Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20505/2019 (R)

THE IMMIGRATION ACTS

Remote Hearing by Skype for Business	**Decision & Reasons Promulgated**
On 29th September 2020	**On 20th October 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR TAYYIB [G]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss L Mair, Counsel instructed by Scarsdale Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS (R)

1. The hearing before me on 29th September 2020 took the form of a remote hearing using skype for business. Neither party objected. At the outset, I was informed by Miss Mair that the appellant did not intend to join the hearing. Miss Mair confirmed the appellant is happy for the hearing to proceed in his absence. I sat at the Birmingham Civil Justice Centre and the hearing room and building were open to the public. I was addressed by the representatives in exactly the same way as I would have been if the parties had attended the hearing together. I was satisfied: that

this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

2. The appellant is a national of Pakistan. He appealed the decision of the respondent made on 28th November 2019 to refuse his application for leave to remain in the UK that was based on his relationship with his partner, who I shall refer to as NA in this decision, and the private life that he claims to have established in the UK since arriving here in 2012. The appeal was dismissed for reasons set out in the decision of First-tier Tribunal Judge McAll promulgated on 10th March 2020.

3. It is uncontroversial that the appellant cannot satisfy all the requirements of Section E-LTRP; Eligibility for leave to remain as a partner set out in Appendix FM of the immigration rules. In order to succeed in an application for leave to remain as a partner under the immigration rules, the appellant must therefore establish he does not fall for refusal on grounds of suitability, that he meets the requirements of paragraphs E-LTRP.1.2 – 1.12, and, paragraph EX.1 applies. That is, he has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

4. The respondent accepted that the appellant's application did not fall for refusal on grounds of suitability and, insofar as the appellant relied upon his family life with his partner, that he meets the eligibility relationship requirement set out in paragraphs E-LTRP.1.2 – 1.12 of Appendix FM. The issue was whether there are insurmountable obstacles to family life with the appellant's partner continuing outside the UK. Insofar as the appellant relied upon the private life that he has established in the UK, the respondent was not satisfied that the requirements for leave to remain on private life grounds set out in paragraph 276ADE of the immigration rules are met by the appellant. The respondent was not satisfied that there would be very significant obstacles to the appellant's integration into Pakistan if he is required to leave the UK.

5. In support of his claim that there are insurmountable obstacles to family life with NA continuing outside the UK, the appellant relied upon two matters. First, the appellant and NA have been approved by the NHS for

funding for IVF Treatment, and that treatment is ongoing. Second, NA is also being treated for mental health issues and requiring her to leave the UK to continue their family life outside the UK would impact upon the treatment that she is receiving and would be detrimental to her mental health.

6. At paragraph [10] of his decision, Judge McAll states:

> "Before hearing from the appellant Miss Mair explained that the appellant's partner [NA] was prevented from attending the hearing as she had been taken to hospital by the appellant on the 12th February 2020 and was currently sectioned under the Mental Health Act 1983 (MHA) and is an inpatient on the "Saxon Ward" at her local hospital. Miss Mair explained that due to NA's unusual behaviour on the 12th February 2020, the appellant taken her to hospital and the doctors who examined her were unable to discharge her and she still remains there. Miss Mair explained that the evidence shows that NA has previously been sectioned under the MHA in August, September and October 2019 so the hospital and doctor admitting her are aware of NA's mental health issues and have been treating her. Given the absence of a statement from NA in the bundle (which I noted had been served on the 6th February 2020) I asked whether the appellant had ever intended to call NA and Miss Mair informed me she was not aware of any intention to call NA and therefore it did not prevent the appellant continuing with his appeal. There was no application to adjourn the hearing."

