IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002392

First-tier Tribunal Nos: HU/53526/2022
IA/05493/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 11 September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

PAPA DIAW
(NO ANONYMITY ORDER MADE)

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Litigant in person
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

Heard at Field House on 2 August 2024

DECISION AND REASONS

1. The Appellant, although previously represented, is now a litigant in person. He appeared with his partner Eleanor Oury and gave evidence before the Upper Tribunal in support of his appeal. The issue following the error of law hearing was whether the requirements of EX.1.(b) of Appendix FM of the Rules were met i.e. given that it was accepted that there was a genuine and subsisting relationship with his British partner, whether there were insurmountable obstacles to family life with his partner continuing outside the UK, insurmountable obstacles being defined by EX.2. as very significant difficulties which could not be overcome or would entail very serious hardship for the Appellant or his partner.

2. Ms Oury gave evidence first as she needed to engage with a work call later in the morning. In response to my questions she stated in evidence that her mother had been diagnosed with leukaemia and so it was now even more important that she was able to remain in the UK in order to see and support her mother and her birth family. She said she did not practise her religion although she was a Roman

Catholic. She did not think she would be able to obtain employment in Senegal even in Dakar because she worked for a specialist solicitor's firm that dealt exclusively with investment funds from Jersey, so this was not something that was transferable to Senegal. Ms Oury also confirmed that she did not speak French.

3. In response to questions from Ms Isherwood, Ms Oury said her mother had been diagnosed in January 2023 with COPD and leukaemia following sepsis, which meant that she was hospitalised over the New Year. Ms Oury said she would visit her parents at least every two months, the family being based in Blackburn, Lancashire. When suggested that she could fly back from Senegal every two months, Ms Oury said she did not think that would be possible because of the expense and that given her mother was 78, if she got seriously ill, Ms Oury said she would want to be there quickly.

4. When asked if she understood that she could not choose where to exercise her family life, Ms Oury said that her family life was here in the UK. She did not know why she would have to leave, that it would take her many years to learn French. She confirmed she was not responsible for any other financial dependants although she sometimes helped her mum out and confirmed that there was no equivalent work for her in Senegal. She would also need to obtain a visa in order to travel and remain there. Ms Oury said she had, out of curiosity, investigated the process for getting a visa, but she had not undertaken detailed research. She further stated she is now 37 years of age. She did not really want to embark on a different career. She was looking at potentially being promoted next year in the career that she was in and that she did not want a long-distance relationship as ideally, she would she like to have her own family.

5. In relation to when she knew that the appellant was illegal in the UK, Ms Oury said that he told her pretty much straight away. She was sympathetic and of course encouraged him to sort out his status, which is why they embarked on the appeal process. When suggested that the appellant could return to Senegal and obtain entry clearance, Ms Oury said it was not guaranteed that this would happen and again that the same would apply for her going to Senegal on a temporary basis.

6. The Appellant then gave evidence when he stated that he had left Senegal when he was really young, he was 19. He did not have anything with him because he fled abroad out of fear. In terms of what obstacles he might face, the Appellant said he had no family, that people were still looking for him and he feared being killed by his father. He then stated that he was in contact with his mother and had in fact spoken to her recently, that she was living on the outskirts of Dakar near Juba, she was remarried and had had further children with her second husband. The appellant then mentioned that he had a liver condition but he was unable to receive treatment for this since his application for asylum had been denied and also he had been diagnosed with an eye condition, called keratoconus by Moorfields Eye Hospital, which was an issue relating to the cornea and that, although he had no current evidence apart from the letter from Moorfields which was handed up, he relied on the evidence that had previously been submitted. He also added that the reason he was not represented today is that he had paid a lot of money to previous lawyers who had not done well for him and that he had made a formal complaint against them, that he had been fighting his case for more than ten years and had not succeeded as yet.

