**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2021-001805**
**First-tier Tribunal No: HU/04415/2020**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 12 April 2023**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**ANNITA VIOLA LEWIS**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms E. Harris, instructed by Rashid and Rashid Solicitors
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

**Heard at Field House on 14 November 2022**

**DECISION AND REASONS**

1. There has been a lengthy delay in preparing this decision, in part due to a period of illness. For this I apologise because I know that the appellant and her husband will have been anxious to know the outcome.

2. The appellant appealed the respondent's decision to refuse a human rights claim. The background to the case was set out in the error of law decision sent by the Upper Tribunal on 15 September 2022 (annexed). The First-tier Tribunal decision, in so far as it allowed the appeal with reference to the *Chikwamba* principle, was set aside. The other findings relating to the immigration rules outlined at [9] of the error of law decision were preserved.

3. For the reasons given at [26]-[27] of the error of law decision the hearing was adjourned for the appellant to prepare more detailed evidence relating to the matters of concern that she had raised about a past history of domestic abuse in Trinidad, for the respondent to consider whether it was a 'new matter' within the meaning of section 85 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2022'), and/or whether to give consent for the matter to be considered.

4. At the beginning of the resumed hearing Ms Harris argued that the appellant had mentioned domestic abuse in an initial affidavit submitted with the application for leave to remain in 2019. Mr Tufan argued that in so far as any protection arguments purported to be made with reference to the Refugee Convention or Article 3 of the European Convention this would be a new matter that has not been considered. The Secretary of State did not give consent for any protection issues to be determined in this appeal.

5. Although it is an unusual procedure for one of the parties to an appeal to be able to decide what issues can be considered by an independent Tribunal, absent a successful challenge to a decision to refuse to consent to a new matter being considered by way of judicial review, I am bound by section 85 NIAA 2002 to restrict the scope of the appeal if the Secretary of State does not give consent for a new matter to be considered.

6. In any event, Ms Harris did not seek to argue that a formal protection claim was put forward. Although the appellant had mentioned that she had 'suffered quite an ordeal in Trinidad at the hands of my ex-husband' and had said that 'our problems were such that it made it extremely difficult for me to attempt to return to Trinidad', nothing in the original statement made in 2019 formulated any claim that she might be at risk on return. I noted at [9(ii)] of the error of law decision that the First-tier Tribunal Judge had found the appellant's evidence on this issue somewhat vague and had concluded that the problems that she experienced with her ex-husband were not sufficient to amount to 'insurmountable obstacles' to the couple continuing their family life in Trinidad for the purpose of paragraph EX.1 of the immigration rules.

7. The witness statement prepared for the resumed hearing went into more detail about the domestic abuse the appellant suffered after she married in 1992. The appellant gave a detailed account of specific incidents over the years. She explained that her parents have now passed away. The appellant said that she has two sisters in Trinidad who are both married with children but are not able to accommodate her. She claimed that she would be destitute if she returned and would have nothing to survive on. The appellant now expressed a fear that her 'life is in great danger' because her husband was a 'very violent, aggressive and jealous man' who is a senior police officer in Trinidad.

8. It did not appear to be disputed that the appellant has mentioned a history of domestic abuse on several occasions. Although the appellant has raised the issue of fearing to return at a very late stage in relation to

the human rights claim, there was a level of agreement between the parties that this factual matrix could be considered in so far as it might be relevant to any assessment of the outstanding issue for determination in this appeal i.e. in relation to the balancing exercise under Article 8(2).

9. At the hearing, the appellant adopted her witness statement and answered some additional questions. She confirmed that she has four adult children still living in Trinidad. The two oldest children were not able to accommodate her, and the two youngest children, who were 27 and 28 years old, still lived with their father. She spoke to her children on a regular basis. The appellant said that she would still be frightened of her ex-husband even if she returned to Trinidad on a temporary basis to apply for entry clearance. The appellant told me that she separated from her ex-husband in 2006, but the divorce was not finalised until 2017. The appellant lived with her parents for about a year before she came to the UK. The appellant described this time as still being full of 'turmoil and torment'. She would still see her husband around when she went to work. She thought he might be following her. When asked if there were any specific incidents during that year, the appellant told me that the only incident was when her husband threatened her at her father's wake. He told her that 'if he could not have me then no one can'.

10. The legal representatives then made submissions, the content of which are a matter of record. Where relevant, I will refer to them in my findings.

## Decision and reasons

11. The First-tier Tribunal found that the appellant did not meet the requirements of the immigration rules for leave to remain as a partner because she was remaining in the UK in breach of immigration law.

