



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08445/2016

THE IMMIGRATION ACTS

Heard at Field House
On 27 February 2018

Decision & Reasons Promulgated
On 30 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

HARDEEP SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dixon of Counsel instructed by Gills Immigration Law
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me pursuant to the 'error of law' hearing on 10 January 2018.
2. On 16 January 2018 the Tribunal promulgated my reasons for concluding that there had been an error of law in the decision of First-tier Tribunal Judge Baldwin promulgated on 1 August 2017, necessitating the remaking of the decision in the appeal. The 'error of law' decision sets out the factual background to this case as well as certain issues identified during the course of discussion and in respect of which Directions were issued. (The 'Decision and Reasons: Error of Law' is annexed hereto for ease of reference. It should be read as an integral part of this Decision.)

3. In response to the Directions the Appellant has filed a bundle under cover of letter dated 25 January 2018 incorporating up-to-date evidence of the financial circumstances of his wife, Ms Davinder Kaur ('the sponsor'), and evidence of the settling of a debt to the National Health Service. Also included in the bundle are materials in respect of the Appellant's application for leave to remain made in 2013, the decision thereupon, and the judicial review proceedings which - unsuccessfully - sought to challenge that decision.
4. The Respondent has replied to the Directions by way of written submissions drafted by Mr Bramble dated 13 February 2018 in which particular reliance is placed on the case of **R (on the application of Chen) v Secretary of State for the Home Department** (Appendix FM Chikwamba: temporary separation: proportionality) IJR [2015] UKUT 00189 (IAC). A copy of the decision in **Chen** has also been provided to the Tribunal.
5. The Respondent's written submission otherwise acknowledge: the Appellant no longer owes an outstanding debt to the NHS; legal costs arising from the judicial review proceedings are being repaid in accordance with agreed instalments. In such circumstances the Respondent raises no adverse issue in respect of 'suitability' (cf. Appendix FM, S-LTR 4.4. and 4.5).
6. The Appellant has provided a brief written 'Response' dated 20 February 2018 in reply to the Respondent's written submission. However, the 'Response' unfortunately does not address much of the issues raised in the Directions and in the 'error of law' discussion; moreover it somewhat confusingly concludes with the plea that permission to appeal should be granted. Mr Dixon acknowledged that the Response - which was not drafted by him - was not going to form the foundation of his submissions which, instead, he developed orally at the hearing.
7. The Directions required the Appellant to file and serve "*any available evidence relating to the application of 10 May 2013, the decision thereunder, and any judgement in respect of the subsequent judicial review proceedings*" (Directions, paragraph 1(iii)). This was further to the points of discussion at the 'error of law' hearing set out at paragraph 32(iii)-(v) of the 'error of law' decision. The materials now filed pursuant to the Directions demonstrate that the subsequent application made in September 2015 contained nothing of substance that was new or different from the 2013 application that had already been dismissed, save in respect of claims with regard to the sponsor's health (possible forthcoming treatment for tuberculosis), and in respect of supposed IVF treatment.

8. The Appellant and the sponsor have at no point provided any supporting evidence for such claims. First-tier Tribunal Judge Baldwin observed: *“Despite the Respondent flagging up the absence of documentary evidence to corroborate their claim to be trying to help conceive, there remains no medical evidence beyond that relating to [the sponsor’s] past urological issues. Nor is there any medical evidence relating to any risks for her of her Tuberculosis restarting, a condition the Sponsor makes clear in her Statement has mercifully been cured”* (paragraph 23). It remains the case that no supporting evidence has been filed in respect of either commencement of IVF or recurrence of TB. (See similarly in this context paragraphs 5-7 of the ‘error of law’ decision.)

9. In such circumstances it is not possible to identify anything genuinely new or different being raised in the application made in September 2015 compared with the previously rejected application, beyond the effluxion of time. The potentially new matters that were raised – IVF and TB treatments – were not, and have never been, supported by evidence. It is reasonable to infer that if those matters were genuine there would be supporting evidence available to the Appellant. In the absence of such supporting evidence it is reasonable to infer – and I do so infer – that such matters were raised without any foundation in fact or truth. Moreover it is to be noted that the application in September 2015 was bound to fail under the Rules – and in substance was no more than a resubmission of an application that had already been rejected.

10. It may also be seen that in the course of submissions before Upper Tribunal Judge Kekic on 26 September 2014 in the judicial review proceedings, the Appellant’s counsel acknowledged that the 2013 application did not meet the requirements of the Rules (paragraph 4 of Judge Kekic’s Judgement), and abandoned a submission based on Zambrano (paragraph 5). The Appellant relied on Article 8 of the ECHR. Although Judge Kekic observed that she was not embarked on a merits review (paragraph 9), in refusing the application for judicial review she identified that the Appellant had put his application to the Respondent on the basis that he satisfied the requirements of the Rules (paragraph 7). Judge Kekic continued:

“7. ... Whilst there is a reference to Article 8 case law at the end of the representations, it is not maintained that the applicant’s removal would be disproportionate and indeed there is no argument at all on any matters which the applicant wanted the respondent to consider with respect to the balancing exercise. In the absence of any case being put to the Secretary of State on this basis, her succinct consideration of Article 8 in the refusal letter should have come as no surprise to the applicant.

8. No matters have been put forward which would make it difficult for family life to be continued overseas, whether permanently or temporarily. No information is put forward as to why the applicant should not be expected to bring himself under the Immigration Rules and make an entry clearance in the proper manner to join his wife. There are no details as to any life he has established independently of his marriage and no ties to the UK of any kind have been referred to.”

