IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001845

First-tier Tribunal No:
HU/50528/2020
IA/00420/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 March 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

B S-K
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Malik, Counsel instructed by Calices solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Heard at Field House on 12 January 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 22 November 2022, following a hearing on 21 October 2022, I found there to be an error of law in the decision of First-tier Tribunal Judge S J Clarke dated 15 March 2022 by which the Appellant's appeal was allowed. In light of the error found, I set aside the First-tier Tribunal decision and gave directions for re-making in this Tribunal. My error of law decision to which is also appended an earlier adjournment decision is annexed hereto for ease of reference.

2. The salient facts of the Appellant's case are set out at [5] of the error of law decision and I do not repeat them. In essence, the Appellant's case relies on Article 8 ECHR. In turn, that is based now only on her private life but involves as a main strand her relationship with her husband [SG] who very unfortunately passed away on the day after they married (in a religious ceremony).

3. The Appellant has suffered mental health issues following the untimely death of her late husband. Although he died in 2018, she continues to grief his death. I had before me some medical evidence to which I will come below which shows that the Appellant is still suffering some mental health issues. I therefore asked Mr Malik at the start of the hearing whether he was asking for her to be treated as a vulnerable witness. He confirmed that he was. Although the oral evidence I heard from the Appellant was brief, I asked Mr Walker to ensure that the questions he asked were put to the Appellant sympathetically and to avoid so far as possible raising the issue of past events so as not to upset her unduly. He did so. I confirm that when considering the Appellant's evidence, I have had in mind the guidance given by the Court of Appeal in AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 and the Joint Presidential Guidance Note No 2 of 2010 which is referred to in that judgment. There is in any event limited dispute as to the facts of the case. It turns on my assessment both within the Immigration Rules ("the Rules") and outside them.

4. When making my error of law decision, I gave directions for the filing of further evidence by the Appellant. That was duly filed within time. I therefore have before me the Appellant's bundle before the First-tier Tribunal to which I refer as [AB/xx] and the Appellant's supplementary bundle filed for the hearing before me to which I refer as [ABS/xx]. In addition, I had a letter written by Mr and Mrs Robin Fowler dated 6 January 2023. Mr and Mrs Fowler are long-standing friends of the Appellant and her family and, as emerged from the Appellant's oral evidence, have been supporting her and accommodating her in the UK. I also had the Respondent's bundle before the First-tier Tribunal to which I do not need to refer except in relation to the decision under appeal. Finally, I had a skeleton argument from Mr Malik which was filed late but without objection from Mr Walker.

LEGAL FRAMEWORK

5. Mr Malik accepted that the Appellant cannot rely on her family life based on her relationship with her late husband. Although Mr Walker had drawn Mr Malik's attention to the provisions of the Rules dealing with bereaved partners (section BPILR of Appendix FM to the Rules), Mr Malik very fairly accepted that the Appellant is unable to meet those as she did not previously have leave to remain as a partner. He said however that those were instructive as to the Respondent's policy towards those who are unable to obtain leave to remain within Appendix FM due to the loss of a partner.

6. Otherwise, within the Rules, Mr Malik relied upon paragraph 276ADE(1)(vi) of the Rules ("Paragraph 276ADE(1(vi)"). The Appellant says that there are very significant obstacles to her integration in the UK due to the length of time that she has spent away from her home country and what Mr Malik termed her "emotional attachment" to the UK based on the memories of her relationship with her late husband and the fact that his grave is in the UK.

7. When considering whether there are very significant obstacles to the Appellant's integration in Namibia, I am guided by the Court of Appeal's comments in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 and in particular [14] of the judgment as follows:

> "In my view, the concept of a foreign criminal's 'integration' into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

8. This is of course not a deportation case, and the Appellant is not a criminal. However, the test in this regard is the same. As Mr Malik fairly accepted, the threshold for "very significant obstacles" is a high one. He referred in that regard to the guidance given in Treebhawon and Others (NIAA 2002 Part 5A – compelling circumstances test) [2017] UKUT 00013 (IAC) ("Treebhawon") that "[m]ere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of 'very significant hurdles' in paragraph 276 ADE of the Immigration Rules" ("hurdles" there bearing the same meaning as "obstacles" which was therefore the same test as here).

9. Mr Malik accepted that the Appellant's mental health problems are insufficient to engage Article 3 ECHR, but those problems are relied upon as an additional factor when assessing Article 8 outside the Rules. Whilst recognising realistically that this may not be the strongest case when interference is balanced against the public interest, he submitted that the balance just tips in favour of the Appellant.

10. When assessing Article 8 outside the Rules I am bound to have regard to section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") which reads as follows so far as relevant to this case:

> "**117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts —
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and …
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> **117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

…"

11. In Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, the Supreme Court accepted that the concept of "little weight" at Section 117B(4) and (5) involves "a small degree of flexibility" so that applications would "occasionally be able to succeed" ([49]). At [58], the Court again referred to that concept as involving a "limited degree of flexibility". As the Court made clear, that arises in particular from Section 117A(2)(a). At [57] of Rhuppiah, the Court also held that where the factors in Section 117B (2) and (3) are met those do not count positively in an appellant's favour but are neutral. It is only where they are not met that they have a (negative) impact on the assessment.

12. Finally, since it emerged from one of Mr Malik's submissions, I mention paragraph EX.1. of Appendix FM to the Rules ("Paragraph EX.1.") which reads as follows so far as relevant:

"EX.1. This paragraph applies if

(a) …

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or … and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

EVIDENCE AND FINDINGS

Appellant's Evidence

13. The Appellant has provided two witness statements dated 29 July 2021 ("the First Witness Statement") and 2 December 2022 ("the Second Witness Statement"). She gave oral evidence in English. I permitted Mr Malik to ask her some additional questions in chief and she was very

briefly cross-examined by Mr Walker. I asked a few clarificatory questions arising out of her oral evidence.

