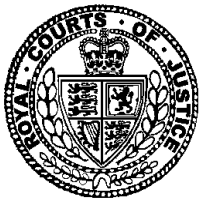

Neutral Citation Number: [2019] EWCA Civ 1925

Case No: C5/2018/0603

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Storey
HU/2750/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2019

Before:

THE MASTER OF THE ROLLS
LADY JUSTICE ASPLIN
and
LORD JUSTICE LEGGATT

- -

Between:

CATHRINE LAL	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

Amanda Jones (instructed by **Prime Law Solicitors**) for the **Appellant**
Zane Malik (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 17 October 2019

- -

Approved Judgment

Sir Terence Etherton MR, Lady Justice Asplin and Lord Justice Leggatt:

1. This case raises issues about when refusing the partner of a British citizen leave to remain in the United Kingdom violates their rights to respect for their family life.

Relevant dates

2. The appellant, Ms Cathrine Lal, is an Indian national born in 1984. She arrived in the UK on 24 January 2011 with entry clearance as a Tier 4 (General) Student valid until 10 January 2013. Her leave to remain was subsequently extended until 19 April 2015.

3. On 12 December 2014 Ms Lal married a British citizen, Mr Keith Wilmshurst. On 17 April 2015 she applied for leave to remain in the UK on the basis of her relationship with him.

Leave to remain as a partner

4. Rules laid down by the Secretary of State as to the practice to be followed in considering applications for leave to remain in the UK on the basis of family life with a person who is a British citizen (or settled in the UK or in the UK with leave as a refugee or humanitarian protection) are contained in Appendix FM to the Immigration Rules.

5. Section R-LTRP of Appendix FM sets out the requirements to be met for leave to remain as a partner. These include suitability requirements relating to matters such as the applicant's criminal record, and also eligibility requirements. The eligibility requirements are set out in Section E-LTRP. This has four parts which are concerned, respectively, with the applicant's relationship, immigration status, financial means and ability to speak English.

6. An applicant who meets all of the eligibility requirements of Section E-LTRP (as well as the other requirements specified in Section R-LTRP) qualifies for leave to remain under the "five year route" – so called because an applicant who is granted leave to remain on this basis is eligible after five years to apply for indefinite leave to remain in the UK. Alternatively, an applicant will qualify for leave to remain under the "ten year route" if (as well as the other requirements specified in Section R-LTRP) he or she meets the relationship and certain of the immigration status requirements of Section E-LTRP and if, in addition, an exception set out in paragraph EX.1. applies. An applicant who is granted leave to remain under this route is eligible after ten years to apply for indefinite leave to remain in the UK.

7. The relationship requirements, which are set out in paragraphs E-LTRP.1.1. to E-LTRP.1.12. and which all applicants must satisfy, include the following:

> "E-LTRP.1.7. The relationship between the applicant and their partner must be genuine and subsisting.
>
> …
>
> E-LTRP.1.10. The applicant and their partner must intend to live together permanently in the UK …"

8. The immigration status requirements, which also apply in all cases, are set out in paragraphs E-LTRP.2.1. and E-LTRP.2.2. At the relevant time these paragraphs stated as follows:

> "E-LTRP.2.1. The applicant must not be in the UK –
>
> (a) as a visitor; or
>
> (b) with valid leave granted for a period of 6 months or less …
>
> E-LTRP.2.2. The applicant must not be in the UK –
>
> (a) on temporary admission or release, unless paragraph EX.1. applies; or
>
> (b) in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1. applies."

9. Paragraphs EX.1. and EX.2. are in these terms (with the most pertinent provisions highlighted):

> "**EX.1. This paragraph applies if –**
>
> (a)
>
> (i) the applicant has a genuine and subsisting parental relationship with a child who-
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
>
> (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or
>
> **(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen**, settled in the UK or in the UK with refugee leave or humanitarian protection, **and there are insurmountable obstacles to family life with that partner continuing outside the UK**.
>
> **EX.2. For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the very significant**

> **difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.**"

10. The rules set out in Appendix FM are intended to reflect the duty of the UK under the European Convention on Human Rights – and of UK public authorities under the Human Rights Act 1998 – to act compatibly with the right to respect for family and private life guaranteed by article 8 of the Convention. But it is recognised by the Secretary of State that, in exceptional circumstances, it is necessary to grant leave to remain in the UK in order to act compatibly with article 8 even though the applicant does not meet the standard requirements of Appendix FM.

11. Since August 2017 the obligation to consider whether there are exceptional circumstances requiring leave to be granted on article 8 grounds has been contained in the Immigration Rules themselves. But at the time of Ms Lal's application, this element of the Secretary of State's policy was embodied in instructions issued to officials. The version then current was "Immigration Directorate Instruction, Family Migration: Appendix FM Section 1.0b", published in July 2014. This stated:

> "In every case that falls for refusal under the Immigration Rules, the decision maker must go on to give full consideration to whether there are any exceptional circumstances."

The following further explanation was given:

> "'Exceptional' does not mean 'unusual' or 'unique'. Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1. of Appendix FM have been missed by a small margin. Instead, 'exceptional' means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate under article 8. … Cases that raise exceptional circumstances that warrant a grant of leave outside the rules are likely to be rare."

