Neutral Citation Number: [2025] EWCA Civ 189

Case No: CA-2024-000302

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER
UPPER TRIBUNAL JUDGE LANE
UI-2022-005006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2025

Before:

LADY JUSTICE KING
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WILLIAM DAVIS

- -

Between:

ARTESHAM BUTT	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Sohail Mohammed (instructed by **Kingston Law Limited**) for the **Appellant**
Christian Howells (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 29 January 2025

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Approved Judgment

This judgment was handed down remotely at 12 o'clock on 28 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. The Appellant ('A') applied to the Secretary of State for leave to remain as a spouse on 4 May 2021 ('application 2'). The Secretary of State refused application 2 in decision 2, dated 30 December 2021. A appealed to the First-tier Tribunal (Immigration and Asylum Chamber) ('the F-tT'). The F-tT allowed his appeal in determination 2, which was promulgated on 24 June 2022. The Secretary of State appealed to the Upper Tribunal (Immigration and Asylum Chamber) ('the UT'), with the leave of the UT. In determination 3, promulgated on 17 October 2023, the UT held the F-tT had erred in law in determination 2. The UT therefore allowed the appeal of the Secretary of State.

2. A now appeals against determination 3 with the permission of Arnold LJ. A relies on three grounds of appeal.
    1. The UT erred in its application of *Alam v Secretary of State for the Home Department* [2023] EWCA Civ 30; [2023] 4 WLR 17 ('*Alam*') to A's case. A relies, among other things, on the (correct) point that this court did not, in *Alam*, refer to the reasoning of the UT in *R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality)* [2015] UKUT 00189 (IAC); [2015] Imm AR 867. I will refer to that decision of the UT as '*Chen*'.
    2. The UT misunderstood the F-tT's reasoning about *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] 1 AC 1159 ('*EB (Kosovo)*').
    3. The UT erred in law in 'confusing the test for insurmountable obstacles (under the Immigration Rules) with the test of proportionality (with reference to *Chikwamba*) concerning temporary separation outside the Immigration Rules'.

3. The Secretary of State relies on a Respondent's Notice ('RN'), giving two reasons for upholding determination 3 in addition to those relied on by the UT.
    1. In its assessment of proportionality, the F-tT ignored a material consideration which section 117B(4)(b) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') required it to take into account.
    2. The relevant provisions of the Immigration Rules (HC 395 as amended) ('the Rules') required the F-tT, as part of that assessment, to ask whether A could show that there were exceptional circumstances making it unjustifiably harsh to refuse his application. The F-tT ignored that requirement.

4. For the reasons given in this judgment I would dismiss A's appeal. The UT was right to hold that the F-tT erred in law in allowing A's appeal. In short, the F-tT's approach, relying on the decisions in *EB (Kosovo)* and *R (Chikwamba) v Secretary of State for the Home Department* [2008] UKHL 40; [2008] 1 WLR 1420 ('*Chikwamba*') ignored several material developments in the law about article 8 of the European Convention on Human Rights (article 8') in immigration cases (as explained by this court in *Alam*).

In fairness to the F-tT, it was not helped by the parties' express agreement that this was 'a *Chikwamba* case' (paragraph 44 of determination 2).

5. I do not accept A's assertion, in paragraph 16 of his skeleton argument, that there is still confusion, after the decision in *Alam,* about the status of *Chikwamba*. *Alam* decides that the only case in which the reasoning in *Chikwamba* is potentially relevant now is if the Secretary of State expressly refuses leave to remain solely on the narrow procedural ground that the applicant must leave the United Kingdom to apply for entry clearance; and even then, it is necessary for the F-tT to make an overall assessment of the strength of the applicant's article 8 case. This case is not such a case. The reasoning in *Alam* leaves no scope for A's argument that *Chikwamba* applies if the effect of a refusal of leave to remain amounts, 'in substance' to a requirement to leave the United Kingdom and to apply for entry clearance from abroad. That argument coincides with one the grounds of appeal which this court dismissed in *Alam* (see paragraph 17, below).

6. On this appeal A was represented by Mr Mohammed, who drafted A's grounds of appeal and skeleton argument. The Secretary of State was represented by Mr Howells, who drafted the Secretary of State's skeleton argument. I thank both counsel for their help. I am particularly grateful to Mr Howells, as I explain in paragraphs 13 and 18, below.

The decisions in Chikwamba and in Alam

7. The reasoning in *Chikwamba* and in *Alam* is central to the grounds of appeal. It is therefore convenient to begin this judgment with a short summary of those two decisions. Neither party to the appeal suggested that the summary of *Chikwamba* in *Alam* is inaccurate, so in order to avoid making this judgment longer than necessary, I will rely on that summary, and on the reasoning in *Alam*.

Chikwamba

8. *Chikwamba* is summarised in paragraphs 12-17 of *Alam*. The appellant was a national of Zimbabwe. She came to the United Kingdom in 2002 and claimed asylum. The Secretary of State refused that claim but did not remove her immediately because of the conditions in Zimbabwe. She then married another Zimbabwean who had been granted asylum in the United Kingdom, and whom she had known since childhood. The Secretary of State refused her article 8 claim based on her marriage. The couple had a daughter in 2004. Her statutory appeals against that decision were dismissed, essentially because the Secretary of State had a policy of requiring people in her situation to return to their home country and to apply for entry clearance from there, on the assumption that a relatively short period of separation from her family was not a breach of article 8. This court also dismissed her appeal.

9. The House of Lords allowed her appeal. The leading speech, with which the other members of the Appellate Committee agreed, was given by Lord Brown. He dismissed her argument that a statutory appeal could never be dismissed on the ground that the appellant should be expected to leave the United Kingdom and apply for entry clearance from abroad (paragraph 34). He then considered when it could be appropriate to dismiss her appeal on that ground, which was 'altogether more difficult' (paragraph 35). He quoted the relevant policy in paragraph 37. He guessed that the purpose of the policy might be to deter people from entering the United Kingdom without the appropriate entry clearance (paragraph 41). He did not think that that purpose was 'necessarily

objectionable'. It would be reasonable and proportionate in some cases, for example, if the appellant had 'an appalling immigration history' and would only have to wait a short time to get entry clearance. The reason why the appellant had come to the United Kingdom would also be relevant, as would delay by the Secretary of State, and the likely length and extent of any temporary disruption to family life in the meantime.