7. The appellant's immigration history and the matters relied upon in support of his application for leave to remain in the UK are summarised at paragraphs [13] to [21] of the decision. Judge McAll heard evidence from the appellant, his sister and the appellant's brother-in-law. It is convenient to set out the treatment being received by NA, as recorded in paragraphs [19] and [20] of the decision of Judge McAll:

> "19. The appellant and NA are trying for a child and they made their application for fertility treatment to the NHS around April 2018..... They have been approved by the NHS for funding for IVF treatment. They were approved for their current treatment in November 2018 as there is a letter in the respondent's bundle at C39 confirming they met the criteria for donor eggs with "CARE Fertility". The treatment they are currently undergoing is set out in detail in the papers which is a matter of record and I will not repeat it here, however to summarise, it involves medical implantation of frozen "embryos" using donor eggs and that procedure was successfully completed in late 2019. Sadly, NA miscarried on 23rd December 2019. The couple still have two further frozen embryos remaining for another attempted implant and the appellant stated at the hearing that they have funding for a further round of treatment and that could result in another eight eggs or four further attempts to implant embryos at a later date.
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> 20. In addition to this fertility treatment NA is also being treated for mental health issues. The NHS report of Dr Babiker dated 26th September 2019 at page 407 of the Appellant's bundle explains that

> NA was admitted and detained at her local hospital under Section 2 MHA on the 21st August 2019 and remained detained in their care to the 29th August 2019 and prior to that she had had no contact with mental health services at all. The diagnosis at that time was "acute stress reaction". This detention under the MHA coincided with the appellant's arrest immigration detention. Since the initial section 2 MHA detention in August, NA has been sectioned in September and October 2019 and now again in February 2020."

8. At paragraph [21] of his decision, Judge McAll referred to an expert report relied upon by the appellant and said:

> "The appellant has produced an expert report from Dr Waquas Waheed Consultant Psychiatrist to support his claims that NA will be ostracised in Pakistan because of her mental health and she will be unable to obtain appropriate treatment there that will meet her needs."

9. There was other evidence before the FtT regarding the mental health of NA, from Dr Babiker, together with evidence from Dr Amir Hannan, her GP, regarding NA's admission and detention under the MHA, and the treatment received. Judge McAll addressed the medical evidence before the Tribunal, including the expert report of Dr Waheed commissioned by the appellant, at paragraphs [38] to [45] of his decision. At paragraph [43], he said:

> "Taking all of the evidence in the round I am not satisfied that the report of Dr Waheed is reliable. I find information that he has been provided with from the appellant, NA and NA's brother is not reliable and he has based his prognosis, diagnosis and opinion largely on misinformation."

10. Judge McAll accepted at paragraph [35] that the appellant and NA are in a valid and genuine marriage. He noted that there is no statement from NA before the Tribunal, and he found there is no satisfactory explanation for the absence of a statement from her. Although he expressed some surprise that NA is undergoing NHS funded IVF treatment given the evidence regarding her mental health, at paragraph [37] of his decision, Judge McAll accepted that NA is currently receiving fertility treatment and that she is also currently receiving treatment for her mental health. At paragraph [48] he said:

> "I find that there are no financial social insurmountable obstacles to this couple settling in Pakistan if that is where they would choose to settle. I have considered whether the medical treatment that NA is receiving amounts to an insurmountable obstacle and I am satisfied that it is not. The respondent is not preventing NA from continuing with her fertility treatment if that is the course that she wishes to pursue, and the NHS are willing to continue with it. The appellant's presence in the UK is not essential true that treatment. The fertility treatment is not required to maintain or improve NA's health, it is voluntary treatment undertaken in order to have a family. Miss Mair argues that the respondent is obliged to promote family ties which as a general

> statement I find that she should, however in the context of Miss Mair's argument I find that there is no burden on the respondent to allow an appellant to remain in the UK in order to promote a couple conceiving a child through fertility treatment, particularly when one of the parties has no leave to be in the UK. I find that where one of the parties to a marriage does not have leave to be in the UK the mere fact of marriage and the desire to have children here in the UK does not on its own bestow on a couple a legitimate right or expectation to be allowed by the respondent to remain together here."

