Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04423/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 May 2019	**On 10 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

YAHYA ABDULSAMAD MULLA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Amin of Counsel instructed by Bhavsar Patel Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes back before me further to the 'error of law' hearing held at Field House on 11 April 2019, and the Decision and Directions promulgated by the Tribunal on 30 April 2019. (The 'Decision and Reasons: Error of Law & Directions' is appended to, and should be read as an integral part of, this Decision.)

2. Since the last hearing - pursuant to the Directions issued - the Appellant has filed and served further evidence under cover of letter dated 7 May 2019. The further evidence includes further witness statements (both from the Appellant and his partner), and further financial information. Original documents, in particular in respect of the financial evidence, were made available at the Tribunal today. Further to this, a Schedule has been helpfully prepared by Ms Amin indicating the pages in the bundles - both current and previous - that demonstrate income of either or both the Appellant and his partner cross-referenced to corresponding entries in bank statements.

3. Ms Everett on behalf of the Secretary of State for the Home Department has had an opportunity to consider the materials now presented - including inspecting the original documents. She informs me, albeit with the *caveat* that the opportunity to consider these materials this morning has been limited, that there is nothing immediately apparent to show that any of the documents are inadequate in terms of the requirements of Appendix FM-SE; indeed she acknowledges that the apparent overall picture that emerges is that the combined income of the Appellant and his partner surpasses the threshold of £18,600 required under Appendix FM of the Rules.

4. I note Ms Everett's *caveat*; however, on balance I am satisfied that the evidence that has now been filed is adequate to meet the requirements of Appendix FM and Appendix FM-SE in respect of the financial requirements for leave to remain as a partner.

5. Further to this, my attention has been directed to the decision of **TZ (Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 1109**, in particular at paragraph 34, and the significance when considering issues of proportionality of the fact that the Immigration Rules are met in any particular case.

6. My consideration of matters at the 'error of law' stage included looking at the very particular circumstances of the Appellant, his partner and her parents. I indicated in my 'error of law' Decision that discussion that the available evidence made it plain that there was a family life as between the Appellant's partner and her parents because of the very particular dependency that they had on her (e.g. paragraph 20). It is also the case necessarily that there is family life between the Appellant and his wife. I am also persuaded that there is an element of family life between the Appellant and his in-laws.

7. The departure of the Appellant from the United Kingdom in consequence of the Respondent's decision would inevitably involve a disruption to one or other aspect of the mutual and inter-dependent family life of the Appellant, his partner and her parents. If the Appellant were to depart the UK without his wife, necessarily there would be an interference in their mutual family life. If he were to depart with his wife, then necessarily there would be an interference in her family life as enjoyed with her parents; the consequence would more likely than not be significant bearing in mind the materials explored at the 'error of law' hearing and rehearsed in the 'error of law' Decision.

8. In the circumstances I have little hesitation in finding that the first and second **Razgar** questions are to be answered in favour of the Appellant. There is no particular issue in respect of the third and fourth **Razgar** questions. Accordingly, the real issue in the appeal - as is so often the case - is that of the fifth **Razgar** question, proportionality.

9. In this regard Ms Amin points in particular to the circumstance that the Rules are now essentially met - and in this regard highlights the pertinence of **TZ (Pakistan)**. On behalf of the Secretary of State, Ms Everett observes that this was not the situation at the time of the Appellant's application or indeed the time of the Respondent's decision in that specified evidence had not been brought forward: she suggests arguably it would be proportionate to expect the Appellant now to make a further application.

10. I find the facts of this particular case are very exceptional. The extent of the medical difficulties and consequent functional abilities of both of the Appellant's wife's parents are significant. In my judgment the balance favours allowing the appeal rather than expecting the Appellant to make a further application. In this context it seems to me that an approximate analogy with the approach in **Chikwamba** is to be drawn. I find that the decision of the Respondent is disproportionate. I remake the decision in the appeal by allowing the Appellant's appeal on human rights grounds with particular reference to Article 8 of the ECHR.

Notice of Decision

11. The appeal is allowed on human rights grounds.

12. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **3 June 2019**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

Although I have allowed the appeal this is in significant part by reference to evidence that did not from part of the initial application. In all the circumstances I do not consider a fee award to be appropriate.