7. The appellant was then cross-examined by Ms Isherwood, who asked why he had not mentioned his medical conditions in his previous statement before the First-tier Tribunal. The appellant said he had told the judge. He was also asked why he did not mention he was in contact with his mother and the appellant said his lawyer had not asked him and that he thought the focus was the relationship between him and his partner. He was asked why his mother and her new partner would be unable to support him if he went back to Senegal and he said that his mother could potentially be in trouble with his father and the people who were looking for him and that her new husband divided his time between his mother and another wife, to whom he is also married and spent time with.

8. The appellant then stated that his partner, Ms Oury, had a disabled sister as well as her mother having been diagnosed with cancer and that she would be unable to leave the UK.

9. In her submissions Ms Isherwood asked that the appeal be dismissed. She pointed out there were preserved findings regarding the dismissal of the appellant's asylum claim based on his sexual orientation and conversion to Christianity. She submitted that the appellant said he respects the law but he had chosen to stay actively illegal in the UK from 2015, that he had chosen to act illegally and he had also received a prison sentence for trying to leave the UK.

10. In relation to whether there were insurmountable obstacles, Ms Isherwood submitted that the issue was whether this met the high threshold set out in Agyarko [2017] UKSC 11 and she further submitted that there were no very significant obstacles to the appellant's return there. In relation to his partner, it was her choice whether or not she returned with him. Whilst, unfortunately her mother had been diagnosed with leukaemia, she only sees her every two months and there is no evidence of emotional dependency. The appellant's partner had actively chosen to come to London and Ms Isherwood submitted the appellant does not meet the requirements of the Rules and the couple are unable to chose where to enjoy family life in these circumstances and that nothing that had been put forward met the threshold, even taking account of the fact it may be expensive to travel backwards and forwards and that the appellant's partner has her family in the UK and her employment. Ms Isherwood suggested that they could maintain a long-distance relationship. She submitted the Appellant's evidence in relation to the circumstances in Senegal was evasive but he was in contact with his mother and nothing had been put forward as to why he would be unable to go back and stay with her and there was nothing to show that he would be unable to get treatment in Senegal.

11. Ms Isherwood submitted that the language barrier was not an obstacle for the Appellant's partner and that she would be able to obtain alternative employment or work in Senegal. Ms Isherwood also submitted that the appellant's historic credibility and immigration history need to be taken into account, which called into question the conduct and character of the Appellant. She submitted that the Appellant could not have the benefit of remaining in the UK because there is no guarantee that he would get entry clearance if he returned to Senegal and applied and that one has to respect the underlying basis and purpose of the Immigration Rules.

12. Ms Isherwood accepted she had not put the point but submitted that his partner could continue to support him financially if he returned to Senegal and lastly, following the Court of Appeal judgment in *Alam* [2023] EWCA Civ 30, that *Chikwamba* [2008] UKHL 40 was only relevant if entry clearance would be bound

to be granted, but that that would not succeed in light of the issues arising in relation to the appellant's past credibility and immigration history. She further submitted that nothing constituted exceptional or compelling circumstances that would render the appellant's removal unjustifiably harsh.

13. In response, the Appellant set out some of the dates in relation to his immigration history but essentially was concerned with focusing on the genuine nature of his relationship. In light of Ms Oury's legal training I asked her to assist the Appellant in terms of submisions. She submitted that she and the Appellant had a long-distance relationship for some time when she was working in Jersey and the appellant was in Cardiff, but there was only a one hour plane journey between the two places, so that was a very different type of long-term relationship. She said that she would quite often visit her parents more than every two months; that retraining for a new career in Senegal would take years and would also prevent her from setting up her own life and having children. She further submitted that her firm only operates in offshore locations and so it would not be possible for her work remotely in Senegal for the same firm. Also, there was no infrastructure for that and that her partner needed an eye operation because his eyesight is deteriorating.

14. I reserved my decision, which I now give with my reasons.

15. I have directed myself, when reaching my findings and conclusions, with regard to the judgments in *Agyarko (op cit)* at [43] and *Lal* [2019] EWCA 1925 at [37] both of which are set out in the error of law decision. In essence, the test as to whether there are insurmountable obstacles must be applied in "*a practical and realistic sense*" and that it is relevant and necessary to have regard to the particular characteristics and circumstances of the individual(s) concerned.

