Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18172/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 August 2021	**On 13 October 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

JOCILEA DO ROSARIO HENRY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ngwuocha of Carl Martin Solicitors
For the Respondent: Ms Cunha, Senior Presenting Officer

DECISION AND REASONS

1. On 16 March 2021, I issued my first decision in this appeal. I concluded that the FtT had erred in law in its decision to dismiss the appeal and I set that decision aside. I ordered that the decision on the appeal would be remade in the Upper Tribunal but that the finding that the appellant could not meet the Immigration Rules (and paragraph EX1 of Appendix FM in particular) should be preserved. It was in those circumstances that the matter returned before me on 26 August 2021.

2. I need not repeat the appellant's immigration history, the content of her human rights claim or the basis upon which the respondent and the FtT found against her. Those elements of the background to this appeal are set out at [2]-[14] of my first decision, a copy of which is appended. It suffices for present purposes to

recall that the appellant is married to a British citizen, Mr Henry, and that it has been accepted throughout by Mr Ngwuocha that there are no insurmountable obstacles to the couple relocating to Brazil, although he does submit that this course, or the separation of the appellant from the sponsor, would give rise to unjustifiably harsh consequences.

3. No further evidence was filed or served in advance of the day of the hearing. At the outset of the hearing, Mr Ngwuocha sought to hand up additional evidence in the form of a second witness statement from the sponsor, more recent payslips and a letter dated 24 August 2021 from the South London and Maudsley NHS Foundation Trust. I confirmed with the advocates that we all had the documents which had been before the FtT, comprising a 25 page bundle, two further letters from the Maudsley and the certificate of marriage dates 23 May 2019.

4. I heard oral evidence from the sponsor in English. He adopted his witness statements and confirmed that he was the owner of his home, subject to a mortgage. He remained employed by Mason Pearson with a salary of over £21,000 per annum. He had been born in Lewisham and had lived in the UK his whole life. His only language was English. He had been married to his first wife for 20 years and she had died of a stroke. He could not leave the UK for Brazil. He was 65 years old. He did not speak the language. The country was in the midst of a Covid-19 crisis and was on the 'Red List'. He had been working for Mason Pearson for 20 years and had a mortgage to pay. It would be a big disappointment for him if his wife had to return to Brazil.

5. In answer to questions from Ms Cunha, the sponsor confirmed that he had been married for 2 years. He had a private pension with Scottish Widows but he wanted to keep working. He was able to retire but that was not his wish. He had 2 years left to pay on his mortgage. He was not sure he could trust a tenant and he was reluctant to rent the property, although he had a lodger living with him. He paid no health insurance and had not paid for the appellant's NHS treatment. Nor had she. He could not travel to Brazil due to the pandemic; they would have to isolate. He had brothers and sisters in the UK but he did not see them and they had their own lives. He had not met his wife's family, although he had spoken to them on the telephone. He had not been to Brazil. The last time he had travelled was to Israel with his late wife.

6. I asked the sponsor some questions by way of clarification. He said that he would receive a private pension of around £4000 but he did not know whether this was a lump sum or an annual amount; he had not studied the correspondence because he wanted to work on to 75. He did not know where the appellant's family lives in Brazil. Her father is 94. She has 3 brothers and 1 sister. They lived in different places but her father lives with her sister. He thought that they all lived in towns and cities. His flat is a 2 bedroom flat in Southwark which they shared with the lodger. He did not know what it was worth but it was 'a lot'. It was shared ownership with the Peabody Trust but he did not know what proportion he owned.

7. There was no re-examination and no questions arising from my own.

Submissions

8. Ms Cunha relied on the letter of refusal and noted that the findings under the Immigration Rules had been preserved. There were therefore no insurmountable obstacles to family life continuing in Brazil. It remained necessary to consider whether it would be unjustifiably harsh for the sponsor to follow the appellant there. In the respondent's submission, it was not. It was accepted that the sponsor did not speak the language but Brazil was part of the G20 and English was widely spoken there. He was able to retire. He had assets and he could sell or rent his property in London. He had the right to remain in the UK as a British citizen but he did not have family in the UK with whom he would lose contact. There would not be very significant obstacles to the appellant's re-integration to Brazil. Adopting the objective approach to the question of relocation, as required by Cathrine Lal v SSHD [2019] EWCA Civ 1925; [2020] 1 WLR 858, it was not unreasonable to expect the sponsor to move to Brazil with the appellant.

9. Nor, in Ms Cunha's submission, was it unreasonable for the sponsor and the appellant to be separated pursuant to the need to maintain a fair system of immigration control. That might be difficult for them but it would not be unjustifiably harsh as she had family in Brazil who could assist her in finding work or in pursuing an application for entry clearance as a spouse. Whatever the current relevance of Chikwamba v SSHD [2008] UKHL 40; [2008] 1 WLR 1420, it could not avail this appellant. The appellant's immigration history was poor and it could not properly be said that she would certainly be granted entry clearance. In response to my request for greater particularity in that submission, Ms Cunha accepted that the Financial Requirements in Appendix FM of the Immigration Rules would be met, and that there was a genuine and subsisting relationship between the appellant and the sponsor. She submitted that the general grounds of refusal in Part 9 of the Immigration Rules might apply in a future entry clearance application, however, in light of the appellant's poor immigration history.