10. He observed that the policy seemed to apply to all article 8 cases, whether or not the Rules also applied. He considered that it was only 'comparatively rarely, certainly in family cases involving children', that an article 8 case should be dismissed on the ground that it would be proportionate and more appropriate to require an appellant to apply for entry clearance from abroad (paragraph 44). He concluded that there was no doubt that, in the long run, this family would have to be allowed to live together in the United Kingdom. There was only one right answer, in his view, to the rhetorical question he asked at the end of his speech. He clearly did not consider that effective immigration control required the appellant and her daughter to return to Zimbabwe, particularly when returns to Zimbabwe had been suspended, and conditions there were 'harsh and unpalatable', for only a few months, before returning to the United Kingdom and to her family life, which would have been 'gravely disrupted' in the meantime (paragraph 46).

Alam

11. In *Alam* this court considered two appeals by Bangladeshi nationals. They had both arrived in the United Kingdom with leave to enter for temporary purposes and had then overstayed for significant periods. They then applied for leave to remain, relying on a relationship with a British citizen wife or partner which had started or continued when the appellant in question was in the United Kingdom unlawfully. In both cases, the appellants' statutory appeals failed. The relevant tribunal had found, in particular, that the appellants could continue their family life abroad. They then appealed to this court. The main issue in the appeals was whether the decision of the House of Lords in *Chikwamba* had any effect in such cases.

12. It is therefore obvious that there are at least three important differences between the facts of the cases which this court considered in *Alam* and the facts in *Chikwamba*. First, in *Alam*, the tribunals had found as a fact that family life could continue abroad, whereas it could not in *Chikwamba*, because the appellant's husband had been granted asylum in the United Kingdom. Second, the family life in *Chikwamba* was enjoyed by a husband and wife and their young child. There were no children in the *Alam* appeals. Third, in neither of the appeals in *Alam* did the Secretary of State refuse the application on the sole ground that the appellant must leave the United Kingdom and apply for entry clearance from abroad.

13. I summarised the legal framework in paragraphs 7-10. I did not, in paragraph 11, refer to all the relevant provisions of the Rules, as the comprehensive submissions from Mr Howells in this appeal showed. The missing relevant provision of the Rules is paragraph GEN 3.2. That paragraph requires a decision-maker who has refused entry clearance or leave to remain under the relevant provisions, including paragraph EX.1, to consider 'on the basis of information provided by the applicant, whether there are exceptional circumstances which would render a refusal of …leave to remain a breach of Article

8…because such refusal would result in unjustifiably harsh consequences for the applicant, [or] their partner…'

14. In paragraphs 25-33, I analysed the decision of this court in *Hayat v Secretary of State for the Home Department* [2012] EWCA Civ 1054; [2013] INLR 17. In the second appeal, this court said that the UT had rejected an argument that the Secretary of State had refused leave to remain on the ground that the appellant should leave the United Kingdom and apply for entry clearance, and the F-tT had not based its decision on such an argument, but on the ground that it was reasonable for him to return to Mauritius and continue his private life there (paragraph 32).

15. In paragraph 33 of my judgment I noted that one of the grounds of appeal in that case had been that the only real reason why the claimant was being sent back to Mauritius was a procedural one; that is, so that he could apply for entry clearance, an application which, it was submitted, would succeed. 'That' the argument ran, 'would be to impose "a wholly unnecessary and formal requirement which achieves no legitimate objective so far as immigration control is concerned"'. Elias LJ rejected that argument. It was based on a misreading of the decision of the F-tT. The F-tT had not made its decision 'on a procedural basis at all'. The F-tT, rather, had considered the article 8 claim on its merits and had rejected it.

16. In paragraphs 37-43, I referred to two cases in which the UT had considered *Chikwamba*. As Mr Mohammed rightly pointed out in his submissions, those cases did not include *Chen*, which I summarise below in paragraphs 22-30. I also mentioned two decisions of the Supreme Court which were referred to *Chikwamba*. They were *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799 and *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; [2017] 1 WLR 823 ('*Agyarko*'). Part 5A of the 2002 Act was not in force at the material times, and the Supreme Court considered the appeals in *Agyarko* in the context of recent amendments to the Rules, which, for the first time, had made express provision for the treatment of article 8 claims by decision-makers. There was a passing reference to *Chikwamba* in paragraph 34 of Lord Reed's judgment in *Hesham Ali*, and in paragraph 51 of his judgment in *Agyarko*. At least two relevant points are clear from his judgment in *Agyarko*. First, he considered that if the test of insurmountable obstacles in the Rules was not met, it would not be disproportionate to refuse leave to remain under the Rules (paragraphs 43-48). Second, less weight would be given to family life established in the knowledge that one partner's presence in the United Kingdom was unlawful or precarious. Leave to remain might be granted outside the Rules in exceptional circumstances, but they had to be compelling and to produce unjustifiably harsh consequences which would make removal disproportionate. That was the test in the Instructions pursuant to which decision-makers then considered article 8 applications outside the Rules. Lord Reed gave *Chikwamba* as an example of a case in which, if a person living unlawfully in the United Kingdom was 'certain' to be granted entry clearance from abroad, 'there might be no public interest in his removal' (paragraph 51).

17. Ground 1 of the appeal in the case of one of the two appellants in *Alam* was that the tribunals had erred in law by failing to understand the flexibility inherent in section 117B of the 2002 Act. There was, it was argued, no public interest in dismissing his appeal because even if he could not get leave to remain from within the United

Kingdom, if he were to leave the United Kingdom and apply for entry clearance, he would be certain to be given it. His appeal should therefore succeed 'in accordance with the *Chikwamba* principle' (paragraphs 99-101). The other appellant argued, among other things, that the UT erred in his case in concluding that *Chikwamba* cannot apply if the couple can be expected to continue their family life abroad, as long as he was certain to be given entry clearance if he applied from abroad, even if he was here unlawfully when the relevant relationship was formed (paragraph 103).