12. In *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; [2017] 1 WLR 823, paras 54-60, the Supreme Court approved almost identical guidance contained in the previous version of the Secretary of State's instructions to officials as consistent with the case law of the European Court of Human Rights.

The Secretary of State's decision

13. Ms Lal's application was refused by the Secretary of State in a letter dated 7 July 2015. The sole reason given for deciding that Ms Lal did not meet the requirements of Appendix FM for leave to remain as a partner under either the five year route or the ten year route was that the Secretary of State did not accept that the relationship between Ms Lal and her husband was genuine and subsisting and that they intended to live together permanently in the UK. The Secretary of State accordingly concluded

that Ms Lal did not meet the requirements of paragraph E-LTRP.1.7. or paragraph E-LTRP.1.10. of Appendix FM. As regards the ten year route, the Secretary of State also concluded that, because Ms Lal's relationship with her husband was not genuine and subsisting, paragraph EX.1. did not apply in her case.

14. In addition, the refusal letter said that Ms Lal's application did not raise any exceptional circumstances which warranted granting leave to remain on article 8 grounds outside the Immigration Rules.

Appeal to the First-tier Tribunal

15. Ms Lal appealed from the Secretary of State's decision to the First-tier Tribunal (Immigration and Asylum Chamber) (the "FTT").

16. Since April 2015 there has been no right of appeal to the tribunal on the ground that the Secretary of State's decision was not in accordance with the Immigration Rules. The only relevant right of appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) in a case of this kind is from the decision of the Secretary of State to refuse a "human rights claim" – defined in section 113 of the 2002 Act as a claim made by a person to the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998.

17. On such an appeal the task of the tribunal is to decide whether requiring the appellant to leave the UK is compatible with article 8 (and not merely to review the Secretary of State's decision). Nevertheless, the Immigration Rules and associated guidance are highly relevant to the tribunal's task because they reflect the responsible Minister's general assessment of when interference with the right to respect for private and family life is justified under article 8(2) on the basis of legitimate public interests. As explained by the Supreme Court in *R (Ali) v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, paras 44-46, 50 and 53, and *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; [2017] 1 WLR 823, paras 46-47, the European Court has acknowledged that national authorities have a wide margin of appreciation in relation to immigration control; under the constitutional arrangements of the UK, the national authorities responsible for determining policy in relation to immigration, within the limits of this margin of appreciation, are the Secretary of State and Parliament; and courts and tribunals in dealing with cases therefore have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the rules by Parliament, and have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case.

18. Also relevant to the tribunal's decision-making is Part 5A (sections 117A- 117D) of the Nationality, Immigration and Asylum Act 2002 (inserted by the Immigration Act 2014). As provided by section 117A(1), Part 5A applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches article 8 and as a result would be unlawful under section 6 of the Human Rights Act 1998. Section 117A(2) requires the court or tribunal, in considering whether an interference with a person's right to respect for private and family life is justified

under article 8(2), to have regard in all cases to the considerations listed in section 117B.

19. Section 117B states as follows (again with the most pertinent provisions highlighted):

> "**Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> **(4) Little weight should be given to—**
>
> **(a) a private life, or**
>
> **(b) a relationship formed with a qualifying partner,**
>
> **that is established by a person at a time when the person is in the United Kingdom unlawfully.**
>
> **(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.**
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

The decision of the First-tier Tribunal

20. At the hearing of her appeal to the FTT on 7 December 2016, Ms Lal and her husband, Mr Wilmshurst, gave oral evidence. She also called three further witnesses and relied on written statements from three of Mr Wilmshurst's four children. Almost all the evidence and argument was directed to the question whether the couple were in a genuine and subsisting relationship – which, as mentioned earlier, was the only basis on which Ms Lal's application for leave to remain had been refused by the Secretary of State. However, Mr Wilmshurst (who is in his 70s and retired) also gave evidence about the difficulties that he would face if Ms Lal was not permitted to stay in the UK, testifying that there was no way that he would be able to live in India as he could not put up with the heat. This was supported by the witness statements of two of his children who said that their father could not stand hot weather and had never been able to go on holiday in hot climates. When cross-examined on this point by the Home Office Presenting Officer, Mr Wilmshurst explained how he had refused a good and very well-paid job in Majorca because he would be unable to live with the heat.

21. In her submissions the Presenting Officer positively relied on Mr Wilmshurst's evidence that he would not be able to live in India because of the heat as casting doubt on the genuineness of the marriage.

22. The FTT allowed the appeal. In her decision promulgated on 6 February 2017, FTT Judge Malcolm gave detailed reasons for finding on the evidence that Ms Lal and her husband were in a genuine and subsisting relationship and intended to live together permanently in the UK.

23. At the end of the decision the FTT judge also briefly addressed the question whether there were insurmountable obstacles to family life continuing outside the UK. Ms Jones, who represented Ms Lal as counsel in the FTT as she does on this appeal, told us that this issue was raised because Ms Lal had not provided all the evidence necessary to show that she met the financial requirements in Section E-LTRP: consequently, her only way of qualifying for limited leave to remain as a partner in accordance with Appendix FM was under the ten year route by showing that paragraph EX.1. applied in her case.