11. Judge McAll found the medical evidence relied upon to be conflicting and in parts, unreliable. Nevertheless, he accepted that NA is currently undergoing a mental health assessment and that she receives medication for her mental health issues. He also accepted that the NHS is funding fertility treatment. He noted that Dr Waheed accepts that treatment for the appellant's mental health condition is widely available in Pakistan, and he rejected the claim that the appellant will face social stigma in Pakistan because of her mental health. At paragraph [49] he concluded:

> "49. … I am being asked by the appellant to find that NA would be deprived of the treatment she is receiving in the UK if she was to go to Pakistan. On the evidence before me I am satisfied that the mental health treatment is available to NA in Pakistan. I also find that the appellant has not established that NA would be prevented from accessing fertility treatment in Pakistan should she wish to continue with that treatment which is voluntary in nature and is not required in order to maintain or improve her health."

12. At paragraphs [50] and [51] of his decision, Judge McAll said:

> "50. When she entered into the relationship with the appellant NA knew the appellant's immigration status was precarious as he had no leave to remain here and had held no leave since 2014. In terms of the fertility treatment that she is receiving that is again a matter for NA. She has been attempting to have a child since she married her first husband in 2008 and she has been undergoing NHS funded fertility treatment since 2013, sadly without success, and it appears she will continue to try which is a matter for her and the doctors advising her and facilitating the treatment. There is no satisfactory evidence before me that such treatment is not available to her in Pakistan, the argument is that it is costly and she should not be required to give that treatment up as a British citizen. I accept that any treatment in Pakistan will not be NHS funded but it is available, and these two families are not families without means should they wish to support her. There is also the possibility of NA continuing with the treatment in the UK with the appellant in Pakistan and her joining him at a later date. There are therefore obstacles to their relationship continuing, however, I do not accept they are insurmountable obstacles.
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> 51. I am not satisfied that the appellant faces insurmountable obstacles to returning to Pakistan. He has strong family, social and cultural ties there having left at the age of 22 years old. I do not accept his claim that NA is unable to follow him to Pakistan. NA came to the UK in 2012 and she also has strong family, social and cultural ties to

> Pakistan. They are both from the same village, the families know each other. Dr Waheed states that if NA remains in the UK or if she goes to Pakistan, she needs to follow a prescribed mental health medication which is "widely available" in Pakistan. From the evidence before me I am satisfied that it is a matter of choice for NA whether she continues with that medication and treatment here in the UK whether she goes to Pakistan, it is available to her in both countries. I find the appellant does not meet the requirements of EX.1"

13. Judge McAll was satisfied that the appellant has a family and private life in the UK. As to whether respondent's decision would be in breach of the appellant's right to respect for private and family life under Article 8, Judge McAll concluded at paragraph [62]:

> "I have found the appellant and NA have strong family social and cultural ties in Pakistan. I have not accepted the claims that the appellant's family will be in some way hostile towards her should they return to Pakistan as a couple. The respondent is in any event not requiring NA to leave and that is a matter for her. I am satisfied medical treatment is available for the mental health issues that have arisen since August 2019 and they can be treated here or in Pakistan and NA will have access to such treatment. I have made a similar finding in regard to the fertility treatment. I have considered whether it is reasonable to expect NA to join her husband in Pakistan and for the reasons that I have given I find that it is (MA Pakistan v SSHD [2009] EWCA Civ 953 considered). After careful consideration of the appellants claim I am satisfied that the respondent's decision is proportionate and does not breach Article 8."

The appeal before me

14. The appellant claims Judge McAll made perverse findings when he considered whether there are insurmountable obstacles to family life between the appellant and NA continuing outside the UK, or alternatively, in reaching his decision, he failed to take relevant evidence into account without cogent reasons, took irrelevant evidence into account, and, applied the incorrect test.

15. The appellant claims it is perverse to suggest that the appellant's presence would not be required in the UK for the couple to continue with their fertility treatment. It is said that any future rounds of fertility treatment will require the appellant's sperm as well as the donor eggs, to create new embryos and it is impossible to see how this could occur without the appellant's presence in the UK. NA would be unable to avail herself of the further rounds of IVF treatment that she has been offered with the donor eggs in the UK if the couple were not both present in the UK. Furthermore it is impossible to see how NA could be implanted with the two extant frozen embryos in the UK without her being physically present here in the UK. Miss Mair submits, relying upon the judgement of Lord Reed in Agyarko, that Judge McAll failed to apply the correct test and

consider what the practical and realistic barriers would be for the on-going fertility treatment to continue if the couple were in Pakistan.

