IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002132

First-tier Tribunal No: HU/01315/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5 September 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Salima Ouahrani Sp Khaznadji
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:
For the Appellant: Mr A. Bandegani, Counsel, instructed by Kamberley Solicitors
For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

Heard at Field House on 11 July 2023

DECISION AND REASONS

1. This is an appeal against a decision of the respondent dated 25 January 2021 to refuse a human rights claim made in the form of an application for entry clearance by the appellant, a citizen of Algeria, who applied for leave to enter to join her Algerian husband who resides in the in the UK with limited leave to remain.

2. The appeal was originally heard and allowed by a panel of the First-tier Tribunal by a decision promulgated on 7 February 2022. The appeal was originally brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

3. By a decision given orally at a hearing on 22 May 2023, I allowed the Entry Clearance Officer's appeal against the decision of the First-tier Tribunal, and

directed that the decision would be remade in the Upper Tribunal, with certain findings of fact preserved, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. I promulgated written reasons for my decision that the decision of the First-tier Tribunal involved the making of an error of law on 5 July 2023, which I shall refer to as the "Error of Law decision". It is annexed to this decision.

4. It was against that background that the appeal was reheard before me on 11 July 2023, sitting at Field House.

Factual background

5. I summarised the factual background in the following terms at paragraphs 5 and 6 of the Error of Law decision:

> "5. The appellant applied for entry clearance as the spouse of her Algerian husband, Adlane Khaznadji, whom I shall refer to as 'the sponsor'. The sponsor was granted limited leave to remain on the grounds of his long residence in August 2017, following an allowed appeal. He married the appellant, to whom he had been introduced remotely in 2016, in late 2017, having returned briefly to Algeria to do so after he was granted limited leave to remain. He returned to the UK in order to make arrangements for the appellant to join him here; he works, earning an income sufficient to meet the minimum income requirement of the rules, and has amassed considerable savings. The appellant applied for entry clearance as a spouse on 30 August 2020.
>
> 6. In the refusal decision, the Entry Clearance Officer accepted that appellant met all requirements of the Immigration Rules for entry clearance as a spouse contained in Appendix FM, paragraph EC-P-1.1., save for the 'relationship eligibility requirement'. She was unable to meet that requirement as the sponsor is not British, settled, or present as a refugee: see paragraph E-ECP.2.1. There were no exceptional circumstances such that there would be unjustifiably harsh consequences which would render refusal of the application a breach of Article 8 of the European Convention on Human Rights ('the ECHR')."

6. In summary, the First-tier Tribunal accepted a submission on behalf of the appellant below that the immigration rules were unfair. Appendix FM only entitled the partners of British citizens, refugees and those with indefinite leave to remain ("ILR") to be granted entry clearance as partners. By contrast, other categories of the Immigration Rules permitted the dependents of non-settled, non-refugee migrants to be admitted to the UK. There was no rational justification for drawing that distinction, the First-tier Tribunal found, and as such the weight ordinarily attracted by the public interest in the maintenance of effective immigration controls was diminished, such that the appeal should be allowed. I held that that amounted to an impermissible attempt to redefine the public interest as set out in immigration rules, which was the constitutional preserve of the Secretary of State and set the decision side. For full details, please refer to the Error of Law decision.

Issues

7. It is plain that the appellant and sponsor enjoy "family life" together: Article 8(1) ECHR is engaged, and that the refusal of leave to enter to the appellant amounts to an interference with the family life the sponsor enjoys with her. The question

for my consideration is whether the Secretary of State has justified that interference under Article 8(2) ECHR.

8. It remains common ground that the appellant cannot meet the full requirements of the Immigration Rules. The issues to be determined in this decision are therefore as follows:

a. Whether (as Mr Bandegani, who did not appear at the first hearing in the Upper Tribunal, submitted) the Error of Law decision was decided without the benefit of authority, in particular *FH (Post-flight spouses) Iran* [2010] UKUT 275 (IAC), discussed below;

b. Whether, therefore, there is no justification for the differential treatment by the Immigration Rules of the appellant and the sponsor, on account of the sponsor not holding indefinite leave to remain, in contrast to other categories of limited leave to remain under the Immigration Rules, which do permit the dependents of non-settled migrants to be granted limited leave to enter and remain. If so, should the public interest in the maintenance of effective immigration controls be "modified" or otherwise diminished in its application to the appellant?

c. Whether the continued exclusion of the appellant from the United Kingdom represents a fair balance for the purposes of Article 8(2) ECHR?

Preserved findings of fact

9. Neither party challenged the First-tier Tribunal's findings of fact, which I summarised in the following terms at para. 37 of the Error of Law decision:

> "…there has been no challenge to the findings of fact reached by the panel, by either party. Those findings include the general credibility of the sponsor (para. 20); the sponsor's circumstances and the appellant's English language skills (para. 22); the fact that the sponsor has family in Algeria, but that in light of the length of his residence here, he is unfamiliar with Algeria and the requirements for obtaining employment (para. 23); the appellant and the sponsor are in a genuine and subsisting relationship, the appellant meets the financial requirements of the rules, and knows sufficient English to allow for integration (para. 27); the fact that the appellant and the sponsor are Algerian was 'appreciated', the sponsor has family in Algeria, and there are no insurmountable obstacles to their relationship continuing in Algeria."

10. I preserved those findings insofar as they represented the position at the time of the hearing before the First-tier Tribunal, on 19 November 2021.