24. Whether it was necessary to show that paragraph EX.1. applied when the Secretary of State had not suggested that Ms Lal was unable to satisfy the financial requirements and (as we have noted) the only reason relied on for refusing leave to remain was the denial that Ms Lal's relationship with her husband was genuine and subsisting is a matter about which we have doubt. It has, however, been accepted on Ms Lal's behalf throughout the proceedings and was expressly conceded on this appeal that she had to show insurmountable obstacles in order to succeed in her appeal to the tribunal on the basis that she met the requirements of the Immigration Rules.

25. The FTT judge dealt with this issue at paragraph 94 of the decision as follows:

> "The appellant's husband is a British citizen and has always lived in the UK, his family are in the UK. It was his evidence that he would not be able to move to India if his wife was required to return to India as he simply would not be able to cope with the heat in the country and was very clear in his evidence that if his wife was required to return to India that he would not be able to return with her. I accept that this met the test of insurmountable obstacles to family life continuing outside the UK (in terms of EX.1(b))."

Appeal to the Upper Tribunal

26. The Secretary of State appealed from the FTT's decision to the Upper Tribunal (Immigration and Asylum Chamber).

27. The first ground of appeal was that the FTT had erred in law in finding that Ms Lal and her husband were in a genuine and subsisting relationship. The decision of the Upper Tribunal promulgated on 8 January 2018 gave that argument short shrift. However, as a second ground of appeal the Secretary of State contended that the FTT had failed to give adequate reasons for finding that there were insurmountable obstacles to the couple continuing their family life in India. Upper Tribunal Judge Storey agreed with that criticism. After quoting paragraph 94 of the FTT's decision, he said:

> "6. On its face this passage is clearly an unsatisfactory treatment of the issue. It was one thing for the judge to accept Mr KW's subjective evidence that he would simply not be able to cope with the heat in India. What the judge was required to undertake, however, was an objective assessment of whether Mr KW could in fact cope with the heat and whether a difficulty of this kind would pose an insurmountable obstacle. The Supreme Court has confirmed in *Agyarko* [2017] UKSC 11 that insurmountable obstacles is a stringent test requiring an applicant to show serious hardship. Difficulty [in] coping with heat is not in itself a serious hardship in a country where there is air conditioning and available urban environments built to protect people against the heat.
>
> 7. Ms Jones sought to argue that the judge's assessment at paragraph 94 had to be read in the light of the decision as a whole and the evidence as a whole, but looking wider there is really nothing else that is shown over and above Mr KW's difficulties with hot weather. Significantly, there was no medical evidence identifying Mr KW as having any specific condition that would make exposure to hot weather medically harmful. Paragraph 94 represents a singular failure to treat the insurmountable obstacles threshold as a high one.

> 8. For the above reasons I conclude that the decision of the FTT Judge is legally flawed."

28. The Upper Tribunal judge then went on to consider whether he was in a position to re-make the decision and decided that he was. For reasons that we will come to later, he concluded that there were no insurmountable obstacles to Ms Lal and her husband living together in India and that she therefore could not meet an essential requirement of the Immigration Rules. The judge also decided that Ms Lal's appeal could not succeed on article 8 grounds outside the rules. He therefore dismissed her appeal from the Secretary of State's decision to refuse her human rights claim.

This appeal

29. On 31 January 2019, following an oral hearing, Hamblen LJ granted Ms Lal permission to appeal to the Court of Appeal. In doing so, Hamblen LJ determined that the appeal satisfied the test for a second appeal as it not only had a real prospect of success but raised an important point of principle, which he expressed in these terms:

> "Is it open to the Upper Tribunal, having left the FTT judge's findings on the facts undisturbed, namely that the husband of an applicant for leave to remain would not be able to cope with the identified insurmountable obstacles in the country of return and would not be able to return with her, to conclude that the test is not whether the applicant's husband subjectively cannot surmount those obstacles but whether objectively he should be able do so?"

The issues on this appeal

30. As identified in discussion with the court at the start of the hearing of the appeal, there were three grounds of appeal which Ms Jones wished to advance on Ms Lal's behalf:

    (1) The Upper Tribunal was wrong to set aside the FTT's decision, as the FTT's finding that there were insurmountable obstacles to family life continuing outside the UK involved no error of law.

    (2) Alternatively, in re-making the decision and concluding that there were no such insurmountable obstacles, the Upper Tribunal itself erred in law.

    (3) In the further alternative, the Upper Tribunal erred in law in its consideration of article 8 outside the rules.

31. On behalf of the Secretary of State, Mr Malik objected to the second and third of these grounds being advanced, as neither was mentioned in Ms Jones' skeleton argument and the second ground had not previously been raised at all. There is considerable force in this complaint. It appears to have been thought that the permission to appeal granted by Hamblen LJ was restricted to the issue which he identified as an important point of principle, until the court pointed out in a message sent to counsel on the day before the hearing of the appeal that Hamblen LJ's order did not limit the issues which could be argued. It is, however, in the interests of justice that the court should consider all the respects in which the decision under

appeal arguably involved a material error of law, if this can be done without unfairness to either party. In the event we are satisfied that we are in a position to decide all three issues without unfairness to the Secretary of State in circumstances where (i) the reasons given by the Upper Tribunal for setting aside the FTT's finding of insurmountable obstacles and for reaching its own contrary finding were the same reasons, (ii) Mr Malik had addressed the question whether Ms Lal's claim should have been upheld on article 8 grounds outside the Immigration Rules in his own skeleton argument, and (iii) as well as addressing all three issues ably in oral argument, Mr Malik has provided further assistance to the court on the second and third grounds of appeal by way of additional material and a written submission sent after the hearing.

