Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01801/2020 (V)**

THE IMMIGRATION ACTS

Heard by Skype for business
On the 28 April 2021

Decision & Reasons Promulgated
On 10 May 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

YVES CHRISTIAN NJAPOU MBA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S. Walker, Senior Presenting Officer.
For the Respondent: Mr M. Mukulu, Counsel instructed on behalf of the respondent.

DECISION AND REASONS

Introduction:

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal Judge Seelhoff (hereinafter referred to as the "FtTJ") promulgated on the 14 December 2020, in which the appellant's appeal against the decision to refuse his human rights application dated 14 January 2020 was allowed.

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2. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal.

3. Whilst this is the appeal by the Secretary of State, I intend to refer to the parties as they were before the First-tier Tribunal.

4. The hearing took place on 28 April 2021, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face -to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant and his partner who was able to see and hear the proceedings being conducted. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

Background:

5. The appellant is a national of Cameroon. On the 7 November 2019 he made a human rights application in an application for leave to remain in the UK on the basis of his family life with his partner and on the basis of his private life.

6. The application was refused in a decision made on the 14 January 2020. The decision letter states that the appellant had made a human rights claim in an application for leave to remain in the UK under Appendix FM to the Immigration Rules on the basis of his family life with her partner.

7. The reasons given for refusing the application can be summarised as follows. The respondent considered his application under paragraphs R-LTRP of Appendix FM but considered that he could not meet the eligibility relationship requirements (E-LTRP 2.1 of Appendix FM) because he had not demonstrated by sufficient evidence that he had been living with his partner in a relationship akin to marriage of the two years immediately preceding the application. Consequently, he could not meet the definition of a partner as defined in GEN 1.2 of Appendix FM.

8. The appellant also could not meet the eligibility immigration requirement (paragraphs E-LTRP 2.1 -2.2) because his previous leave on a business visa ended on 24 April 2012 and he had been without valid leave in United Kingdom since that date and paragraph 39E did not apply. He was in the UK in breach of immigration laws and paragraph EX1 did not apply.

9. The respondent considered whether the appellant would be exempt from meeting certain eligibility requirements of Appendix FM because paragraph EX1 applied.

10. It was accepted that the appellant had a genuine and subsisting relationship with his British partner. However the respondent did not accept that there were any insurmountable obstacles in accordance with paragraph EX2 of Appendix FM which means "very significant difficulties which will be faced by the appellant or his partner in continuing their family life together outside of the UK, and which could not be overcome or entail very serious hardship for him and his partner". The respondent considered that the relationship could continue in Cameroon as there were no children involved in the family life and any skills gained in the UK could be used in Cameroon to reintegrate. As an individual who had resided there for a considerable amount of time, he could aid his partner in the integration and the cultures and customs of life in Cameroon. Therefore paragraph EX1 did not apply.

11. His application was considered under the private life rules under paragraph 276 ADE, where it was noted that the appellant was a national of Cameroon who had entered the UK on 27 December 2011. He had lived in the UK for 7 years and it was not accepted that he lived in the UK continuously for 20 years; he was not between the ages of 18 and under 25 having lived in the UK for more than half his life and was over the age of 18 and therefore could not meet the requirements of paragraph 276 ADE(1 (iii)(iv) and (v).

12. As to paragraph 276 ADE(1) (vi) the respondent did not accept that there would be very significant obstacles to his integration into Cameroon if required to leave the UK because he resided in Cameroon for more than half his life, arriving in the UK in 2011. It was noted that he resided in Cameroon for his childhood years prior to this date, totalling 28 years residing in Cameroon. It was considered that he would have retained cultural and linguistic connections to Cameroon during his time in the UK. He had set out in his application form that he spoke fluent French alongside English which is the main language spoken in Cameroon. Consequently, he failed to meet the requirements of the Immigration Rules.