18. I considered those arguments in paragraphs 106-114 of my judgment. I said that in *Chikwamba*, the Secretary of State had met a very strong article 8 case by relying on 'an inappropriately inflexible' policy. *Chikwamba* does not decide any wider point than that the Secretary of State cannot resist a strong article 8 claim on that basis alone. I added that three further points should be borne in mind when *Chikwamba* is cited nowadays. The case law on article 8 has developed significantly since then; Part 5A of the 2002 Act has been enacted; and, whereas there were then no provisions in the Rules about article 8, there are now. They include Appendix FM (and paragraph GEN.3.2, as Mr Howells rightly reminded the court in this appeal). Those points meant that *Chikwamba* does not state a rule of law which would bind a court or tribunal now in its approach to a case in which an applicant applies to stay in the United Kingdom relying on his article 8 rights.

19. I added that Lord Brown had not suggested that an appeal could never be dismissed on the ground that the appellant should be required to leave the United Kingdom and to apply for entry clearance from abroad. The Secretary of State could insist on removal in some cases. He said that the family in that case would have to be allowed to live together eventually and that they could not resume their family life in Zimbabwe because the father was a recognised refugee. None of the other cases went further than to comment that, if an application for entry clearance is bound to succeed, that might make removal disproportionate. Other decisions showed that, even if an application was refused on the sole ground that the applicant should be required to leave the United Kingdom and to apply for entry clearance, the overall strength of the article 8 had to be assessed.

20. The applications of the two appellants in *Alam* could not succeed under the Rules. The courts must give great weight to the Rules. The fact that there were no insurmountable obstacles to family life abroad was 'a further powerful factor militating against the article 8 claims', as was the fact that the relationships were formed when each appellant was in the United Kingdom unlawfully. The tribunals were obliged to take those factors into account, and entitled to decide that the public interest in immigration control outweighed the appellants' weak article 8 claims, and to hold that removal was therefore proportionate.

21. I summarised my three general conclusions in paragraph 6.

    1. The decision in *Chikwamba* 'is only potentially relevant on an appeal when an application for leave to remain is refused on the narrow procedural ground that that applicant must leave the United Kingdom in order to make an application for entry clearance.
    2. Even in such a case, a full analysis of the article 8 claim is necessary. If there are other factors which tell against the article

8 claim, they must be given weight, and they may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance.

3. A fortiori, if the application is not refused on that procedural ground, a full analysis of all the features of the article 8 claim is always necessary.

R (on the application of Chen) v Secretary of State for the Home Department [2015] UKUT 00189 (IAC) ('Chen')

22. Ms Chen applied for judicial review of a decision of the Secretary of State refusing her application for leave to remain on article 8 grounds. She was a Chinese citizen. She relied on her marriage to a British citizen. The Secretary of State did not, in that decision, consider whether or not she could apply for entry clearance from China. The Secretary of State refused her application on the ground that there were no insurmountable obstacles to family life in China, applying paragraph EX.1 of the Rules. The UT gave permission to apply for judicial review of that decision. The Secretary of State then made a further decision, elaborating on the absence of insurmountable obstacles, and also considering the possibility of an application for entry clearance.

23. The UT allowed Ms Chen to challenge the second decision. The issue about that decision was whether the Secretary of State had 'unlawfully used an exceptionality test or a threshold of exceptionality in applying *Chikwamba*…' when she considered a possible application for entry clearance. In paragraph 20, the UT acknowledged that, as at 2015, the Rules did not 'provide in advance for every nuance in the application of Article 8 to individual cases'. The UT referred to paragraph 64 of the judgment of Underhill LJ in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74. Underhill LJ had said that 'There is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules'.

24. In paragraph 22, the UT recorded the parties' agreement that 'in any case where a question arises as to whether it is disproportionate to expect an individual to return to his or her country to make an application for entry clearance, this falls for consideration outside the Rules'.

25. The UT dismissed Ms Chen's claim. It referred to the decision of this court in *Hayat* (see paragraphs 14 and 15, above) in paragraphs 27-29. It rejected the argument that the Secretary of State had unlawfully applied a test or threshold of exceptionality in the second decision. What was meant by the word 'exceptional' was that 'something very compelling (which will be exceptional) is required to outweigh the public interest in removal'. The UT referred to the Secretary of State's guidance for caseworkers assessing article 8 cases outside the Rules, which provided that 'exceptional' meant 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate…' (paragraph 30). In paragraph 31, the UT said that the mere use of the word 'exceptional' was not enough to show that the Secretary of State had acted unlawfully in assessing a case outside the Rules. 'An applicant must point to a defective process of reasoning which shows that the test of exceptionality was in fact applied'.

26. The UT concluded that the Secretary of State had plainly considered the question of proportionality, for the reasons given in paragraph 32, and rejected the submission that she had unlawfully applied a test of exceptionality. In paragraphs 34-40 the UT considered an argument, based on *Chikwamba*, that it will only rarely be proportionate to expect a foreign national who is enjoying family life in the United Kingdom to leave and apply for entry clearance from abroad. The UT referred to a decision of the Administrative Court from which it inferred that it was 'misconceived to suggest, in reliance on *Chikwamba*, that it is only rarely that it will be proportionate to expect a claimant to make an application for entry clearance from abroad *irrespective of his or her individual circumstances*' (paragraph 35, original emphasis). The UT referred to paragraph 42 of *Chikwamba*.

27. The UT concluded (provisionally) that if an applicant could show both that and application for entry clearance would be granted and that there would be a significant interference with family life by a temporary removal, 'the weight to be accorded to the formal requirement of obtaining entry clearance…is reduced'. The UT added that this would be easier to show in cases involving children, 'than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established while the immigration status of one party was "precarious"' (paragraph 39). I use the word 'provisionally' in the first sentence of this paragraph because, as the UT also said in paragraph 39, it had not heard argument on this point. It decided the case on a different basis.

