**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/14332/2019

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 4 June 2021** | **On 24 June 2021** |

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**Mrs. SANA ZALID**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Ms. E Griffiths, Counsel, instructed by Rahman & Co
For the Respondent: Mr. E Tufan, Senior Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant is a national of Pakistan who is married to a British national. She is presently aged 28.

2. Her appeal was allowed by a decision of the First-tier Tribunal (JFtT Dineen) sent to the parties on 3 February 2020. The respondent was granted permission to appeal to this Tribunal and by a decision sent to the parties on 2 October 2020 I allowed the

respondent's appeal to the extent that the decision of the First-tier Tribunal was set aside, with certain identified findings of fact kept, and the decision to be remade by this Tribunal.

3. The representatives, the appellant and her husband attended the face-to-face hearing at Field House.

**Anonymity**

4. No request was made by either party for an anonymity order at the hearing held on 4 June 2021.

**Background**

5. The appellant married her husband, the sponsor, in Pakistan. Her husband is a British national who was born in Pakistan but has resided in this country since he was 6 months old.

6. The appellant subsequently secured entry clearance as a spouse. She arrived in the United Kingdom on 8 April 2014 and enjoyed leave to remain until 23 December 2016.

7. She made an in-time application for further leave to remain on 21 December 2016. The respondent refused the application by means of a decision dated 18 January 2018, concluding that the appellant was unable to meet relevant financial requirements. The appellant's husband had previously been employed on a full-time basis but had been unwell and not worked for a period of time. He then resumed employment as a self-employed taxi driver but was only able to provide evidence of 8 months self-employment at the date of application.

8. The appellant appealed against this decision and at the date of the hearing the appellant's husband was earning in the region of £19,200 gross per annum.

9. The appeal was dismissed by a decision of the First-tier Tribunal (JFtT Trevaskis) sent to the parties on 3 July 2018. Judge Travaskis' decision is addressed below.

10. The appellant submitted a human rights application based upon article 8. The respondent refused this application by a decision dated 20 August 2019. Reliance was placed upon the appellant's immigration status having remained in this country upon the expiry of her previous grant of leave to enter. Reliance was also placed upon the appellant's English language certificate being over two years old and therefore not a document that could properly be relied upon under the relevant immigration rule. The respondent accepted that the appellant's application did not fall for refusal on suitability grounds, that the relationship requirements under the relevant immigration rule was met and that the appellant now met the relevant financial requirement.

11. The appellant exercised attendant appeal rights and her appeal was initially considered by Judge Dineen. I observe that the findings of fact made at §18 of the First-tier Tribunal's decision, namely that the couple have lived together in this country since 2014 and that family life subsists between them, have been preserved.

**Preliminary issues**

12. By directions accompanying my error of law decision of 2 October 2020 I directed, *inter alia*:

    - Any further evidence to be relied upon by the parties was to be filed and served no later than 7 days before the next hearing.

    - The appellant was to file and serve a skeleton argument no later than 3 days before the resumed hearing.

13. The notice of resumed hearing was sent by email from the Tribunal to the parties on 14 May 2021, some three or so weeks before the matter came before me.

14. The appellant's legal representatives, Rahman & Co, wrote to the Tribunal on 1 June 2021 and explained that the firm had failed to note the direction for the filing and serving of the appellant's skeleton argument and requested an extension of time, observing that counsel had been instructed that day to prepare the document. Rahman & Co acted properly in identifying their error and in making the request, and the proposed amendment permitting filing and serving to be undertaken by 3 June 2021 was granted by UT Lawyer Curry by means of a decision dated 3 June 2021. Ms. Griffith's skeleton argument was filed in accordance with the amended direction.

15. A supplementary bundle was filed and served at 15.57 on the day before the hearing, with no explanation as to why the appellant was in breach of the relevant direction. Unfortunately, Rahman & Co were in breach of the direction as to the filing and service of further evidence and made no request for an extension of this direction. Subsequently, a supplementary witness statement from the appellant's husband was filed and served at 23.23 on the night before the hearing. Again, no explanation was provided for the egregious failure to abide by directions. I observe that the supplementary witness statement is dated 3 June 2021, though Rahman & Co had been aware since October 2020 that a resumed hearing was to take place and were on notice as to the hearing date from May 2021.