14. The Appellant arrived in the UK on 28 December 2012 as a student. She came to study accountancy but confirmed that she did not complete her qualifications due to sponsorship difficulties and is therefore not qualified to practise as such in the UK. She has overstayed since April 2015.

15. The Appellant met [SG] in April 2014. They began a romantic relationship in December 2014. [SG] proposed to her in mid-2015 and they became engaged in July 2016. The Appellant says that they were unable to marry in a civil ceremony as the Home Office was holding her passport. They therefore decided to marry in a religious ceremony. They did so on 5 May 2018.

16. [SG] was born in Ivory Coast but came to the UK in December 2007 (then aged nineteen years) to join his mother who was married to an EEA national at that time. He had since become settled in the UK.

17. The Appellant made the application which led to the decision under appeal by way of a section 120 notice on 4 April 2018 (having made earlier applications which were all refused (see [5] of the error of law decision). [SG] tragically died on 6 May 2018. The Appellant's solicitors informed the Home Office of his death and sent various documents confirming the position. The application was refused on 13 August 2020. I will come to the basis of the Respondent's decision below.

18. The Appellant said that she currently lives alone in a flat owned by Mr and Mrs Fowler. She said in her oral evidence that she has no family or friends in the UK other than Mr and Mrs Fowler. She says in her written evidence that [SG] was her best friend. He is buried in Croydon cemetery. She says in the First Witness Statement that she visits the grave "regularly". At the First-tier Tribunal, she said that at that time (in March 2022) she visited the grave weekly and had previously visited it daily. Her family (parents and two siblings) live in Namibia. She remains in contact with them by phone. She speaks to them about once per week.

19. The Appellant is unable to work in the UK as she has no permission to do so. She indicated in her oral evidence that she would like to take up a job in the care sector if she is permitted to remain. However, she confirmed that she has no qualifications in that area of work. She said that her therapist told her that she needed to keep busy, and she had therefore volunteered at a care home. She said that she "felt touched" by the experience and would like to help the elderly and vulnerable if she remained and even if she found a different job. However, she also said that she had only volunteered on one occasion.

20. The Appellant has suffered mental health problems. It is entirely understandable given the tragic circumstances of [SG]'s death that she would suffer from grief following his death. I deal however with the extent of the medical evidence about this below. In terms of her own evidence about this, she says that her mental health "has not improved much" since

[SG] died. She says that the trauma triggered earlier problems from her time in Namibia when she says that she was "molested". She says in her first statement that she was molested at the age of six years and then again at the age of twelve years by two different people. She does not however provide any further details in this regard and was not asked about it in oral evidence. Mr Malik did not mention this as being a reason why there would be very significant obstacles to her integration in Namibia and the Appellant says only that she "dread[s]" returning in those circumstances to a country where she has not visited for more than eight years.

21. In terms of treatment for her mental health, the Appellant has been prescribed anti-depressants. She says in the Second Witness Statement that she is "struggling on a daily basis" and finds it "difficult..to cope with life". She says that she finds it difficult to sleep or wake up and hears voices. She says that she thinks of ending her life. The Appellant says she tried talking therapy in 2021 which "helped a little" but she "got a serious nervous breakdown" when she stopped the therapy. She says that she is "in the process of arranging …therapy sessions" and is waiting for a date. However, in her oral evidence she confirmed that between December 2021 and December 2022 she had not received treatment other than medication.

22. Mr Walker did not challenge the credibility of the Appellant's evidence. There are some minor discrepancies in it when compared with the other evidence which I identify below but in the main I accept her evidence as credible.

Medical Evidence

23. There is very little documentary evidence about the Appellant's mental health. I therefore set out what there is in full.

24. A letter at [AB/D1] from Talking Therapies dated 21 July 2021 addressed to the Appellant's GP confirms that the Appellant had by that date attended thirteen sessions of cognitive behavioural therapy. The letter suggested that further support was required and referred the Appellant to secondary care. The letter provides outcome measures indicating some improvement after that therapy.

25. The letter at [AB/D3-4] dated 28 October 2020 from Talking Therapies confirms that the Appellant was referred to them in October 2020. Under the heading of "RISK" the psychological wellbeing practitioner indicates that the Appellant scored "2/3 on PHQ-9". The Appellant reported suicidal and self-harming thoughts. However, the practitioner reported that she had no active plans and "rated the likelihood of acting on any thoughts/plans as 3/10". The Appellant was however provided with protective information to deal with those thoughts.

26. A letter from the Appellant's GP dated 30 December 2020 ([AB/D6]) records that the Appellant had a "history of depressive disorder" for which she had been receiving treatment from Talking Therapies. The GP

indicates that she had suicidal thoughts in November 2020. He says that [SG]'s birthday had just passed and had contributed to the Appellant's low mood. There is mention of the Appellant being molested in the past. The medical notes attached however show only that the Appellant had visited the GP in November and December 2020 for her mental health problems and had been prescribed fluoxetine in December 2020. There is no earlier record of treatment or medication for mental health problems.

27. The Appellant has provided further medical documentation in the supplementary bundle. A letter from a mental health practitioner at Barking Community Hospital dated 7 December 2021 ([ABS/B2]) indicates that the Appellant visited the hospital because she had not been able to get through to her GP to provide her with medication. The Appellant was said to be "very low and depressed with daily suicidal thoughts". The letter urges the GP's surgery to provide the medication.