11. To summarise the history up to the decision that is subject of this appeal:
- the Appellant entered the UK illegally in 2003;
 - he married in August 2012 and made an application for leave to remain in May 2013;
 - the application relied upon the Immigration Rules – but it was subsequently acknowledged that he could not satisfy the Rules;
 - the application was refused in circumstances that “*should have come as no surprise*” to the Appellant;
 - nonetheless he pursued a challenge by way of judicial review;
 - the challenge was initially based on Zambrano, but this argument was abandoned before Judge Kekic;
 - the Appellant then sought to rely on Article 8 in circumstances where he had not advanced a case in respect of Article 8 previously;
 - Judge Kekic observed that no matters had been advanced that might give rise to a case under Article 8;
 - the judicial review proceedings were concluded in October 2014;
 - although he had no basis to remain in the UK the Appellant did not depart;
 - on 9 September 2015 he made a further application for leave to remain;
 - the application raised issues in respect of IVF treatment and TB treatment for which no evidential foundation has ever been established;
 - the application otherwise did not raise any matters that had not already been considered in the course of the earlier application;
 - the application of 9 September 2015 was refused on 8 March 2016.
12. The focus for the remaking of the decision in the appeal - as identified in the ‘error of law’ decision - is in respect of the so-called Chikwamba point. As discussed in the ‘error of law’ decision, the possibility of making a successful application for entry clearance – and therefore the availability of a submission grounded in Chikwamba – only manifested itself in or about April 2017 when evidence showed that the sponsor’s earnings had increased to a level that satisfied the Rules for entry clearance as a spouse: see paragraphs 26-27 and 32(i).

13. In short: not only was there no basis for succeeding on the application at the time it was made in September 2015, there was no basis for succeeding in the appeal at the time it was lodged (March 2016). It was not until approximately a year later (c. April 2017) that a basis for advancing an appeal that took the case beyond the circumstances already considered and rejected in 2013/2014 emerged.
14. Mr Dixon essentially made the following submissions.
- (i) With reference to the case of **MA (Pakistan) [2009] EWCA Civ 953**, the question to be considered was “*whether there was any sensible reason as to why [the Appellant] should be required to [return to India in order to make an application for entry clearance from there]*” (per Lord Justice Sullivan at paragraph 9), bearing in mind that the circumstances of the sponsor were now such that she was in a position to support a successful application for entry clearance as a spouse.
- (ii) In anticipation of Mr Bramble’s submissions, and with regard to the Respondent’s written submission, Mr Dixon directed my attention to the words of Lord Justice Elias in the case of **Treebhowan and Hayat [2012] EWCA Civ 1054** quoted at paragraph 27 of **R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM - Chikwamba - Temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC)** - and in particular the citation with approval of the language of Lord Justice Sullivan in **MA (Pakistan)**: “*Where Article 8 is engaged, it will be disproportionate interference with family or private life for such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so*”.
- (iii) In this way Mr Dixon emphasised that at the core of the ‘**Chikwamba** point’ is the need for there to be ‘a sensible reason’.
- (iv) On the particular facts of the instant case the Appellant could not be said to fall within the rare cases where it was appropriate to require an applicant with an established family or private life in the UK to return to his/her country of origin in order to make an application merely to come back to the United Kingdom again.
- (v) Mr Dixon also sought to draw a favourable comparison between the circumstances of the Appellant and the sponsor and the circumstances of the appellant in **Chen**. In particular he noted that the Appellant in **Chen** had siblings in China whereas the Appellant’s family in the instant case in India had taken an adverse view of the Appellant’s marriage to the sponsor and nothing could be expected by way of support from them.
- (vi) Mr Dixon also placed reliance upon the Appellant’s and sponsor’s wish to found a family. Whilst he acknowledged that there was no medical evidence in respect of IVF treatment, he highlighted that nonetheless it was the evidence of both the Appellant and his wife that they wished to have children together. In this context

my attention was directed to paragraph 38 of the Appellant's witness statement of 17 July 2017:

"Davinder and I have been trying for a baby and we would like to start a family. However, Davinder has not been able to conceive. She has therefore sought medical advice and will be starting IVF treatment soon. But for that treatment to be successful I need to be in the UK with her."

(vii) Ms Kaur's witness statement at paragraph 20 is in similar terms:

"I would like to stay in the UK with my husband Hardeep, and start a family together. However unfortunately I have been suffering from a constant pain in my stomach. It may be due to this I have been unable to conceive. I have consulted my doctor regarding this and my inability to conceive as we have been trying for a baby for a long time. He recommended that Hardeep and I undergo IVF treatment. Our blood tests have been taken and we are currently waiting for the doctor to start this treatment. I am now 43 years old and I am aware that it will not be easy for me to start a family at this age. However, we are trying."

(viii) Irrespective of the absence of any supporting evidence as to IVF treatment, Mr Dixon invited the Tribunal to recognise that a wish to found a family is expressed, and attempts so to do identified - *"we are trying"*. In this context Mr Dixon emphasised the age of the sponsor: in colloquial terms, her 'biological clock is ticking'. It was submitted that even temporary separation will be significant by way of interference in the couple's attempt to have children.

(ix) Mr Dixon sought to argue that the fact that the sponsor has previously been married was a favourable distinguishing feature compared to **Chen** which involved a younger couple neither of whom had seemingly been married previously. I intervened in Mr Dixon's submissions in this regard because it seemed to me that I could not really make a comparison between the couple in the instant appeal and the couple in a different appeal, and the strength of the respective marital relationships, without much clearer evidence as to the circumstances. It did not seem to me to be a helpful exercise to try and evaluate the quality of a marital relationship on the premise of such a matter as whether or not one or other partner or both partners had been married before. The nature and quality of a marital relationship will depend upon the facts of the particular case. I was not prepared to draw inferences from the limited information available in **Chen** as to the nature of that marital relationship that could in any way be taken forward into some comparative analysis as to how the law should be applied to the facts of the instant case, and certainly not by mere reference to the previous marital history of any of the partners.

(x) Nonetheless, in this regard Mr Dixon made the further, and different, point that the fact that the sponsor had had past marital difficulties involving being taken to India by her former spouse, and thereby had a poor previous experience of cross-border separation, was a matter that was relevant to an evaluation of the nature and gravity of any interference inherent in the couple being apart whilst the Appellant pursued an application for entry clearance.

(xi) In this latter regard some brief discussion was had to the fact that the sponsor was seemingly in the habit of visiting India from time to time. The First-tier Tribunal Judge found that “[India] is also clearly not somewhere the Appellant’s wife cannot visit because she did so very recently without apparently being accompanied by the Appellant” (paragraph 24). Mr Dixon suggested that to visit India would necessarily involve taking time away from her work and so only limited periods might be possible to visit and stay with the Appellant in India. Any such limitation as to length of visit would mean that such visits were only a partial remedy to any disruption of the attempt to begin a family.