Signed: Date: **3 June 2019**

Deputy Upper Tribunal Judge I A Lewis

APPENDIX

TEXT OF 'ERROR OF LAW' DECISION AND DIRECTIONS
(promulgated on 30 April 2019)

1. This is an appeal against the decision of First-tier Tribunal Judge Row promulgated on 27 March 2018 dismissing an appeal against a decision dated 21 February 2017 refusing leave to remain on human rights grounds.

2. The Appellant is a citizen of India born on 22 May 1987. He entered the United Kingdom on 27 March 2014 pursuant to entry clearance as a spouse conferring leave to remain until 27 December 2016. His spouse is Ms Shamabanu Ayub Khan (d.o.b. 28 September 1987). Ms Khan, formerly an Indian national, is a British citizen who has been present in the United Kingdom since 2002 (i.e. since she was approximately 15 years old).

3. The Appellant applied for further leave to remain in the same capacity - as the spouse of a British citizen. In making that application he relied upon a claimed exemption from the financial requirements of the Immigration Rules on the basis that his wife was in receipt of carer's allowance. In the event, although it appears that at one point his wife was indeed in receipt of carer's allowance, by the time of the application and the Respondent's decision - and indeed also at the time of the hearing before the First-tier Tribunal - she was not in receipt of carer's allowance. The arrangements by which she received monies in respect of her undertaking care for her father were now managed through the local authority in circumstances that were such that the carer's allowance that had originally been awarded through the Department of Work and Pensions was no longer paid. On that basis the Appellant could not rely upon any exemption to the financial requirement aspect of the Rules.

4. I pause to note that at the time of the hearing before the First-tier Tribunal it was said on behalf of the Appellant that he did indeed now satisfy the financial threshold under the Immigration Rules. To that end, he provided some supporting evidence by way of a letter from his employer and photocopies of wage slips (see Appellant's bundle before the First-tier Tribunal at pages 77 to 81). The First-tier Tribunal Judge noted that on its face this evidence did not meet the requirements of Appendix FM-SE, but otherwise made no finding in respect of the Appellant's claimed level of earnings. Indeed, in this regard the Judge suggested that if the Appellant had an application to make it was open to him to make such an application but that it was *"not for me to decide its outcome"* (see paragraph 29). It has been reconfirmed to me today that it is still the case that the Appellant claims that his current earnings in combination with the earnings of his wife are sufficient to satisfy the requirements of

the Rules. However, notwithstanding that some further medical evidence has been filed in the appeal to be relied upon in the event of a finding of error of law, no further financial evidence has been filed to date.

5. The Respondent refused the Appellant's application for leave to remain as a spouse for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 21 February 2017.

6. The Appellant appealed to the IAC.

7. The appeal was dismissed for reasons set out in the decision of Judge Row promulgated on 27 March 2018.

8. The Appellant applied for permission to appeal which was granted by First-tier Tribunal Judge Feeney on 13 July 2018. (Judge Feeney also extended time for lodging the application for permission to appeal, which was a day late.)

9. The grounds of challenge have primarily focused upon the Judge's consideration of supporting evidence filed in respect of the health of the Appellant's in-laws, that is to say the mother and father of his wife.

10. The evidence indicates that the Appellant and his wife live in the same household as the Appellant's in-laws, Mr Mohamed Khan and Mrs Avambibi Abdulaziz; their personal details are a matter of record on file and it is unnecessary for me to set them out here. It was said that both the Appellant's father-in-law and mother-in-law suffered from significant disabilities such that a high level of care was required. It was also said that that care was met by the Appellant's wife with the aid and assistance of the Appellant since his arrival in the United Kingdom.

11. The Judge gave consideration to these matters in the first instance in the context of considering the application of paragraph EX.1 of Appendix FM; that is to say the Judge looked at these matters whilst considering whether there were any very significant difficulties which would be faced by the Appellant or his wife in continuing their family life together outside the UK which could not be overcome or would entail very serious hardship for the Appellant or his wife. The Judge said this at paragraphs 17 to 23:

> *"17. The Appellant argues that he and the sponsor [i.e. his wife] provide 24-hour personal care to the sponsor's father and mother. The sponsor's father and mother receive disability living allowance. The Appellant and sponsor say that they have*

to feed them, bathe them, get them out of bed with a hoist, dress them and do everything for them. They are unable to leave them alone. They had to get sleeping tablets from their GP to render the parents unconscious before coming to the hearing.