10. It was relevant that the appellant was present in the UK unlawfully when the relationship began, Ms Cunha submitted. Section 117B of the Nationality, Immigration and Asylum Act 2002 militated against the appellant in various respects. Section 117B(1) was particularly relevant due to the appellant's immigration history. Section 117B(2) militated against her as there was no adequate evidence to show that she spoke English. It was accepted that she was financially independent and that s117B(3) was a neutral consideration. Section 117B(5) did not apply as the appellant did not rely on a private life. Section 117B(4) did apply, however, as the family life had been entered into when the appellant was present in the UK unlawfully. In addition to these considerations, there was the burden which the appellant posed to the NHS: Akhalu (health claim: ECHR Article 8) [2013] UKUT 400 (IAC). In all the circumstances, the decision to refuse the appellant's human rights claim was a proportionate one.

11. Mr Ngwuocha submitted that the appellant had not disregarded immigration control; she had made applications and had engaged with the Home Office. Any gaps in that engagement was attributable to the appellant's mental health problems. The respondent had continued to overlook what in Mr Ngwuocha's submission was the decisive consideration: the fact that an entry clearance

application was bound to succeed. The real question was therefore whether the appellant should be required to make that application. The sponsor had said that he would lose his house and his job if he relocated to Brazil and he had no ties to that country. There were other important aspects of the case, including the fact that an entry clearance application might not succeed and might actually take years to progress. There had been credible and consistent evidence given by the sponsor and there had been no deception on the part of the appellant. The sponsor was a widower when he met the appellant and he was understandably concerned about what would happen to her. For her part, she was apprehensive and had had episodes of mental health problems in the past.

12. I asked Mr Ngwuocha to assist me with the submission made against him by Ms Cunha, that the appellant might be refused in an application for entry clearance because of her adverse immigration history. He was not prepared to deal with the point and there followed some consideration of the Immigration Rules online. In the final analysis, Mr Ngwuocha's submission was that the appellant could not fall foul of the Suitability grounds for refusing an application for entry clearance under Appendix FM of the Immigration Rules and that Part 9 of the Rules was of no application to a case which fell to be considered under that Appendix. The issue, he submitted, was one of proportionality. The appellant would be separated from the sponsor and would be required to make an application for entry clearance to rejoin him in the UK. Considering the absence of criminality or deception and the personal circumstances of the appellant and the sponsor, the course proposed by the respondent was not a proportionate one. Section 117B considerations did not apply in a case to which Chikwamba v SSHD applied as the appellant was not resisting removal; she was submitting merely that it was not in the public interest to require her to make an entry clearance application.

13. I reserved my decision.

Analysis

14. The relevant facts are not in dispute. I have set out the appellant's immigration history in my first decision and I need not rehearse it. She has spent most of the last seventeen years in the UK but she was present lawfully for significantly less than half of that time. She has overstayed, made an unsuccessful application for asylum and been removed at public expense during those seventeen years.

15. The appellant and Mr Henry have been in a relationship for some years. They met and began a relationship whilst she was present in the UK unlawfully. They married by proxy in Brazil in 2019. He is a salaried hairbrush maker for Mason Pearson and his current salary is £21,954.40. He is a British citizen by birth and he is the shared owner of a two-bedroom property in Southwark. He and the appellant live there with a lodger. There are two years remaining on the mortgage. Mr Henry is able to retire now but he does not know what his pension entitlement would be. He was a widower when he met the appellant. He and his first wife had no children. He has brothers and sisters in the UK but he is not in contact with them. The appellant has family members living in different parts of Brazil. She remains in contact with them.

16. In the event that this appeal is dismissed, the appellant and the sponsor will have three choices. Firstly, they could separate, with the appellant living in Brazil and the sponsor staying in the UK. Secondly, they could agree that the appellant would return to Brazil and make an application to return to the UK as Mr Henry's spouse. Thirdly, Mr Henry could leave his life in the UK and could relocate to Brazil. What I must consider is the proportionality of these possibilities. In order to do so, I turn firstly to the severity of the consequences which would be experienced by the appellant and the sponsor.

17. As noted by Mr Ngwuocha in his considered submissions, the appellant is a woman with a history of mental illness. There are four letters before me from mental health practitioners at the Maudsley.