The hearing

11. The hearing took place on a face-to-face basis at Field House. There had previously been a suggestion by the appellant's legal team that the permission of the government of Algeria would be sought in order to enable the appellant to give evidence remotely, from Algeria. That would have entailed a potentially lengthy adjournment. In the end, that approach was not pursued. Ms Everett indicated that she would have few, if any, questions for the appellant, were she to give evidence. I also note that this resumed hearing takes place against the background of a range of extensive, unchallenged, findings of fact.

12. Ms Everett applied for an adjournment in order to respond to Mr Bandegani's submissions going to issues (a) and (b), identified above. I refused the application. I did not consider that it was necessary for the Secretary of State to have further time to prepare her case, or to call evidence to justify the Immigration Rules.

13. Mr Bandegani initially said that the appeal could proceed on submissions alone and that he did not want to call the sponsor, since Ms Everett had indicated that there were no credibility concerns arising from his evidence. I said that it might be helpful for the sponsor to amplify his evidence concerning the impact of the Entry Clearance Officer's decision on the family life he enjoys with his wife, in order to ensure I had the fullest possible picture of their circumstances. I said I would permit additional evidence in chief. Mr Bandegani called the sponsor and asked him to adopt his witness statement but chose not to elicit any additional evidence in chief. Ms Everett had few questions for him; I asked a number of additional questions of my own. He gave evidence through an Arabic interpreter; at the outset, I established that he was able fully to communicate with and through the interpreter.

14. After hearing the sponsor's evidence, I heard submissions from both parties. Mr Bandegani relied on a helpful 29 page skeleton argument.

15. I will summarise the evidence and submissions in the course of my analysis, below.

16. I reserved my decision.

The law

17. This is an appeal brought on the ground that the refusal of entry clearance to the appellant would be unlawful under section 6 of the Human Rights Act 1998, on the basis that it would breach the United Kingdom's obligations under Article 8 of the European Convention on Human Rights ("the ECHR") (right to respect for private and family life). It is for the appellant to establish that Article 8 is engaged, and for the respondent to establish that any interference with it is justified.

18. As Baroness Hale explained in *R (oao Bibi) v Secretary of State for the Home Department* [2015] UKSC 68 at [25] to [29], and in *R (oao MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10 at [38] and [40] to [44], the European Court of Human Rights has for long distinguished between the negative and positive obligations imposed by Article 8 of the ECHR. Contracting parties to the ECHR are subject to negative obligations not to interfere with the private and family lives of settled migrants, other than as may be justified under the derogation contained in Article 8(2). By contrast, in cases concerning the admission of migrants with no such rights, the essential question is whether the host state is subject to a positive obligation to facilitate their entry. In positive obligation cases, the question is whether the host country has an obligation towards the migrant, rather than whether it can justify the interference under Article 8(2). But the principles concerning negative and positive obligations are similar. As the Strasbourg Court held in *Gül v Switzerland* (1996) 22 EHRR 93:

> "In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation…" (paragraph 106)

19. Part 5A of the 2002 Act contains a number of public interest considerations to which the tribunal must have regard when considering the proportionality of the refusal of entry clearance. In addition, it is settled law that the best interests of the child are a primary consideration when assessing proportionality under Article 8(2) of the ECHR.

Findings of fact

20. I reached the following findings of fact having considered the entirety of the evidence in the case, in the round, to the balance of probabilities standard.

21. The written evidence of the appellant, and the oral and written evidence of the sponsor, establish that their continued separation weighs heavily upon them. In her translated statement dated 20 June 2023, the appellant gives a compelling account of the heavy weight of disappointment and sorrow which characterises her mood in light of the continued separation from her husband. She provides a vivid, at times raw, account of the impact of not being able to live in the UK with the sponsor. She writes (para. 10) that she cannot ask the sponsor to give up his life in the UK in order to relocate to Algeria, he has a good job and a home in this country. By contrast, in Algeria, he has no property and no job, and they would struggle to find happiness without the stability of employment or a home of their own. It is clear that, from the perspective of the appellant, she and her husband are in limbo; she cannot join him permanently here, and he cannot join her permanently there. I accept this evidence.

22. In his statement, the sponsor gives a similar account. While Mr Bandegani did not accept my invitation to invite the sponsor to elaborate on the ways in which the continued separation from his wife is affecting him, it was clear from his answers to Ms Everett's questions that the impact of the situation weighs heavily on him, too. He is sad and worried for his wife, and for the situation of limbo within which they find themselves. The sponsor has started to make mistakes at work; he is distracted by the situation, which is a cause of anxiety for him.

23. Under cross-examination, the sponsor provided additional insight into the situation of the appellant in Algeria. She doesn't work, but she is qualified in computer science. He thinks it would not be easy for her to obtain a visa for the UK in her own capacity, on another basis, as she would need to have experience, which she does not have. But they have not actually looked. The sponsor said he is too busy to visit Algeria at the moment and that he is waiting for the resolution of these proceedings. He plans to visit in a couple of months.

24. In relation to the appellant's prospects of securing a visa in her own capacity, although she does have some IT skills, I accept the sponsor's evidence that she does not presently work. Her language abilities are limited; her English, while at A1 standard is sufficient for an initial entry clearance application, is likely to be insufficient to work in the IT industry. That is not to say there are not other bases which she could in time explore, perhaps following a period of training in Algeria, but there is no imminent prospect of her securing a visa in her own capacity.

25. The sponsor's written evidence was that, when the appellant's elderly mother dies, she will fear being required to leave the family home. This was not challenged, and I accept that it is a fear that both parties to the marriage have, although it is not clear whether it is a well founded fear, and there is no evidence that it is.

26. I accept the above evidence and will address it and any other matters arising from the evidence in the course of my 'balance sheet' analysis, below.

