Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/24003/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 January 2020	**On 27 February 2020**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

ANNATOLIA CHINGWAWALA

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Khan of counsel, instructed by Longfellow Solicitors

For the Respondent: Mr. L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Zimbabwe and is now 63 years old. She first entered the United Kingdom on 24 November 2003, as a visitor, and subsequently had leave to remain as a student until 30 September 2007. It is the Appellant's case that she has been in a relationship

with her British partner since January 2004 and has lived with him since 2005. He is now 82 years old and originally came from Trinidad and Tobago.

2. The Appellant applied for leave to remain on the basis of her family and private life on 29 January 2018, but her application was refused on 14 November 2018.

3. She appealed and First-tier Tribunal Judge Frantzis, dismissed her appeal in a decision promulgated on 17 July 2019. The Appellant appealed against this decision and First-tier Tribunal Judge Lever granted her permission to appeal on 24 September 2019. He found that it was arguable that, given the findings made in relation to their time together and their respective ages and time in the UK, insufficient consideration was given to the issue of obstacles on return to Zimbabwe for the Appellant when conducting the balancing exercise.

4. At a hearing on 11 November 2019, I found that there had been errors of law in First-tier Tribunal Judge Frantzis' decision and set it aside. I also retained the appeal in the Upper Tribunal for a re-hearing and provided the Appellant with permission to file and serve additional evidence.

RESUMED HEARING

5. On 13 January 2020 the Appellant's solicitors filed and served a letter from Dr. Patel at Goodmayes Medical Practice, dated 10 January 2020. They had been granted an extension of time to do so on 6 January 2020. The Respondent did not file and serve any evidence in response.

6. The Appellant had not complied with my previous directions in so far as she had not provided any medical evidence detailing the treatment provided to her partner for each of his medical conditions and the prognosis for these conditions. She had also failed to provide any objective evidence relating to the provision of treatment for these conditions in Zimbabwe and the cost of any such treatment. Counsel for the Appellant explained that he had only been instructed the night before and acknowledged that the directions had not been complied with. I indicated that it was my view that the Appellant's solicitors had not provided her with the

quality of advice and representation I would have expected in relation to the failure to comply with the detailed directions given at the error of law hearing.

7. At that hearing, the Appellant had sought to rely on a small additional bundle of material, but I had not admitted this material, as it had not been before First-tier Tribunal Judge Frantzis. But I did give the Appellant permission to rely upon it at the current hearing as it was in the interests of justice for there to be more detailed medical evidence and some objective material before the Tribunal.

8. Counsel for the Appellant called both the Appellant and she adopted her witness statement. The Appellant explained that her partner suffered from heart and kidney failure, a cataract and diabetes. She also said that he had no balance, had swollen feet and could not do things. In addition, she said that she washed him, cooked for him and managed his medication and that he was at home with her all the time. She also said that he took medication for his heart and kidneys and his diabetes and had to be helped up the stairs. In addition, she said that she currently put drops in his eyes four times a day as he had just had a cataract operation and that he had to go for a post-operation check up the following week.

9. The Appellant also said that she would not be able to live in Zimbabwe as she had no family or friends there and there were no hospitals or doctors there, as most hospitals had closed. When cross-examined she asserted that the Appellant asserted that she would not be able to return to Zimbabwe to apply for entry clearance as a partner, as she did not know anyone in Zimbabwe and her partner would not be able to travel and start a new life there. In addition, she asserted that she did not have a passport, could not afford to travel there and would have nowhere to stay there. She also said that she and her partner could not live together in Trinidad and Tobago as her partner's parents had died and he had no other contacts or property there. In re-examination she said that her partner's Trinidadian passport had expired.