32. We will therefore consider each of the three issues raised in turn.

(1) The FTT's finding of insurmountable obstacles

33. The first issue is whether the Upper Tribunal was right to hold that the FTT had erred in law in concluding in paragraph 94 of its decision (quoted at paragraph 25 above) that there were insurmountable obstacles to Ms Lal's family life with her husband continuing outside the UK.

34. The FTT judge based that conclusion entirely on her acceptance of Mr Wilmshurst's evidence. It seems to us that the facts which Mr Wilmshurst's evidence, if accepted in its entirety, were capable of proving were (i) that he is a retired man in his 70s who cannot bear hot temperatures and (ii) that for this reason he would feel unable to go, and would therefore not in fact go, to India with his wife if she is required to leave the UK. We think it clear, however, that proof of these facts is not by itself legally sufficient to establish insurmountable obstacles for the purposes of paragraph EX.1.(b) of Appendix FM to the Immigration Rules and that the reasons given by the FTT for reaching that conclusion were therefore inadequate.

35. Mr Malik submitted that "insurmountable obstacles", as that phrase is defined in EX.2. of Appendix FM, can take two forms: first, a very significant difficulty which would be literally impossible to overcome, so it would be impossible for family life with the applicant's partner to continue overseas (for example, because they would not be able to gain entry to the proposed country of return); or second, a very significant difficulty which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could be overcome but to do so would entail very serious hardship for one or both of them. This submission reflects the current guidance for officials published on 23 September 2019, "Family Policy: Family Life (as a partner or parent, private life and exceptional circumstances)", version 3.0. We accept that it is an appropriate explanation of the effect of paragraph EX.2. and accordingly of what is meant by "insurmountable obstacles" in paragraph EX.1.(b) of Appendix FM.

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

avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both).

37. To apply the test in what Lord Reed in the *Agyarko* case at para 43 called "a practical and realistic sense", it is relevant and necessary in addressing these questions to have regard to the particular characteristics and circumstances of the individual(s) concerned. Thus, in the present case where it was established by evidence to the satisfaction of the tribunal that the applicant's partner is particularly sensitive to heat, it was relevant for the tribunal to take this fact into account in assessing the level of difficulty which Mr Wilmshurst would face and the degree of hardship that would be entailed if he were required to move to India to continue his relationship. We do not accept, however, that an obstacle to the applicant's partner moving to India is shown to be insurmountable – in either of the ways contemplated by paragraph EX.2. – just by establishing that the individual concerned would perceive the difficulty as insurmountable and would in fact be deterred by it from relocating to India. The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to an applicant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together.

38. On the basis of the evidence of Mr Wilmshurst and his children, we accordingly consider that the FTT judge was entitled to find, given the general knowledge that India has a hot climate, that Mr Wilmshurst's sensitivity to hot weather would represent a very significant difficulty if he were to move to India but not that it would make it impossible for him to move there. To decide whether the obstacle would entail very serious hardship for Mr Wilmshurst and was for that reason "insurmountable", it was necessary in our view to examine the facts in more detail and to consider questions such as these: if the couple had to move to India, where in India could they reasonably be expected to live? What are the average temperatures in that part of India during different periods of the year? Are there steps which could reasonably be taken to mitigate the heat during hot weather, such as air conditioning, and how adequate would such steps be to meet the difficulty? Are there any cooler places in which it would be practicable for Mr Wilmshurst and Ms Lal to live for all or part of the year? The ultimate question is whether, in all the circumstances, the climate would entail not merely a significant degree of hardship or inconvenience for Mr Wilmshurst but "very serious hardship".

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. But the upshot of this is that the basis on which the FTT concluded that paragraph EX.1.(b) applied was indeed deficient and the Upper Tribunal was right to set aside the FTT's decision.

(2) The Upper Tribunal's treatment of "insurmountable obstacles"

40. We accept that, having reached that conclusion, the Upper Tribunal was entitled to re-make the decision by reference to the FTT's findings of fact and the documentary evidence. At this stage of his reasoning, however, the Upper Tribunal judge said nothing further about Mr Wilmshurst's difficulty in coping with heat and instead went

on to consider the difficulties posed by Mr Wilmshurst's age and his ties to the UK. The judge must therefore have thought that the reasons he had already given (which we have quoted at paragraph 27 above) were sufficient to explain not only why the FTT's treatment of the issue was unsatisfactory but also why, in his view, the evidence taken at its highest did not show that there were insurmountable obstacles to the couple's family life continuing outside the UK.