Additional public interest arguments

27. Mr Bandegani did not appear at the hearing on 22 May 2023. He submitted that I did not have the benefit of hearing argument concerning *FH (Post-flight spouses) Iran* and other authorities and related submission which are outlined at paragraphs 25 to 28 of his skeleton argument. He invited me to revisit the error of law decision. Alternatively, I should take account of submissions along these lines in the course of performing the Article 8 balancing assessment, which is the approach I shall take.

28. In my judgment, the additional submissions Mr Bandegani seeks to rely upon, if meritorious, will be relevant to my overall proportionality assessment in any event. If they attract the determinative weight Mr Bandegani submitted that should attract, that will be dispositive of the appeal in the appellant's favour, and it will not be necessary to take the exceptional step of revisiting the error of law decision (as to which, see *AZ (error of law: jurisdiction; PTA practice) Iran* [2018] UKUT 245 (IAC), headnote (1), (2)). I therefore permitted Mr Bandegani to advance the full range of submissions upon which he sought to rely in order for me to ensure that the appellant's side of the balancing scales featured all relevant factors.

29. Mr Bandegani's primary submission was that the "spouse visa rule" was "unjustified". It puts the sponsor and the appellant in an "invidious" position; the choice they face is to wait until the sponsor obtains indefinite leave to remain, following approximately five more years on the 10 year route to settlement, to enable him to sponsor the appellant under the rules, or for the sponsor to relocate back to Algeria, following 34 years' residence in the United Kingdom. The limited leave he currently enjoys was granted on the basis that the immigration rules recognise that it would be a disproportionate interference with an individual's article 8 private life rights to expect an individual to leave the country after 20 years. He cannot leave, submitted Mr Bandegani. It would be disproportionate to expect him to do so. That disproportionality is augmented by the fact that other parts of the Immigration Rules *would* permit the spouse of a non-settled migrant to be granted leave to enter and remain.

30. This argument is based on the following building blocks:

    a. In *MM (Lebanon)* [2017] UKSC 10 at para. 75, the Secretary of State's constitutional responsibility for setting immigration policy was distinguished from her specialist expertise in setting and implementing that policy, and:

        "The weight to be given to the rules or Departmental guidance will depend on the extent to which matters of policy or implementation have been informed by the special expertise available to the Department." (*per* Lady Hale)

    b. Not everything in the rules needs to be treated as matters of "high policy peculiarly within the province of the Secretary of State, nor as necessarily entitled to the same weight" (*MM (Lebanon)*, para. 76).

    c. In some cases, the public interest in the removal of an unlawfully resident migrant who was "otherwise certain to be granted leave to enter" if

applying from outside the UK may be diminished (*Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, paras. 36 - 46, as approved in *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 at para. 51).

d. In *A (Afghanistan)* v SSHD [2009] EWCA Civ 825, the Court of Appeal accepted, in principle, that the differential treatment between pre- and post-flight spouses of refugees may be a relevant public interest consideration, and remitted the appeal to the AIT for that issue to be assessed.

e. In *FH (Post-flight spouses) Iran*, panel of the Upper Tribunal presided over by Lord Justice Sedley concluded that the Immigration Rules relating to the post-flight spouses of recognised refugees were unfair and allowed the appeal outside the rules on the basis of Article 8 ECHR. The headnote to the decision called for the rules to be changed:

> "1. The Immigration Rules make no provision for the admission of post-flight spouses of refugees with limited leave. The Rules should be changed. In the mean time it is most unlikely that it will be proportionate to refuse the admission of the spouse of a refugee where all the requirements of paragraph 281 are met save that relating to settlement.
>
> 2. Immigration Rules cannot be the subject of a declaration of incompatibility under s.4 of the Human Rights Act 1998, and in any event, a Tribunal has no power to make such a declaration."

f. There was no evidence as to what the legitimate aim pursued by the Secretary of State by maintaining this rule was. As Mr Bandegani's skeleton argument puts it at para. 21(2):

> "If '[t]he only answer given on behalf of the Secretary of State is that government policy requires [it]', that is 'elevating policy to dogma': Chikwamba, per Lord Scott, at [§4]."

g. In *R (on the application of Quila and another) (FC) v Secretary of State for the Home Department* [2011] UKSC 45, the Supreme Court considered whether the ban on entry for settlement of foreign spouses or civil partners unless both parties were aged over 21 was a lawful way of preventing or deterring forced marriages.

h. Therefore, in principle, it is open to a tribunal to look beyond the Immigration Rules to the public interest that lies behind them and ascribe determinative weight to the appellant's side of the scales, in proceedings such as this.

31. I reject these submissions. I do not accept that they attract determinative weight, such that the error of law decision was wrong, or that, automatically and without more, they are dispositive of the Article 8 balance sheet analysis in favour of the appellant. It is necessary to be clear, however, that the analysis that follows does not mean that the case-specific points advanced on the part of the appellant play no part in the balance-sheet analysis conducted as part of my overall proportionality assessment. The reality of the situation of the sponsor and the appellant, and what Mr Bandegani described as the "invidious choice" that they face, will feature firmly on their side of the scales. But the reasons I reject

the argument that the public interest in the maintenance of immigration controls is diminished in these proceedings is as follows.

32. First, pursuant to *MM (Lebanon)* the specialist expertise of the tribunal, as there distinguished from the institutional competence of the Secretary of State, related to the evidential assessment of operational matters, such as the quality of evidence necessary to satisfy the substantive requirement of the rules, as set by the Secretary of State. *MM (Lebanon)* is not authority for the proposition that a tribunal can purport to redefine the public interest in the manner the Mr Bandegani submits. If anything, *MM (Lebanon)* underlines the institutional competence and constitutional pre-eminence of the Secretary of State's role in defining the scope of those entitled to be admitted as the spouses of migrants. That assessment is precisely the sort of *high policy* that is outside the expertise of a tribunal.