18. The first letter is dated 28 June 2019 and recounts that the appellant was admitted to the hospital from 8 to 21 January 2017, suffering from a first episode of psychosis. She was discharged and had been under the care of the Southwark Team for Early Psychosis ("STEP") since then. She had been prescribed an antipsychotic medication and had completed a course of psychological therapy. At the time of writing she was experiencing some symptoms of relapse. She felt (and the author agreed 'somewhat') that ongoing uncertainty about her immigration status was adding to her symptoms and making her less able to cope. The appellant was said to be 'incredibly worried' about being removed to Brazil. The author expressed the view that it would be 'disastrous in terms of her wellbeing' because 'she is going to need to be taking antipsychotic medication in one form or another for the foreseeable future' and if she was in Brazil she would have neither the money nor the emotional drive to seek such help. The appellant spoke passionately to the nurse about the UK being her home and about her connections to this country, including her relationship. The letter ended as follows:

> Therefore, in my professional opinion, I feel that returning to Brazil would, without doubt, have a negative impact on the mental health and wellbeing of Ms Dos Santos. I recommend Ms Dos Santos is allowed to continue to reside in the UK and continue to access support from mental health services, enjoy her life with her husband and feel safe with family and friends.

19. The second letter, dated 10 February 2020, states that it had been established that the appellant had suffered an 'acute and transient episode, brought on by the stress from investigation around her leave to remain in the country.' It was felt by the team that her mental health may be placed in state of vulnerability in the event that her immigration status was put under further and ongoing scrutiny. The author noted, however, that there had been no relapse in the last three years, despite ongoing investigations and an 'upcoming court case'.

20. The third letter, dated 20 February 2020, is the only letter from a Consultant Psychiatrist. It states that the appellant's mental health had improved considerably and her mood was stable. She was sleeping and eating well and she was no longer preoccupied with worries. It was likely that her medication could be reduced and stopped in the long run.

21. The fourth letter, dated two days before the hearing, is from a Clinical Charge Nurse. It states that the appellant had a 'previous history of a mental health issue'. The appellant had identified issues with her immigration status as exacerbating her ongoing low mood, stress and depression. She remained on anti-psychotic medication.

22. There is no expert report before me and I am invited to draw my own conclusions about the likely effect of the appellant's removal on her mental health. Drawing together the evidence I have summarised above, it is clear that the appellant has improved significantly since her psychotic episode in 2017. I consider it more likely than not that the appellant's mood would suffer in the event that she was removed, and that she would find the process stressful. Her immigration status has been under investigation (to use the term which appears in the letters) when all of these opinions were expressed and it is notable that there has been no relapses of psychotic symptoms. I do not consider it likely that the appellant, who suffered one episode of psychosis in 2017 and remains on anti-psychotic medication, would suffer another such episode in the event of removal. Had there been a real risk of the appellant's psychosis reoccurring in the event of her removal, that risk would have been more clearly expressed in these letters.

23. What of the sponsor? It has quite properly been accepted by Mr Ngwuocha since the outset of this appeal that there are no insurmountable obstacles to his relocating to Brazil. As I explained in my first decision, however, and as both advocates accepted, it remains necessary to consider just how difficult it would be for him to relocate to that country. It is fair to say that he seemed fairly daunted by that prospect at the hearing and I am far from convinced that her has confronted the question in his own mind. Understandably, he says that he is a British citizen, that he has lived his whole life in the UK and that he has a settled life, working in familiar employment and living in a home which he has enjoyed for many years. He has never been to Brazil and the thought of relocating at this stage in his life (he is 65 years old at today's date) is rather upsetting. As Ms Cunha noted in her submissions, however, it is necessary to consider the actual difficulties which relocation would bring about.

24. Mr Henry is a British citizen and is entitled to remain in the UK. That is an important consideration. So is his career and the fact that he has a home in the UK. As the respondent submitted, however, he has worked for the same employed for more than 20 years. He is able to retire (although he does not wish to do so) and he would receive a pension (although he was unsure of the sums concerned). Mr Henry is also the part-owner of his flat in the UK. He is able to sell that flat, which he thought to be worth 'a lot' or he could secure a responsible tenant for it. He currently has no health conditions which require the support of the NHS and he has no family ties to the UK. The appellant has family members in various different parts of Brazil to whom they could turn for support upon moving to Brazil. He does not speak Portuguese but I accept Ms Cunha's submission (with which Mr Ngwuocha did not disagree) that English is widely spoken in Brazil. Relocation would be a culture shock for Mr Henry and would require a period of adaptation. He would leave behind all that is familiar to him but it would not, even at his age, be particularly difficult or onerous.

25. Mr Ngwuocha submitted that the appellant would so obviously be granted entry clearance that there is no public interest in her being removed. This is not the occasion to consider the ongoing application of Chikwamba v SSHD in light of the manifest changes to primary legislation and the Immigration Rules since 2008. The law has in any event been considered more recently in R (Agyarko) v SSHD [2017] UKSC 11; [2017] Imm AR 764 and in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC). The first question, it seems to me, is whether the appellant is indeed certain to be granted entry clearance. Ms Cunha readily accepted that the appellant would not be refused under the Financial Requirements or the Relationship Requirements in Appendix FM. She did not point to any of the Suitability Requirements which might be held against the appellant. What she did submit, drawing on something I had said in my first decision, was that there might be an available ground of refusal under Part 9 of the Immigration Rules.