28. The UT had not heard argument on the Secretary of State's contention that if an application for entry clearance was unlikely to succeed, the '*Chikwamba* principle' could not apply. The UT added, 'To state the obvious' if a person applies for leave to remain based on article 8, 'the Secretary of State is only obliged to make a decision on that application'. She is not obliged to consider whether a later application for entry clearance would succeed, although she could do so (paragraph 40).

29. Ms Chen had not shown that her removal would interfere with her family life. She had not shown that there would be insurmountable obstacles to family life in China. She and Mr Chen had no children. There was no relevant evidence (paragraph 41). She had relied solely on *Chikwamba* and other cases. Such evidence as there was plainly suggested that it would have been proportionate to require her to leave the United Kingdom and apply for entry clearance. As against that, the parties knew that Ms Chen's leave had expired, and entered into the relationship 'in the full knowledge' that she did not have leave and that her status was precarious. 'Weighing all the factors in the balancing exercise, there was plainly only one answer, on any legitimate view' (paragraph 43).

30. In paragraph 24 the UT had referred to two questions which the decision which I have just summarised made immaterial. The second question, which the UT had raised with the parties, was whether, if it was accepted that there were no insurmountable obstacles to family life abroad, it would be a breach of article 8 to require an applicant to leave and to apply for entry clearance. Neither counsel had addressed the UT on that issue. The UT was inclined to the view that there might well be cases in which there were no insurmountable obstacles to family life abroad but the requirement to leave and apply for entry clearance might be disproportionate. The UT referred to paragraph 18 of

Hayat. I note that in that paragraph, Elias LJ seems to have in mind a situation in which leave to remain was refused with no consideration of the underlying merits of the article 8 claim, and solely on the basis that the applicant should be required to leave the United Kingdom and to apply for entry clearance.

The facts in this appeal

31. A is a citizen of Pakistan. He was born on 22 March 1979. He entered the United Kingdom in 2006 on a 'visit visa' which was valid until 7 June 2006. There was nothing to stop him from leaving the United Kingdom and returning to Pakistan when his visa expired, but he chose not to. He chose, instead, to overstay; and to overstay for many years.

Application 1

32. A made an article 8 application on 3 December 2016 ('application 1'). The Secretary of State refused application 1 in March 2018 in decision 1. A appealed. The F-tT dismissed his appeal in determination 1, after a hearing on 3 October 2019.

Determination 1

33. The F-tT summarised the reasoning in decision 1. A had failed to meet the 'eligibility immigration status requirements' as he had been in breach of immigration laws for more than 28 days (paragraphs E-LTRP.2.1-2.2). The Secretary of State did not accept that there would be insurmountable obstacles to the continuing of family life outside the United Kingdom (paragraph EX.1). The requirements of paragraph 276ADE were not met as there were no exceptional circumstances which could result in unjustifiably harsh consequences. The F-tT referred to the decision of the Supreme Court *Agyarko* (paragraph 24).

34. A's case was that he and his wife could not go back to Pakistan 'because of their respective families'. The F-tT referred again to paragraph 276ADE, noting that it was 'not invited to find' that its requirements were met (paragraph 25). The F-tT referred to various aspects of the evidence about life in Pakistan in paragraphs 26-31, and made various findings about the extent to which A or his wife would be at risk in Pakistan. In paragraph 32 it said that there was no 'satisfactory independent evidence' to show that A or his wife's family was unhappy about their marriage. After several other intermediate findings, the F-tT held (paragraph 35) that it was 'satisfied that [A] and his sponsor could re-locate, if necessary, to part of Pakistan where they are not known'. The F-tT was 'not persuaded that any difficulties could properly be described as very significant and entailing very serious hardship for the parties as set out in *Kaur v SSHD* [2018] EWCA Civ 1423. In those circumstances, section EX.1 does not apply and I cannot uphold this appeal under the Immigration Rules' (paragraph 35).

35. The F-tT then considered whether there were 'any exceptional circumstances outside the Immigration Rules which would result in unjustifiably harsh consequences for [A] and his spouse' (paragraph 36). The F-tT applied the test in *R (Razgar) v Secretary of State for the Home Department (No 2)* [2004] UKHL 27; [2004] 2 AC 368 (paragraph 36). The only issue was proportionality. The F-tT also had to consider the public interest criteria in section 117B of the 2002 Act. It could only attach little weight to A's relationship or to his private life. The F-tT accepted the sponsor's evidence that she was

'fully aware of [A's] lack of status before their marriage'. That was 'strong evidence' that decision 1 was proportionate. The F-tT added, 'The decision in [*Chen*] reinforces section 117B(4)' (paragraph 38).

36. The F-tT recorded an argument based on *EB (Kosovo)* and the Secretary of State's alleged delay in removing A. The F-tT said that there was 'no satisfactory evidence… to show that [the Secretary of State] knew [A's] whereabouts so as to do so. He only surfaced in 2016 to make the current application' (paragraph 39). The F-tT found that A could return to Pakistan, permanently, or temporarily, and apply for entry clearance. His sponsor could go with him, on the F-tT's findings. There was no satisfactory evidence to show that he would have to wait 'disproportionately long'. The F-tT was 'not persuaded that this is a *Chikwamba* situation'. A spoke English, but it was not clear that he had given the Entry Clearance Officer the evidence to show that. The Entry Clearance Officer would also have to consider whether A's exclusion was conducive to the public good under Section S-EC. 'He has not shown that a grant of entry clearance would be purely procedural' (paragraph 40). A had failed to show that there were any compelling circumstances which would result in 'unduly harsh consequences if he were refused leave to remain'. The F-tT was satisfied that decision 1 was proportionate and dismissed A's appeal.

Application 2 and decision 2

37. A then made a second application ('application 2'). The Secretary of State refused application 2 in decision 2. In short, A did not meet any of the requirements of the relevant provisions of the Rules. Of particular relevance to this appeal, the Secretary of State was not satisfied that A had shown that he and his partner had lived together for at least 2 years before the date of application 2, A had been in the United Kingdom without valid leave for 5394 days, and there were no exceptional circumstances which would result in unjustifiably harsh consequences for him or for his partner if leave were refused.