16. With regard to the Appellant, whilst he claimed to have a fear of return to Senegal from his father and other persons, his asylum claim was entirely rejected by the First tier Tribunal Judge and no challenge to these findings in the form of any cross-appeal was brought and therefore, those findings stand. The Appellant has a truly awful immigration history and has not been found credible in any material respect other than with regard to his relationship with his partner, Ms Oury. Whilst the Appellant claimed he told the previous judge about his eye condition there is no record of that evidence in her decision and reasons nor any documentary evidence contained in the bundle before the First tier Tribunal. Nevertheless in light of the letter from Moorfields Hospital I accept that he suffers from keratoconus, a condition which affects his cornea. In the absence of any evidence as to whether or not he could receive treatment for this condition in Senegal and the consequences if he is unable to access treatment I do not find that this amounts to a very significant obstacle to his integration into Senegal. The Appellant also stated that he has a liver condition but in the absence of any documentary evidence about this or any particularisation of his condition I do not find that this amounts to a very significant obstacle to his integration in Senegal either.

17. Whilst I entirely accept that the Appellant does not wish to return to Senegal and that he has been absent for 12 years I do not find even considered holistically, that the matters he has raised, including his health and long absence amount to insurmountable obstacles to his integration there. The Appellant's mother continues to live near Dakar and they have maintained contact and are not estranged and I find he could turn to her for practical and financial support eg in terms of accommodation until he is able to find his feet.

18. With regard to Ms Oury, the particular characteristics and circumstances to consider are the fact that she is British by birth, culture and language. She does not speak French, the primary language of Senegal and has never been there. She has gainful employment in a specialist solicitors' firm that deals exclusively with investment funds from Jersey and has relocated to Jersey and now to London with the same firm. Whilst she will have gained transferrable skills she would be unable to continue to work for the same firm. It is not known whether as an English qualified solicitor she would be able to obtain employment as a solicitor in Senegal. She sees her parents, who reside in Blackburn, Lancashire, regularly. Her mother has sadly been diagnosed with leukaemia and she has a sister who is disabled (although this evidence came from the Appellant who stated that he was sure she would not have mentioned it). Whilst no documentary evidence of her mother's leukaemia diagnosis was adduced I accept Ms Oury's evidence bearing in mind that the Appellant is currently without the benefit of legal representation; her evidence was corroborated by the Appellant and Ms Isherwood did not challenge this. She does provide her family with occasional financial support. In order to live in Senegal she would have to obtain a visa.

19. The judgment in *Lal* holds at [36] that:

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

20. I find that the matters raised by Ms Oury, when considered holistically, do amount to very significant difficulties for her in contining her family life with the Appellant in Senegal. However, I find that it would not be impossible to continue family life, given that is a very high threshold. Therefore, I turn to the question of any steps that could reasonably be taken to mitigate the difficulties. In cross-examination, Ms Isherwood suggested that having previously maintained a long distance relationship when the Appellant was living in Cardiff and Ms Oury was living and working in Jersey she could do the same if the Appellant was in Senegal. Ms Oury responded that it would be very expensive and it was much further away and that she would not want to be so far away from her mother, who is now 78, given that she is suffering from leukaemia.

21. I have concluded that in order to maintain family life with her partner, the Appellant, would entail very serious hardship for Ms Oury, who would have the unenviable task of choosing whether to relocate to Senegal with her partner, with the loss of everything else that is important to her, in particular, her career and her family, or to remain in the UK in order to pursue her career and maintain regular contact and visits with her mother but without the Appellant. I find that it is most likely that Ms Oury would remain in the United Kingdom, particularly in light of her mother's illness. Given the Appellant's lengthy period of overstay and particularly his prior conviction and 10 month sentence, I find that any application for entry clearance to re-join Ms Oury in the United Kingdom would be most likely refused on suitability grounds, despite the fact that the First tier Tribunal Judge found in his favour with regard to S-LTR 1.6 and therefore, the judgment in *Alam (op cit)* is inapplicable.