13. The respondent did not consider that there were any exceptional circumstances to warrant a grant of leave to remain and considered the issues that had been raised as to why it would be unjustifiably harsh for him to return to Cameroon. The respondent took into account his private life which was established at a time when he was not on a route to settlement and with no limited leave to remain and therefore could not have had a realistic expectation that relationships would be able to continue uninterrupted. Whilst it was claimed that he had established a private life in the UK and would find it difficult to return to Cameroon, the respondent considered that as he had never obtained leave to enter and remain in the UK since his expiry of the business visa in 2012 and this was not a route to settlement, he was fully aware when developing any private life or ties that he had no expectation that he would be able to remain indefinitely.

14. It was noted that he commenced a relationship with a British national and had a relationship in the UK however it was believed the relationship could continue from or in Cameroon if she chose to move overseas to pursue the relationship. Furthermore, the appellant stated he had family members in Cameroon including a daughter (with whom he had no contact with) who would be able to provide him with accommodation and a family unit for emotional and other support. It was believed that the appellant and his partner could re-establish their relationship together in Cameroon.

15. It was further noted that he would be familiar with the culture, customs, and language of that country and whilst it was acknowledged it may be initially difficult upon return, there were no exceptional circumstances which would prevent him from re-establishing his private life in Cameroon. It was considered that as an individual had spent the majority of his life in Cameroon, including all of his child, that those ties that he would establish would not have dissolved over a period of seven years. His linguistic ties remained.

16. In support of the claim he provided no exceptional circumstances as to why he could not return to Cameroon and continue his relationship with his British partner. There was no evidence that he would struggle or adjust to life in Cameroon as it spent nearly all his life there.

17. As to a fear of return raised in the representative's letter, an application form was provided to make an asylum claim. He was contacted by the asylum team to confirm if he wished to pursue the claim but no response was given. An asylum appointment was booked on 11 January 2020 and it was noted that he did not attend the appointment. Failure to attend the appointment and to pursue the claim cast doubt as to the veracity of the claim.

18. Therefore the respondent did not find that there was any evidence to demonstrate that there were any" exceptional circumstances" established in his case.

The appeal before the First-tier Tribunal:

19. The appellant's appeal against the respondent's decision to refuse leave came before the First-tier Tribunal (Judge Seelhof) on the 30 November 2020.

20. In a determination promulgated on the 14 December 2020, the FtTJ allowed the appeal on human rights grounds, having considered that issue in the light of the appellant's compliance with the Immigration Rule in question and on Article 8 grounds.

21. This was an appeal where the respondent did not appear nor was she represented. The judge considered that the respondent had chosen not to be represented and thus he satisfied himself that it was a matter of choice before

determining that it was appropriate and fair to proceed in the circumstances (at [13]).

22. The judge heard evidence from the appellant and also heard evidence from his partner and two witnesses who were in New Zealand. He also had a bundle of documentation in support of the application, including witness statements for the appellant, his partner, the appellant's partner's daughter, a friend of the appellant's partner and niece of the appellant's partner. There were further water bills and payslips which confirmed that the appellant's partner was employed as a teacher earning well in excess of the minimum income under the rules (at [11]).

23. Having heard oral evidence from all of the witnesses and having considered the documentary evidence, the FtTJ made the following findings at [20] –[27].

24. By reference to his relationship with her partner, the judge accepted that he was in a genuine and subsisting relationship with his partner and that they had been living together continuously in a relationship since 2013. The FtTJ stated, "all three of the supporting witnesses gave credible evidence and there is no plausible reason as to why the sponsor's daughter and niece would give supporting evidence if they were not satisfied that the relationship was genuine and subsisting. There are photographs which support the evidence of all three witnesses regarding the visits and the time together." (at [20]).

25. At paragraphs [21-[25] the FtTJ addressed the issue of "insurmountable obstacles"

26. The FtTJ stated that he was not persuaded that the risk from the appellant's family was such to justify finding that EX1(b) or EX 2 was met and that if he had a plausible fear of family members, then was reasonable to expect him to have pursued an asylum claim which he has not done.