18. *It is not at all clear why the sponsor's parents should require such care. The sponsor's father is 48 years old. Her mother is apparently 64 years old. There is a letter from their GP at page 90 in the Appellant's bundle dated 19 February 2018 and an earlier letter dated 18 April 2016. The GP records that the sponsor's father has osteoarthritis of the hip and avascular necrosis of the head of the femur. It records that his wife has severe headaches and depression. Both are said by the GP to be bedbound, in a state of stupor, with reduced wakefulness and responsiveness.*

19. *It is not clear why. Mr Khan has a painful hip. No surgical intervention is planned. He is treated conservatively with standard analgesics.*

20. *The sponsor said that her mother was treated with a standard first-line antidepressant. She was not treated by a psychiatrist. The secondary services were not involved. There had been no intervention of the crisis team. There had been no hospital admission. The GP in his letter of 19 February 2018 mentions no physical problem for the sponsor's mother. There is no explanation of why she should need to be removed from her bed in a hoist as the Appellant and sponsor claim.*

21. *Moreover although Mr Khan is said to require 24-hour care he is being paid carer's allowance by the DWP for providing day-to-day care to his wife.*

22. *I do not find that the care required by either of the sponsor's parents is as claimed. There is in any event no reason why Mr Khan could not pay someone else to provide care to him. It is clear that Leicester City Council is prepared to arrange care in appropriate cases and to finance it. That is what it has done. There are other relatives who might be able to provide such care. The sponsor has a sister-in-law. The letter from the consultant orthopaedic surgeon at page 91 records that other family members attend hospital appointments with Mr Khan. The care assessment made by Leicester City Council refers to other relatives.*

23. *If the Appellant and sponsor returned to India any difficulties would be caused to the sponsor's parents and not to the Appellant and sponsor".*

12. In my judgment the reasoning set out in those paragraphs is unsustainable and otherwise fails to engage adequately with the detailed supporting evidence.

13. Indeed, Ms Cunha on behalf of the Secretary of State acknowledges that she cannot support the Judge's finding at paragraph 19 in respect of Mr Khan, and that it is in

error. The reference to no surgical intervention being planned masks the reality that surgical intervention has been suggested and recommended, but that Mr Khan for reasons essentially related to anxiety has resisted that suggestion. This is evident from the documents that the Judge states he has taken into account. For example, the University Hospital of Leicester letter dated 8 June 2015 notes that Mr Khan was accompanied by his daughter whilst attending pain clinic; it records that he complains of *"bilateral hip and knee pains which started in 2010"* albeit without any obvious precipitating factors; he is described as bedbound; it is also indicated that there were plans to install a bed hoist but at that time Mr Khan was in too much pain to engage with such an option. The following is then stated in respect of management:

> *"I have noticed that Mr Khan and his daughter do not have a clear idea about whether or not surgery would be an advisable option which is the reason why they are reluctant to go ahead. I think it is important for them to be referred to an orthopaedic consultant so that they can be given all the options with the risks and possible benefits and then they can make an informed decision about surgery".*

14. I also note in passing that the author of this letter, a consultant in anaesthesia and pain management, observes that it is Mr Khan's daughter (the Appellant's wife) who reports Mr Khan's progress and reaction to the medication that he has been receiving. This is an illustration of the Appellant's wife being the go-between for her parents and healthcare professionals – a circumstance that is very much a theme in the medical documents and social services assessments.

15. The GP's letter of 18 April 2016 mentioned at paragraph 18 of the First-tier Tribunal's decision confirms the longstanding diagnosis of osteoarthritis of the hip and avascular necrosis of the head of the femur, dating back to 2011 and 2012 respectively. This demonstrates the chronic nature of Mr Khan's underlying medical conditions which have not received any surgical intervention in all of that period, or since. These are conditions that are degenerative in nature and are necessarily not conditions that are likely to improve without intervention.