15. Mr Dixon also addressed me on the matters identified at paragraphs 32(v) and (vi) of the error of law decision - the extent to which it is appropriate to have regard to the fact that an applicant or appellant is only able to plead **Chikwamba** by reason of the passage of time having remained in the UK notwithstanding previous adverse decision or decisions.
16. In the first instance Mr Dixon invited me to take a broader view of the immigration history, and to consider that it may well have been the case that the Appellant could have established a basis to remain at an earlier stage. I find that no factual basis for such a submission has been shown. It is clear that the financial requirements of the spouse/partner rules that were introduced in July 2012 predate the couple’s marriage. It is also clear why the Appellant had no right of appeal in respect of his earlier application. Nonetheless he challenged that application without any success – and on careful analysis as set out at paragraphs 10 and 11 above, without any proper foundation for such a challenge. Nor has there been any cogent challenge to the Respondent’s decision of 8 March 2016 in respect of Appendix FM or paragraph 276ADE of the Rules. Yet further, even as of the time of his current application, and the time of the refusal and the lodging of his appeal, it is now acknowledged that he could not have satisfied the financial requirements of the entry clearance Rules for a spouse. The reality is the entire strength of the Appellant’s case now rests on a submission based on ‘the **Chikwamba** point’, and his case in this regard is contingent upon circumstances that did not eventuate until his wife’s earnings reached a level that might avail him under the entry clearance Rules. I reject the submission that there was any point hitherto when the Appellant could have established a sound basis to be allowed to remain in the UK.
17. Mr Dixon in due course accepted that the circumstances identified at paragraph 32(v) and (vi) of the error of law hearing could in principle inform a proportionality assessment. Nonetheless, he maintained the primary submission that on the particular facts of the case there was no sensible reason why the Appellant should be expected to return to India to make an application for entry clearance.

18. Mr Bramble's primary submission, in reliance on the case of Chen, was that it was erroneous to approach the appeal solely on the basis of whether or not there was a 'sensible reason' why the Appellant should be required to return to India to make an application for entry clearance. The Appellant was still required to establish that such a course of action would involve an interference with his and/or the sponsor's Article 8 rights. The Respondent contended that this had not been shown. Even if it were demonstrated that there was an interference with family and/or private life, the decision was justified as being proportionate.
19. Mr Bramble otherwise argued that in so far as it might be necessary to identify a 'sensible reason', on the facts of the particular case this was provided by the imperative of maintaining effective immigration control. The Appellant's history, including remaining in defiance of relevant decisions in respect of his immigration status, was contextually pertinent. Further, it was submitted that the Appellant's poor immigration history also informed any proportionality balancing exercise; and it was argued there was nothing in any of the matters advanced by Mr Dixon - individually or cumulatively - that constituted a sufficiently weighty countervailing factor to tip the proportionality balance in the Appellant's favour.
20. In support of his primary submission Mr Bramble relies upon the contents of his written submission. In particular he emphasised paragraph (i) of the headnote in Chen, which was suggested to be informed by and derived from, paragraphs 24(ii), 36, and 39-42. Paragraph (i) of the headnote is in these terms:

"Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40."

21. It seems to me that the essential point being made in Chen is that in a case where it is suggested that possible remedy for the uncertain immigration status of a partner (or family member) lies not in the grant of leave to remain but in the partner (or family member) being required to leave the UK to apply for entry clearance as a partner (or family member) from abroad, any consideration of Article 8 is not confined simply to the question of whether there is a sensible reason to expect the individual to follow such a course of action. Instead, consideration must begin with an evaluation - in the usual way - of whether there would be a relevant interference in family life (i.e. Razgar questions 1 and 2) as a consequence of being required to depart to make an application from abroad. It is only on such a premise being established that it would become necessary to consider proportionality - which would, at that stage, involve

consideration of whether there was ‘a sensible reason’ to require departure to apply for entry clearance.

22. The dictum of Elias LJ in **Hayat** at paragraph 30(b) (quoted above at paragraph 14(ii)) referencing the ‘sensible reason’ wording of Sullivan LJ in **MA** underscores that the ‘sensible reason’ is an aspect of the proportionality balance, and requires engagement of Article 8 as a premise: *“Where Article 8 is engaged, it will be disproportionate interference with family or private life for such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so”*. This is further manifest at 30(f) of **Hayat**: *“Nothing in Chikwamba was intended to alter the way the courts should approach substantive Article 8 issues as laid down such well known cases as Razgar and Huang”*. Moreover such an issue is not inevitably determined by the fact that there would be no insurmountable obstacles to the continuation of family life outside the UK: as per the Respondent’s concession in **R. (Iqbal) v SSHD [2014] EWHC 1822 (Admin)**, and see further **Chen** at 24(ii).

23. Paragraph 39 of **Chen** is instructive:

“In my judgement, if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child’s enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant 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 whilst the immigration status of one party was “precarious”. In other words, in the former case, it would be easier to show that the individual circumstances fall within the minority envisaged by the House of Lords in Huang or the exceptions referred to in judgements of the ECtHR than in the latter case. However, it all depends on the facts.”

24. I also note, at paragraph 37 of **Chen**, the citation and quotation from paragraph 77 of **R. (Zhang) v SSHD [2013] EWHC 891 (Admin)**, albeit in the context of a consideration of paragraph 319C of the Rules. With reference to **Ekinci v SSHD [2003] EWCA Civ 765**, it adverts to the potential relevance of a poor immigration record to place an individual in the ‘comparatively rare’ group of cases where *“the immigration priorities of the state”* – (cf. Nationality, Immigration and Asylum Act 2002 section 117B(1), *“The maintenance of effective immigration controls is in the public interest”*) – make it appropriate for an individual to leave to apply for entry clearance from abroad.