27. As to the circumstances of his British partner, at [22], the judge stated, "I do not agree that it is necessarily unreasonable to expect the appellant's partner to move to Cameroon. I accept that it would be difficult but the threshold in the rules is a very high one and as an experienced teacher I am reasonably sure that she would be very employable even in the French-speaking portions of Cameroon".

28. However the FtTJ concluded that the evidence was sufficient to meet the high test for insurmountable obstacles in paragraph EX1(b) of the rules for the reasons set out at paragraphs [23 – 25]. In those paragraphs read as follows:

> "23. However, at the current time, as is apparent from the foreign office advice, there is no Visa route for the appellant's partner to join in Cameroon. It is not currently possible to apply for visit or spouse visas through the embassy in the UK and visas are not being issued on entry. What that means is that at the current time the appellant's partner is simply not able to travel to the country. Whilst I acknowledge that the Covid 19

> travel restrictions are subject to review I am however required to consider the circumstances as at the date of the hearing. Whilst there is a possibility that the restrictions could be lifted within months it is equally possible that Third World countries who may have access to vaccines far late in the West will continue to impose restrictions for far longer.
>
> 24. The absence of a legal Visa route for the sponsor to travel to Cameroon clearly meets the requirements of EX2 of Appendix FM of the Immigration Rules. The only way in which family life could currently continue in Cameroon would be if the appellant's partner were to attempt to travel to that country illegally. I consider that to be a very significant obstacle and therefore the appeal should be allowed as the rules are effectively met as of the date I am considering this appeal albeit this will put the appellant on a 10 year route to settlement.
>
> 25. I note that the wording of EX1 (b) and EX2 is not such as to confine me to considering the circumstances as at the date of application and accordingly my findings do mean that the rules are effectively met."

29. At paragraphs [26]-[27] the judge went on to consider the proportionality of the appellant's removal under Article 8 of the ECHR but concluded that it would be a disproportionate interference with his right to respect for private and family life.

30. When considering the section 117 public interest considerations, the FtTJ that took into account that it would be appropriate to attach minimal weight to the family life rights developed which developed whilst his leave to remain in the UK was precarious however he stated, "I would also have to bear in mind the fact that the relationship is one which can justify the grant of leave to remain under the immigration rules as the couple have lived together for two years."

31. The FtTJ took into account that the appellant spoke reasonable English and that this did not "weigh against the balancing exercise" and that the appellant's partner earned well in excess of the income threshold.

32. The FtTJ stated at [27]:

> "Covid restrictions will undoubtedly place considerable burden on any attempts to travel to be in the same country or even any attempt by the appellant to return to Cameroon in order to make an application for entry clearance. Further whilst I would not have found that there would be significant challenges for the sponsor in integrating in Cameroon absent the legal restrictions, I am satisfied that it will be challenging for a woman of her age to adapt in a very different country. In all the circumstances of this case I would allow the appeal on article 8 grounds outside the rules had I not been satisfied that the requirements of the rules were met."

33. The FtTJ therefore allowed the appeal on article 8 grounds "as the requirements of Appendix FM of the immigration rules are met" or "in the alternative, the appeal was allowed on Article 8 grounds outside the rules."

34. Permission to appeal was issued on the 29 December 2020 and on 21 January 2021, permission to appeal was granted by FtTJ Chohan stating:-

> "The grounds assert that the judge erred in giving inadequate reasons and erred due to a procedural irregularity.
>
> At paragraph 12 of the decision, the judge states that, "we consulted the foreign office travel guide on Cameroon". At the hearing, the respondent was not represented. It is not clear what the judge means by "we". It is further not clear whether the judge was referring to a document within the appellant's bundle or whether research was undertaken at the hearing. As such, this matter must be explored further.
>
> Accordingly, it is arguable that there has been a procedural error of law."

The hearing before the Upper Tribunal:

35. In the light of the COVID-19 pandemic the Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face -to -face hearing. Thus directions were given for a remote hearing to take place and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.

