pregnant partner should never be treated as such…"

54. I stress that there is no allegation that the Judge did anything or said anything at the hearing that suggested a predisposition to dismiss the appeal. Nor is there anything in the grounds that suggests that, apart the two sentences quoted at my para 53 above from para 79 of the Judge's decision and perhaps the Judge's assessment of the appellant's attitude towards immigration control which I have dealt with as part of ground 2, there is anything else in the Judge's decision from which a predisposition to dismiss the appeal can or should be drawn.

55. No objection can reasonably be taken to the use of the phrase "*trump card*", given that it has been used by the courts, including higher courts, on many occasions in saying, for example that the best interests of a child are not a trump card.

56. Therefore the only question is whether the Judge's use of the phrase "*trump card*" to describe his assessment of the appellant's view about the weight that his relationship with his wife should carry as against the state's interest in immigration control shows that the Judge was biased and predisposed to dismiss the appeal.

57. I simply cannot see how it can be said that the Judge was predisposed to dismiss the appeal simply because he used the phrase "*trump card*" to describe his assessment of the appellant's view about the relative weight that should be given to his relationship with his wife and that they are expecting a child as against the state's interest in immigration control.

58. In my judgment, it is clear that, in reality, para 6 of the grounds amounts to no more than a disagreement with the Judge's assessment of the appellant's evidence.

59. Taken as a whole, the Judge's reasoning at paras 76-94 as a whole demonstrates a fair and balanced assessment of the case.

60. For all of the reasons given above, there is not a shred of evidence that supports the serious allegation that the Judge was predisposed to dismissing the appeal, i.e. that he was biased.

61. I therefore reject ground 3.

Ground 4

62. It is wholly immaterial that the Judge misunderstood the evidence and mistakenly considered that the solicitors who had taken responsibility for not advising the appellant of the consequence of not paying his litigation debt were the appellant's previous representatives and not Zahra & Co Solicitors. Whilst regrettable, it does not warrant being described as a mistake that was "*truly alarming*" nor does it warrant being described as a "*mistake on an issue of such fundamental importance*", given that the purpose of grounds of appeal in an application for permission to appeal to the Upper Tribunal is to establish that the judge materially erred in law in reaching his or her decision on the appeal. It is obvious that the Judge's mistake was immaterial to his decision on the appellant's appeal.

63. I therefore reject ground 4. As for any concern that the Judge may have cast doubt on the competence of Zahra & Co Solicitors, both Zahra & Co Solicitors and the

appellant would have been aware that Zahra & Co Solicitors were not acting for the appellant at the relevant time and that the Judge therefore made a mistake.

64. In view of the fact that the issue in this appeal is whether the Judge had materially erred in law, ground 4 is devoid of merit, for the reasons given above.

65. Before dealing with grounds 5 and 6, I shall deal with certain aspects of ground 7.

Ground 7: The Chikwamba 'principle'

66. Ground 7 contends, inter alia, that, if the appellant satisfies the requirements for entry clearance as a spouse, this is determinative of his appeal. This ground is based on Chikwamba and para 51, in particular, of the Supreme Court's judgment in Agyarko where Lord Reed said:

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

67. In Agyarko, it was only said that there *"might"* be no public interest in the removal of a person who would be certain to succeed in an entry clearance application. If the Supreme Court had decided in Chikwamba that the mere fact that an individual is certain to succeed in an entry clearance application is determinative of an in-country Article 8 claim, it is difficult to see why Lord Brown referred to the individual circumstances of the appellant in Chikwamba at para 46 where he said:

> "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."

68. It has been said by the higher courts and the Tribunal more than once that Chikwamba does not establish that the mere fact that an individual would qualify for entry clearance is determinative; for example, the Upper Tribunal's decision in R (Chen) v SSHD IJR [2015] UKUT 00189 (IAC) and, more importantly, the Court of Appeal's judgment in R (Kaur) v SSHD [2018] EWCA Civ 1423. At para 45 of Kaur, Holroyde LJ said:

> "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."

69. Yet, Chikwamba is still being cited as having authoritatively established that, if an appellant can establish that he would be certain to be granted entry clearance, this is determinative of his in-country Article 8 claim, in that, it means that there is then no public interest in removing the individual concerned or expecting him to leave the United Kingdom merely in order to make an application for entry clearance.

70. The submission that Chikwamba and Agyarko authoritatively established this '*principle'* was advanced to the Upper Tribunal in the recent decision in Younas (section 117B(b)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC), published on 17 April 2020. The Upper Tribunal (Lane J, President and UTJJ Hanson and Sheridan) rejected the argument for reasons that it gave at paras 78-88.

71. Furthermore, and as the Upper Tribunal said in Younas at para 90, Chikwamba was decided before the coming into force of part 5A of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"). Pursuant to s.117A(2), a court or tribunal considering "*the public interest question*" in a non-deportation case must have regard to the considerations listed in section 117B. The "*public interest question*" is defined as "*the question of whether an interference with a person's right to respect for private and family life is justified under article 8(2)".* Whilst Part 5A created certain exceptions, for example, the exception in s.117B(6), Parliament chose not to create an exception that would apply in cases in which the individual is certain to succeed in an application for entry clearance from abroad.