16. There is also on file a letter from Spire Leicester Hospital based on a clinic date of 4 August 2015 (Appellant's bundle before the First-tier Tribunal at page 91), which again refers to concerns about the absence of any surgical intervention. The letter states in part:

> *"I think that Mr Khan has had bad hips for a period of time but he is frightened of having an operation and has therefore in the past refused. In the past three years he has pretty much lived on the bed with minimal movement. He feels severe pain with all movement of his hips and knees".*

It is also to be noted that there is a passing reference to a discussion with Mr Khan *"and his son who attended with him and other family members"*. In this context I am told, and see no reason not to accept, that Mr Khan in fact only has two daughters and the reference to a son is a reference to a son-in-law, specifically the Appellant.

17. It seems to me manifestly the case that the supporting medical evidence explains with clarity why Mr Khan has a painful hip. He has osteoarthritis of the hip and necrosis of the head of the femur. Surgical intervention has been recommended, but this has been declined. Whilst strictly accurate to say that no such intervention is planned, the fact that it has been recommended at such a relatively young age is indicative of the gravity of the underlying condition. These matters give the context of why Mr Khan is essentially bedbound.

18. Further documents on file set out in considerable detail the nature of the underlying medical conditions and care needs of both the Appellant's mother-in-law and his father-in-law. In so doing, they also provide a considerable degree of emphasis on the role of the Appellant's wife. For example, she is the appointee for both her parents in respect of their relationship with the Department of Work and Pensions (Appellant's bundle before the First-tier Tribunal at pages 87-89). Further, a care plan in respect of the Appellant's father-in-law, and assessments carried out by the local authority in respect of both in-laws describe functional limitations and the Appellant's wife's role. The assessment in respect of Mrs Abdulaziz in particular makes repeated references to the role of her daughter in both her care and her contact and interrelationship with medical healthcare professionals: it may be seen that the Appellant's wife answered the questions on behalf of her mother during the assessment; that she supports her mother in respect of transfers from the bed to the toilet; that she supports her mother in her incontinence; and that she supports her mother in taking medications; it is stated *"family and friends visit regularly but Mrs Abdulaziz does not recognise them and will also not engage in conversation. She will only communicate with Shama and Yahya"*, that is to say the Appellant's wife and the Appellant; it is also recorded that *"Mrs Abdulaziz is unable to make decisions or choices related to her life. She receives support from Shama who has got appointeeship and is happy to make important decisions about Mrs Abdulaziz's care and life including managing her finances"*.

19. In all those circumstances it seems to me that the supporting medical evidence overwhelmingly indicated both the nature of the care needs and the fact that those care needs were being met in part by the Appellant, and more particularly by the Appellant's wife.

20. Whilst it may be that the Appellant's wife receives financial remuneration for this, and whilst it may also well be that in theory other people could perform the practical

duties required – though not necessarily those of communication which are likely achieved by reason of the family relationship - none of this negates the clear and obvious inference that there exists a substantial quality of family life as between the Appellant's wife and her parents, notwithstanding that they are all adults. There is a more than the usual degree of dependency such that the test explored in **Kugathas** is plainly and obviously met on the available evidence. This does not find its way into any particular finding or consideration of the First-tier Tribunal Judge.

21. It may be unobjectionable in the context of paragraph EX.1 to observe that the difficulties that might arise in consequence of the Appellant and his wife continuing family life together outside the UK "*would be caused to the sponsor's parents not to the appellant and sponsor*" (paragraph 23) - although even then it is difficult to see how the impact upon the Appellant's wife of leaving her parents without her care to which they have become habituated would not entail a degree of hardship for the Appellant's partner that would require to be given very careful consideration within the framework of the definition of insurmountable obstacles in paragraph EX.2. More particularly, the disruption to the family life between the Appellant's wife and her parents were she to relocate to India with the Appellant is a matter that requires consideration in the wider context of a freestanding consideration of Article 8.

22. There is no such consideration. After the heading 'Article 8 ECHR' in the Decision, at paragraph 25 it is apparent that the Judge considered the element of interference with family life only in the context of "*a relationship between husband and wife*".

23. In my judgement the First-tier Tribunal Judge errs in failing to recognise that the continuation of family life between the Appellant and his wife outside the UK would cause a significant disruption to the family life between the Appellant's wife and her parents - who are clearly vulnerable individuals in need of a high degree of support and habituated to receiving that support from the Appellant's wife. This is a significant omission from the analysis and findings of the decision of the First-tier Tribunal, and I am ultimately satisfied that it is material to the overall consideration of the Article 8 issues in the appeal.