36. Mr Walker on behalf of the Secretary of State relied upon the written grounds of appeal .

37. There was no Rule 24 response filed on behalf of the appellant.

38. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear and helpful oral submissions during the hearing.

39. I intend to consider the submissions made by the parties when considering the grounds advanced on behalf of the appellant.

Discussion:

40. There are two grounds advanced on behalf of the Secretary of State. Firstly that the FtTJ erred in failing to provide adequate reasons for reaching his conclusion that EX 1 had been met and having found that insurmountable obstacles existed. Secondly, that the judge committed a procedural irregularity.

41. Dealing with the procedural irregularity, it is submitted in the written grounds that at paragraph [12] the FtTJ stated "we consulted the foreign office travel guidance".

42. The grounds go on to state that aside from the references to "we" calling the witnesses and hearing for the witnesses at [14] and [17] which denotes an arguable lack of independence, it is wholly unclear on what basis the FtTJ felt it appropriate to perform his own research at [12].

43. The grounds go on to make reference to the decision in AM (fair hearing) [2015] UKUT 656 that independent judicial research is inappropriate and that if it were a matter that the judge felt needed to be addressed, fairness dictates that the issue be canvassed and that both parties be allowed to address the issue. Whilst there was not a presenting officer present at the hearing, the grounds assert that it was clear that given the judge considered the inability of the sponsor to travel to Cameroon to be determinative of matters under EX1 at [24] that it was incumbent on the judge to enable both parties to address the matter.

44. The grounds refer to paragraphs [23] and [24] and that the judge concluded that the absence of a legal Visa route was determinative of the matter but the judge failed to consider whether this was a temporary measure (not least the information was accessed in the midst of a four week lockdown period). The only evidence referred to as that set out at [12]. At [23] the judge appeared to consider the current limits of the Cameroon consulate facilities in issuing visas beyond business and diplomatic applicants as dependent on the availability of vaccinations in Cameroon.

45. The grounds submit that the evidence referred to at [12] makes no such link between these two issues and thus the judge was indulging in speculation and failed to give adequate reasoning with reference to the evidence. Furthermore, the consideration that Third World countries would impose restrictions far longer due to delayed access to vaccines was also based on speculation and without reference to any evidence. There is also no substantive consideration of anything beyond the ability to travel to Cameroon.

46. In his oral submissions Mr Walker submitted that by reference to the decision in AM (as cited) independent judicial research is inappropriate in the absence of the other party.

47. In addition he submitted the judge failed to consider whether closure from the country was on a temporary basis due to the current Covid restrictions.

48. Mr Mukulu submitted that a relevant factor was that the respondent did not attend the hearing. In the context where the respondent was not present and where it is alleged that the court engaged in unfairness, when considering the Surendran guidelines there was no bias on the part of the judge. In the case where the respondent not attend it is not possible suggest that there was any unfairness and the submission suggested that the judge should have stayed the

hearing and then invited the presenting officer to make submissions on this evidence. That could not be correct.

49. In any event he submitted, the decision in AM did not assist the respondent. On the facts of this case, the judge was dealing with unprecedented circumstances namely a global pandemic and he was entitled to consider or take judicial notice of this.

50. He further submitted that in the context of the circumstances in which the hearing was conducted and to elevate this to judicial research was putting a gloss that did not accurately deal with the circumstances. He further submitted that the hurdle that the Secretary of State had to overcome to show that the hearing should have been adjourned was not met in this case given that the Secretary of State had chosen not to attend the hearing. Had a presenting officer attended, they would have been able to make their input to the circumstances set out at paragraph 12. This was a legitimate point raised by the judge and he was entitled to consider this.

51. Therefore when looking at how this applied to the decision, the assessment made at paragraph 23 was open to him to make and he was entitled to consider the circumstances as at the date of the hearing.

Ground 1: Procedural irregularity

52. Dealing with the issue of procedural irregularity, I am not satisfied that the respondent has made out her grounds that there was any procedural irregularity that led to unfairness based on the conduct of the FtTJ concerned.