16. To compound my concern as to the approach adopted by Rahman & Co, the supplementary bundle was not accompanied by the mandatory rule 15(2A) application whereby in an asylum or immigration case if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party and indicate

the nature of the evidence and explain why it was not submitted to the First-tier Tribunal. In considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence: rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

17. Mr. Tufan graciously confirmed that despite the very late service of documents, running in total to 62 pages, he was happy for the documents to be admitted and that he was ready to proceed. I therefore admitted the documents at the hearing.

18. The Tribunal can expect a firm of solicitors holding itself out as specialising in immigration law to have knowledge of basic procedural requirements. Rahman & Co should observe that a risk is run of a hearing being adjourned on fairness grounds in this Tribunal if basic procedure is not complied with and documents are filed and served late. Service at 23.23 on the night before the hearing requires, at the very least, a detailed explanation and not the silence employed in this matter. Rahman & Co should be aware that there are costs implications arising from such adjournments, and professional complaint may well arise.

**Evidence**

19. The appellant relied upon her witness statement dated 30 December 2019, and her husband's statements dated 30 December 2019 and 3 June 2021.

20. The couple detail the employment history of the appellant's husband, who is presently a self-employed taxi driver and works as a part-time chef earning in the region of £19,500 gross *per* annum, thereby satisfying paragraph E-ECP.3.1. of Appendix FM.

21. The appellant detailed that she passed an English language test in September 2016, equivalent to level A2. A copy of the certificate was placed before the First-tier Tribunal. She accepted that the certificate is no longer valid and confirmed that she had unsuccessfully sought to secure her passport from the respondent so as to be able to undertake a further English language test.

22. Reliance is also placed upon the couple's evidence as presented to Judge Trevaskis in 2018. The appellant's husband confirmed that he has resided in this country for all but 6 months of his life. He does not speak Urdu and only speaks a little Punjabi. He expressed concern as to his ability to secure employment with a lack of relevant language skills. He further confirmed that all of his family reside in this country.

23. At the hearing Mr. Tufan confirmed that the respondent did not challenge the couple's credibility and though they were tendered by Ms. Griffiths it was agreed that this matter would proceed to submissions.

## Decision

24. The introduction of Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') has not altered the need for a two-stage approach to article 8 claims. Ordinarily, the Tribunal will firstly consider an appellant's article 8 claim by reference to the Immigration Rules ('the Rules') that set out substantive conditions without any reference to Part 5A considerations. Such considerations only have direct application at the second stage of the article 8 analysis, when the claim is considered outside of the Rules.

25. Ms. Griffiths accepted on behalf of the appellant that she cannot meet the requirements of article 8 under the Rules, including paragraph 276ADE(1)(vi), and so exceptional circumstances are required to establish that removal would be a disproportionate interference with their article 8 rights. This requires the appellant to establish that her removal to Pakistan would result in 'unjustifiably harsh consequences': *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 W.L.R. 823.

26. As for article 8 outside of the Rules, I am required to undertake a proportionality evaluation. I am therefore to undertake an evaluation of exceptional circumstances outside the Rules which requires taking into account as a factor the strength of the public policy in immigration control as reflected in the Rules: *TZ (Pakistan) v. Secretary of State for the Home Department* [2018] EWCA Civ 1109, [2018] Imm AR 1301, *per* the Senior President of Tribunals at [33]. The Supreme Court confirmed in *Hesham Ali v. Secretary of State for the Home Department* [2016] UKSC 60, [2017] Imm AR 484, at [46], that I am to attach considerable weight to the respondent's policy.

27. Ultimately, my task is to address the test of whether a fair balance is struck between competing public and private needs in the requirement that the appellant return to her home country as confirmed by the Supreme Court in *R (Agyarko) v. Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 W.L.R. 823, at [41]-[60].

28. In *TZ (Pakistan)* the Senior President confirmed that I am permitted to apply principles established by the Strasbourg Court, at [28].

29. The parties agreed that I am to adopt the structured approach to considering the appellant's article 8 appeal and to observe the five steps identified by Lord Bingham in *R (Razgar) v. Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, at [17].

30. The respondent accepts that the appellant enjoys family and private life rights in this country. I am satisfied that the proposed interference will have consequences of such gravity as to potentially engage the operation of article 8, and Ms. Griffiths accepts on behalf of the appellant that the proposed interference is in accordance with the law.