25. I accept that mere invocation of 'the Chikwamba point' is not sufficient. I also accept that consideration and application of the guidance in Chickwamba is not limited solely to the question of whether there is a sensible reason why an applicant should be required to leave the UK in order to make an application for entry clearance from abroad. Rather, in the premises it is incumbent upon a partner (or family member) applicant or appellant to establish that a requirement to return to his or her country of origin to make an application for entry clearance as a partner (or family member) would involve an interference with family life to an extent contemplated in the first two Razgar questions. It is only thereafter, and subject to a consideration of the third and fourth Razgar questions, that the issue of 'a sensible reason' arises in the context of proportionality (pursuant to the fifth Razgar question).
26. It is against this context that I turn to a consideration of the particular issues and facts in the appeal.
27. I have given particular and very careful consideration to those matters advanced by Mr Dixon that potentially inform an evaluation of the nature and extent of any interference with the Appellant's and sponsor's mutual family life in the event that the Appellant is required to return to India to make an application for entry clearance.
28. I have reached the conclusion that ultimately those matters relied upon by Mr Dixon are of relatively little significance.
- (i) In the premises no evidence has been presented to show how long the process of making an application for entry clearance would likely take - notwithstanding that the First-tier Tribunal Judge identified the absence of such evidence. In such circumstances the Appellant has not demonstrated that his absence from the UK would be for such a length of time that the duration in itself would constitute a significant interference with his family/private life.
- (ii) Although I acknowledge that if the Appellant is to enjoy the company of the sponsor pending the application for entry clearance she will have to take time away from work, nothing has been presented by way of evidence in respect of her holiday allocation, or her ability to take unpaid leave, for example on the grounds of compassionate circumstances.
- (iii) The evidence otherwise suggests that the sponsor has been a recent visitor to India, and as such there is no particular reason why the Appellant and the sponsor should be apart for the entirety of the period of processing his entry clearance application.

(iv) The fact that there may be some animosity on the part of the Appellant's family arising from his relationship with the sponsor does not in any meaningful way affect his ability to visit and stay in India, or to be accompanied by his wife there.

(v) In the circumstances of the sponsor's financial solvency and possession of significant savings, there is no apparent suggestion of financial hardship involved in the process of the Appellant departing to make an application from abroad.

(vi) In respect of the fertility issue, I am not satisfied that the Appellant's relatively brief absence from the UK will substantially interfere with the couple's ability to found a family. As indicated above, it has not been shown that the absence would be for a particular period such that it could be considered unreasonable. Further, as also noted above, it seems to me that it is open to the couple to arrange for the sponsor to be present in India with the Appellant for at least some of the duration of any absence. In any event, in my judgment, I need to be cautious as to the extent to which this is a couple that is in a position to conceive through natural means at all - given the lack of success so far, notwithstanding the length of their relationship. The supposed need to revert to attempts to become pregnant by way of IVF (albeit that there is no evidence that IVF has ever been commenced) also cautions against any suggestion that conception by natural means is likely. Even if IVF treatment were commenced, it is not inevitably the case that the Appellant would have to be present in the UK throughout such treatment.

(vii) I do not accept that the sponsor's past experience of cross-border separation during her previous relationship is a factor that is of any weight in considering the impact of any separation from the Appellant currently. The circumstances were very different, involving her claimed abandonment by her first husband. The abandonment did not prevent her from returning to the UK on her own (witness statement of 17 July 2017, paragraph 10). The circumstances suggest a marital problem rather than an immigration problem. There is no suggestion of a marital problem here; neither the Appellant nor sponsor need fear any abandonment by his/her spouse - and, yet again, I observe that they may spend at least some of the time during processing of an entry clearance application together in India.

29. In all of the circumstances, whilst I accept that there would be limited disruption to the modus of family life presently enjoyed by the Appellant and the sponsor in the UK by reason of a requirement for him to depart for India to make an application for entry clearance, I find such disruption would not constitute significant interference with the underlying quality of the marital relationship or the wish to found a family. Further, it has not been shown that any such disruption would be for anything other than a limited period, during which the Appellant and the sponsor may yet still enjoy each other's company by the simple expedient of the sponsor also visiting India. To this extent, whilst I am just prepared to accept that the first **Razgar** question is to be answered in the Appellant's favour, I am not satisfied that the second **Razgar** question - will such interference have consequences of such gravity as potentially to engage the operation of Article 8 - is to be answered in his favour.

30. There is no issue between the parties in respect of the third and fourth **Razgar** questions. The fifth **Razgar** question – proportionality – is not reached in light of my finding on the second **Razgar** question.
31. I find that on the facts here the Appellant has not shown that there would be a significant interference in his and/or the sponsor’s mutual family life or otherwise in his private life if he were now required to leave the UK in order to make an application for entry clearance to return to the United Kingdom.
32. Had I been persuaded that the circumstances described above did surpass the threshold of the second **Razgar** question, I would in any event have concluded that the appeal fails on the issue of proportionality.
33. In the simplest terms, the ‘sensible reason’ is provided by the public interest in the maintenance of effective immigration control.
34. Regard must be had not only to section 117(B) of the 2002 Act, but also section 117B(4)(b) – *“Little weight should be given to... a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully”*. The fact that there is no particular concern on the facts herein in respect of section 117B(2) and (3) is essentially neutral, rather than positively in favour of the Appellant.
35. I also take into account that on my findings the extent of any disruption to family life is essentially a disruption to the present modus for a limited period pending the processing of the application for entry clearance. As such the engagement of Article 8 may be characterised as tenuous: cf paragraph 77 of **Zhang**, citing **R. (Mdllovu) v SSHD [2008] EWHC 2089**.
36. However the most compelling adverse factor is the Appellant’s immigration history, including the history of what I find to have been unfounded applications, and the circumstance that the Appellant is only now able to raise any sort of argument because of a change of circumstance that has come to pass subsequent to his previous defiance of immigration control.
37. In my judgement the matters mooted at the ‘error of law’ hearing - see paragraphs 32(iii)-(vi) of the ‘error of law decision - do indeed significantly inform the evaluation of proportionality. Mr Dixon accepted, at least, that they were relevant. I find on the

facts of this particular case the history is not merely relevant but determinatively adverse in the issue of proportionality – and the more so bearing in mind the very limited nature of any interference.