53. Whilst the respondent submits that it is wholly unclear on what basis the judge felt appropriate to consider this information, it is plain from reading the decision that the issue that the judge was required to decide was whether there were insurmountable obstacles to family life outside of the United Kingdom. Part of that assessment would necessarily consider the circumstances in the country where it is stated family life should be established. In this case Cameroon. As Mr Muluku submitted when looking at the issue in the context of the circumstances, the information that the judge accessed during the court hearing was relevant to that issue. Furthermore, rather than describing this as "research" it was better expressed as the judge having taken judicial notice concerning the unprecedented global pandemic at the time of the hearing.

54. I enquired of Mr Mukulu how that information came before the court and he advised that the judge had raised the issue during the court hearing and this was addressed by the parties present. That seems clear by the reference to "we" at paragraph [12]. I do not consider that to be evidence in support of any allegation of bias or lack of judicial independence but merely to reflect the fact that the judge was considering along with the representative in a court setting information that was pertinent to the decision he was required to decide.

55. The grounds rely upon the decision of AM (fair hearing) [2015] UKUT 656 to demonstrate that independent judicial research is inappropriate. I have considered that decision and as can be seen by a fair reading of it, the facts are entirely different. In that case the Secretary of State made a number of assertions that the judge had considered Internet research which he failed to disclose the parties, the grounds of challenge asserted that by doing so the judge erred procedurally in forming a view on core elements of the claim in advance of the hearing and that the judge had concerns about the background material relied upon by the respondent. The presidential panel found that the grounds were "unsubstantiated assertions" and that the judge did not engage in background research but it had in fact accessed the footnotes that were entirely permissible.

56. The points expressed in the decision and set out in the head note are said to be "general in nature given the unavoidable contextual and fact sensitive nature of every case". In my judgement, whilst that decision provides general guidance concerning fairness in proceedings relating to evidence, what is equally clear is that each case must be considered on its own particular factual circumstances. When those are addressed here, it is plain in my judgement that the FtTJ properly raised the point at the hearing which enabled the representatives present to take account of it and make submissions upon it. The decision in AM (as cited) is not authority for the submission that if the judge felt a matter needed to be addressed that this should have been canvassed with both parties in the circumstances where the respondent had chosen not to attend the hearing. In those circumstances I do not consider that it was incumbent on the judge to adjourn the hearing and then to obtain the views of the respondent who had chosen not to attend the hearing.

57. Furthermore, I do not consider that the judge was in error in considering this evidence. The grounds assert that the judge failed to consider whether this was a temporary measure as the information was accessed in the midst of a four-week lockdown. In my judgement, the FtTJ was entitled to consider evidence as at the date of the hearing which is the time in which the human rights claim is to be determined. The judge would have been in error to consider it as a temporary measure on the basis that at some point in the future the circumstances might be different. Furthermore, when seen in the current circumstances the information set out at paragraph 12 still appears on the foreign office travel guidance on Cameroon. That being the case, the circumstances referred to at paragraph 12 were not temporary.

58. Whilst the judge made reference to the ability to issue visas as being dependent on the availability of vaccines, I do not think that this undermines the evidence that the judge relied upon. In my view was open to the judge to consider whether in the circumstances as at the date of the hearing the appellant and his partner would be able to establish family life outside of the United Kingdom.

59. I therefore find no error of law on the basis of procedural irregularity or the failure to provide reasons by reference to the absence of a legal Visa route.

Ground 2: adequacy of reasons:

60. The grounds challenge the findings of fact made by the FtTJ concerning the relationship between the parties on the basis of inadequacy of reasons.

61. Firstly, the grounds seek to challenge the finding at [20]. It is submitted that the judge failed to give adequate reasons as to why the evidence of the relationship was accepted at "face value".