28. The Appellant's medical record is provided from October 2020 onwards ([ABS/B5-7]) and shows the following. In October 2020, there is a first entry of "depressive disorder". She was reviewed on 30 December 2020 by telephone. Her mood was said to be better on medication, but she reported feeling "apathetic". She asked to be provided with a letter confirming her condition. On 18 January 2021, she sought repeat medication, and it is said was taking the incorrect dose. She said that she had been "feeling low" but was "fine now". She denied any suicidal intent and said that she was "currently surrounded by friends, who are giving her company".

29. There is a lengthy entry on 24 August 2021 following a telephone consultation and recording the breakdown which the Appellant says she suffered at that time. Her moods had been "up and down, a little low". She had panic attacks and was not leaving the house. This appears to have coincided with the end of her therapy sessions with Talking Therapies. The entry suggests that the trigger may have been that she was not taking medication. For some reason the doctor provided a "not fit for work" certificate (which is odd given that she is not entitled to work). There is a note that she was living with an aunt in Bedford. A question mark is raised regarding possible PTSD, and it is said that she had been referred to a psychologist and should be referred to community mental health.

30. Following the plea for medication made by Barking Community Hospital, the medical record shows that the GP was unwilling to provide further medication unless the problems were acute and would prescribe only two weeks' worth "due to risk of overdose". On 13 December 2021, following a telephone consultation when further medication was requested, it is noted that medication was reduced to two weekly intervals "due to previous suicidal thoughts". In spite of the Appellant being said to still have suicidal thoughts, the GP notes that there were no active plans. In fact, the Appellant is said to be "adamant" that she would not overdose on her medication. The Appellant was said to be still living with "family" in

Bedford “after an ‘incident’” (which I assume is that reported in August 2021).

31. There are no entries between December 2021 and November 2022. On 9 November 2022, there is an entry indicating that the Appellant had been trying to book an appointment in the previous week but was “feeling better now”. It is said that she had been “feeling low” with “thoughts of giving up” two weeks previously. She was still taking medication but wanted to know if she could go back to therapy. Reference is made to the ongoing immigration case which is said to have made her “feel worse” but she is said not to have any thoughts of self-harm by the time of the entry. The Appellant is said to be living with a cousin apparently in the Milton Keynes area.

32. There is a letter from Barking & Dagenham Psychological Services dated 26 November 2021 addressed to the Appellant’s GP ([ABS/B3-4]). The authorship of the letter is not given and therefore the qualification of the writer is unclear. This letter records that the Appellant was discharged as she would not talk about her mental health difficulties because she was concerned about triggering a relapse having suffered a “breakdown” when she finished therapy on the previous occasion (again I assume that recorded in August 2021). Concern is expressed that the Appellant says that she continues to hear voices which was making her paranoid “resulting in interpersonal difficulties and commanding her to self-harm”. The Appellant is said to still have thoughts of suicide but “not as frequent” and was trying to ignore the voices telling her to self-harm. It appears that the writer had a conversation with the Appellant on 24 November 2021 when the Appellant said that she was in Dartford “but could travel to her address in Dagenham if she needed to be seen”.

33. Finally, there is a letter from the same mental health practitioner as requested the repeat medication in December 2021 (Phebe Hinson) ([ABS/B1]). That letter is undated, but Mr Malik said that it had recently been obtained from the therapist. Mr Walker was prepared to accept that without sight of the email which had provided it. The letter says that the Appellant had been referred and accepted for therapy. It provides a diagnosis of “depressive disorder and PTSD” but provides no further detail of the PTSD diagnosis. It indicated that the Appellant “reported fluoxetine 40mgs” and says there is a risk posed by “ongoing suicidal thoughts”.

34. Whilst Mr Walker did not take any issue with the medical evidence and I am prepared to accept it as undisputed, the difficulty with that evidence is that it provides little detail about the reasons for the Appellant’s mental health problems nor what would be the impact of return to Namibia for her, particularly bearing in mind her evidence that she does not have family or friends in the UK but has family in Namibia who could presumably help her with her problems.

35. Although I accept that the medical evidence is not disputed, I am also unable to place weight on the diagnosis of PTSD given the lack of any evidence of tests conducted to form that diagnosis and the lack of any

mention of that elsewhere in the documents (other than an entry in the GP's notes putting that forward as a possible diagnosis). The Appellant has clearly been prescribed anti-depressants over a period of over two years and I therefore accept that she is suffering from depression. I accept that she has also expressed suicidal thoughts but has apparently never acted upon them or reached the stage of active planning. The only assessment of risk which I have is in October 2020 when the Appellant's problems were first being assessed and indicates that the risk of suicide was a low one.

36. Overall, I accept that the medical evidence shows that the Appellant has been suffering mental health problems since October 2020. It is notable that this was only a couple of months after the Respondent's refusal of the Appellant's claim. It is perhaps surprising that the Appellant did not seek medical help immediately after [SG]'s death. The timing of her problems suggests that it may have been the uncertainty of her immigration position which has triggered the problems rather than [SG]'s death taken alone. However, given the sudden nature of [SG]'s death I am prepared to accept that this may well have contributed to her mental health problems even if it did not apparently immediately trigger those problems.

Evidence of Mr and Mrs Fowler

37. Mr Robin Fowler and Mrs Bianca Gawanas-Fowler are family friends. They are British citizens. They have known the Appellant since birth as they are close family friends of her parents. They provided a letter before the First-tier Tribunal dated 1 August 2021 ([AB/C70]) and a further letter dated 6 January 2023 for the hearing before me. Neither letter is in statement form, nor did they attend to give oral evidence. I am however prepared to place some weight on the evidence I have subject to what I say below.