33. Secondly, Mr Bandegani's reliance on *Chikwamba* is misplaced, since the import of *Chikwamba* is only relevant "when an application for leave to remain is refused on the narrow procedural ground that the applicant must leave the United Kingdom in order to make an application for entry clearance" (*Alam v Secretary of State for the Home Department* [2023] EWCA Civ 30, per Laing LJ at para. 6(i)). *Chikwamba* is not authority for a broader proposition that the substantive requirements of the Immigration Rules may be overlooked. A true *Chikwamba* situation does not involve an attempt to demonstrate that the substantive requirements of the rules are unfair, or that they essentially present married couples with a decade-long invidious choice; by contrast, the *Chikwamba* doctrine (to the extent it survives *Alam*) involves an appellant demonstrating that they meet the rules for an out of country application. It involves no overlooking of the substantive criteria in the Immigration Rules, as the appellant invites me to do. Properly understood, *Chikwamba* involves respecting the criteria established by the Immigration Rules, by demonstrating that they would be met in an out of country application.

34. Thirdly, the cases relating to refugees are of minimal relevance. A refugee cannot return to his or her country of nationality, due to a well-founded fear of being persecuted. Under the old rules prior to *A* and *RH*, a post-flight spouse could not be admitted. In *A* and *RH*, there could, therefore, have been no possibility of continuing family life in the country of nationality, for relocation would have entailed a real risk of persecution or serious harm. That is the paradigm example of an insurmountable obstacle. By contrast, pursuant to the unchallenged, preserved findings of fact reached by the First-tier Tribunal, the appellant sponsor would not face any insurmountable obstacles to continuing their family life in Algeria. The sponsor could choose to relocate, but he does not want to do so.

35. Fourthly, while I accept that there is no evidence from the Secretary of State demonstrating why she has chosen to frame Appendix FM in the manner that she has, it is not necessary for her to provide such evidence. As I held at paragraph 25 of the error of law decision, the public interest in the maintenance of effective immigration controls is not dependent upon the ability of the Secretary of State from time to time to demonstrate the rationale behind those rules. Her constitutional role entails using the unique institutional expertise that only she possesses to define, and thereby limit, the parameters of those who are entitled to be granted leave to and remain in the United Kingdom. In addition, as observed at paragraph 26 of the error of law decision, there may be any number of reasons why the Secretary of State has chosen to make more generous

provision under the managed migration provisions of the immigration rules than for those she has accepted pursuant to the United Kingdom's Article 8 ECHR obligations. Conspicuously absent from Mr Bandegani's submissions is any reference to Strasbourg authority demonstrating that those in the position of this appellant, that is married to a non-settled migrant, should be entitled to be admitted.

36. Fifthly, Mr Bandegani's submissions do not engage with the reasoning adopted in the error of law decision, particularly at paragraphs 19 to 26.

37. Finally, *Quila* is of no assistance. It concerned restrictions imposed by the Immigration Rules on visas being issued to spouses unless both parties were over the age of 21. It was common ground among the parties that the restrictions were not motivated by immigration control. See Lady Hale's judgment at para. 63:

> "The crucial point is that, as the Secretary of State assures us, and the other parties accept, the purpose of this exception has nothing to do with immigration control. Its sole purpose is to deter or prevent forced marriages."

38. Thus, *Quila* is not authority for the general proposition that it is open to a court or tribunal unilaterally to purport to define the public interest in the maintenance of effective immigration controls. That was not even an issue in the case. *Quila* does not assist the appellant.

39. I therefore reject Mr Bandegani's submissions that, at a general level, it is open to this tribunal to conclude there is inherent unfairness in the immigration rules arising from the inability of non-settled migrants to sponsor their spouses, still less that the public interest in the maintenance of effective immigration controls is diminished in the manner and to the extent Mr Bandegani contends.

40. That is not to say, and I stress, that the individual circumstances of the appellant and the sponsor, and the impact of the immigration rules on their situation, is of no relevance. Quite the opposite, as I set out below. However, it does mean that the weight on the Secretary of State's side of the scales is not diminished for any of the reasons Mr Bandegani submits that it should be. It follows that there is no basis for me to exercise the exceptional jurisdiction to revisit my error of law decision. Moreover, I adopt and apply all reasoning in relation to this issue from that decision.

Article 8 outside the rules: balance sheet assessment

41. I will determine the proportionality of the appellant's ongoing exclusion from the United Kingdom by adopting a balance-sheet assessment. References to legislation are to provisions of Part 5A of the 2002 Act.

42. Factors on the Secretary of State's side of the balance include:

    a. The public interest in the maintenance of effective immigration controls (section 117B(1). This is a weighty factor.

    b. The sponsor's immigration status has, for most of his time in the United Kingdom, being unlawful. Latterly, it has been (by virtue of its limited nature) precarious. It attracts little weight (section 117B(4), (5)). I accept that there are degrees of precariousness, and that the sponsor is now on the 10 year route to settlement. But it remains the case that he is not

settled. It will take a further five years for him to attain a "non-precarious" immigration status. The family life the appellant formed with the sponsor commenced at a time when the sponsor's immigration status was precarious, and his immigration status could have conveyed no expectation of a swift reunion.

c. The appellant and the sponsor would not face insurmountable obstacles to their relationship continuing in Algeria.

d. While the sponsor was granted leave to remain on the grounds of his private life, it was not on the basis that he would face very significant obstacles, or any other form of hardship in Algeria, the country of his nationality. It was on the basis of long residence alone.

e. The ECHR cannot be taken to impose on a state a general obligation to respect a married couple's choice of country for their country of residence.

f. The sponsor told the appellant about his lack of immigration status before they married ("I told her about my background and that I needed to regularise my immigration status in the UK…", sponsor's statement dated 5 November 2021, para. 4).