12. The judge went on to consider whether the exception contained in paragraph EX.1 of Appendix FM applied but concluded that there were no 'insurmountable obstacles' to the couple continuing their family life outside the UK. She also concluded that there were no 'very significant obstacles' to integration for the purpose of the private life provision contained in paragraph 276ADE(1)(vi) of the immigration rules. In making these findings, the judge considered what the appellant had said about the problems that she had with her ex-husband. It was open to the appellant to provide detailed reasons why she did not want to return to Trinidad, even for a limited period of time, in the initial application or at the First-tier Tribunal hearing. It seems that she only mentioned it in passing during her oral evidence before First-tier Tribunal Judge Bart-Stewart. The findings made by the First-tier Tribunal relating to the immigration rules have been preserved.

13. Since then, the appellant has given a more detailed account of the violence and abuse that she suffered in her first marriage. The history that she gave was detailed, plausible, and was not disputed at the hearing. In light of this history, it is understandable that the appellant might be

apprehensive about returning to Trinidad, even for a temporary period of time. However, even if her evidence is taken at its highest, she left her husband in 2006 and did not have any significant problems for a year before coming to the UK save for a single unfulfilled verbal threat. This was at a time when they had just separated, and tensions were likely to be running high. At the date of this hearing, the appellant had been separated from her husband for a period of 16 years, during which time it is reasonable to infer that any threat he might pose is likely to have diminished.

14. I accept that the appellant might still have a subjective fear of her ex-husband because of a past history of violence and abuse, but even on her own account, her ex-husband did not take any steps to harm her after she left him in 2006. The appellant is worried that if her current husband returned to Trinidad with her that it might incite her ex-husband's animosity. However, her current husband would be able to act as support and possibly a deterrent to any animosity that her ex-husband might show towards her. Other family members including her siblings and adult children could also provide some support. As adults who support themselves through work in the UK, there is no evidence to suggest that they could not continue to support themselves in Trinidad. No doubt it would be difficult to establish a new life there and the appellant might be worried about her ex-husband. However, the threshold of 'insurmountable obstacles' is a high one. Having considered the more detailed evidence now given by the appellant, I find that there is no good reason to depart from the finding made by the First-tier Tribunal that there are no insurmountable obstacles to the appellant and her husband continuing their family life outside the UK.

15. The appellant does not meet the requirements of the immigration rules. Having found that there are no insurmountable obstacles to the couple continuing their family life outside the UK, the appellant's removal in consequence of the decision would not interfere with her right to family life for the purpose of Article 8(1) of the European Convention on Human Rights. The appellant has lived in the UK for 16 years and both she and her husband have established a life together here. For this reason, I find that removal is likely to interfere with the appellant's right to private life in a sufficiently grave way as to engage the operation of Article 8(1).

16. Article 8 of the European Convention protects the right to private and family life. However, it is not an absolute right and can be interfered with by the state in certain circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.

17. The Upper Tribunal must consider where a fair balance should be struck for the purpose of Article 8(2) of the European Convention. This involves a

balancing exercising considering the relative weight that should be given to the appellant's individual circumstances and the public interest in maintaining an effective system of immigration control.

18. The appellant has lived in the UK for a period of 16 years. During that time, it is likely that she has established social networks and other connections in the UK although there is little evidence of the fact. Not least, she met and married her current husband.

19. Section 117B NIAA 2002 requires a court or tribunal to consider matters that might weigh in the public interest in the balancing exercise. Little weight can be placed on the appellant's private life, which was established at a time when she had no permission to remain in the UK. She and her husband began a relationship at a time when they knew that she had no lawful immigration status. The appellant does not meet the requirements of the immigration rules, which are an indication of where the Secretary of State considers a fair balance should be struck for the purpose of Article 8. Significant weight must be given to the public interest in maintaining an effective system of immigration control in circumstances where the appellant overstayed her visa in breach of immigration law for a long period of 12 years. In such circumstances, a person would normally be expected to leave the UK.

20. Without diminishing the serious nature of domestic abuse, the evidence does not suggest that the appellant is likely to be at real risk from her ex-husband after such a long period of time. It is understandable that she has a subjective fear of him, however, for the reasons I have already given, the likelihood of him being a significant problem appears to be minimal given that, despite his position as a senior police officer, he did not follow through on his threats in the year after their separation. Although I can't discount the possibility that the appellant's return to Trinidad might resurrect some animosity, the fact remains that their marriage broke down many years ago and that the appellant is likely to have a significant number of family members, including her current husband, to provide her with support.