26. Mr Ngwuocha submitted that Part 9 of the Immigration Rules does not apply to applications for entry clearance made under Appendix FM of those Rules. He was wrong in that submission. Paragraph 9.1.1 of Part 9 generally disapplies that part to applications under Appendix FM, subject to certain listed exceptions. The exceptions include paragraphs 9.8.2(a) and (c) where the application is for entry clearance. Those paragraphs apply to previous breaches of immigration law as follows:

> 9.8.2. An application for entry clearance or permission to enter may be refused where:
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> (a) the applicant has previously breached immigration laws; and
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> (b) the application was made outside the relevant time period in paragraph 9.8.7; and
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> (c) the applicant has previously contrived in a significant way to frustrate the intention of the rules, or there are other aggravating circumstances (in addition to the immigration breach), such as a failure to cooperate with the redocumentation process, such as using a false identity, or a failure to comply with enforcement processes, such as failing to report, or absconding.

27. In the event that the appellant left the UK voluntarily at her own expense, the period specified by paragraph 9.8.7 would be 12 months. In the event that she left voluntarily at public expense or was removed, it would increase to 2 years or five years respectively. The appellant has certainly breached immigration laws in the past. The real question would be whether paragraph 9.8.2(c) might apply. On the evidence presently before me, I am not able to say with certainty that it would not. Mr Ngwuocha has not placed before me any material related to the appellant's previous asylum claim or her other applications for leave to remain and it simply cannot be said that an entry clearance officer would be certain not to refuse an entry clearance application made by a person with such an immigration history under the provision above.

28. Nor, in any event, does it follow that the public interest in immigration control is necessarily absent when an individual is bound to be granted entry clearance in the future. As Lord Reed stated in Agyarko, there *might* be no public interest in the removal of such a person. In cases such as the present, however, where the appellant has remained in the UK without leave for many years and has made a number of unsuccessful applications, I do not consider that it can properly be said that there is no public interest in her removal.

29. The public interest in the appellant's removal is underlined by the non-exhaustive list of considerations in s117B of the 2002 Act. I do not accept Mr Ngwuocha's submission that these statutory considerations do not apply whenever a Chikwmaba submission is made. Section 117A contains no such exception and it requires the public interest considerations in the following section to be considered in all cases in which it is submitted that the decision under appeal breaches rights under Article 8 ECHR. The first paragraph of the judicial headnote in Younas in fact rejects Mr Ngwuocha's argument and I follow what was said by the President in that decision.

30. On any proper view, the respondent is able to point to powerful considerations which arise under s117B. The maintenance of an effective immigration control militates squarely in the favour of the respondent in light of the appellant's immigration history. Whilst I accept that her mental health was precarious in 2017, there is no basis in the evidence for attributing the previous periods of overstaying to mental health difficulties.

31. There is no evidence before me that the appellant speaks English to the standard required by the Immigration Rules and s117B(2) also militates against her. Adopting the approach to financial independence which is required by Rhuppiah v SSHD [2018] UKSC 58; [2019] Imm AR 452, I accept that s117B(3) is a neutral matter, as the appellant is supported by the sponsor without recourse to public funds. Section 117B(4) applies because the appellant formed her relationship with Mr Henry when she was in the UK unlawfully. Section 117B(5) is of limited application, given the appellant's primary focus is on her spousal relationship and not on her private life in the UK. There are no children to whom s117B(6) might apply.

32. The list of considerations in s117B is expressly non-exhaustive, however, and I accept Ms Cunha's submission that there is another cogent point which weighs in the respondent's favour in the scales of proportionality. The appellant has been in receipt of NHS services for a number of years and she continues to use the NHS without paying despite the fact that she has no leave to remain and should therefore pay for her treatment. It seems that the appellant and the sponsor were unaware of that but this is immaterial; the appellant has used public health resources to which she is not entitled and it is clear from Akhalu that this past and future recourse to the NHS is a matter which weighs against the appellant under Article 8(2).

33. There is, in my judgment, a cogent public interest in the appellant's removal.

34. Having set out the pros and cons in favour of the appellant's removal, I return to the three scenarios which I set out at the start of my analysis. Whilst I accept that

either of those three scenarios (permanent separation, temporary separation or relocation to Brazil as a couple) would bring about unhappiness and difficulty for the appellant and the sponsor, I do not accept that the resulting hardship would be such as to outweigh the public interest in the appellant's removal. The consequences would not, in other words, be unjustifiably harsh and the appellant is not able to establish the very strong or compelling claim which is required to outweigh the public interest in immigration control in case of this nature.

Notice of Decision

The decision of the FtT having been set aside, I remake the decision on the appellant's appeal by dismissing it on human rights grounds.

No anonymity direction is made

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 September 2021

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18172/2019

THE IMMIGRATION ACTS

Heard at Field House
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Decision & Reasons Promulgated

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Before

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Between

JOCILEA DO ROSARIO HENRY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ngwuocha of Carl Martin Solicitors
For the Respondent: Mr Lindsay, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Brazilian national who was born on 28 May 1966. She appeals, with permission granted by First-tier Tribunal Judge O'Brien against the decision of First-tier Tribunal Judge Chinweze ("the judge"). By that decision, the judge dismissed the appellant's appeal against the respondent's refusal of her human rights claim.