10. The Appellant's partner adopted his witness statement and also said that he had recently had a cataract operation, takes tablets for his diabetes and had had a stroke. He added that he did not receive any treatment as a result of his stroke but that his heart condition meant that he could not walk fast or climb up stairs. He also said that he took medication for a prostrate condition but this and his tablets for his diabetes were the only pills that he took. He then explained that

his partner cleans their house, cooks for him, takes him to the GP and puts drops in his eyes. He added that, if she had to go to Zimbabwe to apply for entry clearance, he would have no-one else who could look after him. However, he confirmed that he had not made any enquiries about assistance from social services or other sources and said that he did not want to do so. He also confirmed that he had no family members or friends in Trinidad and Tobago.

11. Both the Home Office Presenting Officer and counsel for the Appellant then made their submissions and I have referred to these submissions, where relevant, in my findings below.

DECISION

ENTITLEMENT TO LEAVE WITHIN THE IMMIGRATION RULES

12. The Respondent now accepts that the Appellant is in a genuine and subsisting relationship with her British partner, that they had lived together for more than two years before she made her most recent application for leave to remain and had lived in a relationship akin to marriage since 2005.

13. She also accepts that the Appellant's application did not fall for refusal on grounds of suitability under section S-LTR of Appendix FM to the Immigration Rules. However, it is still the case that the Appellant could not meet the immigration status requirements contained in section E-LTR.P.2.2 of Appendix FM as she was present in the United Kingdom in breach of the immigration laws and had been since 1 October 2007.

14. However, it was the Appellant's case that she was entitled to leave to remain under paragraph EX.1 of Appendix FM, which states that:

"This paragraph applies if

...

(b) the applicant 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".

15. EX.2. of Appendix FM also states:

"For the purposes of paragraph EX.1(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner".

16. I have reminded myself of the decision in *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 and the need to apply this test in a practical and realistic sense. In particular, Reed LJ noted that:

"42. In *Jeunesse*, the Grand Chamber identified, consistently with earlier judgments of the court, a number of factors to be taken into account in assessing the proportionality under article 8 of the removal of non-settled migrants from a contracting state in which they have family members. Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were "insurmountable obstacles" in the way of the family living in the country of origin of the non-national concerned, and whether there were factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (para 107).

43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to "un obstacle majeur" (Sen v The Netherlands (2003) 36 EHRR 7, para 40), or to "major impediments" (Tuquabo-Tekle v The Netherlands [2006] 1 FLR 798, para 48), or to "the test of 'insurmountable obstacles' or 'major impediments'" (IAA v United Kingdom (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could "realistically" be expected to move (Sezen v The Netherlands (2006) 43 EHRR 30, para 47). "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In Jeunesse, for example, there were said to be no insurmountable obstacles to the relocation of

the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119.

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…

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

17. In addition, as explained in *Agyarko* Section GEN sets the context for decisions made under Appendix FM of the Immigration Rules and, in particular, paragraph GEN.1. states:

"This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British citizen…It sets out the requirements to be met and, in considering the applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and economic well-being of the UK; the prevent of disorder and crime; the protection of health and morals;

and the protection of the rights and freedoms of others and in doing so reflects the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002…"

18. The Respondent has also published relevant policy entitled *Family Migration: Appendix FM Section 1.0: Family life (as a Partner or Parent) and Private Life – 10 Year Route* Version 3.0 23 January 2019. This states that:

"…an insurmountable obstacle can take 2 forms:

• a very significant difficulty which would be literally impossible to overcome, so it would be impossible for family life with the applicant's partner to continue overseas – for example because they would not be able to gain entry to the proposed country of return
• a very significant difficulty which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could be overcome but to do so would entail very serious hardship for one or both of them

When assessing an application under paragraph EX.1. (b) and determining whether there are "insurmountable obstacles", the decision maker should have regard to the individual circumstances of the applicant and their partner, based on all the information that has been provided. The onus is on the applicant to show that there are insurmountable obstacles, not on the decision maker to show that there are not.