21. The primary finding made by the First-tier Tribunal was that there were no insurmountable obstacles to the appellant continuing her family life outside the UK and for that reason her removal in consequence of the decision is not likely to lead to a disproportionate breach of Article 8.

22. The alternative argument considered by the First-tier Tribunal related to the *Chikwamba* principle. I explained the relevant case law in some detail in the error of law decision and will not repeat it here [15]-[21]. Since the resumed hearing, the Court of Appeal has issued further guidance on the issue in *Alam v SSHD* [2023] EWCA Civ 30. I did not consider it necessary to invite further submissions from the parties because the decision simply reaffirms the narrow scope of the principle as outlined in the existing case law.

23. A finding has been made that the appellant and her husband could continue their family life outside the UK. If they want to continue their family life here, the appellant could return to Trinidad on a temporary basis to apply for entry clearance to return through the proper channels under Appendix FM. Mr Tufan said that the estimated time for an application to be considered is around 24 weeks. Although it seems likely that the appellant would meet the main requirements of Appendix FM for entry as a spouse, the case law makes clear that the mere fact that she might be granted entry clearance is insufficient reason to render removal disproportionate. Otherwise, the purpose of the changes made to the immigration rules in 2012 to prevent those who are remaining in the UK in breach of the immigration rules regularising their status unless there are insurmountable obstacles to family life being continued outside the UK would be rendered meaningless.

24. The only factor that the appellant argues is compelling, is her fear of her ex-husband. I have already explained why this is unlikely to prevent her return to Trinidad with her current husband. It is even less likely to be a difficulty if she returned for a temporary period of a few months. For these reasons, I conclude that no sufficiently compelling circumstances are raised in this case that might render it disproportionate to expect the appellant to return to Trinidad for a temporary period to apply for entry clearance through the proper channels if she and her husband wish to continue their family life in the UK in the longer term.

25. For the reasons given above, I conclude that the decision is not unlawful under section 6 of the Human Rights Act 1998.

## Notice of Decision

The appeal is DISMISSED on human rights grounds

**M.Canavan**
Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 April 2023

**ANNEX**

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: UI-2021-001805
HU/04415/2020

**THE IMMIGRATION ACTS**

**Heard at Field House**
**on 30 August 2022**

**Decision Promulgated**
.....

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ANNITA VIOLA LEWIS**

Respondent

**Representation:**
For the appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the respondent: In person

**DECISION AND REASONS**

1. For continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. Ms Lewis (the original appellant) is a citizen of Trinidad and Tobago. She says that she entered the United Kingdom on 19 August 2007 with entry clearance as a visitor. She was granted entry clearance as a student from

15 May 2008 until 31 July 2009. An application for further leave to remain as a student was rejected on 16 August 2009, but a subsequent application was granted. Ms Lewis was granted further leave to remain as a student until 01 October 2010. She remained in the United Kingdom without leave after her visa expired. She did not make an application to regularise her status until 19 December 2019, when she applied for leave to remain based on her family life as the partner of a British citizen.

3. The Secretary of State (the respondent) refused the application in a decision dated 09 March 2020. The decision letter stated that Ms Lewis did not meet the 'Immigration Status' requirement of paragraph E-LTRP.2.2. of Appendix FM of the immigration rules.

> E-LTRP.2.2. The applicant must not be in the UK-
>
> ...
>
> (b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph EX.1 applies.

4. If a person is not eligible for leave to remain as a partner because they do not meet the Immigration Status requirement, leave to remain can only be granted if a person meets the requirement of the exception contained in paragraph EX.1 of Appendix FM of the immigration rules. At the date of the First-tier Tribunal hearing the wording of the rule was:

> EX.1. This paragraph applies if
>
> …
>
> (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, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), 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.

5. The Secretary of State decided that Ms Lewis did not meet the requirements of paragraph EX.1 because there were no 'insurmountable obstacles' to the couple continuing their family life outside the United Kingdom.

6. The Secretary of State decided that Ms Lewis did not meet the private life requirements contained in paragraph 276ADE(1) of the immigration rules.

She did not meet the requirement for 20 years' continuous residence under paragraph 276ADE(1)(iii). There were no 'very significant obstacles' to her integration in Trinidad and Tobago for the purpose of paragraph 276ADE(1)(vi). The Secretary of State noted that Ms Lewis had lived in Trinidad and Tobago for 44 years before she came to the UK and still had family connections there.