38. In my judgement where a person has remained in the UK in defiance of immigration control - for example by not leaving after becoming 'appeal rights exhausted' after an adverse decision, or after an unsuccessful challenge to an adverse decision of either the Secretary of State or the IAC by way of judicial review – it would not generally be in furtherance or protection of the public interest in maintaining effective immigration control, if he/she were able to achieve a favourable outcome by reason of a subsequent change of circumstance that improves his/her prospect of satisfying entry clearance requirements, whilst remaining in the UK rather than departing to make the appropriate application for entry clearance. A favourable outcome by regularisation of immigration status without having to leave the UK would risk being seen as an endorsement of defiance, or otherwise being seen as an encouragement to those with no lawful basis to remain, nonetheless to stay in defiance of immigration control in the hope that later they will be able to establish a basis to remain. This would significantly negate the purpose of seeking to impose a system of control at all.
39. I have rehearsed the Appellant's immigration history in detail above. He entered illegally and has never had a basis to remain lawfully. Although he sought to regularise his status in 2013, it is hardly to his credit if upon an unsuccessful outcome he remained anyway. It is clear that in reality he had no sound basis for making his application in 2013. Moreover he had no sound basis for pursuing a challenge by way of judicial review. In turn: it was conceded that he could not satisfy the Rules; his ground of challenge upon which permission had been obtained in respect of Zambrano was subsequently appropriately abandoned; his residual Article 8 submission had no foundation. His next application for leave to remain in reality advanced no new matters: although assertions were made in respect of medical treatments there was no foundation for such assertions. His application was appropriately refused under the Immigration Rules and with reference to Article 8. At the time that he lodged his appeal he had no sound basis to challenge the decision. The present foundation of his case is based on a matter that did not manifest until approximately one year after the lodging of his appeal. I do not accept that he should now be allowed to rely on such a matter in any meaningful way by reference to Chikwamba, or otherwise, as a basis for remaining in the UK rather than pursuing an application for entry clearance from abroad. Accordingly, it is the Appellant's immigration history - including the particular aspect of the basis of case manifesting only after a sustained period of baseless defiance - in the context of the public interest in maintaining effective immigration control, that provides the 'sensible reason' contemplated by Lord Justice Sullivan.

40. Accordingly, in all of the circumstances, I dismiss the appeal under Article 8 of the ECHR.

Notice of Decision

41. The appeal is dismissed.

42. No anonymity direction is sought or made.

Signed:

Date: **25 May 2018**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed:

Date: **25 May 2018**

Deputy Upper Tribunal Judge I A Lewis
(*qua* Judge of the First-tier Tribunal)

ANNEX

TEXT OF 'DECISION AND REASONS: ERROR OF LAW' DECISION PROMULGATED ON 16 JANUARY 2018

Background

1. This is an appeal against the decision of First-tier Tribunal Judge Baldwin promulgated on 1 August 2017.
2. The Appellant is a citizen of India born on 4 January 1981. He claims to have entered the United Kingdom illegally in 2003 and to have remained without leave ever since.
3. On 10 May 2013 the Appellant made an application for leave to remain as the spouse of Ms Davinder Kaur (d.o.b. 9 April 1974), a British citizen to whom he was married in a civil ceremony in Ealing on 10 August 2012. The application was refused without a right of appeal. Although the exact date of the refusal is not apparent from the documents presently available to me, it is indicated that on 29 January 2014 the Appellant made an application for judicial review of the decision. The application for judicial review was in due course dismissed on 10 October 2014.
4. Notwithstanding the refusal of his application and the dismissal of his challenge thereto, the Appellant remained in the UK. On 9 September 2015 he made another application for leave to remain on the basis of his marriage to Ms Kaur by way of form FLR(FP).
5. The application was stated to be made on the basis of 'Family Life as a Partner (10 year route)' - (see FLR(FP) at section 2). It was supported by a covering letter from the Appellant's representatives dated 7 September 2015 (Annex C of the Respondent's bundle before the First-tier Tribunal), and various items of supporting documentation (also incorporated into the Respondent's bundle). The covering letter sought to address, amongst other things, the Respondent's refusal of the Appellant's previous application. In this context, and with reference to paragraph EX.1 of Appendix FM of the Immigration Rules it was said:

"It is evident that the Home Office has failed to take into account of our client's personal circumstances due to which he is unable to return to India. As stated above, our client's partner is unable to conceive and shall be starting her [IVF] treatment soon. It is essential for our client to remain in the UK during this treatment. Additionally there is a possibility that the sponsor may be restarting her treatment for Tuberculosis."

6. In the latter regard it was said that Ms Kaur had been diagnosed with tuberculosis shortly after she was granted indefinite leave to remain in the UK in 1998 (on the basis of her first marriage to a British citizen). It was also said that Ms Kaur had been taken back to India by her then husband, later returning to the UK after her treatment was completed (although no particular date is given).
7. No supporting evidence was provided with the application in respect of either the possible recommencement of treatment for tuberculosis, or the commencement of fertility treatment. Indeed, nor was any such supporting evidence provided on appeal – as identified by the First-tier Tribunal Judge at paragraph 23 of his decision.
8. The application for leave to remain, which was treated as a human rights claim, was refused for reasons set out in a ‘reasons for refusal’ letter (‘RFRL’) dated 8 March 2016. The Respondent has not disputed that the Appellant and Ms Kaur are in a genuine and subsisting marital relationship. In respect of the so-called ‘10 year route’ it was accepted that the Appellant met the ‘suitability’ requirements as identified by paragraph R-LTRP.1.1(d)(i) of Appendix FM, and also that he met the ‘eligibility’ requirements as identified by paragraph R-LTRP.1.1(d)(ii). However, it was not accepted that paragraph EX.1 applied, as required by paragraph R-LTRP.1.1(d)(iii). The Respondent also gave consideration to the Appellant’s private life pursuant to paragraph 276ADE(1) of the Immigration Rules, but concluded that he did not satisfy the requirements with particular reference to subparagraph (vi) because it was not accepted that there would be very significant obstacles to the Appellant’s integration into India. The Respondent otherwise did not consider that there were exceptional circumstances or compassionate circumstances such as to warrant a grant of leave outside the requirements of the Rules.
9. The Appellant appealed to the Immigration and Asylum Chamber.
10. First-tier Tribunal Judge Baldwin dismissed the appeal for reasons set out in his Decision and Reasons.
11. The Appellant applied for permission to appeal which was granted by First-tier Tribunal Judge Hollingworth on 27 October 2017.