22. For the reasons set out above, I find that the requirements of R-LTRP including EX.1(b) are met. Following the judgment in *TZ (Pakistan)* [2018] EWCA Civ 1109 the fact that the requirements of the Rules are met is dispositive of the appeal, which is allowed on human rights grounds on the basis that removal of the Appellant to Senegal would be contrary to Article 8 of ECHR.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber 2 September 2024

Annex

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THE IMMIGRATION ACTS

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Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PAPA DIAW
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr A Slatter, Counsel, instructed by TMC Solicitors Limited
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

Heard at Field House on 20 March 2024

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Senegal born on the 6 July 1993. He left Senegal on the 4 August 2012 and entered the UK on the 22 April 2013. He made a claim for asylum on the 9 May 2023, on the basis of his conversion from Islam to Christianity. That appeal was unsuccessful, being dismissed on the 28 August 2015. The Claimant became appeal rights exhausted on 15 October 2016 and was subsequently arrested on 2 June 2018 as he was attempting to leave the UK for Canada. He was prosecuted and sentenced to ten months' imprisonment in respect of that offence.

2. On 20 June 2019, further submissions were made in which the Claimant maintained his fear of persecution due to his conversion from Islam to Christianity. He also raised a fear of persecution due to his sexual orientation in

that he claimed to be bisexual and had had a previous same sex relationship and he also raised Article 3 in relation to a health condition. These further submissions were refused on the 24 May 2022, but the Claimant was given a right of appeal, which was lodged on the 8 June 2022. His appeal hearing took place on 20 April 2023 via CVP and in a decision promulgated on 30 May 2023, his appeal was allowed, on the narrow basis that there would be insurmountable obstacles to family life continuing outside the UK.

3. The Secretary of State sought permission to appeal against this decision on the basis that First-tier Tribunal Judge Mulready had made a material error of law in the determination in the following respect:

> *"It is respectfully submitted, that in allowing the appeal, FTTJ Mulready errs in conflating the issue of very significant difficulties with that of simple choice. As indicated, the appellant's partner was aware that the appellant had no legal right of permanent stay in the UK at the start of their relationship [60], and as such, knew that he would be required to leave the country at some point, she made the choice to pursue the relationship, despite this fact. A relationship of this nature should be given little weight against that of the public interest. It is asserted, that the appellant, nor his partner have advanced any reasons which could be considered insurmountable. The fact she has her family, and work in the UK, is insufficient without more [57]. There are no identifiable features about her relationship with her family which could contribute to a finding that separation from them would cause very significant difficulty, she is an adult, and she maintains an adult relationship with them, furthermore, she has indicated that French is a language that she could learn [62], she is clearly highly educated, and as such would be able to obtain work in Senegal once settled with the assistance of her partner, who would assist her to integrate culturally. The fact she does not wish to, cannot be held to be a very significant difficulty or exceptional, in the sense that it is intended [Agyarko relied upon at [56]-[57].*
>
> *Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as Lord Dyson MR made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling … is required to outweigh the public interest", applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in Ali.*
>
> *57 That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question,*

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

It is trite law, that there is no obligation of a state under article 8 to respect the choice of residence of a married couple, paragraph EX1, exists as a mechanism to ensure the Immigration Rules are article 8 compliant, therefore, it is respectfully submitted that to find the partners preference to remain in the UK, rather than accompany the appellant to Senegal to be a difficulty that cannot be overcome, is to devalue the Immigration Rules, and allows the SSHD to be held to ransom by any couples, who choose to flout those rules, as in the instant case (the appellant has not only remained illegally, but has pursued two unmeritorious claims to asylum and been convicted of immigration fraud), and then expect simply, by virtue of the fact they prefer to remain in the UK to circumvent their requirements, and therefore must be a misdirection in law.