43. Factors on the appellant's side of the balance include:

a. She meets all requirements of the rules, save for the requirement for her sponsor to be settled. She will be financially independent and speaks sufficient English to meet the requirements of the rules to be issued entry clearance.

b. The sponsor's settlement will, on the current rules, take a further five years. He will be 60 later this year. Waiting for him to become settled will entail a considerable further delay for the appellant and the sponsor.

c. There is no evidence that the sponsor will be able to secure a visa in her own capacity, on another basis, and it is important to be realistic about the difficulties she may experience if she tries to do so, at least in the immediate future.

d. The sponsor has lived in the UK since 1992, pursuant to Judge Gibbs' findings at para. 15 of her decision dated 12 June 2017 allowing his appeal against the Secretary of State's refusal of his own human rights claim, which is more than half his life. He has been granted leave to remain by the Secretary of State pursuant to the Immigration Rules' recognition that those in his position will have formed a private life of such depth in the UK that it would be disproportionate for them to be removed. He has not lived in Algeria for a considerable length of time.

e. The ongoing appeal process has been very stressful for the appellant and the sponsor. The appellant has become withdrawn and often stays at home. She is worried that when her elderly parents die, she will be without a home.

f. The appellant and sponsor fear the appellant being required to leave home in the event of her mother dying.

g. The length of the sponsor's total residence, on Judge Gibbs' unchallenged findings of fact, is now 30 years.

44. This is a difficult case. It throws the interaction between people's lives, on the one hand, and the public interest in the maintenance of immigration control, on the other, into sharp relief, such public interest being a weighty factor, not capable of being diminished in the manner suggested by the appellant.

45. In my judgment, a fair balance between the factors in the appellant's favour and those in the Secretary of State's favour is to dismiss this appeal. The sponsor is on a route to settlement, which he may pursue if he chooses to remain in the UK. There is nothing to stop him visiting his wife in the meantime, or meeting in a third country from time to time. Alternatively, it would be open to him to relocate to Algeria, should he choose to do so; there has been no challenge to the First-tier Tribunal's finding of fact that the couple would not face insurmountable obstacles to their relationship continuing in Algeria (albeit there would be difficulties and a sense of loss on the appellant's part arising from leaving the country of his residence since 1992). There is no evidence that the sponsor's fears of losing her home in Algeria are well-founded. The sponsor's private life in the UK attracts little weight. While he and his wife consider that they face an "invidious choice", the reality is that they are both free to live in Algeria, together, at any time, or here in the UK in five years. Article 8 does not oblige a Contracting Party to the ECHR to respect a migrant's choice of country of residence.

46. A fair balance in this case is for the Immigration Rules to be applied: a private life that statutorily attracts "little weight" is not capable, in the circumstances of this case, of outweighing the public interest in the maintenance of effective immigration control, even when taking into account the flexibility inherent to Part 5A. There are no exceptional circumstances such that it would be unjustifiably harsh for the appellant to remain outside the UK.

Notice of Decision

The appeal is dismissed.

I do not make a fee award.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 August 2023

Annex – Error of Law decision

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

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THE IMMIGRATION ACTS

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Entry Clearance Officer

Appellant

and

Salima Ouahrani Sp Khaznadji
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms A. Everett, Senior Home Office Presenting Officer
For the Respondent: Mr F. Magennis, Counsel, Instructed by Kamberley Solicitors

Heard at Field House on 22 May 2023

DECISION AND REASONS

1. By a decision promulgated on 7 February 2022, a panel of the First-tier Tribunal (Tribunal Judge Burnett, Deputy Upper Tribunal Joliffe sitting as a Judge of the First-tier Tribunal: "the panel") allowed an appeal brought by a citizen of Algeria against a decision dated 25 January 2021 to refuse her human rights claim made in the form of an application for entry clearance. The appeal to the First-tier Tribunal was brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The Entry Clearance Officer now appeals against the decision of the First-tier Tribunal with the permission of Upper Tribunal Judge Kamara.

3. I informed the parties at the hearing that the appeal was allowed, and that the decision of the First-tier Tribunal would be set aside to be remade in the Upper Tribunal, with written reasons to follow.

4. Although this is an appeal brought by the Entry Clearance Officer, for ease of reference I will refer to the appellant before the First-tier Tribunal as "the appellant".

Factual background

5. The appellant applied for entry clearance as the spouse of her Algerian husband, Adlane Khaznadji, whom I shall refer to as "the sponsor". The sponsor was granted limited leave to remain on the grounds of his long residence in August 2017, following an allowed appeal. He married the appellant, to whom he had been introduced remotely in 2016, in late 2017, having returned briefly to Algeria to do so after he was granted limited leave to remain. He returned to the UK in order to make arrangements for the appellant to join him here; he works, earning an income sufficient to meet the minimum income requirement of the rules, and has amassed considerable savings. The appellant applied for entry clearance as a spouse on 30 August 2020.