7. The Secretary of State went on to consider whether there were any compelling circumstances that might show that removal would lead to unjustifiably harsh consequences for Ms Lewis or her family members. She concluded that no exceptional circumstances had been raised that would lead to a breach of Ms Lewis' right to family or private life under Article 8 of the European Convention on Human Rights.

8. The decision to refuse leave to remain had a right of appeal to the First-tier Tribunal. The First-tier Tribunal is an independent court that does not have any connection to the Home Office. A First-tier Tribunal judge will make findings about the facts of the case based on the evidence they are given. The judge will then consider whether the person meets the requirements contained in the relevant legal framework. They can substitute their own decision for that of the Secretary of State.

9. First-tier Tribunal Judge Bart-Stewart ('the judge') allowed Ms Lewis' appeal in a decision sent on 14 September 2021. It was not disputed that Ms Lewis and Mr Dacres are in a genuine and subsisting relationship. In considering whether Ms Lewis met the requirements of the immigration rules for leave to remain on family or private life grounds the judge came to the same conclusions as the Secretary of State.

    (i) The judge found that Ms Lewis did not meet the Immigration Status requirement of paragraph E-LTRP.2.2 of Appendix FM because she had overstayed since 2010 [20].

    (ii) The judge found that there would be no insurmountable obstacles to the couple continuing their family life outside the United Kingdom. She noted that a state is under no obligation to respect the preferred place of residence of a couple. Ms Lewis and her partner were both aware of her illegal immigration status and the potential difficulties it might cause. She found that Ms Lewis' explanation as to why she did not return to Trinidad and Tobago when her visa expired, because she feared her ex-husband, was vague. The judge did not accept that she had a genuine fear of return. The couple did not have close family members in the UK. Nor was there any evidence to show that they suffered from any significant health problems. In contrast, Ms Lewis had four adult children in Trinidad and Tobago. The judge acknowledged that there might be some upheaval if the couple relocated but found that this would not amount to an insurmountable obstacle to continuing their family life. For those reasons, the judge concluded that Ms Lewis did not meet the requirements of paragraph EX.1 [21]-[22].

(iii) The judge concluded that there were no exceptional circumstances to show that removal would be unjustifiably harsh on Ms Lewis or her family members for the purpose of paragraph GEN.3.2 of Appendix FM of the immigration rules [23].

(iv) The judge found that there were no very significant obstacles to Ms Lewis' integration if she returned to Trinidad and Tobago. She did not meet the requirements of paragraph 276ADE(1)(vi) of the immigration rules [24].

10. As I explained to Ms Lewis at the hearing, the right to private and family life under Article 8 of the European Convention is not an automatic right. The task of a decision-maker is to strike a fair balance between a person's right to family life and the public interest in maintaining an effective system of immigration control. The broad assessment under paragraph GEN.3.2 of the immigration rules is intended to reflect where the Secretary of State considers a fair balance is struck. A judge might consider a full balancing exercise outside the rules taking into account all relevant factors. Even if the judge does not do this within the context of paragraph GEN.3.2 an appellant will normally need to show that there are compelling circumstances that outweigh the public interest in maintaining an effective system of immigration control if they do not otherwise meet the requirements of the immigration rules for leave to remain.

11. In this case the judge considered arguments put forward by Ms Lewis' representative relating to principles that were first outlined in a case decided by the House of Lords (now the Supreme Court) called *Chikwamba* (*Chikwamba v SSHD* [2008] UKHL 40). The principle relates to the question of whether it would be reasonable or proportionate to expect a person who has remained in the UK without leave to remain, and who does not meet the requirements of the immigration rules, to leave the United Kingdom to apply for entry clearance through the proper channels. The judge made the following findings in relation to this issue:

> '28. I have regard to the submission with respect to Chikwamba [2008] UKHL 40 in respect of the likelihood of the appellant being able to secure entry clearance in order to return [to] the UK. Whilst there is a lengthy period before the appellant brought herself to the attention of the authorities she entered the UK lawfully and there is no suggestion of any other unlawful behaviour save for overstaying after her leave expired.
>
> 29. The appellant's bundle of documents includes copies of her partners (sic) payslips from 1 January to 30 July 2021. The end of the financial year 2 April 2021 shows his gross pay at £23,358.73p. This is comfortably within the requirements of the Rules. I consider that it is almost certain that the appellant would be granted leave to enter. The Secretary of State has accepted that the relationship is genuine and subsisting. Mr Dacres has submitted evidence of adequate accommodation. There is also evidence that he meets the financial requirements. The appellant's previous overstaying would be irrelevant to the entry

> clearance application and there is no evidence of criminality or anything else adverse. Consequently I find that there is no public interest or benefit in moving the appellant from the UK and making return to the country where she has not lived for 13 years simply to make an application to return to the UK.'