72. Accordingly, I reject the submission that if the appellant satisfied the requirements for entry clearance, this was decisive of his in-country Article 8 claim or appeal, in that, it would then be disproportionate to remove him or to expect him to leave the United Kingdom and make an entry clearance application.

73. The correct approach is to conduct a fact-specific assessment in each case, having regard to the public interest considerations in Part 5A of the 2002 Act. In this regard, I consider whether the Judge made a material error of law in his assessment of the proportionality balancing exercise at para 87 below.

Ground 7: The eligibility suitability requirement

74. Ground 7 also contends that the Judge failed to resolve material matters, as set out in the grounds and summarised at my para 38(vii) above. Firstly, it is said, inter alia, in ground 7 that no reasonable reader would be able to establish whether the appellant satisfied the eligibility suitability requirement. I do not agree. It was clear from the Judge's summary of the submissions of the representatives before him that the only eligibility requirement under the Immigration Rules that the respondent's representative took issue with was the immigration status eligibility requirement (see paras 42-43 of the Judge's decision). At para 81 of his decision, the Judge specifically said that "*There seems to be no argument that he had not paid his immigration fees ….. those have now been paid and were apparently paid before*

today's hearing" and at para 82 that: *"Of course I'm looking at the situation as it pertains now".*

75. Nowhere in his reasoning at paras 76-94 did the Judge say that the appellant does not meet the eligibility suitability requirement. In looking at the factors for and against the appellant in the proportionality balancing exercise, the Judge said he would follow the balance sheet approach and, again, did not go on say that the appellant did not meet the eligibility suitability requirement.

76. Considering the Judge's reasoning as a whole, it is clear that he implicitly found and accepted that the appellant satisfied the eligibility suitability requirement and, further, that he took it into account in conducting the balancing exercise in relation to proportionality.

Ground 7: The eligibility relationship requirement

77. The submission in ground 7 that the Judge failed to resolve whether the appellant met the eligibility relationship requirement ignores the fact that the respondent's representative accepted that the appellant met the eligibility relationship requirement (see para 42 of the Judge's decision) and that the Judge specifically referred to the fact that there is no dispute as to the relationship between the appellant and the sponsor (see para 80 of his decision).

Ground 7: The English language requirement

78. The Judge considered proportionality outside the Immigration Rules, as he was requested to do by the appellant's representative (paras 55-56 and para 83 of the Judge's decision). It follows that s.117B(2) of the 2002 Act applied and there was no need for the Judge to make a specific finding as to whether or not the appellant satisfied the English language requirement under the Immigration Rules for a grant of leave to remain as spouse or a grant of entry clearance as a spouse.

79. Furthermore, the submission that the Judge did not make a finding as to whether or not the appellant satisfies the English language requirement ignores the fact that he took into account in the appellant's favour that the appellant and the sponsor speak English, notwithstanding that this is a neutral factor as was held in Rhuppiah. Any error by the Judge in taking into account what he should in fact have treated as a neutral factor is not material to the outcome as he still found that the decision was proportionate.

80. There is therefore no substance in this ground.

Ground 7: The minimum income threshold

81. I accept that the Judge did not, in terms, make a finding as to whether or not the sponsor's income met the minimum income threshold. However, as I have said above, the fact is that he was considering proportionality outside the Immigration Rules, as he was requested to do on the appellant's behalf (paras 55-56 and para 83 of the Judge's decision). Accordingly, Part 5A applied of the 2002 Act applied. It follows that the caselaw in relation to s.117B(3), to the effect that financial independence is a neutral factor (Rhuppiah), applied in the Judge's assessment of

the balancing exercise in relation to proportionality. If financial independence is a neutral factor, so too must be that the minimum income threshold is satisfied for leave to remain or entry clearance to be granted under the Immigration Rules.

82. Even if I am wrong to say that the legal position is that the fact that the minimum income threshold is satisfied for the appellant to be granted leave to remain or entry clearance is a neutral factor when one is carrying out the balancing exercise in relation to proportionality outside the Immigration Rules, the fact is that the Judge heard submissions from the appellant's representative (see para 69 of his decision) that the sponsor's income satisfied the minimum income threshold. There is no reason to think that he did not factor this into the balancing exercise, given that he specifically referred at para 85 of his decision to the sponsor being in employment. In conducting the balancing exercise, he did not count as a factor against the appellant that he was not financially independent.

83. There is therefore no substance in this ground.

Grounds 5, 6 and the remainder of ground 7

84. The main thrust of grounds 5, 6 and the remainder of ground 7 is that the Judge failed to engage properly with, or that he paid lip service to, the submissions made before him. It is clear that the allegation in ground 6, that the Judge had erred by failing to engage with the legal submissions, that he "*merely paid lip service to the submissions*" and that there was "*a lack of any clarity of thinking or serious engagement with the submissions*" concerns the legal submissions advanced before the Judge in relation to the judgments in Chikwamba, Hayat and Agyarko.