6. In the refusal decision, the Entry Clearance Officer accepted that appellant met all requirements of the Immigration Rules for entry clearance as a spouse contained in Appendix FM, paragraph EC-P-1.1., save for the "relationship eligibility requirement". She was unable to meet that requirement as the sponsor is not British, settled, or present as a refugee: see paragraph E-ECP.2.1. There were no exceptional circumstances such that there would be unjustifiably harsh consequences which would render refusal of the application a breach of Article 8 of the European Convention on Human Rights ("the ECHR").

The decision of the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal. At the hearing, which took place on 19 November 2021, the sponsor gave evidence, and the appellant was represented by Mr Magennis.

8. An issue which evidently caused the panel some concerns at the hearing was to ascertain the underlying rationale behind the Immigration Rules' exclusion of persons with limited leave to remain, such as the sponsor, from the definition of "partner" in E-ECP.2.1., while other categories of leave under the Immigration Rules, such as students and Tier 2 migrants, made provision for dependents to accompany the primary migrant. The panel recorded the following exchange, at para. 12 of its decision:

> "[The Home Office Presenting Officer] Ms Ahmed was asked a question by the Tribunal whether there were other provisions which allowed partners to be in the UK where the sponsor only had limited leave. She stated that there were, agreeing with the categories of student and worker. Ms Ahmed could not identify any public interests in particular to this category of individual, to stop this couple being together when other couples in other temporary capacities were permitted to have their partner living in the UK. Ms Ahmed could not identify any policy rationale for the difference of treatment between the groups of individuals. Ms Ahmed was asked if allowing this route for partners had been over looked? She stated that it might be something which had been overlooked."

9. The panel made a number of findings of fact which have not been challenged. They found that the appellant met all requirements of the rules, save for her inability to demonstrate that the sponsor was her "partner", as defined. Although

the sponsor had not lived in Algeria for some time, and so would be unfamiliar with the country and the labour market (paragraph 23), the couple would not face insurmountable obstacles to their relationship continuing in Algeria (paragraph 28). The appellant and her husband were Algerian, the sponsor still has family members, including her parents, in Algeria, and family life between the couple could continue there.

10. The panel directed itself as to the law at various points in its decision. At paragraph 24, the panel noted that paragraph GEN.3.2. of Appendix FM made provision for leave to be granted within the Immigration Rules where there are exceptional circumstances and a refusal to do so would result in unjustifiably harsh consequences for the applicant, their partner or other specified family members. At paragraph 25, the panel set out the Home Office's guidance concerning what amounts to "exceptional circumstances" at considerable length. At paragraph 26, the panel quoted from paragraph 86 of *SD (British citizen children - entry clearance) Sri Lanka* [2020] UKUT 43(IAC), which itself summarised some key principles relating to Article 8 and immigration considerations. The quoted extract was as follows:

> "86. It is an established part of Article 8 jurisprudence that (to repeat the words used by the Court in *Ahmut v Netherlands* [(73/1995/579/665) 26 October 1996]):
>
> > '(a) The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest.
> >
> > (b) As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.
> >
> > (c) Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory.'

11. Having found that the appellant and the sponsor would not face "insurmountable obstacles" to the continuation of their family life in Algeria, the panel returned to the concerns it had identified at the hearing, concerning the line drawn by the Immigration Rules between partners and dependents by different categories of leave to remain. See paragraphs 29 and 30:

> "29. We consider that the outcome of requiring the sponsor to give up his employment in the UK and his residence here after spending more than 25 years in the UK, to require him to go to Algeria to try to find gainful employment and support his wife, to be particularly harsh and not be in the public interest in this case.
>
> 30. It has not been made clear to us why there is a difference drawn between people being allowed to bring partners and children to the UK if they have limited leave to remain in categories such as work and students and a person granted leave under the private life provisions. No public interest or policy has been identified to us to justify this difference of treatment."

12. The panel found that the refusal of leave to remain would result in "unjustifiably harsh" consequences for the appellant and the sponsor for the purposes of GEN.3.2. (paragraph 31), and concluded that the appellant met the requirements of that provision.

13. The decision concluded by addressing Article 8 directly. It appeared to conclude that the "little weight" provisions of section 117B(4) of the 2002 Act did not apply to the appellant, since she was outside the UK, and had applied for leave to remain from outside the UK. It found that "in this case there will be an interference with the appellant's private life and her relationship with her family in the UK (her husband)" (paragraph 35). It concluded at paragraph 36 in the following terms:

> "It is our conclusion that there can be little to weigh in favour of the public interest as the appellant and her husband have a genuine marriage and we are satisfied that they meet the other requirements of the immigration rules apart from the requirement for the sponsor to be settled in the UK. We have made observations above about the public interest and the other categories under the immigration rules which allow sponsors in a temporary capacity to have their spouses and partners be with them in the UK. Ms Ahmed could not provide any policy or public interest considerations for the difference in treatment between the appellant's position and those other categories under rules. We conclude that given the public interest is not a fixed weight but a flexible movable interest that in this particular case it has little weight."

14. The panel allowed the appeal on human rights grounds.

Issues on appeal to the Upper Tribunal

15. There are four grounds of appeal, all under the rubric of "making a material misdirection of law on any material matter":

a. The panel failed to give the correct weight to the public interest;

b. The panel failed to incorporate its finding that there would be no insurmountable obstacles to the appellant's relationship with the sponsor continuing in Algeria to its proportionality assessment;

c. In so doing, the panel failed to follow the guidance in *TZ (Pakistan)* [2018] EWCA Civ 1109 at para. 31;

d. The panel erred by attaching significant weight to the sponsor's private life, contrary to section 117B of the 2002 Act. Since the sponsor does not have settled status, his private life attracts little weight.