Determination 2

38. A appealed against decision 2. The F-tT heard his appeal on 23 June 2022. Both parties were represented. In paragraphs 5-15 the F-tT summarised A's case. The F-tT referred to a finding in determination 1 that A and his partner were in a genuine and subsisting relationship. The F-tT referred to the difficulties which applicants without status have in providing documents which prove that they have been living together (paragraph 6). A's case by reference to paragraph EX.1 and EX.2 was that he and his wife would face insurmountable obstacles to their family life continuing outside the United Kingdom (paragraph 8). The F-tT quoted A's skeleton argument at length.

39. The F-tT recorded that A relied on *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; [2009] 1 AC 115, *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 ('*Huang*'), *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5; [2009] Imm AR 436, and *EB (Kosovo)* (paragraph 9). A also relied on *(Chikwamba)* and *Agyarko*, among other authorities (paragraphs 9 and 11).

40. The F-tT referred to section 117B of the 2002 Act. A speaks English and is financially self-sufficient. 'Despite section 117B(6) …which specifies that little weight should be

attached to [A's] relationship developed whilst in the UK unlawfully, [A] relies on the guidance in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536 ('*Rhuppiah*') which made it clear that there is an inbuilt flexibility to this consideration and the requirement to attach little weight to this consideration and that this allows the Tribunal to apportion appropriate weight on the basis of the individual circumstances of the case'. A had been in the United Kingdom for 16 years which was only four years short of the 20 years needed 'for leave to remain under the alternative route'.

41. The F-tT recorded that the Secretary of State refused the application because A did not meet the 'immigration status requirements and would not face insurmountable obstacles in accordance with EX.1 of Appendix FM. She relied on *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 702; [2003] Imm AR 1 ('*Devaseelan*') in relation to determination 1. A submitted that determination 1 could be departed from because he was putting his case differently in this appeal (paragraph 13). The F-tT did not confront this argument in determination 2.

42. A accepted the findings in determination 1. The F-tT had decided it was not a *Chikwamba* case for two reasons. First, A did not satisfy the English language test. A did now satisfy that requirement, as the Secretary of State accepted. The second reason was that any Entry Clearance Officer would have to consider A's suitability, and a grant of entry clearance could not be guaranteed. The F-tT in determination 1 had failed to acknowledge that the Secretary of State had not relied on that point. The Secretary of State accepted now that A would not 'fall for refusal on that basis'. A submitted that it was therefore a *Chikwamba* case. A requirement that he return to Pakistan to apply for entry clearance would be unreasonable and disproportionate (paragraph 14). The refusal of leave to remain was therefore disproportionate (paragraph 15).

43. The F-tT summarised the Secretary of State's case in paragraphs 16-27. A did not meet the requirements of Appendix FM, section R-LTRP. A had not provided evidence that he and his partner had been living together for two years. Nor did he meet the immigration status requirement. He had not had leave to remain for 5394 days. Paragraph 39E did not apply (paragraphs 19 and 20). He did not meet the financial requirement but did meet the English language requirement.

44. The Secretary of State did not accept that A would face very significant obstacles to integration in Pakistan (see paragraph 24). Nor did she accept that there were exceptional circumstances in accordance with GEN.3.2 of Appendix FM which would make a refusal a breach of A's article 8 rights because it would result in unjustifiably harsh consequences (paragraph 25).

45. Having reviewed determination 1, the Secretary of State now accepted that A and his partner were in a genuine and subsisting relationship (paragraph 27). But there was no reason for departing from the conclusions in determination 1 that the claim failed under EX.1 and outside the Rules (paragraph 27).

46. The F-tT summarised the law in paragraphs 28-39. It referred, among other things, to article 8, paragraphs EX.1 and GEN.3.2 of the Rules and to section 117B of the 2002 Act. It said that it was only necessary to refer to article 8 outside the Rules where 'there

are compelling circumstances which are outside their contemplation [*SS (Congo)* [2015] EWCA Civ 387]' (paragraph 37).

47. The F-tT recorded, in paragraph 44, that both representatives acknowledged that 'contrary to the conclusions [in determination 1] this was now a *Chikwamba* case with reference to *Chen*'. The F-tT said that they had agreed that there were three issues.

    1. 'Does paragraph EX.1 and EX.2 apply in that [A] and his wife would face insurmountable obstacles to family life continuing outside the UK?'
    2. Were there exceptional circumstances such that a refusal would result in unjustifiably harsh consequences?
    3. Was the refusal a disproportionate interference with A's article 8 rights?

48. In paragraphs 47-52, the F-tT considered the first issue. It decided that issue against A (paragraph 52).

49. The next heading in determination 2 was 'Outside of the Rules – Article 8 ECHR'. The F-tT seems to have overlooked the second issue which it had recorded the parties had agreed that it was necessary for it to decide (see paragraph 47, above).

50. In paragraph 59, the F-tT found that A's overstaying 'for such a significant period weighs heavily against him'. While there was no evidence that the Secretary of State knew where A was before 2016, 'there has been no opportunity taken to remove [A] from the UK' (paragraph 62). In paragraph 63, the F-tT questioned whether there was 'any public interest in requiring [A] to return to Pakistan to apply for entry clearance in these circumstances'. There was a clear public interest in removing A given his immigration history. 'As noted in *Chikwamba* the purpose of doing is to deter others from entering the UK and remaining in these circumstances. Another purpose is to ensure the effective maintenance of immigration control, as stated in section 117B of the 2004 Act' [sic] (paragraph 65). 'Also against' [A] was that he had developed the relationship with his partner when he knew he had no 'legal immigration status'. The F-tT added, 'This point, however, is countered by the points made in *EB (Kosovo)*…' (paragraph 66).

51. There were several factors in A's favour. He now met the requirements for entry clearance, were he to apply from Pakistan. 'This weighs in [A's] favour noting that [the Rules] are an expression of the Secretary of State's intention of how immigration policy should be implemented having regard to Article 8 ECHR'.

52. In a confused passage the F-tT then considered what would happen if A's wife were to move to Pakistan temporarily, or permanently. The F-tT listed various difficulties which A's partner would have if she were required to go to Pakistan, even temporarily. She would not 'relocate to Pakistan to maintain her marriage with [A] even on a temporary basis. The consequences would be disproportionately severe' (paragraph 72).