The assessment of whether there are "insurmountable obstacles" is a different and more stringent assessment than whether it would be "reasonable to expect" the applicant's partner to join them overseas. For example, a British citizen partner who has lived in the UK all their life, has friends and family here, works here and speaks only English may not wish to uproot and relocate halfway across the world, and it may be very difficult for them to do so. However, a significant degree of hardship or inconvenience does not amount to an insurmountable obstacle. ECHR Article 8 does not oblige the UK to accept the choice of a couple as to which country they would prefer to reside in.

Relevant country of origin information should be referred to when assessing insurmountable obstacles. The decision maker should consider the specific claim made and the relevant national laws, attitudes and situation in the relevant country.

The assessment of whether family life can continue overseas will generally consider the likely situation in the proposed country of return unless there is information to suggest that the applicant or their partner might have a choice about where they choose to relocate to, such as where one or both of them has or have a right to reside in a country other than the country of proposed return, or where one or both of them has or have more than one nationality. In that case the decision maker should consider whether there are insurmountable obstacles to family life continuing in any of the relevant countries.

Lack of knowledge of a language spoken in the country in which the couple would be required to live would not usually amount to an insurmountable obstacle. It is reasonable to assume that the couple have a language in which they can communicate together. Therefore, it is possible for family life to continue outside the UK, whether or not the partner chooses to also learn a language spoken in the country of proposed return. Although inability to speak the language of that country may cause difficulties for the partner, it is very unlikely to amount to very serious hardship: many people successfully move to a country where, at first, they do not speak the language.

Being separated from extended family members – such as where the partner's parents, their siblings or both live here – would not usually amount to an insurmountable obstacle, unless there were particular factors in the case to establish the unusual or exceptional dependency required for Article 8 to be engaged.

A material change in quality of life for the applicant and their partner in the country of return, such as the type of accommodation they would live in, or a reduction in their income or standard of living, would not usually amount to an insurmountable obstacle, unless this would lead to particular hardship or there were particular exceptional factors in the case.

The factors which might be relevant when considering whether an insurmountable obstacle exists include but are not limited to:

Ability to lawfully enter and stay in another country

The decision maker should consider the ability of the members of the family unit (both the applicant and others) to lawfully enter and stay in another country. The onus is on the applicant to show that it is not feasible for them and their family to enter and stay in another country for this to amount to an insurmountable obstacle. A mere wish, desire or preference to live in the UK is not sufficient.

An example of where it might not be feasible for the family to live together elsewhere might be where the sponsor has gained their settled status in the UK through a refugee route, and the applicant is of the same nationality. In the absence of a realistic third country alternative, the settled person's inability to resume life in the country of origin is likely to constitute an obstacle to family life continuing overseas. The decision maker should consider relevant country information (but may not seek to go behind any decision to grant refugee status).

Serious cultural barriers to relocation overseas

This might be relevant in situations where the partner would be so disadvantaged by the social, religious or cultural situation in a particular country that they could not be expected to live there.

The impact of a mental or physical disability or of a serious illness which requires ongoing medical treatment

Moving to another country may involve a period of hardship for any person as they adjust to their new surroundings, whether or not they have a mental or physical disability or a serious illness which requires ongoing medical treatment. But independent medical evidence could establish that a physical or mental disability, or a serious illness which requires ongoing medical treatment, would lead to very serious hardship: for example, due to the lack of adequate health care in the country where the family would be required to live. As such, in the absence of a third country alternative, it could amount to an insurmountable obstacle to family life continuing overseas"

19. The test I have to apply is a stringent one and I must consider whether the Appellant and her partner would face very significant difficulties entailing very serious hardship if they had to continue their family life in Zimbabwe.

20. I have taken into account the Appellant's partner's age but this of itself is not sufficient to meet such a stringent test. It is also the case that he has a number of medical conditions. I had directed that the Appellant provide medical evidence explaining what treatment her partner presently had for each of his medical conditions and the prognosis for each. However, this was not done. Therefore, I have had to rely on a letter from Mr K. Patel, dated 11 June 2019, which stated that he was suffering from left ventricular systolic dysfunction, a cataract, stage 3 chronic kidney disease, type 2 diabetes mellitus and acute non-ST segment elevation myocardial infarction. In his further letter, dated 10 January 2020, Dr Patel said that the Appellant's partner was suffering from ischaemic heart disease, poorly controlled diabetes, heart failure, progressive and chronic kidney disease and raised PSA levels which had led to him being under investigation for prostrate malignancy. He went on to say that he was unable to comment on his prognosis and in terms of providing further evidence about his treatment he merely said that he was on anti-diabetic and heart failure medication and his progress was followed up by a cardiologist, a nephrologist and a urologist.