24. Notwithstanding, and not without some merit and good reason, Ms Cunha argued that the reality of the situation was that the Appellant did not satisfy the financial requirements of the Immigration Rules and in such circumstances could not reasonably expect to be granted a further period of leave subsequent to the 'probationary' period of leave granted initially as a spouse. In substance Ms Cunha submitted that it was open to the Judge in any event to refuse the appeal on this basis. She suggested that this was the import of the Judge's comments at paragraphs 28 and 30, which were based on the premise that he did not meet the Rules but could

potentially now remedy that by making a new application in circumstances where he claimed that he did now meet the requirements of the Rules.

25. At paragraph 28 the Judge notes that there are other options available to the Appellant and his wife - *"The Appellant could return to India and make an application for leave from there when his wife is able to meet the financial requirements"*. At paragraph 29 the Judge makes reference to the Appellant's claim that he now met the financial requirements and the supporting evidence filed; however the Judge declined to make any evaluation of this stating it was open to the Appellant to make an application relying on such evidence, but *"It is not for me to decide its outcome"*. At paragraph 30 the Judge stated:

> *"If the Appellant says that he now meets the financial requirements then there need to be no interruption to his family life at all. He can make a new application. Interference with his family life would amount to no more than him being required to pay the appropriate fee for the application"*.

26. I am dubious as to the propriety of declining to make findings on evidence duly filed before the First-tier Tribunal. It seems to me that it would have been more prudent to give further consideration to these matters: the future prospects for the Appellant were potentially relevant to his present circumstances; further, the merits in any possible application for entry clearance was potentially relevant to a consideration of the **Chikwamba** principle on the facts of this particular case. Indeed, Ms Amin countered Ms Cunha's submissions by arguing that if it was going to be suggested that it was proportionate for the Appellant to leave the United Kingdom to make an application to return again, then as part of that it was necessary to consider the extent to which there would be an interference with his family life as between not only himself and his wife but between himself and his in-laws given that he had a role in ensuring their care. There is merit in this, given that it was suggested that they need around-the-clock care this was not something that could readily or easily be discharged in its entirety by their daughter - she likely benefited from the support she received from her husband.

27. On the very particular facts of this case I am not persuaded that the appeal can simply be answered on the basis that the Appellant did not meet the requirements of the Rules, or that it is now proportionate to expect him to make a new application whether from within the UK or for entry clearance from outside the UK.

28. I conclude that the decision of the First-tier Tribunal contained a material error of law, and requires to be set aside.

29. After discussion with the representatives it was common ground that the appropriate way forward was to retain the case in the Upper Tribunal, and the Appellant be afforded the opportunity of filing evidence compliant with the requirements for specified evidence under Appendix FM-SE in respect of his financial circumstances and/or the financial circumstances of his wife, with a view to permitting the Tribunal to have a full and proper consideration of the available options - including a consideration of the **Chikwamba** point. It may be that if such evidence demonstrates that there are no financial concerns in this case the Secretary of State will wish to take a view on the case before the matter comes back to the Tribunal. However, that is a matter for the Secretary of State and I offer no indication and make no comment one way or the other as to merit or propriety. It seems to me that it would also be helpful if the Appellant were to file and serve a brief statement/s from either or both him and his wife detailing the breakdown of the pattern of care that they offer to her parents to provide an insight into his role bearing in mind that he is also now in employment.

30. The case is accordingly adjourned on the basis that there is an error of law, and the decision in the appeal requires to be re-made. The appeal is reserved to me for further consideration pursuant to the filing of evidence in accordance with the following Directions.

DIRECTIONS

1. The Appellant is to file and serve within 14 days of the date given as the promulgation date of this document any further evidence upon which he wishes to rely in his appeal. In this regard it is anticipated that the Appellant will seek to file evidence as to his financial circumstances consistent with the requirements of Appendix FM and Appendix FM-SE of the Immigration Rules insofar as that is possible, as well as a statement or statements addressing the division of the care duties for his in-laws between him and his wife. (See paragraph 29 above.)

2. The appeal is to be relisted, reserved to me, on the first available date after 21 days from the promulgation date on this document.

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