16. The appellant claims it was equally perverse for Judge McAll to find that NA would not be deprived of the treatment she is receiving in the UK for her mental health if she were to go to Pakistan. She would not continue to receive the continuity of the treatment that she has received on "Saxon Ward", where she was at the date of the hearing and where she had been hospitalised on three previous occasions since August 2019. She could not benefit from the treatment received from her treating psychiatrist and her extant medical team. It is said that in reaching his decision Judge McAll relied upon the comment made by Dr Waheed that the mental health medication required is "widely available" in Pakistan, having previously found that his report is unreliable. In any event, since Dr Waheed is not a country expert, it was incumbent upon Judge McAll to consider the policy/country evidence submitted by the appellant in support of the appeal. The appellant refers to the respondent's "Family Policy" dated 10th December 2019 in which the respondent expressly recognises that the impact of a mental or physical disability or of a serious illness which requires ongoing medical treatment, could amount to an insurmountable obstacle. Furthermore, the appellant refers to the respondent's CPIN, Pakistan: Medical and healthcare issues Version 2.0 August 2018, and the EASO "Country of Origin Report" regarding the provision of health care in Pakistan and the social stigma associated with mental disorders.

17. Permission to appeal was granted by First-tier Tribunal Judge Scott Baker on 12th May 2020.

18. Before me, Miss Mair adopted the grounds of appeal and submits that the over-arching ground is that the 'insurmountable obstacles' test was not properly applied by Judge McAll and the material findings made, are perverse. She submits Judge McAll accepts that NA is receiving fertility treatment. He accepts they have funding for access to donor eggs and that a number of embryo's are in storage. NA sadly had a miscarriage in December 2019. Currently, there are two remaining frozen embryos, and it is perverse for the Judge to conclude that the fertility treatment could continue without both the appellant and NA in the UK. Miss Mair submits the test is whether there are insurmountable obstacles to the family life of the appellant and NA continuing outside the UK. She accepts that the appellant would not need to be in the UK for the implantation of the two frozen embryos currently in storage, but both the appellant and NA would have to remain in the UK for any further fertility treatment using donor eggs. She submits there is the added complication of a high risk pregnancy for which NA would need monitoring and the assistance and support of the appellant. She submits NA would undoubtedly have to remain in the UK to continue with the fertility treatment and a short term separation would not be possible because it would be a high risk

pregnancy and the removal of the appellant would have an adverse impact upon the mental health of NA.

19. Miss Mair submits NA has already been admitted and detained under the Mental Health Act and the question is not whether there is any mental health treatment available in Pakistan, but whether it would be unjustifiably harsh for NA not to be able to access the treatment that she is already receiving. She submits, the combination of the fertility treatment and the treatment being received by NA for her mental health, called for a careful analysis of whether there are insurmountable obstacles to family life continuing in Pakistan. She submits that in practice, Judge McAll did not apply the correct test but focussed instead on it being a matter of choice for NA as to whether she continues with her medication and treatment here in the UK or whether she goes to Pakistan. It was perverse to conclude that the treatment currently being received would be available to her in both countries. She submits that in considering whether there are insurmountable obstacles, Judge McAll also refers, at paragraph [50], to the fact that when NA entered into the relationship with the appellant, she knew the appellant's immigration history was precarious as he had no leave to remain and had held no leave since 2014. That is entirely irrelevant because the exceptions to certain eligibility requirements for leave to remain as a partner set out in Section EX.1 only apply where all the eligibility requirements cannot be met.

20. Miss Mair submits that what was required was a practical and realistic analysis and if Judge McAll had applied the correct test, the outcome of the appeal may very well have been different. She submits Judge McAll failed to consider matters relevant to even a short separation so that the embryos now available can be implanted, the risks associated with any pregnancy and the impact that even a short separation during this difficult period would have upon the mental health of NA.