41. In this regard, criticisms can be made of the Upper Tribunal judge's reasoning. In so far as he was suggesting (at the end of paragraph 6 of the Upper Tribunal decision) that difficulty in coping with heat cannot entail serious hardship "in a country where there is air conditioning and available urban environments built to protect people against the heat", there was no evidence on which to base such a sweeping statement. Nor, we confess, do we know what the judge had in mind when he postulated the existence of such "available urban environments". Equally, if the judge was intending to suggest that very serious hardship could not be established without medical evidence of a condition that would make exposure to hot weather medically harmful, we cannot accept this. The question is one of fact and there is nothing wrong in principle with basing a finding about a person's sensitivity to heat on evidence given by the person concerned and members of their family, as the FTT judge did in this case, if such evidence is regarded as sufficiently compelling.

42. Nevertheless, on a fair reading of the Upper Tribunal decision, we think that the essential point that the judge was making was that proof of Mr Wilmshurst's intolerance of heat and of his subjective belief that he could not cope with the heat in India did not by itself and without more show that there are insurmountable obstacles to his living there; and that, looking wider at the FTT decision and the evidence as a whole, there was nothing else which bore on this issue. Accordingly, the evidence relied on was insufficient to meet the test set out in paragraphs EX.1.(b) and EX.2. of Appendix FM to the Immigration Rules.

43. As we have already indicated, before a conclusion could properly be drawn that Mr Wilmshurst's difficulty in coping with heat would entail very serious hardship for him if Ms Lal was refused leave to remain in the UK, it would in our view have been necessary to consider matters such as where in India the couple would or could reasonably be expected to live, the climatic conditions in the relevant part(s) of India at different times of year and the measures available to mitigate the heat. There was no evidence addressing any of these matters. In these circumstances the Upper Tribunal judge was entitled to decide that Ms Lal had failed to show that Mr Wilmshurst's difficulty in coping with heat amounted, on its own, to an insurmountable obstacle to the couple continuing family life outside the UK.

44. As we have mentioned, the Upper Tribunal judge went on to consider other obstacles to Ms Lal's family life with her husband continuing outside the UK. At para 10 of the decision he said:

> "As regards insurmountable obstacles, the only matters apart from Mr KW's difficulties with hot weather that were identified by Ms Jones were his age and the relationship the couple have with other family members and friends in the UK. As regards age, Mr KW is 73 but is not said to be in poor health or to have medical problems. Whilst I attach significant weight

> to the ties the couple have in the UK, I do not consider that they suffice to show that disrupting the couples' enjoyment of those ties would pose insurmountable obstacles to them living in India. Neither have any minor children (Mr KW's youngest child from a former marriage is aged 20 and was said to live with KW only as a temporary measure)."

On this basis the Upper Tribunal judge concluded that Ms Lal could not meet the relevant test.

45. It seems to us that, at this stage of his analysis, Upper Tribunal judge went wrong in his approach by considering the matters relied on separately from each other without also assessing their cumulative impact. What the judge ought to have done was to identify all the significant difficulties which Mr Wilmshurst would face if required to move to India and to ask whether, taken together, they would entail very serious hardship for him.

46. Had the judge approached the issue in that way and considered in combination Mr Wilmshurst's age, his proven sensitivity to heat, the fact that he has lived all his life in the UK, and his ties to friends and family including his four children and six grandchildren in the UK, we do not think that the answer to the question whether moving to India would entail very serious hardship for him is a foregone conclusion.

47. For this reason we have concluded that, in re-making the decision on the issue of insurmountable obstacles, the Upper Tribunal made an error of law in his assessment which we cannot say was immaterial.

(3) Exceptional circumstances

48. Given his finding that Ms Lal did not meet the requirements of the Immigration Rules, the Upper Tribunal judge had also to assess whether there were exceptional circumstances which made refusing Ms Lal leave to remain in the UK disproportionate and hence incompatible with article 8. The judge dealt with this question in para 11 of the decision as follows:

> "So far as concerns her circumstances considering article 8 outside the rules, the difficulties in the way of the claimant being able to succeed are even greater as s.117B(4) of [the 2002 Act] requires me to attach little weight to a couple's relationship when that has been entered into at a time when the claimant's immigration status is precarious. When the couple entered into marriage the claimant was an overstayer and she has never had settled status. There are no compelling circumstances that demonstrate that in India the claimant would not be able to live with her husband without serious hardship. Accordingly, I have no alternative but to dismiss the claimant's appeal."

49. In our view, this reasoning involves several errors of law.

"Precarious" immigration status

50. First of all, the judge was wrong to say that section 117B(4) of the 2002 Act required him to attach little weight to a couple's relationship when that relationship has been entered into at a time when the applicant's immigration status is precarious. Section 117B(4) does not refer to "precarious" immigration status and only requires little weight to be given to a relationship formed with a qualifying partner that is established by a person at a time when the person "is in the UK unlawfully". The sole reference in section 117(B) to "precarious" immigration status is in subsection (5). However, subsection (5) provides only that little weight should be given to a private life established at a time when a person's immigration status is precarious. It does not state – and there is no provision of section 117(B) which states – that little weight should be given to a relationship formed with a qualifying partner established when a person's immigration status is precarious.