Consideration of Error of Law

12. The primary submission advanced on behalf of the Appellant is that the First-tier Tribunal Judge materially misdirected himself in law in failing to identify that it was for the Respondent to justify as proportionate any interference in the Appellant’s and Ms Kaur’s mutual Article 8 rights. It was also argued that the Judge’s consideration

of proportionality was “*inadequate and unlawful*” (see Ground 2 of the Grounds in support of the application for permission to appeal).

13. I am not persuaded in respect of the primary submission.
14. Mr Dixon acknowledged that so far as the evaluation of facts were concerned, the Judge had correctly directed himself at paragraph 13 that the burden of proof was on the Appellant to the civil standard of a balance of probabilities. Further, it seems to me abundantly clear that the Judge was aware that he was embarked on a balancing exercise of proportionality, as evidenced by his rehearsal of the public interest considerations pursuant to Part 5A of the Nationality, Immigration and Asylum Act 2002 (paragraph 17), and the **Razgar** questions (paragraph 18).
15. The Judge ultimately identified the nature of the interference in the Appellant’s Article 8 family life (and implicitly also in the family life of his wife) in consequence of the Respondent’s decision to arise in the context of the Appellant returning to India in order to make an application for entry clearance to return as a spouse: see paragraph 23. The Judge put the issue this way:

“The question is whether it would be reasonable and proportionate to expect the Appellant to return to India, there to make an Entry Clearance Application.”

16. In my judgement inherent in the phrase ‘whether it would be reasonable and proportionate to expect the Appellant’ is the notion that it is for the Respondent to justify the proportionality of an outcome. The Judge could not possibly have contemplated that it was for the Appellant to show it would be reasonable and proportionate to expect him to return to India.
17. It also seems to me adequately clear that the Judge understood that the burden was on the Respondent in this regard because in the concluding paragraphs, immediately before stating that the appeal was dismissed on human rights grounds, the Judge found “*that the reasons given by the Respondent do justify the refusal*” (paragraph 25).
18. In this regard, looking at the whole of the sentence at paragraph 25 – “*On the totality of the evidence before me, I find that the Appellant has not discharged the burden of proof and that the reasons given by the Respondent do justify the refusal*” – I accept Mr Bramble’s submission to the effect:
 - (i) Firstly, by the clause ‘the Appellant has not discharged the burden of proof’ the Judge was stating in summary his conclusion that the Appellant had not adequately proved those facts upon which he relied. The Judge had in substance in the

preceding paragraphs 23 and 24 rejected the following factual matters raised by the Appellant: the risk of Ms Kaur's tuberculosis restarting; obstacles to relocating to India because of family opposition to the marriage; the Appellant's claim not to have had any proper employment since leaving school; the unavailability of work in India for Ms Kaur; that making an out-of-country application would take a very long time; that assisted conception was a relevant factor; that the couple would be mocked in India because of their age difference; that there were any exceptional circumstances.

(ii) Secondly, by the clause after the word 'and' - 'the reasons given by the Respondent do justify the refusal' - the Judge was reflecting his conclusion in the immediately preceding sentence that "*Requiring the Appellant now to leave the UK... would... be neither disproportionate nor unreasonable*". (I also consider that the reference to 'requiring' the Appellant to leave is indicative of the Judge having considered whether removal in consequence of the decision was justified: 'requiring' the Appellant to leave denotes an imposition upon him, and it is necessarily not for the Appellant to justify such an imposition but for the Respondent.)

19. Accordingly, irrespective of any disagreement that there might be in respect of the Judge's findings of fact, and irrespective of whether the reasons given by the Respondent in the RFRL addressed the 'Chikwamba point' of expecting the Appellant to return to India to make an entry clearance application (see further below), in my judgement there is identifiable no material error of principle with regard to the onus being on the Respondent to justify as being proportionate a decision that interferes with qualified protected rights.
20. For the avoidance of any doubt I have noted that Mr Dixon has pleaded in aid of his primary submission passages from the cases of PD and others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC) (at paragraph 22), and Secretary of State for the Home Department v. SS (Congo) and others [2015] EWCA Civ 387 (at paragraph 38). Whilst in the abstract I do not dispute anything in the passages relied upon, I do not consider that they add anything of substance to the submissions being pursued, but are, rather, eloquently illustrative of general principle.
21. In respect of PD and others the passage relied upon emphasises the requirement for a properly informed evaluation of all material facts and considerations when assessing a child's best interests, identifying that the requisite balancing exercise cannot be realistically or sensibly undertaken unless "*the scales are properly prepared*" (approving such a quotation from the case of JO and others [2014] UKUT 552 (IAC)). This - and the notion that 'the scales' must be properly prepared and calibrated - adds nothing to the general proposition that a decision-maker must properly understand the nature of the balancing exercise.