21. He also made a bald assertion that he would not advise the Appellant's partner to fly but it was not clear which of his medical conditions meant that he was not fit to fly or the basis upon which this assertion was made.

22. Due to the limitations of these letters, I have also had to rely on the oral evidence of the Appellant and her partner, to try to assess his capabilities and his present treatment.

23. The oral evidence indicated that the Appellant's partner has now had his cataract operation and there is no evidence to show that he will need any further treatment to his eyes in the foreseeable future. I have also taken into account the fact that although he has had a stroke, he stated that he is not receiving any treatment for this and that the only tablets he takes are for his diabetes and his prostrate condition. However, I have taken into account the fact that the GP also said that he took medication for his heart condition. The Appellant had not

provided any further objective evidence about the availability of treatment for these conditions in Zimbabwe and I note that the burden of proof lies on the Appellant to do so, if she asserts that no such treatment would be available.

24. The small bundle of documents, which were handed in to the Tribunal at the error of law hearing, contained some newspaper reports relating to a potential food crisis and hyperinflation in the economy but these articles were not relied upon at the resumed hearing. There were other articles which were critical of the public health service in Zimbabwe and the fact that it was seriously underfunded. They also referred to a dispute about doctor's pay but the majority of these dated back to 2018 or the beginning of 2019 and I was not provided with any up-to-date evidence about any such strikes or the general availability of either public or private health care facilities in Zimbabwe.

25. The Appellant asserted in her oral evidence that there were no hospitals in Zimbabwe but this assertion was not supported by any objective or expert evidence and there was no evidence that, even if public facilities were under-funded, her partner could not access the medication he required in the private sector.

26. The Appellant stated in her oral evidence that her partner had swollen feet, lost his balance and needed assistance when going up stairs. However, I note that in his evidence he merely said that his heart condition meant that he could not walk fast and could not climb stairs. In addition, during the hearing he walked out of the courtroom unaided.

27. It is also the case that the Appellant's partner is a British citizen and has lived in the United Kingdom for many years. However, these factors on their own are not capable of giving rise to insurmountable obstacles. I also note that the Appellant's partner is retired and according to the Appellant's application form has an annual income of £30,000 and also owns his own house. This suggests that they would not face very serious hardship in Zimbabwe, even taking into account his current medical conditions. In addition, I have taken into account the fact that English is widely spoken there and that the Appellant and her partner are not relying on any family and private life which they may have with any relatives living in the United Kingdom.

28. Furthermore, it has not been asserted that the Appellant's partner would not be able to enter Zimbabwe or that they would face any cultural barriers there, a country where the Appellant had lived and worked until 2003.

29. It is also the case that, even though the Appellant's partner may not have a current passport for Trinidad and Tobago, he is also a national of that state. He may not have any remaining friends or relatives there, but this does not mean that they could not live there without experiencing very serious hardship. There was simply no evidence to suggest that any such hardship would arise.

30. For all of these reasons and applying a balance of probabilities, I find that there are no insurmountable obstacles to the Appellant and her partner continuing a family life together in Zimbabwe.