21. In reply, Mrs Aboni submits there is no material error of law in the decision of the FtT. She submits the Judge directed himself appropriately, and reached conclusions that were open to him on the evidence before the Tribunal. The Judge accepted that NA is receiving treatment in the UK, and she submits, it was open to Judge McAll to find that the appellant's presence in the UK is not required. She submits NA could continue the fertility treatment that she is currently receiving in the UK, and could then join the appellant in Pakistan once the embryos have been implanted. When pressed, she accepted that Judge McAll does not appear to address what the impact of a short separation might be, upon NA and her mental health. Mrs Aboni submits it was open to Judge McAll to find that neither the fertility treatment nor the mental health of NA amount to insurmountable obstacles to family life continuing outside the UK. She submits the failure to refer to the respondent's policy is not material and

there was no evidence before the FtT that there is a lack of any treatment required, in Pakistan.

Discussion

22. The appellant had to rely upon Section EX.1.(b) and to establish there are insurmountable obstacles to family life with NA continuing outside the UK. EX. 2 of Appendix FM 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 all would entail very serious hardship the applicant or their partner."

23. In R (Agyarko) v SSHD [2017] UKSC 11, Lord Reed confirmed the words 'insurmountable obstacles' mean not only obstacles which make it literally impossible for a family to live together in the non-national's country of origin, but were to be understood in a practical and realistic sense, as a stringent test. The definition of the test in EX.2 of Appendix FM is consistent with Strasbourg case law. The Rules and associated instructions represent the respondent's policy which had been endorsed by Parliament and fell within the margin of appreciation. They were designed to be compatible with Article 8 in all but exceptional cases. Accordingly, leave to remain would not normally be granted where the applicant or their partner were in breach of immigration laws unless insurmountable obstacles would prevent family life outside the UK. He said:

> "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....
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> 44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "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." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law....
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> ....
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> 48. The Secretary of State's view that the public interest in the removal of persons who are in the UK in breach of immigration laws is, in all but

> exceptional circumstances, sufficiently compelling to outweigh the individual's interest in family life with a partner in the UK, unless there are insurmountable obstacles to family life with that partner continuing outside the UK, is challenged in these proceedings as being too stringent to be compatible with article 8 . It is argued that the Secretary of State has treated "insurmountable obstacles" as a test applicable to persons in the UK in breach of immigration laws, whereas the European court treats it as a relevant factor in relation to non-settled migrants. That is true, but it does not mean that the Secretary of State's test is incompatible with article 8 . As has been explained, the Rules are not a summary of the European court's case law, but a statement of the Secretary of State's policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the "insurmountable obstacles" test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances". In the absence of either "insurmountable obstacles" or "exceptional circumstances" as defined, however, it is not apparent why it should be incompatible with article 8 for leave to be refused. The Rules and Instructions are therefore compatible with article 8. That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with article 8 : that is a question which, if a decision is challenged, must be determined independently by the court or tribunal in the light of the particular circumstances of each case."

24. In my judgment, the decision of Judge McAll is vitiated by a material error of law. I accept, as Miss Mair submits that Judge McAll did not properly apply the 'insurmountable obstacles' test and failed to properly address the claim made by the appellant. He accepted the appellant is currently undergoing a mental health assessment and that she receives medication for her mental health issues. He also accepted the NHS is funding fertility treatment.

25. Taken in isolation, it was in my judgement open to Judge McAll to find there are no financial or social obstacles to the appellant and NA continuing their family life together in Pakistan. It was in my judgement open to the Judge to find that NA will not face any social stigma because of her mental health. Although there was some very limited background material before the FtT around stigma about mental disorders, Judge McAll noted that here, NA has the support of her family, she has only been ill for a short period of time since August 2019 and there is evidence that if she follows her prescribed medication, that is available in Pakistan, there is no good reasons to expect there to be a re-occurrence. Furthermore, the "acute stress reaction" diagnosed from her previous detention under the MHA appears to have coincided with the appellant's arrest and immigration detention. In Pakistan, the appellant and NA would be living

together with the support of each other and their families, who live in the same area.