12. First-tier Tribunal Judge Bart-Stewart found that Ms Lewis did not meet the requirements of the immigration rules and that there were no compelling features to the case. However, she allowed the appeal based on this narrow finding that there would be no public interest in requiring Ms Lewis to return to Trinidad and Tobago to apply for entry clearance to maintain an effective system of immigration control.

13. The Secretary of State applied for permission to appeal to the Upper Tribunal on the ground that the First-tier Tribunal decision involved the making of an error on a point of law. The Secretary of State argued that the judge did not apply the principles in *Chikwamba* properly. At the hearing, Mr Tufan relied on a case decided by the Upper Tribunal called *Younas* (*Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 00129).

14. Ms Lewis appeared with her partner, but without a legal representative. After discussing this with her, it became clear that she was not seeking an adjournment to allow time to instruct a legal representative. She was content to proceed with the hearing without one. I was satisfied that Ms Lewis spoke English fluently and could participate in the hearing without any communication problems. I explained that a judge has a duty to assist an unrepresented person to understand the proceedings. I explained the role of the Upper Tribunal and the nature of the appeal that was before me. I explained the main points made by the Secretary of State in lay terms. Ms Lewis was given a copy of the decision in *Younas*. I took her through the main points made in the decision. She told me that she was still worried about returning to Trinidad and Tobago because her ex-husband had been violent and abusive. He held a position of power in the police so she could not ask them to protect her.

## Decision and reasons

15. The judge found that Ms Lewis did not meet the requirements of the immigration rules for leave to remain as a partner, including the exception contained in paragraph EX.1, which is designed as a fall back for those who do not meet the Immigration Status requirements. Major changes were made to the immigration rules in 2012. The Immigration Status requirement has formed part of Appendix FM since the beginning and post-dates the decision in *Chikwamba*. The intention of this aspect of the rules is likely to be to encourage people who have remained in the UK illegally to return to apply for entry clearance as a partner through the proper channels.

16. *Chikwamba* has been discussed in a series of subsequent cases including *R (Agyarko) v SSHD* [2017] UKSC 11, *R (on the application of Chen) v*

*SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR* [2015] UKUT 00189, *R (on the application of Kaur) v SSHD* [2018] EWCA Civ 1423 and *Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 00129.

17. It is important to note the development of the *Chikwamba* principle and its limitations. The facts of the case in *Chikwamba* were stark. Mrs Chikwamba was a Zimbabwean national who was married to a Zimbabwean refugee. The political and humanitarian situation in Zimbabwe at the relevant time was such that there had been a moratorium on removals to Zimbabwe for a period of two years. Because her husband was recognised as having a well-founded fear of persecution in Zimbabwe there were insurmountable obstacles to the couple continuing their family life there. The question was whether it would be proportionate to expect Mrs Chikwamba to return to Zimbabwe for a temporary period to apply for entry clearance. It was recognised that she was likely to succeed in an application for entry clearance. However, she was also likely to face harsh conditions in Zimbabwe for several months while waiting for the application to be processed and would be separated from their daughter. In those circumstances it was found that there was no public interest in requiring her to leave the UK to apply for entry clearance.

18. In subsequent cases the courts have made clear that the principle does not apply simply because a person can show that they are likely to meet the requirements for entry clearance. The assessment still forms part of the balancing exercising under Article 8 of the European Convention. In particular, the question of whether a person should be required to leave to apply for entry clearance from abroad forms part of the public interest in maintaining an effective system of immigration control.

19. In *Chen* the Upper Tribunal found that a person would need to show that they would meet the requirements for entry clearance to be granted and that temporary separation to return to apply for entry clearance would interfere with their family life in such a significant way that it would be disproportionate to require them to return to apply through the proper channels.

20. In the more recent case of *Younas* the Upper Tribunal reviewed the case law relating to the *Chikwamba* principle. The Upper Tribunal concluded that the mere fact that a person was likely to be granted entry clearance if they made an application from abroad was not sufficient. The Upper Tribunal emphasised that the individual circumstances of each case will need to be evaluated, taking into account the statutory provisions now set out in Part 5A of the Nationality, Immigration and Asylum Act 2002 (‘the NIAA 2002’) relating to the weight that should be given to the public interest in maintaining an effective system of immigration control.