38. The first letter details the immediate aftermath of [SG]'s death. They did not attend the wedding as they were away at the time. Having heard of his death, they rushed back to the UK to support the Appellant and her parents who were in the UK for the wedding and to help with funeral arrangements. They say that the Appellant "will never be the same again". They say that the Appellant became very depressed and they "had to be supportive to the extreme so that [they] could ensure that she would not do any harm to herself". They do not provide a timeline for when this happened and it is therefore difficult to know whether what they say is consistent with the medical evidence where the first mention of mental health problems is October 2020. They also say that they "have remained the stable base that [the Appellant] would come to whenever she is down" and that they have assisted her emotionally and financially.

39. The second letter largely repeats what is said in the first. However, it goes on to report that the Appellant had "another breakdown" during 2021 when she had to write her witness statement for the First-tier Tribunal hearing. The Appellant is said to have told her therapist that she was struggling to deal with this. That is consistent with it being the immigration proceedings which are largely the cause of the Appellant's

mental health problems. It is said that the Appellant thereafter "would get flashbacks more often than usual" which "caused a Mental Breakdown". The Appellant is said to have behaved "erratically" and "had [them] worried". I accept that the timing of the "breakdown" in August 2021 is consistent with the date of the First Witness Statement in July 2021. However, that was well over one year ago. Mr and Mrs Fowler's evidence does not therefore report on the Appellant's mental health more recently.

40. Mr and Mrs Fowler's evidence that the Appellant goes to them whenever she needs stability is at odds with what the Appellant has told medical professionals about where she has been living at certain times. In mid to late 2021 she was said to be living with family in Bedford and in late 2022 she was said to be living with a cousin at an address in Milton Keynes (possibly the same family). She has not mentioned those family members, nor do I have any evidence from them. Although the Appellant says that she has been living at the flat in Islington owned by Mr and Mrs Fowler, she has told medical professionals that she has an address in Dagenham which is consistent with the medical evidence which shows that her GP and mental health team are all in the Barking and Dagenham area. I am however prepared to accept the Appellant's evidence that the Fowlers have been supporting her financially and emotionally.

THE RESPONDENT'S DECISION

41. Although it appears that the Respondent was informed of [SG]'s death, she did not reject the application on the basis that the Appellant could not by then rely on her family life. Instead, she rejected the application under the Rules as if [SG] were still alive. She rejected it on the basis that the marriage was not a legally recognised one and that the relationship did not meet the requirements of two years' co-habitation. She went on to point out that, due to the Appellant's unlawful immigration status, to succeed, the Appellant would in any event have to satisfy Paragraph EX.1.

42. In relation to the Appellant's private life, the Respondent did not accept that the Appellant could meet Paragraph 276ADE(1)(vi). She had lived in Namibia until the age of 32. English is the main language spoken in Namibia and the Appellant was in any event educated and brought up there. Outside the Rules, the Respondent did not accept that removal would lead to unjustifiably harsh consequences for the Appellant.

DISCUSSION AND CONCLUSIONS

43. I begin with the submissions made about the Rules relating to bereaved partner. Although Mr Malik accepted that the Appellant could not meet those because she was not last granted leave as a partner, he said that the policy intention was to permit those who had lost a partner to remain in the UK.

44. I cannot accept that submission. The clear policy intention for bereaved partners, much as those whose relationships end because of domestic violence, is to permit the affected partner to remain because, otherwise, they would lose a lawful status which they previously enjoyed. There is no

indication that the Rules in that regard are intended to benefit those who have formed a relationship whilst here unlawfully and such would be contrary to the policy set out in Section 117B(4) that little weight is to be given to family life where the relationship is formed whilst one partner is here unlawfully.

45. The main thrust of Mr Malik's submission was in any event on the Appellant's private life. He recognised that the threshold in relation to the existence of "very significant obstacles" is a high one. However, he submitted that the Appellant "would not be susceptible to change". He realistically recognised that he could not make detailed submissions about the diagnosis of PTSD but said that this would affect the Appellant's ability to endure change. I have already indicated why I am unable to place weight on the diagnosis of PTSD.

46. I accept that the Appellant suffers from depression. Mr Malik submitted that the Appellant has an "emotional attachment" to the UK because of past events. Whilst I accept that the Appellant will have formed memories in the UK with [SG] and might be reluctant to return to her home country for that reason, I am unable due to lack of evidence to conclude that it would have the sort of mental health consequences which Mr Malik suggested. There is no medical evidence about what the impact of removal would be. As I have already pointed out, the Appellant's mental health problems appear to be more connected chronologically with her immigration case than [SG]'s death. Even if they were initially triggered by his death, I have no medical evidence that the Appellant could not be expected to leave the UK. I accept that she would no longer be able to visit [SG]'s grave. However, even if her mental health problems now are caused by her grief rather than by the ongoing immigration proceedings, it might equally be said that she would have better prospects of recovery if she were not in the place where her husband died. I accept that may be speculative but no more so than Mr Malik's submission which does not have any evidential foundation. On any view, the Appellant would also have the support in Namibia of her immediate family.

47. I can place very little weight on the Appellant's evidence of having been molested as a child in Namibia as giving rise to any very significant obstacle to her return. I did not understand Mr Malik to suggest that this was a very significant obstacle. The Appellant has provided little detail about these events. She was able to remain living in Namibia for twenty years after the last event.

48. As the Respondent has pointed out, the Appellant lived in Namibia for thirty-two years before coming to the UK. She has been in the UK for just over ten years. The Appellant will be familiar with the customs, language and culture in Namibia. She has family ties there. Although the Appellant did not finish her professional qualifications to permit her to practise in the UK as an accountant, she is clearly educated, and I have no evidence that she could not find work in Namibia.

49. I have had regard to what is said in Kamara about what is meant by very significant obstacles to integration. Having regard also to the guidance in Treebhawon that the threshold is a high one, I conclude that there would not be very significant obstacles to the Appellant's integration in Namibia. The Appellant is unable to succeed under Paragraph 276ADE(1)(vi).