Background

2. The appellant entered the UK as a visitor in 2004. She was subsequently granted leave to remain as a student until May 2006. Further leave in that capacity was granted until May 2007 but an application for an extension was refused later that

year. The appellant overstayed and subsequently claimed asylum in 2010. That application was refused in 2010 and the appellant was removed[1] from the UK on 15 December 2010. The appellant returned to the UK and was granted leave to enter as a visitor on 13 July 2011. She departed on the final day of her leave and returned to Brazil on 13 January 2012. She re-entered the UK, again being granted leave to enter as a visitor on 18 July 2012. She made an application for leave to remain based on ten years' lawful residence, which was refused on 20 June 2014. The appellant has overstayed since then. She has made three applications for leave to remain on human rights grounds. Those applications were refused on 28 March 2017, 28 June 2018 and 23 October 2019.

The Application for Leave to Remain

3. The application which led to the last of those decisions had been made on 1 September 2019. The appellant sought leave to remain with her spouse, Leroy Adolphus Henry. They married by proxy in Brazil on 11 April 2019. Mr Henry is a British citizen by birth. He was born on 10 May 1956 and works for Mason Pearson as a salaried Brush Maker. The application was supported by documents which spoke to the relationship and Mr Henry's income. Also adduced in support of the application was medical evidence about the appellant's mental health. In particular, there was a letter from a Community Mental Health Nurse called Mary Nolan dated 28 June 2019. In that letter, Ms Nolan detailed the fact that the appellant had experienced a psychotic episode in 2017. Ms Nolan also explained the treatment received subsequently by the appellant at South London and Maudsley NHS Foundation Trust and gave her opinion that it would be 'disastrous' for the appellant to have to return to Brazil. She noted that the appellant had told her that she had 'nothing and nobody in Brazil', which was presumably a mistake on the part of the nurse because the appellant had told the Secretary of State that her father and her brother remained there.

The Respondent's Decision

4. The respondent refused the application because she was not satisfied that there were insurmountable obstacles to family life continuing in Brazil and because she did not consider that the appellant's removal would constitute a breach of Article 8 ECHR. In reaching those conclusions, the respondent had regard to the appellant's mental health and concluded that she could access suitable treatment in Brazil, which was noted to have a 'fully functioning healthcare system' within which the appellant could access the treatment she was currently receiving from the NHS.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. Her appeal was heard by the judge, sitting at Taylor House, on 28 February 2020. The appellant was represented by Mr Ngwuocha, the respondent was unrepresented. The judge

[1] The respondent suggests in the letter of refusal that she was deported but the judge found at [7]-[8] that she was removed. That finding is unchallenged before the Upper Tribunal and I proceed on the basis that it was correct.

heard oral evidence from the appellant and the sponsor and submissions from the representatives before reserving his decision.

6. It was accepted before the judge that the appellant could not meet the Immigration Rules: [14]. Mr Ngwoucha relied on Article 8 ECHR outside the Rules and placed particular reliance on the decision of the Appellate Committee in Chikwamba v SSHD [2008] UKHL 40; [2008] 1 WLR 1420. The submission, in summary, was that the appellant demonstrably met the requirements of the Immigration Rules; that an application for entry clearance would be bound to succeed; and that it was not proportionate to expect the appellant to return to Brazil to make an application for the same.

7. The judge set out the legal framework at [16]-[19]. In the course of those self-directions, he made reference to the burden and standard of proof and to the decision of the Court of Appeal in TZ (Pakistan) & Anor v SSHD [2018] EWCA Civ 1109.

8. At [20], the judge concluded – in light of Mr Ngwuocha's acceptance – that the appellant was not able to meet the Immigration Rules and, in particular, that there were no insurmountable obstacles to family life continuing in Brazil. In the following paragraph, he turned to consider the argument that the appellant's removal would nevertheless be unlawful under section 6 of the Human Rights Act 1998, as being in breach of Article 8 ECHR. He directed himself to follow the staged approach in R (Razgar) v SSHD [2004] UKHL 27; [2004] 2 AC 368. Having done so, he answered the first two questions posed by Lord Bingham at [17] of Razgar in the appellant's favour. At [24] he stated that the 'critical issue is whether giving due weight to the considerations in favour of effective immigration control, the factors in favour of the appelant's article 8 claim are sufficiently strong to outweigh it.'

9. The judge then directed himself in accordance with Part 5A of the Nationality, Immigration and Asylum Act 2002; to what had been said by Lord Reed about Chikwamba at [51] of R (Agyarko) v SSHD [2017] UKSC 11; [2017] 1 WLR 823; and to the decision of Upper Tribunal Judge Gill in R (Chen) v SSHD IJR [2015] UKUT 189 (IAC); [2015] Imm AR 867. The self-directions at [27] of the judge's decision were all said to flow from the decision in Chen. Since it was the subject of submissions before me, I set out the material parts of that paragraph:

> The burden remains on the appellant to show on a balance of probabilities, that an application from abroad would be granted and that any separation entailed by the application would have a disproportionate impact on her family life [...] It is not sufficient for the appellant to simply [sic] assert without more that an application for entry clearance would succeed. Evidence of the disproportionate impact on her article 8 rights should normally be provided.