62. The grounds assert that when considering the evidence of the relationship, the judge stated that there was no plausible reason why the daughter of the sponsor and niece would support the appeal if it were not a genuine relationship. The grounds state that "given that the witnesses were direct relatives of the partner of the appellant, there is a clear reason why their evidence is not strictly independent". It is also asserted that the judge, despite asking why there was a lack of documentation of prolonged cohabitation at paragraph 17 – 18, failed to set out the evidence in response or factor this into the consideration of the relationship.

63. I am not satisfied that the FtTJ fell into error by failing to give adequate reasons for reaching the conclusion that the appellant and his partner had lived together since 2013 (finding at [20]).

64. By reference to Appendix FM, the respondent considered that the appellant failed to establish that he resided with his partner in a relationship akin to marriage for two years prior to the application (GEN 1.2). However the FtTJ found that the appellant met GEN 1.2 for the reasons set out at paragraph [20]in view of the evidence that they had resided with each other since 2013 and based on the evidence of three supporting witnesses who the judge considered had given "credible evidence". That evidence was set out in witness statements and the oral evidence was summarised at [14]-[18]. The FtTJ was entitled to place weight upon evidence that he had heard and read from the witnesses called in support of the claim. At [14] the judge referred to the first witness who gave evidence (the appellant's partner's daughter) who had confirmed that the letter she had provided in support of the appeal was truthful and that she had met the appellant as a mother's partner in December 2013 and it then stayed with them in the UK for most of the time between November 2015 until May 2017 when she left the UK. The witness also confirmed that she believed the relationship to be a genuine and subsisting one. The judge also made reference to the second witness who was the appellant's partner's friend who confirmed that she visits and stays at the appellant and his partner and had done so 2 to 3 times a year since 2013. Her evidence was to the best of her knowledge and belief that the appellant had lived with his partner since 2013. The last witness was the appellant's partners' niece who confirmed that she had lived with the

appellant and his partner between 2013 and 2017 in the UK again confirming that the relationship was a genuine one at that the couple had lived together for more than two years. Both the appellant and the appellant's partner gave evidence and the judge recorded at [17] that "I had some questions for him about why there were not more bills in his name" and at [18] also set out that the appellant's partner "explained why the appellant had not been on more recent bills." There is reference to this in the record of proceedings where the judge recorded the evidence given that the reason why there were not more bills from the electric company was because the rest of the bills had "come on line and she did not print them out". His partner was also asked why there were no more recent electrical bills and she confirmed "I do everything online. I did one copy of each bill with his name on it. I prefer not to waste paper." Further reference in the oral evidence refers to the parties moving from one address to another. There is also reference made by the judge to the photographs in the bundle which supported the evidence of all three witnesses regarding the visits and the time together.

65. In my judgement, the FtTJ gave adequate and sustainable reasons for reaching his decision which were referable to the evidence. In particular the FtTJ assessed the evidence of three witnesses, all of whom he found to be "credible witnesses", and all of whom had provided evidence particular to their own circumstances which demonstrated that the appellant had lived with his partner since 2013. Whilst the respondent's grounds challenge the finding made at [20] that there was no plausible reason as to why the sponsor's daughter and niece would give supporting evidence if they were not satisfied that the relationship was genuine said subsisting, that finding has to be seen alongside and in the light of the evidence that I have just referred to. The grounds are not made out that the judge failed to give adequate reasoning in support of his factual findings.

66. I now turn to the final part of the grounds relied upon by the respondent. It is submitted on behalf the respondent that at [27] when considering the matter under Article 8, the judge found that despite affording little weight to the relationship and that there would not be significant challenges for the sponsor in integrating in Cameroon, the judge found that it would be a challenge for the sponsor to adapt given her age. Mr Walker submitted that the judge contradicted himself in finding that it was not a significant challenge but also a challenge significant enough to outweigh the attribution of little weight and an absence of challenge to integration. It is therefore submitted that the reasoning was wholly inadequate.