53. Then the F-tT 'therefore' considered the impact if they were required to separate 'temporarily' (paragraph 73). The F-tT seemed prepared to assume that it would take six months for A to apply for and be granted entry clearance. The F-tT nevertheless questioned whether a six-month separation would be 'proportionate'. Despite the F-

tT's previous comments, 'there is the potential for something to happen during the application process'. There might need to be an appeal, which could take years, while A and his wife were separated. The F-tT could not accept that it was 'proportionate to require A to return to Pakistan to apply for entry clearance in these circumstances…I find that the impact on [A] and the Sponsor during a potentially lengthy separation cannot be justified' (paragraph 75). The F-Tt had 'weighed all the factors considered above in the balance both for and against [A]'. Decision 2 was not proportionate. 'There is a public interest in removing [A] due to his past immigration history however I find that this is outweighed by competing factors as highlighted above' (paragraph 76).

Determination 3

54. The Secretary of State appealed to the UT, with the leave of the UT. That grant of leave was not restricted. The Secretary of State's grounds of appeal were not in the documents for this appeal, but it has not been suggested that the UT went beyond them in determination 3.

55. The reasoning in determination 3 is commendably succinct. The UT dismissed A's procedural objection to the Secretary of State's appeal in paragraphs 2-4. In paragraphs 5-6, it referred to paragraphs 2-4 and 44 of determination 2.

56. In paragraph 7 it said that this court handed down its judgment in *Alam* in January 2023. The UT said *Alam* 'pre-dates' the promulgation of determination 2. I think this is a slip for 'post-dates', because the F-tT then added that '*Alam* states the law as it existed at the date of promulgation'.

57. The UT then quoted paragraph 106 of *Alam*. Its comment on paragraph 106 was 'The very limited application of *Chikwamba* …is now apparent'. In paragraph 8, the UT said that the F-tT and the parties had 'proceeded from on [sic] a false premise, namely the general application of the 'principles' of *Chikwamba* which the Court of Appeal has now clarified in *Alam*'. The UT said that the judge in the F-tT 'may be excused for failing to anticipate the judgment in *Alam* but I find that his entire reasoning is coloured by his understanding, or rather misunderstanding, of *Chikwamba*' (paragraph 8).

58. In paragraph 9, the UT added that it agreed with the Secretary of State that the F-tT 'fell into further error' in paragraph 66 (see paragraph 50, above). The Secretary of State submitted that the F-tT held 'in terms' that section 117B(4) was 'countered' by *EB (Kosovo)*. The Secretary of State submitted that that amounted to a 'disapplication of the caselaw [that cannot, in any event displace an Act of Parliament]'. The effect of that approach was that a poor immigration history and a refusal to comply with the expectation that he should return to Pakistan at the expiry of his leave displaced 'the statute to benefit [A's] own poor behaviour'. It was submitted that that was a material error of law. The UT agreed. The F-tT had wrongly applied the statutory provisions by finding that behaviour which Parliament had manifestly intended should count against [A] should be 'countered', or 'in effect, nullified' (paragraph 10).

59. The UT's third reason for setting aside determination 2 was that, possibly as a result of incorrect reliance on *Chikwamba*, the F-tT failed to explain why A's wife, who, the F-tT found, did not face insurmountable obstacles to returning to Pakistan, should not be

expected to move there to continue her family life with him. The F-tT's failure to 'address this fundamental question vitiates [its] analysis' (paragraph 11).

60. The UT set aside determination 2. It remitted the appeal to the F-tT, with no preserved findings of fact.

Submissions

61. Mr Mohammed made his submissions tenaciously and with good humour. He argued, on ground 1, that the F-tT applied *Chikwamba* correctly, 'on the basis of *Alam*', while acknowledging that *Alam* was decided after determination 2. His submission was that, in substance, this was a *Chikwamba* case by the time it reached the F-tT, because one of the Secretary of State's reasons for refusing application 2 had fallen away by then. The effect of decision 2 was that A had to leave the United Kingdom and apply for entry clearance if he wished to continue his family life with his partner. By the date of the hearing in the F-tT, A satisfied all the requirements of EX.1 except the immigration status requirement. Indeed, the parties had agreed that that was the position, as the F-tT recorded in paragraph 44 of determination 2 (see paragraph 47, above). He accepted that, if that agreement was incorrect, it did not bind this court. He contended, however, that the agreement was correct. Moreover the F-tT had correctly balanced the pros and cons of removal.

62. On ground 2, Mr Mohammed argued, correctly, that *EB (Kosovo)* was referred to relatively recently, with approval, by the Supreme Court in paragraph 52 of *Agyarko*. He was not able, however, to explain how a statement in a decision of the Appellate Committee could 'counter' a later statutory provision. His submission was that in deciding what effect to give to section 117B(4), the F-tT was entitled to rely on the statements in *EB (Kosovo)* about the potential impact of delay on article 8 rights. He was asked whether the delay in this case meant that the private life in this case which was established when A was in the United Kingdom unlawfully should be given more than 'little weight'. His initial submission was that A had been reporting to the Secretary of State for years and that the relevant delay was a period of ten years. He retreated from that submission when reminded what the F-tT had found in paragraph 39 of determination 1 (see paragraph 36, above, a passage acknowledged in paragraph 62 of determination 2; see paragraph 50, above). Mr Howells also told us, on instructions, that the Secretary of State had no record of any reporting by A during the period when he was overstaying. Mr Mohammed eventually conceded that the delay was not great, but that there nevertheless had been delay. He also accepted both that the delay referred to in *EB (Kosovo)* is delay in the decision-making process and that, at any stage in the history, A could have chosen to return to Pakistan.

63. Mr Mohammed argued, on ground 3, that although there were no insurmountable obstacles to family life in Pakistan, A's removal could still be disproportionate. The UT had not considered that point in A's case. He referred to *Chen*. It established, he said, that removal could be disproportionate even where there were no insurmountable obstacles. William Davis LJ pointed out that Upper Tribunal Judge Gill had dismissed the application for judicial review in that case on other grounds. While, therefore, she had considered that argument, what she said about it was not necessary to her decision. Mr Mohammed's answer was to repeat that *Chen* showed that removal could be disproportionate even in the absence of insurmountable obstacles.