31. As for stages 4 and 5 of the structured approach, I observe Lord Bingham's confirmation at [17] of *Razgar* that in practice these steps are usually, and unobjectionably, taken together. Ms. Griffiths did not assert that the proposed restriction on the appellant's article 8 rights was plainly unnecessary, and she was right not to. As the Court of Appeal observed in relation to immigration matters in *VW (Uganda) v. Secretary of State for the Home Department* [2009] EWCA Civ 5, [2009] Imm AR 436, at [23], it will be rare that stage 4 will be answered in an appellant's favour.

32. I therefore proceed to consider stage 5 and undertake the proportionality enquiry, observing that it is only possible to form a judgement about the infringement of an individual's rights in the light of all the circumstances of a particular case, and so my enquiry is fact specific.

33. As part of the adoption of the structured approach, and the consideration of proportionality at stage 5, I am required to consider the statutory provisions of Part V of the 2002 Act. I observe that section 117B, which is relevant to my enquiry in this matter, must be construed to ensure consistency with article 8 and so there must be injected into it a limited degree of flexibility so that the application of the statutory provisions will always lead to an end result consistent with article 8: *Rhuppiah v. Secretary of State for the Home Department* [2008] UKSC 58, [2018] 1 WLR 5536, at [36], [49]. Consequently, the limited degree of flexibility may permit an appellant to succeed in establishing exceptional circumstances though they have been unable to satisfy the relevant provisions of the Rules.

34. I am satisfied that the appellant and her husband have provided 'proper' and detailed evidence permitting me to undertake the proportionality enquiry.

35. Section 117B(1) confirms that the maintenance of immigration controls is in the public interest. From the outset I observe that the appellant is unable to meet the requirements of article 8 under the Rules and so cannot meet the weight to be addressed to those identified elements.

36. The appellant is financially independent through her husband's employment. I am also satisfied that though she has not taken an English language test for some years, the appellant can speak the English language to a required standard. She gave evidence before the First-tier Tribunal in the English language, and I observe that she conversed with her husband at the hearing before me in the English language. Whilst the appellant does not obtain a positive right from these factors, they are not ones that count against her: *AM (s117B) Malawi* [2015] UKUT 260 (IAC), [2015] Imm AR 1019.

37. As to section 117B(4) and (5) I observe that the appellant was lawfully present in this country for some 4½ years, and during such time her immigration status was precarious: *Rhuppiah*, at [44].

38. I observe that the 'limited weight' provisions are confined in section 117B to private life as established by a person at a time when their immigration status is unlawful or precarious. This does not mean that I am to disregard precarious family life criteria set out in established article 8 jurisprudence, such as *Jeunesse v. The Netherlands* (app. no. 12738/10) (2015) 60 E.H.R.R. 17, at [108]: see *Rajendran (s117B – family life)* [2016] UKUT 00138 (IAC).

39. Section 117B(6) is not applicable in this matter as the appellant does not have a child.

40. The appellant places considerable weight upon the judgment of the House of Lords in *Chikwamba v. Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 W.L.R. 1420 where it was held that appeals should only rarely be dismissed simply on the basis that it would be proportionate and more appropriate for an appellant to apply for leave from abroad in circumstances where the appellant would succeed in securing entry clearance. The effect on other family members with a right to respect for their family life with an appellant has to be taken into account. *Chilkwamba* is expressly concerned with an appellant seeking to remain with a spouse with settled status in the United Kingdom.

41. Before me Mr. Tufan accepted that on the face of the evidence the appellant would be expected to succeed in a spousal entry clearance application. However, in his concise and articulate submissions Mr. Tufan relied upon the decision of this Tribunal in *Younas (section 117B(6)(b); Chikwamba; Zambrano) Pakistan* [2020] UKUT 129 (IAC), [2020] Imm. A.R. 1084 where it was confirmed that an appellant in an article 8 human rights appeal who argues that there is no public interest in removal because after leaving the United Kingdom she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the 2002 Act including section 117B(1) and reliance on *Chikwamba* does not obviate the need to do this.