67. Mr Mukulu on behalf of the appellant submitted that the FtTJ properly considered the circumstances and that he was satisfied that this was a genuine and subsisting relationship that had been maintained for over the two-year period that was necessary and at the date of the hearing and when reaching his decision, the parties were not able to travel to Cameroon to establish family life outside of the United Kingdom and that was his assessment at paragraph 27 of

the decision and that there was no contradiction because the judge was placing weight upon the inability of the sponsor to travel or to live in Cameroon as a result of the legal restrictions. Thus the judge gave adequate reasons for reaching the conclusion that the appeal should be allowed on Article 8 grounds.

68. I have considered the respondent's grounds and the challenge made to paragraph 27. The grounds do not mount any particularised challenge to the issue of whether there are "insurmountable obstacles" beyond criticism of the judge's assessment of the material he considered at paragraph 12.

69. I have not been addressed upon the relevant law by either advocate. However the relevant legal principles can be addressed as follows.

70. Paragraph EX.1. reads as follows (so far as relevant):

> " EX.1. This paragraph applies if.
>
> (a) ...; or
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. 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."

71. The Supreme Court in Agyarko considered the meaning of the "insurmountable obstacles" requirement at [43] to [45] of the judgment as follows:

> "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. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.
>
> 45. By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate."

72. As the Supreme Court also made clear, even where those requirements are not met, an applicant may still be granted leave if the consequences of removal result are "unjustifiably harsh". However, as the Supreme Court went on to say when looking at the grant of leave to remain outside the Rules, this will only arise in exceptional circumstances. The rationale for that approach is explained at [54] and [55] of the judgment as follows:

> "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 non-nationals 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)."

73. In the case of Lal v SSHD [2019] EWCA Civ 1925 at paragraph 35 of that decision the Court of Appeal gave its view as to the correct interpretation of insurmountable obstacles. The Court of Appeal indicated in paragraphs 36 and 37:

"36. In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK. If not, the decision-maker needs finally to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both).

37. To apply the test in what Lord Reed in the *Agyarko* case at para 43 called 'a practical and realistic sense', it is relevant and necessary in addressing these questions to have regard to the particular characteristics and circumstances of the individual(s) concerned. Thus, in the present case where it was established by evidence to the satisfaction of the tribunal that the applicant's partner is particularly sensitive to heat, it was relevant for the tribunal to take this fact into account in assessing the level of difficulty which Mr Wilmshurst would face and the degree of hardship that would be entailed if he were required to move to India to continue his relationship. We do not accept, however, that an obstacle to the applicant's partner moving to India is shown to be insurmountable - in either of the

> ways contemplated by paragraph EX.2. - just by establishing that the individual concerned would perceive the difficulty as insurmountable and would in fact be deterred by it from relocating to India. The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to an applicant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together".

74. I have given careful consideration to the submissions made on behalf of the respondent, but I am satisfied that the FtTJ did not err in law in his approach when considering the issue of " insurmountable obstacles" by reference to the material set out at [12] and then later analysed in his assessment at paragraph [23].

75. There was no dispute that the appellant's partner was not a citizen of Cameroon. The relevant part of the respondent's guidance at paragraph 23 states "the onus is on the applicant to show that it is not feasible for them or their family to enter or stay in any other country for this to amount to an "insurmountable obstacle"".

76. Thus the burden was on the appellant to demonstrate that it was not feasible to enter or stay in Cameroon for this to amount to an "insurmountable obstacle". The evidence before the Tribunal and set out at [12] was sufficient to demonstrate that at the date of the hearing, neither the sponsor or the appellant would be able to enter or stay there in order for family life to continue.

77. The Court of Appeal in Lal indicated that one has to look at the factors relied on in an objective sense rather than on the basis of what the appellant and/or the appellant's spouse perceive to be the difficulties and that when determining the question of whether return would entail "very serious hardship" based on the evidence which was before the FtTJ (see paragraph [43] of the judgment).