50. Turning then to the position outside the Rules, I have dealt with that to some extent in what is said above. I accept that the Appellant does not wish to leave the UK because she is still able to visit her late husband's grave and may also not wish to leave behind the place where they formed memories together. Although I have not accepted (due to lack of evidence) that return to Namibia would cause deterioration in her mental health, I accept that removal would interfere with the Appellant's private life in that regard.

51. There is however little indication of private life beyond those factors. I accept that Mr and Mrs Fowler have provided the Appellant with some emotional and financial support and are close to the Appellant. It is apparent from their letters however that they have maintained the relationship with the Appellant and her parents when the Appellant was in Namibia, and they were living in the UK. That relationship could therefore continue in the same way.

52. There is a suggestion in the medical evidence that the Appellant may have or had other family members in the UK, but she has made no mention of them, nor do I have any evidence from them. The Appellant said in her oral evidence that she lives alone and has no family or friends other than Mr and Mrs Fowler. I cannot go beyond that evidence. In any event, the Appellant has closer family members in Namibia with whom she retains regular contact. The Appellant has not been able to work since 2015 at the latest. She has not studied since then. The only evidence of work in the UK is one occasion when she volunteered in a care home.

53. In terms of public interest, Mr Malik accepted that as an overstayer, the maintenance of effective immigration control weighs significantly against the Appellant (Section 117B (1)). He referred again in that regard to the Rules in relation to bereaved partners. I have already explained why I do not accept that the policy intention in that regard extends to those in the Appellant's position. I have already rejected the claim that there are very significant obstacles to the Appellant's integration in Namibia and therefore the Appellant does not meet Paragraph 276ADE(1)(vi). She is therefore unable to meet the Rules. I do not therefore accept that the public interest is diminished by the Appellant's circumstances. For the same reason, the case of TZ (Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 1109 does not avail the Appellant. She cannot meet the Rules due to her immigration status.

54. Mr Malik suggested at one point that, if the Appellant and [SG] had not been prevented from marrying in a legal ceremony due to the Home Office having her passport, she would have met the Rules based on her family life if [SG] had not tragically died. I am unable to accept that submission.

Although the Respondent did not go so far as to consider the circumstances substantively under Paragraph EX.1. because [SG] had by that time passed away, it is clear from the decision under appeal that the decision-maker considered that paragraph to be relevant. The Appellant would not have been able to meet the Rules automatically because of her immigration status. She could only have done so if Paragraph EX.1. was met. [SG] was born in the Ivory Coast and did not come to the UK until he was an adult. Although I accept that Ivory Coast and Namibia are at some distance apart, both are in Africa and the Respondent may well have concluded that the Appellant and [SG] could continue their family life outside the UK. I cannot accept as Mr Malik submitted that the Appellant would have been certain to be permitted to remain in the UK if she had been legally married and if [SG] had not died.

55. I accept that the factors in Section 117B (2) and (3) are neutral. The Appellant speaks English. She is dependent it seems on Mr and Mrs Fowler for financial support but is not dependent on the State and is therefore financially independent.

56. In relation to Sections 117B (4) and (5), little weight can be placed on the Appellant's private life either before her leave expired or afterwards. Her status has always been precarious. I recognise of course that little weight does not mean that no weight should be attached but the level of the weight to be given to the Appellant's private life and the interference with it depends on the strength of it as disclosed by the evidence. As I have already said, there is little evidence of the Appellant having formed a strong private life in the UK - in fact quite the opposite. She herself said that she has no family or friends here save for Mr and Mrs Fowler. I have already dealt with Mr Malik's submission that the Appellant's circumstances are such that she will have formed an emotional attachment to the UK. I can give that some weight, but the weight is limited by the shortage of evidence in support of that submission. I can also give some weight to the fact that the Appellant would wish to be able to continue to visit [SG]'s grave. However, I have very little evidence about this including as to the regularity with which she currently visits the grave.

57. I have already dealt with the evidence about the Appellant's mental health. Whilst accepting that the Appellant suffers from depression for which she has been receiving medication and has been referred for some therapy, Mr Malik sensibly did not suggest that the threshold is reached where removal would breach Article 3 ECHR. I accept that the Appellant's mental health problems can be considered as an additional factor under Article 8 ECHR. However, the difficulty I have in this regard is the lack of evidence about the impact on the Appellant's mental health of removal to her home country and/or the impact of separation from the UK. As I have also pointed out, the medical evidence suggests that the Appellant's problems were caused and have been exacerbated by the immigration proceedings rather than her ongoing grief although I accept of course that her grief will have added to them. Absent medical evidence in relation to causation and the impact of removal, however, I am unable to place any significant weight on this factor.

58. Balancing the interference with the Appellant's Article 8 rights against the public interest which Mr Malik fairly conceded is significant due to the Appellant's unlawful status in the UK throughout much of her stay, I conclude that the public interest outweighs the interference. Removal would not lead to unjustifiably harsh consequences. I have every sympathy for the predicament in which the Appellant has found herself. However, based on the evidence I have, removal would not breach the Appellant's Article 8 rights. I therefore dismiss the appeal.

Notice of Decision

The Appellant's appeal is dismissed

L K Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 January 2023

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001845
[HU/50528/2020]

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination promulgated**
On Friday 21 October 2022	**……22 November 2022……**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

B S-K
[ANONYMITY DIRECTION MADE]

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. Although I cannot identify any reason for that order nor is it explained, I continue that order for the time being. Unless and until a Tribunal or court directs otherwise, the Appellant [BS-K] is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Ms H Gilmour, Senior Home Office Presenting Officer
For the Respondent: Mr Z Mughal, Counsel instructed by Callistes solicitors

DECISION AND DIRECTIONS

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge S J Clarke dated 15 March 2022 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 5 October 2020 refusing her human rights claim (Article 8 ECHR).