16. Ms Everett focussed on ground 1(a), submitting that it was an error of law for the panel to purport to redefine the public interest in the manner it did. It was not for the First-tier Tribunal to conclude that the differences between different categories of leave to remain under the Immigration Rules meant that the public interest in the maintenance of effective immigration controls was diminished.

17. Mr Magennis submitted that the panel properly assessed whether the decision resulted in "unjustifiably harsh" consequences for the appellant and the sponsor. It was not the case that the panel attached no weight to the public interest in maintaining effective immigration controls; rather it attracted little weight, which

was finding rationally open to it. The panel referred to the relevant guidance, assessed the application of the rules by reference to it, and reached a conclusion that was probably reasoned. The Entry Clearance Officer merely disagrees with that outcome.

18. Mr Magennis submitted that the panel's approach to the public interest issue was consistent with the approach of the Supreme Court in *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11, at paragraphs 46, 47 and 57 (to which I shall return). Since it had not been possible for the presenting officer before the First-tier Tribunal to explain the rationale behind the differentiation between the entitlement to limited leave enjoyed by some partners under the rules in contrast to partners of those with limited leave to remain, the panel was entitled to conclude that the public interest was diminished, in the circumstances of these proceedings.

Ground 1(a): the panel's approach to the public interest

19. I accept Ms Everett's submissions. I find that, in the course of both its GEN.3.2. analysis under the Immigration Rules, and its Article 8 analysis outside the rules, the panel impermissibly minimised the public interest in the maintenance of effective immigration controls by taking into account an irrelevant consideration (the perceived differences between provision for dependents between different categories of leave). By doing so, it strayed into territory that was the constitutional preserve of the Secretary of State. In turn, the panel failed to ascribe appropriate weight to the Secretary of State's assessment in the Immigration Rules as to how the balance between the competing Article 8 interests should, at a general level, be struck, and failed properly to calibrate what would be "unjustifiably harsh" by reference to a legally sound understanding of the public interest in the maintenance of effective immigration controls. I explain my reasons for reaching this conclusion below.

20. By way of a preliminary observation, in some circumstances, the public interest that otherwise attaches to the maintenance of effective immigration controls may legitimately be regarded as having diminished. The paradigm example arises in the case of delay on the part of the Secretary of State. See *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41 at paragraph 16:

> "Delay may be relevant… in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes."

21. In *Mansur (immigration adviser's failings: Article 8) Bangladesh* [2018] UKUT 274 (IAC), in the context of professional misfeasance by the appellant's immigration advisers, Lane J, P, held at paragraph 32 that:

> "…this really is a rare case in which the misfeasance of a legal adviser can affect the weight to be given to the public interest in maintaining an effective system of immigration control."

At paragraph 33, the Upper Tribunal posited the following rhetorical question:

> "Would confidence in the respondent's system of immigration controls be diminished if, in the particular circumstances of this case, regard was to be had to the fact that, if IWP had complied with their client's instructions, the appellant would have made a valid application for leave that is likely to have

> been successful? It seems to me plain that the answer to that question must be in the negative. On the contrary, public confidence in the system could be said to be enhanced if it were known that the system is able, albeit exceptionally, to take account of such a matter."

22. The authorities therefore suggest that operational failings rendering the immigration control system dysfunctional, or the misfeasance of an immigration adviser may legitimately reduce the public interest in the maintenance of effective immigration controls, in the circumstances of the proceedings under consideration. That is a basis far removed from that adopted by the panel in this appeal to diminish the statutory public interest in the maintenance of effective immigration controls, for the following reasons.

23. At the general level, the Immigration Rules set out the Secretary of State's views as to "the relative weight of the competing factors when striking a fair balance under article 8". While a court or tribunal can, of course, decide how the balance should be struck in an individual case, any judicial assessment mist "attach considerable weight" to the Secretary of State's policy "at a general level". See *Agyarko* at para. 47.

24. The Secretary of State, in setting the rules, has chosen to define – and thereby limit – those who are entitled to enter under the rules as dependents in certain contexts. It is right to observe that there are some categories of leave which may appear to be more generous to dependents than others, but the delimitation between dependents' entitlements is within the institutional competence of the Secretary of State, not a panel of the First-tier Tribunal. So much is clear from para. 46 of *Agyarko*:

> "Under the constitutional arrangements existing within the UK, the courts can review the compatibility of decision-making in relation to immigration with the Convention rights, but the authorities responsible for determining policy in relation to immigration, within the limits of the national margin of appreciation, are the Secretary of State and Parliament."

25. Further, the premise of the First-tier Tribunal's concerns, as expressed to the presenting officer at the hearing below and set out in the decision, is that the public interest in the maintenance of effective immigration controls is in some way conditional on the ability of the Secretary of State's representative adequately to justify the rationale behind a particular rule, or policy, from time to time. In my judgment, there is no such requirement and there is no authority for that proposition. That the maintenance of effective immigration controls is in the public interest is a statutory proposition; that is a consideration to which a court or tribunal must have regard: see section 117B(1) of the 2002 Act. In doing so it cannot purport to redefine that public interest simply because it cannot understand why the Secretary of State has chosen to delimit different categories of the rules in the manner that she has.

26. In any event, there may be any number of reasons why the Secretary of State has chosen to make what the panel considered to be more generous provision in different categories of the rules. The examples given by the panel related to managed migration, where the primary migrant meets rules set by the UK, not on Article 8 grounds, but as a result of immigration policy. It is hardly surprising that the Secretary of State adopts a more generous approach to the dependents of such migrants than she does to those whose (like the sponsor in these proceedings) whose lengthy unlawful presence eventually renders their removal

disproportionate. As the panel itself noted at paragraph 26, it is settled Article 8 jurisprudence that Article 8 cannot be considered to impose on a state a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory.