22. The passage relied upon in **SS (Congo)** highlights a distinction between a leave to enter ('LTE') application and a leave to remain ('LTR') application – the former relating to the State's positive obligations under Article 8 in that a request is being made to grant something that an applicant does not currently have, whilst the latter relates more to the State's negative duty in cases where family life already exists and is being enjoyed in the UK. Mr Dixon particularly emphasises Lord Justice Richards' words at paragraph 38: *"This means that the requirements upon the state under Article 8 are less stringent in the LTE context than in the LTR context."* I note that the context of this observation was not where the proportionality balance might lie in any particular case: the issue in the appeal related to the wider issue of the proportionality of the Immigration Rules imposing in general stringent financial requirements in respect of applicants seeking leave to enter as spouses or partners; the particular observation quoted above was made by the Court in the context of a submission to the effect that the less stringent regimen under the Rules in respect of applications for leave to remain ought also to apply to applications for leave to enter – *"It is not appropriate to refer to the LTR Rules and the position under Article 8 in relation to LTR, as Mr Drabble does, and seek to argue that Article 8 requires that the same position should apply in relation to applications for LTE."* Whilst this serves, in the context of the current case, as a useful reminder that the nature of the interference consequent to the decision is different in circumstances where family life is already being enjoyed in the UK compared to an application for entry, in principle it does not add anything of substance to the reality that it is incumbent upon the decision-maker to consider proportionality in all the circumstances of the particular case.
23. I am not persuaded that there is anything in the submissions at paragraphs 5(1) and (2) of the Grounds in support of the application for permission to appeal, pleaded under the heading of the second general ground – *"Inadequate and unlawful consideration of proportionality"*. The Judge plainly had it in mind that Ms Kaur was a British citizen who had resided in the UK for something of the order of 20 years. In the key 'analytical' / 'reasoning' paragraphs (paragraphs 24 and 25), the Judge made express reference to Ms Kaur's British citizenship (paragraph 24) and aspects of her circumstances *"after 20 years in the UK"* (paragraph 25). I do not accept that the Judge *"reached a speculative finding"* in respect of Ms Kaur's potential employment in India. The Judge stated *"His wife is employed as an aircraft cleaner, something which there is no reason to believe she could not do in India."* This is entirely accurate. Ms Kaur is employed as an aircraft cleaner. Neither she nor the Appellant filed any evidence to suggest that she could not find the same work – or indeed any other work – in India; as such there was no evidential basis to believe that she could not find such work, similar work, or any work, in India. In this context I remind myself, as Mr Dixon acknowledged, the burden of proof to establish the primary facts relied upon was on the Appellant.
24. Even if it were otherwise in respect of prospective employment I would not consider this to amount to a material error. In my judgement it does not behove the Appellant to argue that there would be any financial difficulties in relocation – whether

temporarily to pursue an application for entry clearance a longer term basis – in circumstances where his partner claimed savings of some £25,000, and the evidence otherwise suggested that there was at the very least £70,000 of equity in her home.

25. I do find, however, that the First-tier Tribunal Judge erred in law in respect of what is often referred to as the '**Chikwamba** point'.
26. Although at the time of the Appellant's application, and at the time of the Respondent's decision, Ms Kaur's earnings were not such as to meet the threshold required for entry clearance as a partner, the Judge observed that the evidence at the date of the hearing indicated that her current earnings did exceed the threshold:

"It is clear that her income at the time of this Application was not sufficient to meet the requirements of the Rules in this regard. However, as a result of a very considerable increase in income between the Tax Years '15-'16 and '16-'17 – (over 30%) – it would appear that the Appellant might now be able to provide all the documentation required to evidence the income requirements for a Spouse Application." (paragraph 23)

(Ms Kaur's P60 for 2015/2016 showed an income of £15786.90; her P60 for 2016/2017 showed £20825.32.)

27. It was on this basis that the Judge appropriately determined that the real nature of the 'interference' (cf Article 8(2)) in this case was not in respect of the relocation of Ms Kaur to restart a life with the Appellant in India, but the more limited interference involved in the Appellant's temporary departure for the purposes of making an application to return as a spouse (during which period his wife might accompany him, or visit him) – *"The question is whether it would be reasonable proportionate to expect the Appellant to return to India, there to make an Entry Clearance Application."* Given that the reality of the case focussed upon a limited interruption to shared life in the UK, it was not necessary to evaluate an interference that would involve the relocation of Ms Kaur to India because that was not a likely (i.e. on a balance of probabilities) outcome. In other words, consideration of the proportionality of the decision did not require placing into the scales notions of Ms Kaur abandoning her life in the UK.
28. The '**Chikwamba** point' is most succinctly expressed in following passage from the speech of Lord Brown of Eaton-under-Heywood at paragraph 44 of **Chikwamba v Secretary of State for the Home Department** [2008] UKHL 40:

"Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."

29. Further guidance as to application of the Chickwamba point may be found in the judgement of Lord Justice Sullivan in MA (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 953 at paragraph 9:

“Looking at the particular circumstances of this case, it does appear to me that the manner in which the immigration judge applied the insurmountable obstacle test to the question of removal in order to re-apply for leave in accordance with the Rules is the very antithesis of the approach that was urged by Lord Brown in Chikwamba. The real question was not whether there were "insurmountable obstacles" to the applicant returning to Pakistan in order to make an application for entry clearance from there, but whether there was any sensible reason as to why he should be required to do so.”

30. In my judgement the First-tier Tribunal Judge takes a similar approach to that of which Sullivan LJ disapproves. Whilst the Judge did not evaluate matters by reference to *insurmountable* obstacles, at paragraph 24 he nonetheless considered matters that relate to the ability of the Appellant to leave the UK and spend time in India (with or without the accompaniment of his partner) and to engage in the process of applying for entry clearance. Nothing in his analysis addresses the question of whether there is any sensible reason as to *why* the Appellant should follow such a course rather than be permitted to remain without going through such process. Applying the dictum of Sullivan LJ, that was in material error of law. The consequence is that the decision in the appeal requires to be remade in this regard.
31. The issue that remains in the appeal is relatively narrow, and save in certain respects may essentially proceed from the foundation of the primary facts found by the First-tier Tribunal. In the circumstances it does not seem to me necessary to remit the appeal to the First-tier but to remake the appeal in the Upper Tribunal.
32. I am grateful for the helpful discussion it was possible to have with the representatives as to ‘the way forward’. The following is to be noted:
- (i) Because the possibility of the Appellant successfully applying for entry clearance as a partner did not arise prior to the appeal hearing before the First-tier Tribunal (and indeed would not seem to have existed prior to the availability of the P60 in or about April 2017), the Respondent has not hitherto stated a position as to why it would be sensible and proportionate to expect the Appellant to quit the UK in order to make an application to return from abroad.
- (ii) Mr Bramble was not in a position definitively to state the Respondent’s case in this regard. However, he observed that two matters that appeared relevant and might likely inform the Respondent’s decision in this regard, is that the Appellant appeared to have accrued a debt to the NHS in the sum of £502, and a debt to the Respondent in respect of legal costs arising from the judicial review proceedings in the sum of £8309. It was asserted during the course of evidence before the First-tier Tribunal that the money owed to the NHS had been paid, and that the legal costs

were being repaid by way of agreed instalments of £100 per month. The Judge observed that there was no supporting evidence of the settlement of the £502 debt to the NHS, and it was not apparent why, given Ms Kaur's assets, the legal costs were being paid off at such a slow rate. (See further paragraph 10.) However, the First-tier Tribunal Judge decided that he should presently have no regard to such matters, but recognised that they might yet be relied upon at some future point by the Respondent: "...the Respondent did not seek to rely on this in her Refusal. That does not mean that if the sums remain unpaid the Respondent will not raise this at some time in the future, but it is a matter to which I decided no regard should be had at this stage" (paragraph 22). Nonetheless the Judge made reference to the settlement of such debts as potentially being a prerequisite to a successful application for entry clearance: "...assuming... he has settled any debts he would be expected to have settled before he makes [an entry clearance] Application..." (paragraph 24).