2. The appeal came before me (sitting with Deputy Upper Tribunal Judge Sills) first on 10 August 2022. On that occasion, we adjourned the hearing as the Appellant's representatives claimed that they had not received notice of the hearing and were not therefore in attendance.

3. The adjournment decision made following the hearing on that occasion is appended hereto for ease of reference. That decision sets out at [2] in broad terms the grounds on which the Respondent challenges the Decision and, at [3], the terms of the grant of permission. I do not therefore repeat those matters.

4. Having heard submissions from Ms Gilmour for the Respondent and Mr Mughal for the Appellant, I found there to be an error of law in the Decision. I therefore set the Decision aside and gave directions for a resumed hearing in this Tribunal. I indicated that I would set out my reasons for finding an error of law more fully in writing which I now turn to do.

5. The Appellant is a national of Namibia. She came to the UK on 28 December 2012 as a student with leave to remain until 10 April 2015. She has had no leave to remain since then. On 6 December 2015, the Appellant applied for leave to remain outside the Immigration Rules ("the Rules"). That application and further applications made on 17 June 2016, 7 November 2016, 26 June 2017 and 3 April 2018 were all refused for various reasons. On 5 May 2018, the Appellant married her partner, Mr [G]. Mr [G] unfortunately passed away one day later. The decision under appeal rejected the Appellant's human rights claim on Article 8 grounds made by way of a response to a section 120 notice on 4 April 2018.

6. The Respondent refused the human rights claim on the basis that the Appellant could not meet the Rules. She did not satisfy the definition of "partner" within the Rules as she was not legally married to Mr [G] under UK law nor had she ever lived with him. The Respondent refused the claim also on the basis that there were no exceptional circumstances in the Appellant's case and therefore that she did not meet GEN.3.2 of Appendix FM to the Rules ("GEN.3.2"). The Respondent also concluded that there were no very significant obstacles to the Appellant integrating in Namibia and therefore paragraph 276ADE(1(vi) of the Rules ("Paragraph 276ADE(1)(vi)") was not met. The Respondent also decided that there were no

circumstances warranting the grant of leave to remain outside the Rules.

7. The Decision runs to twelve paragraphs including the outcome. Brevity of decision-making is not of itself a bad thing provided that adequate consideration is given to all relevant factors in reaching the outcome.

8. Having set out the Appellant's case and evidence and made findings that the Appellant was continuing to suffer grief at the loss of her partner, the Judge set out her reasoning at [9] to [11] for concluding that the appeal should be allowed. Those paragraphs read as follows:

> "9. I move onto [sic] consider GEN.3.2 and whether there are exceptional circumstances in the case which would render refusal and breach of Article 8 because it would result in unjustifiably harsh consequences for the Appellant. The Appellant cannot shoehorn herself into the spouse or partner routes because of the tight definitions which she simply cannot fulfil. The introduction of GEN.3.2 was to cater for the gap in the Rules when they first emerged and I have no hesitation in finding the Appellant falls within the first aspect of the rule because she enjoyed a very strong, genuine and subsisting relationship with her partner with whom they tried to marry at a register office from 2016, and then finally entered into a religious marriage/blessing which is not recognised but they were not able to formally marry at a register officer afterwards because her partner died suddenly the next day.
>
> 10. The Appellant would face unjustifiably harsh consequences if she were removed to Namibia because she would not be able to visit the grave of her partner weekly, at best she may be granted a visa to allow her to visit but she has been visiting daily and now weekly and she is locked into grieving and her mental health issues are exacerbated and she can only move forward by having counselling to let her talk about what has happened.
>
> 11. I find that the Appellant would not be able to continue with this process if returned to Namibia and there has been suicide ideation for which she is receiving treatment. This is not an Article 3 case but the consequences to this Appellant of being removed to her country whilst grieving is unjustifiably harsh as at today's date, even if she has a network of family in her country who came to her wedding. This is someone who needs to be in the vicinity of the grave of her partner still and commence counselling here."

9. I begin by observing that the Judge did not find there to be very significant obstacles to the Appellant's integration in Namibia. Whilst she speaks of "unjustifiably harsh" consequences of removal, the outcome is not predicated on the Appellant meeting Paragraph 276ADE(1)(vi). The Judge did not consider the test which applies in that regard. There is therefore no finding whether express or implicit

that there are very significant obstacles to the Appellant's integration in Namibia. There is no consideration of that issue.

10. Mr Mughal submitted that the Judge allowed the appeal applying GEN.3.2 and was entitled so to do on the facts as found. It is worth therefore setting out what that paragraph actually says:

> "GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.
>
> (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application."

11. As is evident from what is there said, GEN.3.2 is not a separate rule in and of itself. It is a general paragraph which allows an applicant to succeed notwithstanding that he or she does not meet the Rules under Appendix FM as a family member on the basis that there are exceptional circumstances which would result in "unjustifiably harsh consequences". As is also evident from GEN.3.2 read as a whole, the reason for this is because removal or refusal of entry clearance would entail a breach of Article 8 ECHR.

12. Article 8 ECHR is of course a qualified right. One need look no further than to the oft-cited extract from the House of Lords judgment in R (oao Razgar) v Secretary of State for the Home Department [2004] UKHL 27 as to how Article 8 operates in removals cases. The assessment, certainly in a case such as this, involves consideration of the proportionality of removal, which itself entails a balancing exercise between the interference with an individual's private and family life and the public interest.