26. I reject the claim that it was perverse for Judge McAll to conclude that the appellant's presence in the UK would not be required for the couple to continue with their fertility treatment. The appellant's presence in the UK is not required for the two embryos that are already available, to be implanted. It was therefore open to Judge McAll to find at paragraph [50], that the appellant's presence in the UK is not essential to the current treatment. As to the availability of a further round of treatment with the use of donor eggs, Judge McAll found that there is no burden on the respondent to allow an appellant to remain in the UK in order to promote a couple conceiving a child through fertility treatment, particularly when one of the parties has no leave to be in the UK.

27. I also reject the claim that it was perverse for Judge McAll to find that NA would not be deprived of the treatment she is receiving for her mental health if she were to go to Pakistan. It is obvious that NA would not continue to be treated at the "Saxon Ward", as she is now, by the same clinicians. That is not what is required. It was in my judgement open to Judge McAll to conclude that the mental health treatment required by NA, would be available to her in Pakistan, based upon the limited evidence in that regard that was before the First-tier Tribunal. The appellant's own expert offered the opinion that if NA goes to Pakistan, she needs to follow her prescribed mental health medication which is widely available in Pakistan.

28. However, Judge McAll repeatedly refers to there being a choice for the appellant's partner to remain in the UK, to continue with her fertility treatment or to join the appellant in Pakistan. At paragraphs [48] of his decision, Judge McAll said:

> "… The respondent is not preventing NA from continuing with her fertility treatment if that is the course that she wishes to pursue and the NHS are willing to continue with it. The appellant's presence in the UK is not essential to that treatment…".

29. At paragraphs [50] and [51] he said:

> "50. … There is also the possibility of NA continuing with the treatment in the UK with the appellant in Pakistan and her joining him at a later date…
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> 51. … From the evidence before me I am satisfied that it is a matter of choice for NA whether she continues with that medication and treatment [referring to NA's mental health] here in the UK or whether she goes to Pakistan, it is available to her in both countries…"

30. The test for 'insurmountable obstacles' is set out in paragraph EX.2, and required the appellant to establish that there would be very significant

difficulties faced by the appellant or his partner continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the appellant or his partner.

31. The question to be determined was not whether NA could remain in the UK to continue her treatment, separated from the appellant, but whether there are 'insurmountable obstacles' to their family life continuing outside the UK. Although one might read in to what is said at paragraph [50], that Judge McAll was considering whether separation for a short period would amount to very significant difficulties faced by the appellant and NA in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship for the appellant or NA, in my judgement the difficulty with that is Judge McAll does not address whether it would be a short-term separation or the impact that a short separation may have upon NA's mental health.

32. It is, as Miss Mair submits, the combination of the fertility treatment and NA's mental health that the appellant relies upon. The question was whether there would be very significant difficulties to the appellant and NA continuing their family life together outside the UK, taking into account the fertility treatment being received and NA's mental health, which could not be overcome or would entail very serious hardship for the appellant or NA. In my judgment, that question is not properly addressed by Judge McAll.

33. In my judgement although it might be open to a judge to conclude that the appellant's presence in the UK is not required and the appellant and his partner could live together in Pakistan once the embryos that are currently available have been implanted, Judge McAll did not consider what the impact of that might be upon the appellant's partner who has previously undergone a miscarriage, and has been sectioned under the Mental Health Act. I accept, as Mrs Aboni submits that the medical evidence before the Tribunal was lacking and unsatisfactory, but I am persuaded that in the end, Judge McAll did not properly consider the question that arises under Section EX.1.(b) of Appendix FM and his decision must be set aside.

34. As to disposal, I agree with the parties that the appropriate course is for the matter to be remitted to the FtT for hearing *de novo* with no findings preserved. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive.

35. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

36. The appeal is allowed and the decision of FtT Judge McAll promulgated on 10th March 2020 is set aside.

37. The appeal is remitted to the FtT for a fresh hearing of the appeal with no findings preserved.

Signed **V. Mandalia** Date 15th October 2020

Upper Tribunal Judge Mandalia