(iii) I also raised with the representatives whether the fact that the Appellant had previously had an application for leave to remain as a partner refused, and had remained in the UK effectively in defiance of that decision might be a relevant matter in considering whether it was sensible and proportionate to expect him to leave the UK in order to avail himself of the appropriate procedures for entry clearance as a spouse.

(iv) Similarly I also mooted possible exploration of whether and how it might be relevant if the Appellant's current application made on 9 September 2015 did not materially differ from the matters previously unsuccessfully advanced. (In this context I note that although in addressing the Respondent's previous approach to EX.1 in the covering letter of 7 September 2015 reference was made to the possibility that the Appellant's wife would be starting fertility treatment soon and might be restarting treatment for tuberculosis no evidence was ever forthcoming in respect of either such matters. As such, it is not presently apparent what, if anything, of substance was being advanced that was materially different.)

(v) Yet further to the above it may be relevant to consider how to factor in, when considering a **Chikwamba** point, the fact that an applicant or appellant is only able to raise the prospect of making a successful entry clearance application because of a change of circumstances that has eventuated well after – and possibly only by reason of the passage of time – an earlier application, the instant application, or the instant decision. On the facts of this case, it would appear that the Appellant is only able to raise the **Chikwamba** point at all because his spouse began to earn at increased levels from, seemingly, about April 2016. But for the passage of time consequent upon his remaining after the unsuccessful application of May 2013 and its ultimate rejection pursuant to judicial review proceedings in October 2014, and pending his application of September 2015 (in respect of which it remains to be seen whether anything materially different was advanced), and his pursuit of an appeal (when at the time it was lodged the Appellant would not seemingly have been able to rely on **Chikwamba** by reference to his ability to satisfy the requirements of entry clearance), the Appellant would not appear to have had a case to advance with any real prospect of success.

(vi) In other words, should the fact that an applicant or appellant is only able to plead Chikwamba – i.e. that they could meet the requirements of entry clearance and therefore it would not be sensible to expect them to quit the UK merely to apply to come back again - by reason of factors that arise after it has been made clear that they have no basis to remain in the UK – and/or perhaps where he or she has nonetheless remained in defiance of an adverse decision – inform a consideration of the Chikwamba point in a manner adverse to the applicant's/appellant's interests?

33. Given that the Respondent has not formulated her position in this regard, and given that up-to-date information and/or evidence was not available in respect of any possible outstanding debts, it is not appropriate to proceed immediately to remaking the decision in the appeal. It will be necessary for the Respondent to decide in the first instance whether in light of the fact that the Appellant's wife now appears to earn in excess of the entry clearance threshold, she considers it sensible and proportionate for the Appellant to quit the UK in order to make an application for entry clearance to return. The Appellant will no doubt wish to assist the Respondent in this regard by providing suitable evidence of earnings (mindful of the requirements of Appendix FM-SE), and any evidence as to the current state of his debts if still outstanding. If the Respondent decides that the Appellant should not be expected to quit the UK and that he should be granted leave to remain, then the appeal proceedings may be concluded. If, however, the Respondent wishes to maintain her refusal of leave to remain, written reasons will need to be filed and served, which will form the framework for the issues to be considered by the Tribunal in remaking the decision in the appeal.
34. Further to the above I give the following Directions.

DIRECTIONS

1. The Appellant is to file and serve by 26 January 2018 any further evidence upon which he wishes to rely. Such further evidence should include in particular:
 - (i) evidence of his wife's earnings to comply, so far as possible, with the specified evidence requirements of Appendix FM-SE in respect of entry clearance applications;
 - (ii) any available evidence with regard to payments to the NHS and to the Respondent in respect of legal costs;
 - (iii) any available evidence relating to the application of 10 May 2013, the decision thereunder, and any judgement in respect of the subsequent judicial review proceedings.

2. The Respondent is also to file and serve by 26 January 2018 any evidence in her possession in respect of the matters at 1(ii) and (iii) above.

3. In the event that the Respondent decides to maintain the decision of 8 March 2016 to refuse the Appellant leave to remain in the UK, the Respondent is to file and serve by 13 February 2018 a written statement of her reasons, addressing in particular the way in which Chikwamba and MA (Pakistan) have been applied to the facts of the case. (If the Respondent does not wish to maintain her decision, this should also be communicated to the Tribunal with a view to the appeal proceedings being withdrawn or otherwise discontinued.)

4. The Appellant is to file and serve by 20 February 2018 a written response to any position adopted by the Respondent pursuant to Direction 3 above together with any further evidence upon which he wishes to rely.

5. At the resumed hearing both parties should be prepared to advance submissions encompassing the matters discussed at paragraph 32 above.

35. Finally, I note that given that I have concluded that the real issue in the appeal – the proportionality between the effective maintenance of immigration control and the extent of any interference in the Appellant’s and/or Ms Kaur’s Article 8 rights involved in requiring the Appellant to quit the UK in order to make an application for entry clearance - is now to be revisited, even if I am wrong in respect of the primary issue raised in the Grounds (with regard to the burden of justification being on the Respondent), it becomes immaterial because the decision in the appeal in respect of the core issue is to be remade anyway.

Notice of Decision

36. The decision of the First-tier Tribunal contained a material error of law and is set aside.

37. The decision in the appeal is to be remade before the Upper Tribunal further to the matters set out above.

38. No anonymity direction is sought or made.

Signed:

Date: 25 May 2018

Deputy Upper Tribunal Judge I A Lewis
(qua Judge of the First-tier Tribunal)