13. That position is not altered by the introduction, in July 2012, of the Rules in relation to Article 8 family and private life as encompassed in Appendix FM to and Paragraph 276 of the Rules. Ms Gilmour drew attention to R (oao Agyarko and Ikuga) v Secretary of State for the Home Department [2017] UKSC 11 which neatly encapsulates the way in which Appendix FM is intended to work (albeit with some slight

differences in numbering from the current version of the Rules). As set out at [14] of the judgment, Appendix FM begins with a general statement that the Rules as there encapsulated are designed to strike the proportionality balance in most cases involving family life. Importantly, however, for the purposes of this appeal, the judgment goes on to draw attention to the other provisions of the general section of Appendix FM which "nevertheless contemplate[s] that the Rules will not cover all the circumstances in which a person may have a valid claim to enter or remain in the UK as a result of his or her article 8 rights." In such situations, leave is granted outside the Rules.

14. At [46] and [47] of the judgment, the Supreme Court went on to say this about the interaction of the Rules and an Article 8 assessment outside the Rules (albeit in the context of paragraph EX.1 of Appendix FM):

> "46. In considering that question, it is important to appreciate that the Rules are not simply the product of a legal analysis: they are not intended to be a summary of the Strasbourg case law on article 8. As was explained at para 10 above, they are statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests. They are designed to operate on the basis that decisions taken in accordance with them are compatible with article 8 in all but exceptional cases. The Secretary of State is in principle entitled to have a policy of the kind which underpins the Rules. While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The margin of appreciation of national authorities is not unlimited, but it is nevertheless real and important. Immigration control is an intensely political issue, on which differing views are held within the contracting states, and as between those states. The ECHR has therefore to be applied in a manner which is capable of accommodating different approaches, within limits. Under the constitutional arrangements existing within the UK, the courts can review the compatibility of decision-making in relation to immigration with the Convention rights, but the authorities responsible for determining policy in relation to immigration, within the limits of the national margin of appreciation, are the Secretary of State and Parliament.
>
> 47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's

> constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case. This was explained in *Hesham Ali* at paras 44-46, 50 and 53."
>
> [my emphasis]

15. At [56] and following of the judgment, the Supreme Court dealt also with how "exceptional circumstances" are to be understood in this context:

> 56. The European court's use of the phrase "exceptional circumstances" in this context was considered by the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544. Lord Dyson MR, giving the judgment of the court, said:
>
> > 'In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal.' (para 42)
>
> Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as the Master of the Rolls made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, 'something very compelling ... is required to outweigh the public interest', applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in *Hesham Ali*.
>
> 57. That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain

> brought by a person in the UK in breach of immigration laws, only where there are 'insurmountable obstacles' or 'exceptional circumstances' as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."
>
> [my emphasis]

16. Finally, at [60] of its judgment, the Supreme Court tied together the reference in the Rules to "exceptional circumstances" with the need to show "unjustifiably harsh consequences" as follows:

> "60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word 'exceptional', as already explained, as meaning 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate'. So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that 'exceptional' does not mean 'unusual' or 'unique': see para 19 above."
>
> [my emphasis]

17. As those paragraphs all make clear, where an individual cannot meet the strict requirements of the Rules and reliance is placed on there being "exceptional circumstances" what is required to be considered by a decision-maker (which includes a Tribunal Judge) is whether a decision to remove would breach Article 8 ECHR because, when a balance is struck between interference with individual rights and the public interest, the individual rights prevail.

18. Finally, before returning to the Decision, I need also to refer to section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B"). As the preceding section 117A of the 2002 Act makes clear, this part of the Act (which includes Section 117B) "applies where a court or

tribunal is required to determine whether a decision made under the Immigration Acts (a) breaches a person's right to respect for private and family life under Article 8, and (b) as a result would be unlawful under section 6 of the Human Rights Act 1998".

19. Having set out the way in which the Rules, statute and Article 8 ECHR interact, I return to the Decision.

20. The most obvious error made by the Judge in this case is the failure to refer at all to the public interest. One searches in vain for any mention of it. There is no reference to Section 117B. There is some recognition at [9] of the Decision that the Appellant is unable to meet the Rules in Appendix FM. There is no reference to the fact that the Appellant has been in the UK unlawfully since April 2015. The Judge sets out the Appellant's individual rights but makes no reference to the public interest in removal. She does not refer to the maintenance of immigration control which is a facet of the public interest where an individual cannot meet the Rules or has remained in the UK without leave. There is no reference to Section 117B(4) or Section 117B(5) in terms of the weight to be given to a private life or family life formed whilst an individual is in the UK unlawfully or with precarious status. There is no consideration whether the Appellant is financially independent or speaks English.

21. There is no attempt made by the Judge to balance the interference with the Appellant's individual rights as set out at [10] of the Decision with any public interest. That is an erroneous approach in law.

22. Mr Mughal sought to persuade me that the Judge had not erred in approach because she was entitled to find that the consequences of removal would be "unjustifiably harsh". He expressly disavowed any suggestion that he was saying that this question was a threshold one. He submitted that the Judge "has quite clearly found that the factors [in the Appellant's case] outweigh the public interest" and that the Judge did not have to specifically refer to that public interest. That is a somewhat astonishing submission. If the Judge had referred to Section 117B and/or to the factors which might be relevant to the public interest, that submission might be sustainable. However, in the complete absence of any reference to the public interest or to Section 117B either expressly or indirectly, the Judge has quite clearly erred. She has either failed to have regard to relevant considerations and/or misdirected herself in law and/or failed to provide adequate reasons for her conclusion.

23. Strictly, I do not need to go beyond that conclusion. The Respondent succeeds on her ground three.

24. I would however also have found for the Respondent on ground four. In relation to health issues, although those may well be relevant in this case, the Judge finds at [11] of the Decision that the threshold in

Article 3 ECHR would not be met. As is pointed out in the grounds, in GS (India) and others v Secretary of State for the Home Department [2015] EWCA Civ 40, the Court of Appeal held that "[i]f the Article 3 claim fails … Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm". In this case, the Judge has simply found there to be a breach of Article 8 ECHR without more. Indeed, the only reference to other relationships is to the Appellant's family in her home country.