10. At [29], the judge returned to the way in which the case was put by the appellant. He noted that the appellant's husband was said to meet the financial requirements for entry clearance to be granted and that the respondent had not challenged the existence of a genuine and subsisting relationship. Nor was there

any refusal on 'suitability' grounds. The judge recapped the Chikwamba submission which was made by Mr Ngwuocha at [30].

11. At [31]-[33], the judge considered the appellant's mental health problems with the assistance of the evidence from Mary Nolan and an additional letter from her former Care Co-ordinator, Tom Callaghan, dated 10 February 2020. He noted Ms Nolan's opinion that it would be disastrous for the appellant to return to Brazil and Mr Callaghan's opinion that she had responded well to treatment but that she would be vulnerable to relapse if her immigration status were put under further scrutiny.

12. The judge then considered the factors favouring immigration control. He noted the appellant had a poor immigration history and that strong weight should be attached to the maintenance of immigration control: [34]-[35]. He found that the appellant and the sponsor were aware of her unlawful immigration status at the time they entered into a relationship and he recalled the consequence of that knowledge, as set out by Lord Reed at [49] of Agyarko.

13. The judge returned to the appellant's mental health at [37], concluding that there was no reason why the appellant could not continue to address her mental health issues in Brazil. He noted, amongst other things, that she had coped with investigations into her immigration status for three years since her psychotic episode: [38]. He found that the appellant could access medication in Brazil and that there had been no evidence adduced by the appellant to challenge the respondent's assertion that she could do so: [40].

14. At [41]-[44], the judge reached his final conclusions on the question of proportionality, which he expressed as follows:

> [41] I find that after considering all the evidence about the appellant's mental health, that it has improved significantly, and that the refusal decision is not a factor that will cause a disproportionate impact, on her family and private life.
>
> [42] I note that for the purpose of section 117B(2)(3) of the 2002 act [sic], that the appellant is supported by Mr Henry and does not need to rely on public funds, she is also able to speak English as indicated on her visa application (RB, p11). However, these factors do not strengthen the appellant's [sic] her article 8 claim, where they do not meet the immigration rules.
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> [43] This was confirmed by the Upper Tribunal in AM (s117B) Malawi [2015] UKUT 0260 (IAC), [14]:
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> *Upon their proper construction neither s117B(2), nor s117B(3), grants any form of immigration status to an individual who does not otherwise qualify for that status, because they have failed to meet the requirements set out in the Immigration Rules…*
>
> [44] I find that the factors in favour of immigration control outweigh the impact of the refusal decision on the appellant's article 8 right. I

have concluded therefore that the refusal decision is not a disproportionate interference with the appellant's article 8 right. Accordingly, the decision is lawful, and the appeal is dismissed.

The Appeal to the Upper Tribunal

15. The appellant sought permission to appeal. The grounds of appeal are not properly delineated but may be summarised as follows:

    (i) The judge had erred in law in failing to make an explicit finding as to whether the appellant was certain to be granted entry clearance: [1]-[5]
    (ii) The judge had misdirected himself in law, at [27], in stating that it was for the appellant to show that the respondent's decision was disproportionate: [6]-[7].
    (iii) The judge had failed to undertake a holistic examination of all the circumstances in reaching a decision on proportionality: [8]-[11]
    (iv) The judge had left out of account the possibility that the appellant would relapse into psychosis if her immigration status was in jeopardy: [12]-[13].

16. In granting permission to appeal, Judge O'Brien specifically identified the first of these grounds as warranting further scrutiny, although he granted leave on the grounds as a whole.

17. Mr Ngwuocha submitted that Judge O'Brien's decision clearly summarised the appellant's submissions. The essential point, he submitted, was that the judge had erred in his approach to proportionality. He had misstated the burden at [27] and it was clear, notwithstanding the remaining self-directions, that the judge had placed the burden on the appellant in that regard. It was accepted before the judge that there were no insurmountable obstacles to family life continuing in Brazil but the judge had failed to consider the impact of separating the appellant from her husband. The judge had also failed to undertake any assessment of what would be likely to happen to the appellant's mental health in the event that she was required to leave the United Kingdom.