ENTITLEMENT TO LEAVE OUTSIDE THE IMMIGRATION RULES

31. However, in paragraph 45 of *Agyarko* Reed LJ also found that even where it was not possible to show that there were insurmountable obstacles, leave to remain could nevertheless be granted outside the Rules in "exceptional circumstances". He then continued by finding that:

"46. In considering that question, it is important to appreciate that the Rules are not simply the product of a legal analysis: they are not intended to be a summary of the Strasbourg case law on article 8. As was explained at para 10 above, they are statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests. They are designed to operate on the basis that decisions taken in accordance with them are compatible with article 8 in all but exceptional cases. The Secretary of State is in principle entitled to have a policy of the kind which underpins the Rules. While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The margin of appreciation of national authorities is not unlimited, but it is nevertheless real and important. Immigration control is an intensely

political issue, on which differing views are held within the contracting states, and as between those states. The ECHR has therefore to be applied in a manner which is capable of accommodating different approaches, within limits. Under the constitutional arrangements existing within the UK, the courts can review the compatibility of decision-making in relation to immigration with the Convention rights, but the authorities responsible for determining policy in relation to immigration, within the limits of the national margin of appreciation, are the Secretary of State and Parliament.

47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case. This was explained in Hesham Ali at paras 44-46, 50 and 53.

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…

49. In Jeunesse, the Grand Chamber said, consistently with earlier judgments of the court, that an important consideration when assessing the proportionality under article 8 of the removal of non-settled migrants from a contracting state in which they have family members, is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be "precarious". Where this is the case, the court said, "it is

likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8" (para 108).

50. Domestically, officials who are determining whether there are exceptional circumstances as defined in the Instructions, and whether leave to remain should therefore be granted outside the Rules, are directed by the Instructions to consider all relevant factors, including whether the applicant "[formed] their relationship with their partner at a time when they had no immigration status or this was precarious". They are instructed:

"Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK."

That instruction is consistent with the case law of the European court, such as its judgment in Jeunesse. As the instruction makes clear, "precariousness" is not a preliminary hurdle to be overcome. Rather, the fact that family life has been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affects the weight to be attached to it in the balancing exercise.

51. 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.*

52. It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if

there is a protracted delay in the enforcement of immigration control. This point was made by Lord Bingham and Lord Brown of Eaton-under-Heywood in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] AC 1159, paras 15 and 37. It is also illustrated by the judgment of the European court in Jeunesse.

53. Finally, in relation to this matter, the reference in the instruction to "full knowledge that their stay here is unlawful or precarious" is also consistent with the case law of the European court, which refers to the persons concerned being aware that the persistence of family life in the host state would be precarious from the outset (as in Jeunesse, para 108). One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.

54. As explained in para 49 above, the European court has said that, in cases concerned with precarious family life, it is "likely" only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious. The court has repeatedly acknowledged that "a state is entitled, as a matter of well-established international law, and subject to its treaty obligations, to control the entry of nonnationals into its territory and their residence there" (Jeunesse, para 100). As the court has made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a fait accompli. On the contrary, "where confronted with a fait accompli the removal of the non-national family member by the authorities would be incompatible with article 8 only in exceptional circumstances" (Jeunesse, para 114).

55. That statement reflects the strength of the claim which will normally be required, if the contracting state's interest in immigration control is to be outweighed. In the Jeunesse case, for example, the Dutch authorities' tolerance of the applicant's unlawful presence in that country for a very prolonged period, during which she developed strong family and social ties there, led the court to conclude that the circumstances were exceptional and that a fair balance

had not been struck (paras 121-122). As the court put it, in view of the particular circumstances of the case, it was questionable whether general immigration considerations could be regarded as sufficient justification for refusing the applicant residence in the host state (para 121).

56. The European court's use of the phrase "exceptional circumstances" in this context was considered by the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192; [2014] 1 WLR 544. Lord Dyson MR, giving the judgment of the court, said:

"In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal." (para 42)

Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as the Master of the Rolls made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling ... is required to outweigh the public interest", applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in Hesham Ali.