51. From the point of view of the Upper Tribunal judge, the error was not material because he was under the impression that, when she married Mr Wilmshurst, Ms Lal was an overstayer and was present in the UK unlawfully. It is, however, common ground that this was a mistake. The origin of the mistake appears to be the Secretary of State's refusal letter which, in summarising Ms Lal's immigration history, failed to mention that, although her original entry clearance was valid only until 10 January 2013, she was granted further leave to remain until 19 April 2015. Ms Lal has in fact never been present in the UK unlawfully. The Upper Tribunal judge therefore considered her situation on a false premise.

52. On behalf of the Secretary of State, Mr Malik has argued that, even so, the errors made were not material because, although this is not a requirement of section 117(B), case law establishes that little weight should be given to a relationship formed by a person with a British citizen if that relationship is established at a time when that person's immigration status is precarious.

53. Mr Malik submits that this is what the Court of Appeal held in *TZ (Pakistan) v Secretary of State for the Home Department* [2018] EWCA Civ 1109. At para 25 of the judgment in that case the Senior President of Tribunals (with whom Moylan and Longmore LJJ agreed) said:

> The settled jurisprudence of the [European Court of Human Rights] is that it is likely to be only in an exceptional case that article 8 will necessitate a grant of leave to remain where a non-settled migrant has commenced family life in the UK at a time when his or her immigration status is precarious … That general principle applies to any consideration of the Rules which involves engaging with a requirement or requirements that possess an article 8 element … and to the consideration of article 8 outside the Rules."

54. Mr Malik also relies on a reported decision of the Upper Tribunal (Immigration and Asylum Chamber) in *Rajendran (s117B - family life)* [2016] UKUT 138 (IAC), which indicated that, although section 117B(5) of the 2002 Act is confined to "private life" established by a person at a time when their immigration status is precarious, the considerations set out in sections 117A-D are not exhaustive and it is still relevant for

a court or tribunal when considering the public interest to have regard to "precarious family life" criteria set out in established article 8 jurisprudence.

55. The established jurisprudence to which reference is made in these cases was summarised as follows by the Grand Chamber of the European Court in *Jeunesse v The Netherlands* (2014) 60 EHRR 17, para 108:

> "Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8."

56. This passage, however, and the European Court's case law, cannot reasonably be read as establishing that, in determining the weight to be given to a couple's right to respect for their family life, any relationship formed when one partner did not (or did not to the other's knowledge) have a right of permanent residence in the country should be given little weight; nor that for this purpose all persons who do not have settled status should be viewed identically, regardless of their particular immigration status and history. To the contrary, the European Court has made it clear that, in striking the balance between the right to respect for family life and the state's interest in controlling immigration, it is necessary to consider the particular circumstances of the individuals involved, including their immigration status and history. Thus, in the paragraph of its judgment immediately preceding the passage quoted above (para 107), the Court said that:

> "in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion …"

57. Earlier in the judgment (at para 102) the Court contrasted the position of the applicant in the *Jeunesse* case, who (apart from a tourist visa valid for 45 days) had never had permission to reside in the Netherlands, with that of someone who had been granted permission to settle in the country. Clearly there are degrees of precariousness in a person's situation ranging from, at one extreme, someone who is in the country in breach of immigration laws and is liable to removal through to someone who has been present lawfully in the country for some years and is on a pathway to settled status (such as the five or ten year partner route in the UK) but does not yet have indefinite leave to remain. It would be unreasonable to attach equal weight to family

relationships established by individuals in such different legal situations and there is no "settled jurisprudence" which requires this. Rather, the *Jeunesse* case makes clear that a person's immigration status may greatly affect the weight to be given to their right to respect for family life: see also *R (Ali) v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, para 32; *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1630, para 33. It is also worth noting that in the *Jeunesse* case the Court concluded that on the facts refusing the applicant residence in the Netherlands had been a violation of her right to respect for her family life as protected by article 8.

58. In *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536, para 39, the Supreme Court recognised that the word "precarious" has been applied both by the European Court of Human Rights and by UK courts to refer to a variety of situations including that of a person unlawfully present as well as the status of a person lawfully present for a limited period. The Supreme Court held that in the context of section 117(B) of the 2002 Act, however, the word "precarious" should be given a bright-line interpretation which excludes anyone present in the UK unlawfully and includes everyone who, not being a UK citizen, is lawfully present but does not have indefinite leave to remain: see paras 43-46.

59. We noted earlier what Lord Reed in the *Agyarko* case (at para 46) called the "real and important" margin of appreciation afforded to national authorities in relation to immigration, and that in the UK the authorities with constitutional responsibility for determining policy in this area are Parliament and the Secretary of State. As recognised in the *Rhuppiah* case (at para 37), it is clear that in section 117(B)(5) of the 2002 Act Parliament has deliberately distinguished between an applicant's private life, to which little weight should be given in so far as it was established at a time when a person's immigration status is precarious, and his or her family life, which is not the subject of such a requirement. That leaves it open to courts and tribunals in cases where a relationship with a qualifying partner is established at a time when a person is lawfully present in the UK but does not have indefinite leave to remain to give such weight to the relationship as is appropriate in the circumstances of the particular case.