18. Mr Lindsay handed up the decisions in Younas [2020] UKUT 129 (IAC) and Chen. He indicated that the appeal was resisted by the respondent. He submitted that the decision in Chikwamba had been misunderstood by Mr Ngwuocha. It was of no application to a case such as this, in which the appellant has a very poor immigration history and cannot meet the requirements of the Immigration Rules. The judge's finding, properly understood, was that there would be no breach of Article 8 ECHR if the appellant and the sponsor were permanently separated. To focus on temporary separation, as the appellant sought to do, was merely to confuse matters. The judge had clearly been aware of the approach required by Chikwamba, Agyarko and Chen, all of which he had cited. The erroneous self-direction in [27] was immaterial to the outcome, particularly when considered alongside the correct directions given elsewhere. The burden of proof was a moot point in any event, given the judge's demonstrable consideration of all relevant matters. The judge had been required to give little weight to the appellant's family life, which was formed when the appellant was present unlawfully. It was not correct to state that the judge had focused on the appellant's mental health to the exclusion of all else; that was a

major part of the appellant's case which had deserved, and had received, proper scrutiny. The basis upon which the judge had reached his conclusion was clear and he had not erred materially in law in dismissing the appellant's appeal.

19. Mr Ngwuocha responded, reiterating his point that there was no specific finding about whether an entry clearance application would succeed. He submitted that such a finding was a necessary part of the assessment of proportionality. The acceptance that there were no insurmountable obstacles to family life continuing in Brazil did not remove the need for the judge to consider whether family life could reasonably be continued there. There was no finding on the prospects of the appellant securing entry clearance, or on the consequences of the appellant's removal.

20. I reserved my decision.

Analysis

21. I remind myself that the First-tier Tribunal is an expert Tribunal, administering a difficult body of law in challenging circumstances and that its decisions are to be respected unless it can be shown that they are clearly wrong. I have firmly in mind the decisions of the Court of Appeal in UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 and Lowe v SSHD [2021] EWCA Civ 62 in considering this appeal.

22. The judge was evidently well-versed in the law in this area, as is clear not only from his citation of relevant authority but also from his identification of salient parts of those judgments. It is clear from his citation of Agyarko and TZ (Pakistan) in particular that he had well in mind that the appellant was unable to meet the Immigration Rules; that she had entered into a family life with Mr Henry when her presence in the UK was unlawful; and that a very strong or compelling claim would be required to outweigh the public interest in immigration control: Agyarko refers, at [57].

23. The structure of the judge's decision is to be considered in light of the authorities which he had in mind. He demonstrably understood the significance of the concession that there were no insurmountable obstacles to family life continuing in Brazil and the significance of the fact that the family life had started when the appellant was present unlawfully in the UK. His self direction at the end of [24], which was not attributed to authority, was actually taken directly from [57] of Agyarko. The judge was correct to distil the critical issue before him as he did in that sentence.

24. Notwithstanding the fact that the judge was aware of Agyarko, it is apparent that he failed to apply some of the guidance in that decision. He was required, by [57] and [51] of Agyarko, to consider whether the appellant would be certain to be granted entry clearance if she made an application for the same. Mr Lindsay was not correct, in my judgment, to submit that the Chikwamba principle was of no application in a case such as the present; its application is to be considered in such a case, as Agyarko shows. Any finding in that regard was relevant to the weight which should properly be attached to the maintenance of effective immigration control.

25. As contended by Mr Ngwuocha, the judge failed to make an explicit finding in this regard. When I first read the papers in the appeal, I formed the view that the judge had chosen not to make an explicit finding in this regard because the point was not contested. Mr Ngwuocha had clearly submitted that the appellant had a good claim for entry clearance. There was a proper evidential foundation for that submission and there was no Presenting Officer to make a contrary submission. It might have been said, in the circumstances, that the judge had simply proceeded on the assumption that the appellant would certainly be granted entry clearance. As I listened to the arguments and upon re-reading the judge's decision after the hearing, however, I have been unable to conclude with any confidence that this is the basis upon which he proceeded. If he assumed that entry clearance would be granted, he demonstrated no awareness – in light of Agyarko – of the potential significance of that assumption in his assessment of proportionality. Contrary to my provisional view, therefore, I conclude that the absence of an explicit finding on this point represents a legal error on the part of the judge.

26. I am less impressed with Mr Ngwuocha's second ground. I have reproduced the material parts of the judge's [27] above. It is apparent from the paragraph that the judge was attempting to summarise within it what he understood to be the ratio of UTJ Gill's decision in Chen. Mr Ngwuocha takes issue with the statement that the 'burden remains on the appellant to show … that any separation entailed by the application [for entry clearance] would have a disproportionate impact on her family life]. The judge attributed that statement of the law to [36] and [39] of Chen. UTJ Gill did not address the legal burden of proof in relation to Article 8(2) in those paragraphs, however. In both paragraphs, she made the point that the evidential burden was upon an appellant to show that entry clearance would be granted and to adduce 'all material that he or she relies upon to suggest that removal … would breach Article 8 ECHR'. UTJ Gill did not suggest that the legal burden of proof was upon an appellant to show that an interference with a qualified right was disproportionate. Had she done so, she would have overlooked binding authority at the highest level. Her point was merely an evidential one, and it appears that the judge misunderstood that nuance in his precis of her decision.

27. As Mr Lindsay submitted, however, it is clear from the rest of the decision that the judge nevertheless understood that the legal burden as regards proportionality was upon the respondent. There was a particularly clear self-direction to that effect at [17] of the judge's decision and the remaining analysis shows clearly that the judge understood where the legal burden lay.