57. That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters

discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

…

60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test…"

32. The Policy referred to above also states that:

"If an applicant for the 10-year partner route does not otherwise meet the requirements of the Immigration Rules, the decision maker must consider, under paragraph GEN.3.2. of Appendix FM, whether there are exceptional circumstances which would render refusal of the application a breach of ECHR Article 8 because it would result in unjustifiably harsh consequences for the applicant or their family"

Decision to grant leave to remain on the basis of exceptional circumstances under GEN.3.2. of Appendix FM

Where an application made or considered under Appendix FM does not otherwise meet the relevant requirements of that Appendix or of Part 9 of the rules, but it is considered, under paragraph GEN.3.2.(2), that there are exceptional circumstance which would render refusal a breach of ECHR Article 8 (because it would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from the information provided by the applicant would be affected), leave to remain

33. When considering whether there are exceptional circumstances which would entitle the Appellant to leave to remain outside the Immigration Rules, I have reminded myself of the case law and policy above. In particular, I have reminded myself that I have to conduct a proportionality exercise balancing the public interest in immigration control against the Appellant's own individual circumstances and those of her partner. This proportionately

exercise relates to Article 8(2) of the European Convention on Human Rights as it has been accepted that for the purposes of Article 8(1) the Appellant and her partner do enjoy a family life together.

34. I have reminded myself of the weight to be given to the fact that the Appellant's initial immigration status was precarious, that thereafter she remained here without leave to do so and that she and her partner continued their relationship in the knowledge that she had no leave to remain. I have also reminded myself that this should not attract as much weight as would have been applied if she was liable to deportation due to criminal convictions.

35. In addition, this was not a case where the Respondent had delayed in making a decision about the Appellant's status. It was the Appellant who failed to apply for further leave to remain between 2007 and 2010 and 2010 and 2018 and, when she did apply, her applications were dealt with promptly.

36. In addition, the Appellant has not provided sufficient medical, objective or expert evidence to show that her partner's medical conditions will result in him suffering unjustifiably harsh consequences if he lives in Zimbabwe. There is no evidence to show that he will not be able to access the medication he requires there and he is not receiving any other regular treatment at the moment. (I note that his cataract operation has already taken place.) There is no explanation of the bald statement by Dr Patel that he is unfit to fly.

37. The Appellant herself lived and worked in Zimbabwe until 2003 and, even though she says that she has no friends or relatives there now, her partner's income and assets suggest that they would be able to support themselves there.

38. For all the reasons given above and applying a balance of probabilities, I find that there are no strong and compelling circumstances to suggest that she should be granted leave outside the Immigration Rules, as neither the Appellant nor her partner would suffer unjustifiably harsh consequences if they had to live together in Zimbabwe. I find that this broad conclusion would also apply to them living in Trinidad and Tobago in the light of the paucity of evidence provided by the Appellant in the context of this potential option.

39. The Appellant and her partner were also asked whether it would not be possible for the Appellant to return to Zimbabwe on her own and apply for entry clearance in the context where it would appear that she met all of the requirements of the Immigration Rules apart from the immigration status requirement. They asserted that the Appellant's partner could not remain here without her care but it was also their evidence that they had not make any enquiries about obtaining some assistance for him from either public or private services if she did return to obtain entry clearance.

40. It may be the case that the Appellant's partner would prefer to be cared for by her but there was no evidence that having alternative assistance for a short period of time would cause him any harm or unjustifiably harsh consequences or that appropriate care to met his needs could not be found.

41. In the light of the Appellant and her partner's financial circumstances it was also likely that she would be able to accommodate and maintain herself during any period in which she had to remain in Zimbabwe to apply for entry clearance and that they would be able to pay for her return ticket.

42. I have also reminded myself that in *R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – IDI - Chikwamba – temporary separation proportionality)* [2015] UKUT 00189 (IAC) the Upper Tribunal found that:

"(i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40.

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

43. For all of these reasons and applying a balance of probabilities I find that a temporary separation whilst the Appellant's seeks entry clearance would not amount to a disproportionate breach of Article 8 and entitle her to leave to remain outside the Immigration Rules.

DECISION

(1) The Appellant's appeal is dismissed.

Nadine Finch

Signed Date 20 February 2020
Upper Tribunal Judge Finch