21. The Upper Tribunal in *Younas* went on to consider four key questions when deciding the appeal. First, whether temporary removal would interfere with a person’s right to family life in a sufficiently grave way to engage the

operation of Article 8(1). Second, whether an application for entry clearance from abroad would be granted. The burden of proof was on the appellant. Third, whether there is a public interest in requiring a person to leave to apply for entry clearance from abroad, and if so, what weight should be placed on that public interest consideration. Fourth, is the interference with the person's right to family life justified and proportionate under Article 8(2).

22. Although the judge's brief findings did touch on some public interest considerations relating to the appellant's length of stay, and whether there were any additional matters going to the public interest, one can see from the above analysis of the case law that her findings did not adequately engage with the relevant legal questions.

23. Having found that there were no insurmountable obstacles to the appellant and her partner continuing their family life in Trinidad and Tobago, there was no analysis of whether temporary return for a few months would interfere with their family life in a sufficiently grave way as to engage with the appellant's right to family life under Article 8(1). There was no analysis of the weight to be given to the public interest in the context of the purpose of the Immigration Status requirement of the immigration rules or Part 5A of the NIAA 2002. The judge's findings at [29] amounted to a finding that the mere fact that the appellant is likely to be granted entry clearance is sufficient to negate the public interest. This approach was expressly disapproved in the recent case of *Younas*, which the First-tier Tribunal did not take into account. While many of the judge's findings were open to her to make, the analysis fell short in a number of respects when considered in the context of the relevant case law.

24. For the reasons given above, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The First-tier Tribunal's findings relating to the immigration rules were not challenge and are preserved. In so far as the decision considered an Article 8 balancing exercise 'outside the rules' that part of the decision is set aside and will need to be remade.

25. Having indicated this decision to Ms Lewis at the hearing she took time to consider whether she wanted to proceed to remake the decision that day or to come back on another day when she would have time to prepare further evidence and/or to instruct a legal representative. She confirmed that she would prefer to proceed.

26. However, when she began to explain the reasons why she did not think she could return to Trinidad and Tobago, even for a temporary period, her evidence strayed into matters that had not previously been raised in her witness statement. This put Mr Tufan in a difficult position. Having discussed the matter, it was decided that it was necessary to put back the hearing to another date so that Ms Lewis could prepare a statement explaining the impact that it would have if she was required to return for a

temporary period. The evidence that was given at the hearing shall be disregarded and will be started afresh at the next hearing.

27. There was some discussion at the hearing as to whether Ms Lewis' account of domestic violence in her former marriage is a 'new matter' that requires the Secretary of State's consent under section 85 NIAA 2002 before it can be considered by the Upper Tribunal. I note that the issue did appear to be raised and was considered by the First-tier Tribunal judge to some extent in her decision ([16], [19] and [21]). The judge considered the evidence to be vague and appeared to make a finding that there was insufficient evidence to show that Ms Lewis had a genuine fear of returning to Trinidad and Tobago. However, if the Upper Tribunal has to decide whether requiring Ms Lewis to return on a temporary basis would breach Article 8 of the European Convention, it would make no sense to artificially exclude matters that would be relevant to the assessment. Nevertheless, I have given an opportunity for the respondent to state her views on the matter in the case management directions below.

DIRECTIONS

28. **The appellant** (Ms Lewis) shall and serve a written witness statement setting out the reasons why she thinks that requiring her to leave the United Kingdom on a temporary basis to apply for entry clearance from abroad would interfere with her right to family life. The witness statement should be as detailed as possible with numbered paragraphs. It should be signed and dated. The witness statement should be sent to the Upper Tribunal and the Secretary of State at the email addresses outlined below no later than 14 days before the next hearing.

29. **The respondent** shall take into account the observations made at [28] above and her policy relating to 'new matters'. The respondent shall notify the Upper Tribunal within 21 days of the date this decision is sent whether the evidence already given in the First-tier Tribunal is considered to be a new matter or not, giving reasons. If it is considered to be a new matter, the respondent shall confirm whether consent is given for the Upper Tribunal to consider it.

30. **The parties** shall file and serve any further evidence that they wish to rely upon no later than 14 days before the next hearing.

31. Documents and submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of this decision) as the subject line. Attachments must not exceed 15 MB.

32. Service on the Secretary of State may be to [email].

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision will be remade at a resumed hearing in the Upper Tribunal

Signed M. Canavan Date 15 September 2022
Upper Tribunal Judge Canavan