60. It is also notable, and unsurprising, that the policy embodied in the Immigration Rules made by the Secretary of State and approved by Parliament for granting leave to remain as a partner of a British citizen (or settled person) attaches importance to the partner's immigration status and distinguishes between different categories of person whose immigration status is precarious, rather than treating them all in the same way. Thus, the eligibility requirements for leave to remain as a partner quoted at paragraph 8 above distinguish between (i) a person who is in the UK with leave to enter or remain of more than six months, (ii) a person who is a visitor or has valid leave to enter or remain for a period of six months or less, and (iii) a person who is on temporary admission or release (arrangements now replaced by immigration bail) or present in breach of immigration laws. This is consistent with an approach which, in determining whether refusing leave to remain would be disproportionate, gives greater weight to a genuine and subsisting relationship formed by a person who has been permitted by the Secretary of State to reside in the UK for a significant period for the purpose of study or work than to a relationship entered into by someone who is merely admitted for a short visit or whose presence is tolerated only because they have made an asylum claim or other application which has not yet been determined.

61. The Secretary of State's instructions to immigration officials are also consistent with such an approach. The current instructions (like those in force when Ms Lal's application was made) emphasise that, in determining whether there are exceptional circumstances, all relevant factors must be considered. Examples given of such factors include the immigration status of the applicant. The current guidance on this factor states:

> "You should take into account the circumstances around each individual applicant's entry into and stay in the UK and the proportion of time they have been in the UK legally as opposed to illegally. Did they establish their right to article 8 consideration at a time when they were in the UK unlawfully? Article 8 rights formed in the knowledge that a person's stay here is unlawful should be given less weight (when weighed against the public interest in their removal) [than] rights formed by a person lawfully present in the UK. Is the applicant in the UK as a visitor, meaning that they have undertaken to leave the UK at the end of their visit as a condition of their visa or leave to enter?"

See "Family Policy: Family Life (as a partner or parent, private life and exceptional circumstances)", version 3.0. (The instructions published in July 2014 contained a substantially similar passage.) The Secretary of State's policy therefore clearly recognises that the weight which should be given to family life with a partner depends upon (among other factors) the individual applicant's particular immigration history and status, and that rights formed by a person lawfully present in the UK and granted leave to remain (albeit for a limited period) should be given greater weight than rights formed by a person when in the UK unlawfully or as a visitor.

62. The two cases under appeal in *TZ (Pakistan)* were both cases in which, on the facts, it was plain that little weight should be given to the appellant's family life. TZ did not even meet the definition of a "partner" for the purpose of the Immigration Rules as he had not been living with his girlfriend for two years before he applied for leave to remain. The other appellant, PG, having entered the UK as a visitor with a visa of less than five months, married the man who became her husband within six weeks of her arrival. Neither appellant therefore met the immigration status requirements of Appendix FM.

63. The general observations made by the Senior President of Tribunals at paras 25-27 of his judgment about family life established at a time when a person's immigration status is precarious were made on the footing that "precariousness includes both those who are in the UK unlawfully and those who are here temporarily" (para 26) before the Supreme Court in the *Rhuppiah* case held otherwise. It also seems clear that no point was raised in *TZ (Pakistan)* about the difference between, on the one hand, section 117B(4) which addresses both a private life and "a relationship formed by a person with a qualifying partner" at a time when the person was in the United Kingdom "unlawfully" and, on the other hand, section 117B(5) which addresses only "a private life" established by a person at a time when the person's immigration status is "precarious". In para 27 of the judgment section 117B is said to require that "if the applicant's immigration status is precarious, then little weight is to be given to private life or to a relationship formed with a qualifying partner" (our emphasis). The Senior

President of Tribunals cannot have meant that, as a matter of statutory interpretation, section 117B(4) or (5) requires little weight to be given to a relationship formed with a qualifying partner established at a time when the person was not in the UK unlawfully but their immigration status was precarious. That would be inconsistent with the plain meaning of the statutory provisions. What is apparent from his judgment is that he considered that, in the case of both appellants, their relationship with their partner was far too tenuous to be capable of give rise to exceptional circumstances outweighing the public interest in immigration control. There was, therefore, never any issue whether, as a matter of law, little weight should be given to a substantial family relationship with a qualifying person established at a time when the person was here lawfully but their immigration status was precarious. The observations in paras 25-27 of the judgment of the Senior President of Tribunals should not be read as commenting at all on that situation; if they were intended to address it, they are not binding as a precedent because they were not necessary to the court's decision.

64. We have no issue with the observations of the Upper Tribunal in the *Rajendran* case on section 117B and family life, on which Mr Malik also relied. We also agree with his submission there is no rule of law which requires that little weight should not be given to a relationship formed with a British citizen at a time when the applicant's immigration status is precarious. The point is that what weight it is appropriate to give to such a relationship in the proportionality assessment depends on the particular circumstances. The relevant circumstances include the duration of the relationship and the details of the applicant's immigration history and particular immigration status when the relationship was formed (and when the application was made).

65. The errors made by the Upper Tribunal in the present case therefore were not only as to the effect of section 117B(5) and Ms Lal's immigration status but also as to the correct approach in law.