64. He accepted that the F-tT had not, in determination 2, expressly applied the test of unjustifiable harshness, but said that the reference (in paragraph 64 of determination 2) to paragraph '86' of *Lal v Secretary of State for the Home Department* [2019] EWCA Civ 1925; [2020] 1 WLR 858 showed that the F-tT was aware of that test. I note that the reference to paragraph '86' is a mistake. The relevant paragraph of *Lal* is paragraph 68, and it does, indeed, refer to the test of unjustifiable harshness.

65. In his reply, Mr Mohammed submitted that it was open to the F-tT to do a freestanding assessment of proportionality outside the Rules. He accepted that *Chen* was decided before paragraph GEN.3.2 was brought into the Rules. There is an 'in-built flexibility' in the scheme. The decision in *Huang* had 'done away with exceptionality'. Even if, per *Agyarko*, the relevant provisions of the Rules are compatible with article 8, they do not cater for every circumstance. Lord Reed made it clear in paragraph 48 of *Agyarko* that the court must make an independent decision about the compatibility of a particular decision with article 8, even if, in general, it is not obvious why, in the absence of insurmountable obstacles, or exceptional circumstances (as defined) it would be incompatible with article 8 to refuse leave to remain. He accepted that 'strong factors' would be necessary to tip the balance in such a case.

66. He added, finally, that the two appeals in *Alam* were not comparable with this case, and that the F-tT had section 117B(4) in mind, as it referred to section 117B(4).

67. In his excellent submissions Mr Howells argued that *Chikwamba* was a case in which the relevant family life included a child, there were insurmountable obstacles to family life in Zimbabwe, and the Secretary of State's only ground for resisting the appeal was to rely on an inappropriately inflexible policy. The relevant framework has also developed significantly since *Chikwamba* was decided. There is now a complete code for article 8 cases in the Rules so that it will rarely, if ever, be necessary to decide an article 8 case outside the Rules. He referred to paragraph EX.1 and GEN.3.2. The Rules now provide for an individual assessment of each case by reference to article 8. The Supreme Court, in paragraphs 42, 44, 45 and 48 of *Agyarko*, held that the relevant Rules and Instructions (as they then were) were compatible with article 8. Those Instructions are now in paragraph GEN.3.2. If the provisions of the Rules are not now met, 'something compelling' is required to outweigh the public interest in immigration control. The approach of Sales LJ to section 117B(4) was (as regards private life) that it could be overridden 'in an exceptional case by particularly strong features of the private life in question'. That was expressly approved by Lord Wilson in paragraph 49 of *Rhuppiah*.

68. It is necessary for the F-tT expressly apply the statutory requirement in section 117B(4) when it assesses proportionality (see paragraph 49 of *Secretary of State for the Home Department v SU (Pakistan)* [2017] EWCA Civ 1069; [2017] 4 WLR 175, per David Richards LJ).

69. Mr Howells accepted that *EB (Kosovo)* and *Chikwamba* could still be relevant under the new framework, but only to the extent that reliance on either could support an argument that there were compelling or exceptional circumstances which enabled the F-tT to take advantage of the limited flexibility which is inherent in section 117B(4) as explained by the Supreme Court in *Rhuppiah*.

70. The F-tT had not assumed, Mr Howells explained, that the parties' agreement that this was 'a *Chikwamba* case with reference to *Chen*' automatically meant that A's appeal should succeed (see paragraph 44 of determination 2). That was clear from the three issues, which, the parties were recorded as having agreed, it was necessary for the F-tT to decide. He added that the Home Office Presenting Officer had been wrong to accept that an application for entry clearance would have succeeded. Part 9 of the Rules applies to applications for entry clearance, as it does to other applications, as is clear from the Secretary of State's guidance to decision-makers dealing with the refusal of, among other things, entry clearance 'on the grounds of a previous breach of an immigration law'. For this purpose, overstaying is a breach of an immigration law (p 6 of that guidance).

71. He pointed out that, despite the terms of paragraph 44 of determination 2, the F-tT had jumped from the first to the third of the agreed issues, and had simply failed to consider the impact of paragraph GEN.3.2. of the Rules. The passing reference to *Lal* did not mend that hole. The point being made in paragraph 68 of *Lal* was that, in contrast to the test of insurmountable obstacles, 'The essential difference' between that test and the test posed in paragraph GEN.3.2 '(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 that against the strength of the public interest in such refusal in all the circumstances of the particular case'.

72. He further submitted that the F-tT's speculation about what might go wrong with a hypothetical application for entry clearance was 'completely inappropriate'. The whole point about *Chikwamba* is that it can only apply to a case in which an application for entry clearance is going to succeed and the only question is how the long that process will take.

73. He made four further submissions about determination 2.

1. The F-tT's jump from agreed issue 1 to agreed issue 3 (see paragraph 47, above) meant that the F-tT did not appreciate that paragraph GEN.3.2 required it to consider whether or not there were exceptional circumstances which would make a refusal a breach of article 8 because it would have unjustifiably harsh consequences, and did not consider that question.
2. It did not 'cite' section 117B(4) in its proportionality assessment or appreciate that the test for departing to any extent from section 117B(4) was whether there were 'compelling reasons', for doing so. It did not therefore ask itself that question.
3. It did not treat section 117B(4) as a starting point.
4. It did not factor into its reasoning on agreed issue 3 its conclusion that there were no insurmountable obstacles to family life in Pakistan. That, in itself, was a powerful factor against the conclusion that removal would be disproportionate.

74. The UT had been right, therefore, on ground 1, to conclude that the F-tT had 'proceeded from a false premise when applying the principles in *Chikwamba*'. The points in *EB (Kosovo)* are now to be applied in a different legislative framework, and against a scheme of express provisions in the Rules which deal with article 8.