28. Nor do I consider the fourth ground to establish any legal error on the part of the judge. He undertook a careful evaluation of the evidence which related to the appellant's mental health. He was obviously aware of what was said about the risk of her relapsing into psychosis upon return to Brazil but he concluded that there was no evidence to show that she could not receive proper treatment there. That was a proper conclusion which discloses no legal error on his part.

29. The ground of appeal upon which I asked Mr Ngwuocha particularly to focus was his third. By this ground, it was submitted that the judge left material

matters out of his proportionality assessment. My first reaction to the submissions was that Mr Lindsay was necessarily correct in asserting that the judge had focused on the thrust of the appellant's case – her mental health – and had given cogent reasons for concluding that this did not come close to establishing the type of compelling case which was required to outweigh the public interest in immigration control. In his reply, however, Mr Ngwuocha made a submission which required further consideration on my part, which was that the judge had failed to consider the impact of the appellant's removal on Mr Henry, who had given cogent reasons for claiming that he would not follow the appellant to Brazil. I asked Mr Ngwuocha to address me on the co-existence of that assertion alongside the concession that there were no insurmountable obstacles to family life continuing in Brazil. Mr Ngwuocha submitted that it remained incumbent on the judge to consider – outside the Rules – whether it was reasonable to expect Mr Henry to relocate, as a British citizen of 63 years old, to that country. Mr Ngwuocha was unable to deploy any authority in support of this submission.

30. Although Mr Ngwuocha was not able to support this submission with authority, there is clear and recent authority from the Court of Appeal which assists him. In GM (Sri Lanka) [2019] EWCA Civ 1630, the Court of Appeal (Green and Simler LJJ) gave guidance on the application of Agyarko, KO (Nigeria) [2018] UKSC 53 and Rhuppiah [2018] UKSC 58. Amongst other matters, Green LJ, who gave the judgment of the court, considered "the relevance of the existence of in-surmountable obstacle to return" and the need separately to assess whether in a given case it was proportionate or reasonable for the sponsoring party to relocate: [46]-[54]. The latter assessment, Green LJ explained, might have some nexus to the question of whether a party *could* relocate but they are nevertheless not the same question: [53]. That distinction was apparently not appreciated by the judge in the instant appeal.

31. In the circumstances, I come to the reluctant conclusion that the judge – who clearly took a great deal of care over his decision - erred in law in two important respects. He failed to make a clear finding about the prospect of an entry clearance application succeeding and he failed to consider whether Mr Henry could reasonably be expected to relocate to Brazil.

32. Mr Lindsay submitted that any errors in the judge's decision were not material to the ultimate outcome. That is a submission upon which it has been necessary for me to reflect carefully. As I have observed, there is a great deal of the judge's decision about which there can be no proper complaint. It was accepted that the appellant did not meet the Rules and the judge understood the significance of that. He also considered s117B of the 2002 Act with care and noted, as he was required to, that the appellant's family life should be given little weight as a result of the fact that it had accrued whilst she was present unlawfully in the UK. Even taking into account all which can be said in the appellant's favour – including the possibilities of a successful entry clearance and a spouse who cannot reasonably be expected to live with her in Brazil – it seems unlikely that the ultimate decision on proportionality would have been different. I recognise, however, that that is not the test. All the appellant must show is that the outcome could have been different were it not for the judge's errors. I am not able to say with certainty that a lawful consideration of proportionality would

have yielded the same conclusion. The absence of findings on these material matters therefore renders the judge's assessment of proportionality defective and that assessment must be undertaken again.

33. There is no appeal against the conclusion that the appellant is unable to meet the Immigration Rules. Nor could there be, as that point has been conceded throughout. I have considered carefully whether I should simply remake the decision on the appeal on the papers but I have decided that I will require further evidence on the issues I have identified. The parties will wish to consider, in particular, whether an application for entry clearance is actually bound to succeed, whether with reference to the requirements of Appendix FM of the Rules or those in Part 9, particularly paragraph 320(11). Equally, the Upper Tribunal would benefit from evidence about the circumstances in which Mr Henry maintains that he could not reasonably relocate to the country of his spouse's nationality, where her brother and father are said to be living.

34. I add this, in fairness to the appellant. It is only by the narrowest of margins that I have decided to set aside the decision of the FtT. As I have endeavoured to explain above, the judge identified cogent matters which weigh against her in the assessment of proportionality and this is, on any view, a difficult case. She should also be aware that there might be further matters on which the respondent is able to rely in support of her side of the balancing exercise, not least of which is the cost to the public purse of the treatment which the appellant has received from the NHS for a number of years: Akhalu [2013] UKUT 400 (IAC) refers.

35. I will direct that this appeal returns for a further hearing before any judge of the Upper Tribunal. I will not reserve it to myself, although it would be preferable if it can return before me.

Notice of Decision

The decision of the FtT was erroneous in law and is set aside to the extent above. The decision on the appeal will be remade in the Upper Tribunal with the findings on the Immigration Rules preserved.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 March 2021