25. That brings me on to a further error which is not identified expressly in the Respondent's grounds, namely whether the Appellant can succeed on the basis of her family life at all. The Judge has concluded that GEN.3.2 is met based on the Appellant's family life. However, the reasons for so finding insofar as those can be ascertained are based not on her family life but her private life. The facts of this case, sad though they undoubtedly are, make it difficult to see how the Appellant could meet any part of Appendix FM. I do not though find an error of law in that regard as this is not a point which was taken by the Respondent either in her decision under appeal or in her challenge to the Decision. It is though a point which the Appellant's representatives may need to consider when preparing for the resumed hearing.

26. For the foregoing reasons, I confirm my decision given orally at the hearing that there are errors of law in the Decision. Having discussed with the representatives the way forward, and having set aside the Decision in consequence of the errors found, I indicated that the appeal could proceed in this Tribunal. The factual and legal issues are narrow. I confirm below the directions which I gave at the hearing for a resumed hearing before this Tribunal.

DECISION

The Decision of First-tier Tribunal Judge S J Clarke dated 15 March 2022 involves the making of errors of law. I therefore set aside the Decision. I make the following directions for a resumed hearing.

DIRECTIONS

1. **By no later than 4pm on Friday 2 December 2022, the Appellant is to file with the Tribunal and serve on the Respondent any further evidence on which she relies, including but not limited to any updated medical evidence.**

2. **By no later than 4pm on Friday 16 December 2022, the parties are to file with the Tribunal and serve on the other party their skeleton arguments for the resumed hearing.**

3. **The appeal is to be listed for a re-making hearing before me (on a face-to-face basis) on the first available date after 3 January 2023 with a time estimate of ½ day. If an interpreter is required, the Appellant shall notify the Tribunal forthwith.**

Signed: L K Smith Dated: 26 October 2022
Upper Tribunal Judge Smith

APPENDIX: ADJOURNMENT DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001845
[HU/50528/2020]

THE IMMIGRATION ACTS

Heard at Field House, London
On Wednesday 10 August 2022

Determination promulgated
.....

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE SILLS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

B S-K
[ANONYMITY DIRECTION MADE]

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. Although we cannot identify any reason for that order nor is it explained, since we have not heard from or on behalf of [BS-K], we continue that order for the time being . Unless and until a Tribunal or court directs otherwise, the Appellant [BS-K] is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Not in attendance and not represented

ADJOURNMENT DECISION

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge S J Clarke dated 15 March 2022 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 5 October 2020 refusing her human rights claim (Article 8 ECHR).

2. The Respondent appeals the Decision on the basis that the Judge has misdirected herself in law, failed to give adequate reasons and has failed to have any or any adequate regard to statute and case-law relevant to the Judge's conclusions (including as to the public interest).

3. Permission was granted by First-tier Tribunal Judge Seelhoff on 24 April 2022 in the following terms so far as relevant:

> "... 3. The decision is brief and there certainly is no reference to the statutory considerations or indeed to any caselaw. The decision does not even identify what family or private life is impacted by the decision. All grounds can be argued."

4. The appeal came before us to decide whether the grounds identify any error of law in the Decision and, if so, whether we should set it aside and thereafter whether to remit the appeal for redetermination or to re-make the decision ourselves.

5. By the time that we reached this appeal in our list, it was already after 11am. The hearing was listed at 10am. There was no attendance by the Appellant or her representative.

6. The Tribunal clerk had however made enquiries in the interim and managed to speak to the Appellant's solicitors. They said that they had not been notified of the hearing and had been unable to contact their client to ascertain whether she knew of it. They indicated that they would be asking for an adjournment.

7. Mr Whitwell indicated that in light of this explanation, although he did not formally ask for an adjournment, he would not oppose one either for reasons of fairness to the Appellant.

8. There is evidence on the Tribunal system that an email was sent to contact@calicesolicitors.com at 1305 hours on 15 July 2022. We endeavoured to check whether that email address was current and were taken to a message indicating that the solicitor's website was under maintenance. We could not therefore be sure that the email

address was still operative. The system does not show that the notice was sent to the Appellant and it was not sent out by post.

9. We indicated that in light of that information, we would adjourn to allow the Appellant to be represented. We would re-list the hearing before Judge Smith on the first available date after seven days. We have directed the Tribunal office to send the notice of hearing also by post. We enquired of Mr Whitwell whether the Respondent had a current address for the Appellant so that notice could also be sent to her. However, although the Appellant apparently remains subject to reporting restrictions and is on immigration bail, Mr Whitwell indicated that he could not be sure which of the many addresses on the Respondent's system was current. We are not therefore directing that the Tribunal also send the notice to the Appellant personally.

10. At 11.15 hours on 10 August, an email was received from the Appellant's solicitors. That shows incidentally that the email address to which the notice of hearing was sent is still operative. The email reads as follows:

> "Further to the Tribunal telephone call informing that the above-named case has been listed for today, we write to confirm that no notification of such was received by Calices Solicitors. A search is being undertaken to locate any notice in connection with the hearing. We are also trying to contact the appellant to ascertain whether she had been notified.
>
> May we plead with the court in view of the circumstances to adjourn the hearing? Had Calices known of the hearing all arrangements would have been made timely [sic]"

DECISION

The error of law hearing is to be relisted before Upper Tribunal Judge Smith on the first available date after seven days. The notice of hearing is to be sent to both parties but is to be sent to the Appellant's solicitors by email and by post. _

Signed: L K Smith Dated: 10 August 2022
Upper Tribunal Judge Smith