Permission to appeal is therefore respectfully sought on the above grounds. An oral hearing is requested."

4. Permission to appeal was granted by Upper Tribunal Judge Gill on the 16 February 2024, on the basis that the grounds arguably disclose that Judge of the First-tier Tribunal Mulready may have materially erred in law in allowing the appeal.

5. The Claimant's representatives lodged a Rule 24 response asserting that the First tier Tribunal did not misdirect itself in law in relation to the test of insurmountable obstacles under the Immigration Rules, that the Secretary of State had misread the Tribunal's decision and that at [63] the conclusion it was not realistic to expect the Claimant's partner to accompany him to Senegal was not simply based on acceptance of her evidence, but an assessment of all the circumstances of the case and that this was a disjunctive test. The judge had explained why the Claimant's partner would face very significant difficulties and there was no material error of law.

Hearing

6. At the hearing before the Upper Tribunal, Ms Isherwood on behalf of the Secretary of State went through the determination in some detail. She submitted that there were no very significant or insurmountable obstacles as to why the Claimant could not return to Senegal. Whilst the relationship between the Claimant and his partner had been accepted as genuine and subsisting, which was recorded at [37], the judge had placed undue emphasis on the Claimant's partner's employment, as constituting a very significant obstacle. However, the Claimant's partner has moved from Blackburn to Jersey and then to London and was quite capable of relocating, they have previously maintained a relationship via video and telephone, see [58] and [59], that they could not live together because of the language barrier. Ms Isherwood also relied upon [61] to [63] and submitted that none of the points raised brought the case within the parameters of the appeal being allowed. One has to look at the very beginning of Article 8. The Claimant knew he had no right to be in the United Kingdom, he undertook an act that resulted in a prison sentence. He cannot chose where to conduct his family life with his partner.

7. Ms Isherwood submitted Agyarko [2017] UKSC 11 sets out a high threshold and that being separated and finding that upsetting, was not a very significant difficulty. She submitted the judge had failed to properly assess the case given the previous aspects of the claim and provided a lack of reasoning.

8. In his submissions, Mr Slatter relied upon his Rule 24 response. He submitted that the judge did not fall foul of the test and that her conclusion was not simply based on the acceptance of the evidence alone and was the consequence of an objective assessment by the judge and did not fall foul of the judgment in Lal [2019] EWCA Civ 1925 at [37]. The judge had given adequate reasons as to why she found that the Claimant and, in particular, his partner would face significant difficulties in Senegal and had provided a number of reasons for that conclusion: see *Lal* at [36].

9. Mr Slatter submitted the judge properly directed herself in law and gave adequate reasons for finding there would be insurmountable obstacles. He drew attention to the fact that the Claimant's partner's statement at page 101 of the Appellant's bundle raised the issue of cultural barriers as well as linguistic barriers and in her August 2022 statement at AB 86, his partner referred to the difficulties as a result of being Catholic and remarks made by an imam, see [28] and [33] of that statement; AB 255 and 258 and page 100 of the stitched bundle which is the representations which make clear that this is how the case was put. The alternative submission was that removal of the Claimant would constitute unjustifiably harsh consequences for his partner, see GEN.3.2, which was also disjunctive.

10. In her reply, Ms Isherwood submitted that the judge did not specifically refer to culture, albeit at [62] there is reference to language and cultural barriers if the Claimant's partner relocated to Senegal. Ms Isherwood submitted the judge had not dealt with the issue of exceptional circumstances. The Claimant had relied on his sexual orientation and an asylum claim but both of those arguments were rejected by the judge. There was no evidence that the Claimant's partner was a practising Catholic and Ms Isherwood reiterated that the focus of the judge's findings related to the Claimant's partner's employment. She submitted that there was clearly inadequate reasons for the judge's findings and that that amounted to a material error of law.