66. Our conclusion on this point accords with the recent decision of the Court of Appeal (Green and Simler LJJ) in *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1630, where the tribunal judge was held to have erred in law by treating the "little weight" provisions of section 117B(4) and (5) as relevant to family life as well as private life created when the appellant's immigration status was precarious, with the result that the tribunal "wrongly discounted the weight to be attached to the family rights relied on in the proportionality assessment" (para 37).

67. Mr Malik sought to distinguish this decision on the grounds that in *GM (Sri Lanka)* the appellant's partner was not a British citizen or other qualifying partner but another foreign national with discretionary leave to remain and that the family life relied on also included the couple's relationships with their two children. But these are plainly not relevant differences. There is no rational basis for requiring family life established with a partner who is a British citizen by a person whose immigration status is precarious to be given little weight when, as *GM (Sri Lanka)* shows, there is no such requirement where the partner is not a British citizen (nor settled in the UK). If anything, there would be more justification for such a requirement in the latter case. Nor can the fact that the couple in *GM (Sri Lanka)* had children (who were not British citizens and did not have settled status at the relevant time) logically affect the question whether the couple's relationship with each other should be given little weight. The Court of Appeal clearly held that the weight attached to all the family

rights relied on had been wrongly discounted. In the same way we are satisfied that the Upper Tribunal judge in this case erred in law in so far as he treated the fact that Ms Lal's immigration status was precarious when her relationship with her husband was formed as requiring him to attach little weight to their right to respect for their family life.

Weighing the relevant factors

68. A further error of law in the reasoning of the Upper Tribunal (quoted at paragraph 48 above) is that the judge applied the wrong test by asking whether the couple would be able to live in India "without serious hardship". As discussed earlier, that is a relevant criterion in deciding whether there are "insurmountable obstacles" to continuing family life outside the UK. 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.

69. The Upper Tribunal did not undertake such an assessment. This was another error of law which flowed from the errors already identified. From the judge's point of view, the question of proportionality had in effect already been answered by his mistaken understanding that he was required by law to attach little weight to the couple's relationship and his previous finding that there were no insurmountable obstacles to Ms Lal continuing family life with her husband outside the UK. As a result of those errors, the judge failed to assess the factors relevant to the question of proportionality in the circumstances of this case.

70. On such an assessment, the factors which it was relevant to consider included the following:

(1) The FTT's findings and evidence about Ms Lal's family life with her husband, including the fact that they had been in a relationship since May or June 2012 and living together since July 2014 before marrying in December 2014.

(2) The facts that Ms Lal was present lawfully in the UK when their relationship was established, that she has never been in breach of immigration laws and that she met the immigration status requirements in Section E-LTRP of Appendix FM to the Immigration Rules.

(3) The fact that no issue has been raised about Ms Lal's ability to speak English or financial independence.

(4) The facts that Mr Wilmshurst was aged 73 at the time of the Upper Tribunal hearing, has lived all his life in the UK and that all his friends and family (including his four children and six grandchildren) are in the UK.

(5) The finding of the FTT that Mr Wilmshurst would face very significant difficulty in living in India because of his inability to cope with heat.

71. It seems to us that, had the correct approach been adopted and the relevant factors considered, there is a real possibility that the Upper Tribunal might have concluded that it would have unjustifiably harsh consequences for Ms Lal and her husband, and would be disproportionate, to require Ms Lal to leave the UK. The errors of law made by the Upper Tribunal were therefore material.

Relief

72. It follows from our conclusions that the decision of the Upper Tribunal to dismiss the appeal from the refusal of Ms Lal's human rights claim must be set aside. Rather than remitting the case to the Upper Tribunal to re-make the decision, however, we think the appropriate course is to invite the Secretary of State to consider the case afresh, as she has made it clear that she will do. There are two reasons for this. First, the Secretary of State's officials have not yet addressed the relevant questions because, as we have emphasised throughout this judgment, the sole reason given for the decision to refuse leave to remain – since found by the FTT to be erroneous – was that Ms Lal did not have a genuine and subsisting relationship and did not intend to live with her husband permanently in the UK. (The decision also appears to have been made on the mistaken understanding that Ms Lal was an overstayer.) Second, since Ms Lal's application for leave to remain was refused, and indeed since her case was considered by the Upper Tribunal, there has been a material change of circumstances which – as discussed in the *GM (Sri Lanka)* case at para 7 – must now be taken into account. The new circumstance is that Ms Lal and her husband now have a daughter who was born on 8 June 2019. She is a British citizen and is therefore a qualifying child for the purposes of paragraph EX.1.(a) of Appendix FM to the Immigration Rules and section 117B(6) of the 2002 Act (quoted respectively at paragraphs 9 and 19 above). In accordance with those provisions, if on the footing that Ms Lal has a genuine and subsisting parental relationship with her daughter, and taking into account the child's best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK, then paragraph EX.1. applies without the need to show insurmountable obstacles to continuing family life outside the UK and, pursuant to section 117B(6), the public interest does not require Ms Lal's removal from the UK. This is a matter which the Secretary of State accepts that it is now necessary for her officials to consider.

73. Accordingly, we will set aside the Upper Tribunal's decision to dismiss the appeal from the Secretary of State's decision but make no further order.