42. There remains a public interest in the removal of a person from this country even if they would succeed in an entry clearance application. The fact specific nature of the proportionality enquiry requires me to consider whether the personal facts arising in this matter are such as to lessen the public interest in removal. As Lord Bridge concluded in *Chikwamba* it was the particular circumstances of the appellant, and in particular the harsh and unpalatable conditions in Zimbabwe, her husband being unable to accompany her and the separation of a child from one of their parents which resulted in it not being in the public interest for the appellant to be removed.

43. In this matter, I am satisfied that it is not reasonable to expect the appellant's husband to relocate to Pakistan for a period of time whilst his wife applies for entry clearance. He is a British citizen. It is not challenged that his close family reside in this country. He has spent all of his life here, save for the first six months. He has rebuilt his employment following serious illness. It is not challenged that he does not speak Urdu and speaks limited Punjabi. I am satisfied that he would be required to give up both his self-employment and his established part-time work as a chef in this country and will have significant difficulties in finding employment in Pakistan due

to language difficulties, not having family to help him find employment and not being enough of an insider in terms of understanding how life in Pakistani society is carried on and a capacity to participate in it so as to have a reasonable opportunity to operate in Pakistan on a day-to-day basis. His wife will only be able to provide limited help in respect of his language difficulties, as she will not be present at any workplace.

44. I do not accept Ms. Griffiths' tentative assertion that the appellant would be returning to a dangerous situation in Pakistan because of the current pandemic. No evidence was filed as to the situation in Pakistan, and the submission veered towards an article 3 complaint that would constitute a new matter. Ms. Griffiths withdrew from this submission.

45. However, I am required to consider article 8 as at the date of my decision and I am satisfied that the appellant would secure entry clearance to rejoin her husband. She would then be required to return to this country from what is presently identified to be a 'red list' country under present pandemic guidance. Having been granted entry clearance, she would possess relevant 'residence rights' to be in the cohort of persons permitted to enter this country having travelled from a red list country and so she can expect to be permitted to enter. She would be required to quarantine and thereby isolate for 10 full days in a managed quarantine hotel with the day of her arrival in England counting as day 0. The cost for such managed quarantine is in the region of £1750, not including the costs of a Covid-19 test before travelling to this country. This sum amounts to approximately 1/10 of the net annual earnings of the appellant's husband. I am satisfied from considering the bank statements before me that this sum, in addition to the entry clearance application fee, would place a very significant financial strain upon the couple. Whilst I have no doubt that the appellant's husband would seek to meet the costs, I am satisfied on balance that he would require time to save such a sum, and this would require the appellant to wait in Pakistan for a considerable period before embarking upon her entry clearance application. Whilst Mr. Tufan informed me that it was expected that such application would take 12 weeks to process, I take judicial note that the pandemic has significantly and adversely impacted upon the present time taken for the consideration of entry clearance applications.

46. I am therefore satisfied, upon considering the personal circumstances of the appellant, and having found that she would succeed on a future spousal application for entry clearance, that this is one of those exceptional matters where the public interest identified at section 117B(1) can properly be lessened. My finding is very much founded on the particular facts arising in this case and is not one that can properly be transferred to someone else's personal circumstances.

47. I confirm that having considered the approach to the public interest in *Chikwamba* and lessened the public interest in section 117B(1), I do not double count the same matter when considering section 117B(4): *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 351 (IAC).

48. I proceed to consider the factors in favour of the respondent: significant weight should usually be given to the public interest; the appellant is an overstayer; she entered the United Kingdom with precarious leave as a spouse and she cannot meet the article 8 requirements established under the Rules.

49. In favour of the appellant I can give a little weight to the genuine and subsisting nature of her marriage to her husband; a little weight can properly be given to her having established a private life in this country over 7 years upon her initially securing entry clearance, a little weight is given to her having committed no criminal offences and a little weight is given to the fact that I have found that she would be returning to Pakistan in the absence of her husband with whom she is a genuine and subsisting marriage. Importantly, I have found that the public interest in her removal is lessened for the reasons detailed above at [40]-[46].

50. Having balanced the factors favourable to both parties and having concluded that the public interest in immigration control is appropriately to be lessened in this matter, I am satisfied that proportionality tips in favour of the appellant with the respondent being unable to justify the proposed interference with the appellant's family and private life rights as protected by article 8. It would, at the present time, be Kafkaesque to require her to return to Pakistan, delay making an entry clearance application in which she is bound to succeed so that her husband can secure hard pressed funds for her quarantine upon return, and then for her to quarantine in isolation on arrival. These are unjustifiably harsh consequences for someone who can meet the relevant entry clearance rules. In such circumstances, I allow the appellant's appeal on article 8 grounds outside of the Rules.