Ground 1(b): unjustifiably harsh by reference to a flawed understanding of the public interest

27. In the familial context, it is only where there would be insurmountable obstacles to the relationship continuing outside the host State, or there are exceptional circumstances such that it would be unjustifiably harsh for the application to be refused, that Article 8 imposes a positive obligation on the host State to confer a right of residence. In findings that have not been challenged by the appellant, the panel found that it was "clear" that there would not be any insurmountable obstacles to the couple continuing their relationship in Algeria (see para. 28). In my judgment, the absence of insurmountable obstacles to the relationship continuing in Algeria is not necessarily determinative of the appeal, but it is a weighty factor which would need properly to be addressed in any proportionality assessment.

28. The operative reasons given by the panel for allowing the appeal under GEN.3.2. were set out at paragraphs 29 and 30, quoted at paragraph 11, above. Those reasons balanced the disruption the that the sponsor would face through relocating to Algeria to be with the appellant, against what the panel perceived to be the minimal public interest in requiring him to do so, pursuant to its re-assessment of where the public interest lay. The panel concluded that it would be unjustifiably harsh for the appellant not to be granted entry to the UK.

29. That assessment was flawed, for two reasons.

30. First, it was flawed because the panel's approach to the public interest reflected by the Immigration Rules involved a misdirection in law. It was not for the panel to step into the shoes of the Secretary of State and decide what the Immigration Rules should say, or where the line for dependents of primary migrants should be drawn between different categories of leave. In turn, that meant that the panel misconstrued the public interest when balancing it against the inevitable disruption the sponsor would face were he to move back to Algeria, at paragraph 29. It also meant that the panel's insistence that the difference in treatment should be justified was misconceived (paragraph 30).

31. Secondly, it was also flawed because this reasoning failed to take account of, or otherwise reflect, the fact that Article 8 does not impose a general obligation on the UK to respect a migrant's choice of the country of their matrimonial residence (despite the correct self-direction on that issue). Properly understood, the panel's findings amount to a conclusion that the sponsor and his wife wanted to live as a married couple in the UK rather than Algeria, despite the absence of insurmountable obstacles to them doing so in Algeria.

32. I do not consider that the panel's fall-back Article 8 analysis is capable of rendering the above errors immaterial.

33. At paragraph 35, in the course of its general Article 8 analysis, the panel concluded that a refusal of entry clearance to the appellant, who is outside the UK, would be an interference with her private life. The UK's obligations under the ECHR are territorial, subject to certain exceptions that are not relevant here (see *Secretary of State for the Home Department v Abbas* [2017] EWCA Civ 1393,

para. 24). Algeria is outside the territorial scope of the UK's obligations under the ECHR. None of the extraterritorial exceptions is engaged. It follows that the Entry Clearance Officer's decision was incapable of engaging the UK's Article 8 obligations insofar as her *private life* in Algeria is concerned, and it was a misdirection in law for the panel to conclude that the decision would be an interference with her private life. Of course, the fabric of the appellant's day to day life in Algeria would have been affected by the Entry Clearance Officer's decision, in the sense that she was unable to relocate to the UK. But that did not amount to her "private life" for the purposes of the UK's Article 8 ECHR obligations. To the extent the panel factored that issue into its overall proportionality assessment, the decision was flawed.

34. The panel's remaining free-standing Article 8 analysis concerning the impact on the (UK-based) sponsor's family life with the appellant was largely a repeat of its earlier analysis of the public interest conducted at paragraphs 29 and 30. Having misdirected itself concerning the engagement of the appellant's Article 8 private life rights, the panel again impermissibly minimised the public interest in the maintenance of effective immigration controls by purporting to stand in the shoes of the Secretary of State in order to determine what the Immigration Rules should say. That was an error; the analysis was flawed.

35. In light of the panel's erroneous approach to the public interest question, it follows that the appeal succeeds on ground 1(b), also.

36. In light of the above analysis (and Ms Everett's focus at the hearing), it is not necessary to consider the remaining grounds of appeal. The errors of law are such that the decision must be set aside.

37. As already observed, there has been no challenge to the findings of fact reached by the panel, by either party. Those findings include the general credibility of the sponsor (para. 20); the sponsor's circumstances and the appellant's English language skills (para. 22); the fact that the sponsor has family in Algeria, but that in light of the length of his residence here, he is unfamiliar with Algeria and the requirements for obtaining employment (para. 23); the appellant and the sponsor are in a genuine and subsisting relationship, the appellant meets the financial requirements of the rules, and knows sufficient English to allow for integration (para. 27); the fact that the appellant and the sponsor are Algerian was "appreciated", the sponsor has family in Algeria, and there are no insurmountable obstacles to their relationship continuing in Algeria.

38. The above findings of fact are preserved, insofar as they represented the position at the time of the hearing before the panel, on 19 November 2021.

39. In light of the preserved findings of fact, having regard to part 7.2(b) of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, I do not consider that the extent of any judicial fact-finding that is necessary is such that the appeal should be remitted to be reheard by the First-tier Tribunal. It will be remade in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. The appellant may apply under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on additional evidence post-dating the preserved findings of fact.

Notice of Decision

The appeal of the Entry Clearance Officer is allowed.

The decision of the First-tier Tribunal is set aside, subject to the findings of fact outlined at paragraph 37 being preserved.

The decision will be remade in the Upper Tribunal.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 July 2023