Decision and Reasons

11. I reserved my decision which I now give with my reasons.

12. The decision and reasons of the First tier Tribunal Judge is striking in that the judge carefully went through the various bases of claim by the Claimant and rejected them, finding at [22] that:

"*22. What is fatal however, is that the evidence offered by the Appellant in support of this aspect of his claim is markedly lacking in detail, and suffers from internal inconsistencies and implausibilities...*

26. Having considered all of the evidence as a whole, in light of the foregoing, including the inconsistencies in the evidence, the lack of detail in the evidence, and the implausibilities in the evidence, I am not satisfied, even to the lower standard, that the Appellant is bisexual as claimed. The first issue in dispute is resolved in favour of the Respondent."...

"34. The Appellant did not argue that the position for people who have decided not to be Muslim anymore but instead to be Christian has got worse in Senegal

since the first judge considered his appeal, nor does he present any evidence that this is the case. The claimed facts on which he relies are therefore not materially different to those put to the first judge, and so I consider them settled by the first judge's decision. I adopt the judge's findings on this issue in full. The second issue is therefore resolved in favour of the Respondent."

13. However, at [53] the judge found in the Appellant's favour with regard to the suitability requirements [S-LTR 1.6] a finding which was not challenged by the SSHD and she went on to address the issue of insurmountable obstacles to family life pursuant to EX1.b of Appendix FM of the Immigration Rules, as follows:

"Conclusions

63. Ms O and the Appellant's relationship has previously been conducted by telephone and video calls when they lived apart. This did not last, and I accept their evidence that this was because they found it unsustainable and upsetting to be apart, and so decided to live together. I accept their unchallenged evidence that they have lived together ever since, in the same home for the last three years. I accept also Ms O's evidence that she would not go with the Appellant were he to move back to Senegal. It is not realistic to expect her to go with him, in circumstances where she has no prior familiarity with the country having never visited it once, where she does not speak the language, knows no one, and would be giving up living in the country of her citizenship, her successful career from which she earns the substantial salary she uses to support herself and the Appellant, and living in the same country as her family, including her parents, her brother and his children, with whom she has regular in person contact. This is clearly a very significant difficulty that would be faced by the Appellant and Ms O in continuing their family life together outside the UK, because they would be living in separate countries.

64. I have considered whether it could be overcome by their relationship, and therefore their family life, being maintained by telephone and video calls. I have concluded it cannot – they attempted this before, and found it so upsetting they moved in together; and they are young people three years into a relationship with the rest of their adult lives ahead of them. The continuation of their family life includes their having the potential to develop their family life together in future. Ms O's evidence was clear that she was not sure their relationship would continue if the Appellant returned to Senegal, and this is entirely plausible. The Appellant's return to Senegal would therefore jeopardise the continuation of this relationship, and the potential for the relationship to develop in future. This cannot be overcome by the use of technology, including because the continuation of a family life between this young couple includes physical contact and the ability to develop their family life together.

65. I am therefore satisfied on the balance of probabilities that the Appellant and Ms O would face very significant difficulties in continuing their family life together outside the UK, and that those very significant difficulties could not be overcome. The fourth issue in dispute is resolved in favour of the Appellant."

14. It is clear from the refusal decision that the judge was not given a great deal of assistance with this aspect of the claim as the SSHD did not accept, based on the length of cohabitation at that time [24.5.22] that the Claimant met the requirements for an unmarried partner, albeit he did not raise any issues relating to the genuineness nor subsistence of the relationship. No consideration was

given to whether the Claimant could make an application for entry clearance and whether the requirements of the Rules were otherwise met.

15. The basis of the SSHD's challenge to the judge's conclusion was simply that the Claimant's partner was choosing not to relocate and that did not reach the high threshold set out in *Agyarko* to demonstrate very significant difficulties in continuing family life and the judge failed to provide adequate reasons for her findings.

16. In *Agyarko* the Supreme Court per Lord Reed held *inter alia* as follows:

"*Insurmountable obstacles*

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

43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to "un obstacle majeur" (Sen v The Netherlands (2003) 36 EHRR 7, para 40), or to "major impediments" (Tuquabo-Tekle v The Netherlands [2006] 1 FLR 798, para 48), or to "the test of 'insurmountable obstacles' or 'major impediments'" (IAA v United Kingdom (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could "realistically" be expected to move (Sezen v The Netherlan"s(2006) 43 EHRR 30, para 47). "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In Jeunesse, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119."