51. Having allowed the appellant's appeal on article 8 grounds outside of the Rules, on exceptional circumstances grounds, I return to address an issue relied upon by Ms. Griffiths. The appellant sought to extend her lawful leave in December 2016 and the application was refused on the basis that her sponsor, her husband, could not meet the relevant maintenance requirements. The appeal therefore fell, in part, to be considered under paragraph EX.1(b) of Appendix FM, namely whether there were insurmountable obstacles to family life with her husband continuing outside the United Kingdom. I note the definition of 'insurmountable obstacles' provided at paragraph EX.2.

52. The Judge made limited, and simply insufficient, findings, at [33]-[34]:

> '33. I have found that the appellant's circumstances do not engage article 8, and, in any event, the appellant will apparently be able to make a fresh application without leaving the United Kingdom. In those circumstances, I do not find that there are any insurmountable obstacles to the continues of family life between the appellant and the sponsor.
>
> 34. For these reasons, I am satisfied that the decision by the respondent was a proportionate interference with the right of the appellant to respect for her

> family and private life in the United Kingdom. The appellant should make a fresh application immediately, supported by the proper evidence.'

53. I am satisfied that the decision of Judge Trevaskis is significantly confused in its approach to the consideration of the appellant's article 8 appeal. It can be fairly said to be incoherent in parts and I conclude that it is riddled with material errors of law. There is a failure to make relevant findings of fact, nor is there any true engagement with the substance of the appeal before the Judge. For reasons that are not clear, the Judge decided that article 8 was not engaged, despite there being no challenge to the genuineness of the marriage and the fact that the couple resided together. This is clearly a material error of law. The Judge then proceeded to consider 'insurmountable obstacles' through the erroneous prism of the possibility of a subsequent in-country application being made, which is a material error of law.

54. My reading of the decision is that Judge Trevaskis felt sympathy for the appellant, possibly concluding that this was a 'near miss' application which could not succeed under the Rules in circumstances where the appellant would have satisfied the maintenance requirements if her husband had returned to work four months earlier than he did. The Judge would have been aware that near miss arguments and article 8 are subject to the observations of the Supreme Court in *Patel v. Secretary of State for the Home Department* [2013] UKSC 72, [2014] AC 651. However, the approach adopted is entirely unsustainable with accumulated material errors of law. It is understood that the appellant was not legally represented and did not appeal this decision which is unfortunate as I am entirely satisfied that it would have been set aside by this Tribunal on appeal and a resumed hearing directed to take place.

55. Considering the evidence placed before Judge Trevaskis I am satisfied that there was a significant likelihood of the appellant having been capable of establishing insurmountable obstacles to her family life continuing as required by paragraph EX1(b) at a resumed hearing, being mindful of the test identified by Sales LJ in *Agyarko v. Secretary of State for the Home Department* [2015] EWCA Civ 440, [2016] 1 W.L.R. 390, at [21]-[22], approved by the Supreme Court in the same matter. However, I am satisfied that the appellant is successful in her present appeal for the reasons detailed above, without my having to engage with a more detailed assessment as to the merits of her original appeal. Consequently, I am not required to place the inadequacies of Judge Trevaskis' decision into the balance sheet exercise.

56. I conclude by thanking both Ms. Griffiths and Mr. Tufan for their very helpful submissions.

## Notice of Decision

57. By means of a decision sent to the parties on 2 October 2020 this Tribunal set aside the decision of the First-tier Tribunal promulgated on 30 September 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

58. The decision is re-made, and the appellant's appeal on human rights (article 8) grounds is allowed outside of the Immigration Rules.

Signed: *D O'Callaghan*
**Upper Tribunal Judge O'Callaghan**
Date: 11 June 2021

**TO THE RESPONDENT**
**FEE AWARD**

Though the appellant has been successful before this Tribunal, I am not satisfied that the respondent's initial decision on the facts then known can properly be said to have been unreasonable.

In the circumstances, no fee award is made.

Signed: *D O'Callaghan*
**Upper Tribunal Judge O'Callaghan**
Date: 11 June 2021