78. When looking at the decision as a whole, in my judgement the FtTJ gave adequate and sustainable reasons that were in accordance with the relevant case law and evidence for reaching the decision that the circumstances relied upon by the appellant and the sponsor did amount to an "insurmountable obstacles" when viewed cumulatively to family life being established outside the United Kingdom. When paragraph [27] is read in context, there is no contradiction as asserted on behalf of the respondent. What the judge was referring to was that whilst he would not have found there to be significant challenges for the sponsor to integrate or in other words to live in Cameroon, as a result of what he described as the legal restrictions this was sufficient to amount to a "significant challenge". His reference to it being challenging for a "one of her age to adapt a very different country" was a finding that was open to him but a fair reading of paragraph 27 indicates that that was not a "significant challenge".

79. Those were a relevant factor when considering the issue on Article 8 grounds. The FtTJ took into account the public interest considerations set out in S117 and when applying section 117B (4) and whilst he stated "little weight" should be given to a private life or a relationship formed with a qualifying partner established when the person is in the UK unlawfully (the FtTJ stated " precarious" but it was during his unlawful residence) it did not mean that "no weight" should be given in the proportionality balance.

80. I have given careful consideration to the submissions advanced on behalf of the appellant and have considered them in the context of the evidence and the assessment made by the judge. Having done so, I am satisfied that the judge did properly carry out an Article 8 assessment in accordance with the evidence and the relevant legal principles and gave adequate and sustainable reasons for reaching his decision.

81. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or Tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see Hesham Ali v SSHD [2016] UKSC 60 and see R (MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43].

82. In my judgement the FtTJ correctly identified that when considering the public interest the appellant could meet the Immigration Rules under Appendix FM, for the reasons given. He was entitled to weigh in the balance on the appellant side, that the relationship was genuine and subsisting and had endured beyond the two-year period as at the date of the application and at the date of the hearing and where the judge found that there were insurmountable obstacles for family life being established outside the UK. In the alternative, he found that the appeal should be allowed "outside the Rules". That was in accordance with the decision in Agyarko, that even when the requirements are not met (although the FtTJ consider them to be so) an applicant may still be granted leave "outside the Rules" on the basis of if the consequences of removal are "unjustifiably harsh".

83. I observe that the FtTJ did not make any reference to the *Chikwamba* principle, that is, that there is no public interest in requiring him to leave the UK in order to make a successful application for entry clearance when the sponsor could show she earned over £18,000. However, at [27] the FtTJ did make reference to the covid restrictions meaning that the appellant could not return to Cameroon to make an application for entry clearance.

84. Whilst in *Agyarko*, a case in which the *Chikwamba* principle was not at issue, it is only said that that there "might" be no public interest in the removal of such a person and would not necessarily give rise to a grant of leave, on the facts of this appeal, the FtTJ did find that the appellant's partner could meet the minimum income threshold and had provided evidence in support of this and thus was a relevant factor in the balance on the side of the appellant.

85. In summary and when addressing the second ground advanced on behalf of the respondent, I am satisfied that the FtTJ properly undertook a proportionality assessment outside of the rules and applied it on the circumstances of the individual case that was before him carrying out a "fact sensitive assessment".

86. The findings made by Judge Seelhof were neither irrational nor unreasonable. They may be viewed as generous but that does not make the decision one that was wrong in law. Whilst I would accept that the concluding paragraphs were not as clear as they could have been, when considering the decision as a whole it was open to the FtTJ to reach the conclusion that there were insurmountable obstacles in the light of the restrictions to family life being established outside of the UK and that this was a genuine and subsisting relationship which had endured since 2013, alongside the sponsor's ability to be able to exceed the minimum income threshold, that the refusal of the appellant's human rights claim did constitute a disproportionate and unfair striking of the balance between the public interest and the rights protected under Article 8 and was thus unlawful under s.6 of the Human Rights Act.

87. For the reasons given above, I am satisfied that the decision of the FtTJ did not make an error on a point of law and the decision stands. The appeal of the Secretary of State is dismissed.

Notice of Decision.

88. The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision stands. The appeal is dismissed.

Signed *Upper Tribunal Judge Reeds*

Dated 29 April 2021

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.