17. In his submissions, Mr Slatter relied upon the judgment of the Court of Appeal in *Lal* where the judgment of the Court held as follows:

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

37. To apply the test in what Lord Reed in the Agyarko case at para 43 called "a practical and realistic sense", it is relevant and necessary in addressing these

questions to have regard to the particular characteristics and circumstances of the individual(s) concerned."

The Court then went on to give examples of the enquiries that should have been undertaken by the Tribunal when deciding this issue, concluding:

"*39. The FTT did not undertake a factual enquiry of this sort. That no doubt reflected the fact that the predominant focus of the hearing in the FTT was on whether there was a genuine and subsisting relationship and the question of insurmountable obstacles was treated as a peripheral issue…"*

18. Despite Mr Slatter's gallant attempts to defend the decision of the First tier Tribunal, I find that the judge did materially err in law in that her focus when considering whether there would be insurmountable obstacles or very significant difficulties in the couple continuing their family life outside the UK which could not be overcome or would entail very serious hardship, was on the difficulties for the Claimant's partner in terms of the loss of her life in the UK, in particular her career and close relationships with her extended family. Whilst these are clearly issues of importance they do not, without more, constitute "insurmountable obstacles" within the meaning of the caselaw *cf Agyarko* and *Lal.* Whilst in her evidence before the First tier Tribunal at [62], the Claimant's partner made reference to cultural and language barriers, the judge made no findings on these matters and there is no reference to any evidence on point. I find that the judge failed to give adequate reasons for her findings in the Claimant's favour.

19. It is further clear, following *Lal,* that the judge's consideration of relevant factors such as: where in Senegal the couple would live, whether the Claimant's partner would or would not be able to obtain work as a lawyer in eg Dakar, whether she was a practising Roman Catholic and if so whether she would be able to practice her religion, are all absent from her judgment.

20. The Court of Appeal in *Lal* further held at [68]:

"*In considering, however, whether there are "exceptional circumstances", the applicable test is whether refusing leave to remain would result in "unjustifiably harsh consequences" for the applicant or their partner, such that refusal would not be proportionate: see the passage from the Secretary of State's instructions to officials quoted at paragraph 11 above and the Agyarko case at paras 54-60. The essential difference (reflected in the word "unjustifiably") is that the latter test requires the tribunal not just to assess the degree of hardship which the applicant or their partner would suffer, but to balance the impact of refusing leave to remain on their family life against the strength of the public interest in such refusal in all the circumstances of the particular case*.

21. Having resolved EX1b in the Claimant's favour, the judge did not go on to consider whether there were exceptional circumstances which meant that upholding the refusal would result in unjustifiably harsh consequences for the Claimant. Whilst Mr Slatter referred in passing to the fact that this argument had been raised before the First tier Tribunal there was no cross appeal on the point and it was, therefore, not an argument before me. However, in light of my decision it is a matter that can be argued at the hearing to re-make the decision.

Notice of Decision

22. I find material errors of law in the decision and reasons of First tier Tribunal Judge Mulready with regard only to her assessment of whether there would be insurmountable obstacles to family life continuing outside the UK.

23. I adjourn the appeal for re-making before the Upper Tribunal. I make the following directions:

23.1. The appeal is to be listed for 1.5 hours on the first available date;

23.2. The judge's findings of fact uninfected by error of law should stand;

23.3. If it is intended to call the Claimant and his partner as witnesses then updated witness statements should be submitted to stand as evidence in chief;

23.4. If the Claimant wishes to rely upon any further evidence and an updated skeleton argument these should be submitted 5 working days before the resumed hearing;

23.5. If the SSHD wishes to rely upon any further evidence or a skeleton argument this should be submitted 2 working days before the resumed hearing.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 April 2024