85. Of course, I would have preferred it if the Judge had in fact directly engaged with the legal submissions. However, the fact that he did not do so does not mean that he materially erred in law. I have given my reasons for rejecting the submission that, if the appellant is certain to succeed in an entry clearance application, this is determinative of the balancing exercise in relation to proportionality. Accordingly, any failure by the Judge to deal with the submissions advanced is not material.

86. What matters is whether the Judge conducted a legally adequate balancing exercise in relation to proportionality. I am satisfied that the Judge did conduct a legally adequate balancing exercise in relation to proportionality. As I have said above, if it was relevant to take into account that the sponsor's income met the minimum income threshold in the proportionality balancing exercise, then there is no reason to think that the Judge did not factor this into the balancing exercise. He specifically referred to the fact that the appellant speaks English (para 85) and also various other factors, including that the appellant had now paid his litigation debt (para 81); that the appellant and the sponsor had their roots in Bangladesh although the sponsor was now a British citizen (para 82); that the appellant and the sponsor both have family members in Bangladesh and in the United Kingdom (paras 82 and 87); that the relationship between the appellant and the sponsor commenced when the appellant's immigration status was precarious (para 87); the health of the appellant (para 85) and the sponsor (para 90); and that the United Kingdom is entitled to control its borders (para 91).

87. In my judgment, having regard to the Judge's assessment of the case, it simply cannot be said that he conducted a legally inadequate or flawed assessment of the balancing exercise in relation to proportionality.

88. I therefore reject the submissions in grounds 5, 6 and 7 that the Judge *materially* erred in law by failing to engage specifically with the legal submissions advanced before him.

Ground 8

89. For the reasons given at para 87 above, I am satisfied that ground 8 is simply not established. If the Judge's reasoning at para 76-94 is considered as a whole, a reasonable appellant *will* be able to comprehend why he lost his appeal. Put simply, the Judge found that the public interest considerations outweighed his individual circumstances.

90. The grounds therefore fail to establish that the Judge had materially erred in law.

91. I am compelled to say two further things.

92. Firstly, this is a case in which permission should not have been granted. To the extent that permission was granted because the permission judge considered it arguable that the Judge may have erred in failing to make findings on whether or the appellant met or would, in a future application, meet the requirements under the Immigration Rules, I have explained that what was required of the Judge was a fact-sensitive assessment of the balancing exercise in relation to proportionality, which the Judge did conduct. To the extent that permission was granted due to the possibility that the grounds alleged bias, there was not a shred of evidence of bias. Despite the hyperbolic and emotive terms in which the grounds were couched, at least in part, it is plain the allegation of bias in fact amounted to no more than a disagreement with the Judge's assessment of the appellant and the evidence.

93. Secondly, I was struck by how weak an Article 8 case this was as presented to the Judge. Once it is appreciated that Chikwamba does *not* establish that it would be disproportionate to expect an individual to leave the United Kingdom to make an entry clearance application just because he would be certain to be granted entry clearance and that, to the contrary, a fact-specific assessment is required taking into account the public interest considerations in part 5A of the 2002 Act, the weakness of this case as presented to the Judge becomes evident. He was faced with a couple whose roots were in Bangladesh, a couple who still had family in Bangladesh, a couple with no children albeit that one was on the way. The relationship was developed whilst the immigration status of the appellant was unlawful, so s.117B(4)(b) applied. The appellant's private life was established whilst he had leave that was precarious until September 2014, and subsequently whilst he was in the United Kingdom unlawfully, so that s.117B(5) and s.117B(4)(a) applied. Section 117B(1), that the maintenance of immigration control is in the public interest, applied. That the appellant could speak English and was financially independent (as he was reliant on the sponsor) were neutral factors. It was accepted on the appellant's behalf that medical treatment would be available to him in Bangladesh albeit that it was said that this would not be to the same standard as he would receive in the United Kingdom (para 65). The Judge took into account that the sponsor had experienced

an abusive relationship in Bangladesh but found that she would have the support of the appellant, her husband, if she chose to go to Bangladesh.

94. In these circumstances, it is difficult to see how any judge directing himself properly on the applicable principles could reasonably have found that the factors in favour of the appellant's side of the scales outweighed the state's interest in immigration control.

95. Nothing I have said in this decision should be taken as confirmation that I have reached the view that the appellant is certain to be granted entry clearance. I have merely dealt with the submissions advanced on the appellant's behalf.

96. I dismiss this appeal.

Notice of Decision

97. The decision of the First-tier Tribunal did not involve the making of any error on a point of law such that it fell to be set aside. The appellant's appeal to the Upper Tribunal is therefore dismissed.

Upper Tribunal Judge Gill Date: 23 September 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**