75. The UT had also been correct to hold, on ground 2, that the F-tT had erred in holding, either that the public interest in removal, or that the effect of section 117B(4) of the 2002 Act, was 'countered' by the points in *EB (Kosovo)*. Mr Howells submitted that, as a result of the statutory bar on removal in section 78 of the 2002 Act, there were only five months between 11 December 2020, the date when A's appeal rights were exhausted after decision 1, and 4 May 2021, when he made application 2. Further, the relevant paragraph of the Rules required A and his partner to have been living together for at least two years. That meant that a delay of at least two years between the formation of the qualifying relationship (at a time when A was in the United Kingdom unlawfully) and a decision by the Secretary of State on such an application was 'baked in'. Further, the F-tT had erred by counting the same delay for two purposes (under section 117B(1) and under section 117B(4)).

76. The UT had not erred on ground 3. The F-tT had both held that there were no insurmountable obstacles to family life in Pakistan and that separation for six months would be disproportionate. The UT was therefore right to say that the F-tT had failed to explain why A's partner could not move to Pakistan with A. The UT had not unlawfully conflated paragraph EX.1 and proportionality. Lord Reed had considered whether EX.1 and the Instructions which are now reflected in paragraph GEN3.2 were compatible with article 8 in paragraphs 46-48 of *Agyarko*, and had concluded that they were.

77. As a coda to his submissions, after Mr Mohammed had made his submissions in reply, Mr Howells helpfully drew our attention to paragraphs 58-60 of *Agyarko*. Lord Reed there explained that it had been submitted in that case that the Secretary of State could not, in the face of the reasoning in *Huang*, lawfully impose a test of 'exceptional circumstances' in the Instructions (or in the Rules). *Huang*, said Lord Reed, was decided before there was any provision in the Rules about article 8. The ultimate question is how a fair balance should be struck between the competing public interest in immigration control and an appellant's article 8 rights. The relevant provisions of the Rules and of the Instructions did not impose a test of exceptionality, in the sense in which Lord Bingham used that phrase in *Huang*.

Discussion

78. I have already summarised the two main authorities and the three determinations in some detail. In the light of the very full and helpful submissions from Mr Mohammed and from Mr Howells, which I have also summarised, I can explain my conclusions briefly.

79. The UT did not err in law in holding that the F-tT's use of *Chikwamba* was wrong in law. I of course accept that the F-tT cannot be criticised for failing to anticipate the decision in *Alam*. It is, also, perhaps, captious to criticise the F-tT for uncritically accepting the parties' agreement that *Chikwamba* was somehow relevant to this case. There are, nevertheless, at least four errors of law in determination 2.

80. Although the F-tT did recite the relevant legal provisions, it did not approach them in a structured way, or make reasoned decisions about them. First, it did, as it should have done, consider whether or not there were insurmountable obstacles to family life in Pakistan. It found that there were none. That is a factor which was highly relevant to

the question whether or not decision 2 was compatible with A's article 8 rights. The F-tT erred in law, first, in not giving its decision on that issue any weight in the article 8 balance.

81. Even if the F-tT is given credit for the points in paragraph 79, above, it is not unfair to criticise the F-tT for failing to decide issue 2, which the parties had agreed, it was necessary for the F-tT to decide. Paragraph GEN3.2 required the F-tT to consider whether or not there were exceptional circumstances which meant that the consequences of decision 2 were unjustifiably harsh. It did not do so. The F-tT erred in law in failing to make a decision on that question, and it follows, to factor that into its article 8 assessment. That is its second error of law.

82. Section 117B(4) of the 2002 Act in any event obliged the F-tT to give 'little weight' in its article 8 decision to the relationship between A and his partner, because it was formed when he was in the United Kingdom unlawfully. Following *Rhuppiah* there is some 'flexibility' in the application of that requirement, but that flexibility is not available unless a tribunal identifies some 'compelling factor'. The F-tT identified no such compelling factor. Instead, it held that a period of delay which, on any view, was a short period, and which was not (unlike the delay in *EB (Kosovo)*) a delay in making a decision in an asylum claim 'countered' the effect of section 117B(4). That was the F-tT's third error of law.

83. Fourth, the F-tT gave decisive weight to its view that it was disproportionate to require A to leave the United Kingdom and to apply for entry clearance from Pakistan. Following *Alam*, the F-tT erred in law in taking this into account at all, because the Secretary of State did not base decision 2 on a requirement to leave the United Kingdom and to apply for entry clearance.

84. I reject Mr Mohammed's argument that, in substance, that is what decision 2 amounted to. My reasoning in *Alam*, which is in part based on the express reasoning in *Chikwamba*, and in part on the reasoning in *Hayat*, does not leave any room for an argument that a refusal of leave to remain is in substance a requirement to leave the United Kingdom and to apply for entry clearance and automatically attracts the other reasoning in *Chikwamba*. It is, in any event, clear from *Chikwamba* that an express requirement to leave and apply for entry clearance is not disproportionate in every case, as the strength of the article 8 case will depend on the facts. The reasoning of the UT in *Chen* does not help A's argument. I accept that I did not refer to *Chen* in *Alam*. I do not accept, however, that the reasoning in *Chen* undermines my reasoning or conclusions in *Alam*.

85. In summary, this was not obviously an article 8 case with any compelling features, and the F-tT did not identify any. Indeed, the F-tT found, in determination 1, and in determination 2, that there were no insurmountable obstacles to family life in Pakistan. The F-tT had found in determination 1, and, per *Devaseelan*, the F-tT did not, in determination 2, give any reasons for departing from this finding, that A's partner knew, when the relationship was formed, that A was in the United Kingdom unlawfully. There was no material delay by the Secretary of State in making decisions in this case. There was no finding in determination 2 that the decision 2 had unjustifiably harsh consequences for A or for his partner. Finally, I accept the submission of Mr Howells that the Secretary of State would have been bound, if A were to apply for entry clearance

from Pakistan, to refuse the application under Part 9 of the Rules. So a hypothetical application for entry clearance would not have been bound to succeed.

Conclusion

86. For those short reasons, I do not consider that the UT erred in law in allowing the appeal of the Secretary of State from determination 2, and in remitting A's appeal to the F-tT for the F-tT to consider it afresh.

Lord Justice William Davis

87. I agree.

Lady Justice King

88. I also agree.