Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02991/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 March 2020	**On 27 April 2020**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

CATHERINE THABISILE LANGA-THEDORO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Slatter, Counsel, instructed by Douglass Simon Solicitors (Richmond)
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of South Africa born in 1952. She arrived in the UK in March 2003 as a visitor. She was granted further leave to remain as a student but subsequent applications of the same type were refused until she was later granted four months leave to remain as a Tier 4 Student.

2. She then made an application for indefinite leave to remain as the bereaved partner of a British Citizen, FH, who died in February 2012. The application was refused in a

decision dated 26 February 2013 and her appeal against that decision was dismissed. The appellant then made an application on 14 September 2015 for indefinite leave to remain on the grounds of long residence. That application was also refused and her appeal similarly dismissed in a decision promulgated on 29 June 2017.

3. Next, she made an application on 7 August 2017 for leave to remain on human rights grounds in terms of family and private life and relying on her relationship with a British citizen, DC. The application was refused in a decision dated 18 September 2018. However, following judicial review proceedings a fresh decision was made on 28 January 2019, again refusing the application, that refusal being the subject of this appeal.

4. The application was refused because the respondent was not satisfied that the appellant met the eligibility requirements of the Immigration Rules ("the Rules") in relation to either the genuineness of the relationship or otherwise as to its duration within the terms of the Rules. Similarly, the appellant did not meet the immigration status requirement because she was an overstayer.

5. As regards her private life, the respondent was not satisfied that there would be very significant obstacles to the appellant's integration in South Africa.

6. The appellant's appeal came before First-tier Tribunal Judge L.K. Gibbs ("the FtJ") at a hearing on 17 July 2019 which resulted in the appeal being dismissed. Permission to appeal the FtJ's decision was granted by a judge of the First-tier Tribunal, on all grounds advanced.

7. In order to set my decision in context, it is necessary to refer in more detail to the FtJ's decision and her findings.

The FtJ's decision

8. Before the FtJ it was conceded that the appellant was unable to meet the relationship requirements of the Rules, R-LTRP.

9. The FtJ referred to the decision in *Devaseelan* [2002] UKIAT 00702 with reference to the two earlier appeals, the first having been in 2013 and in which the judge was not satisfied that the appellant was DC's fiancée. The judge in that case also found that the appellant had two adult daughters in South Africa, one of whom she stayed with when she visited in 2009.

10. As regards the second appeal in 2017, the judge in that case had found that the appellant was "an inconsistent and unreliable witness lacking in credibility". He also found that the evidence that one of her daughters in South Africa had died was contradicted by the evidence given in the earlier appeal, and noted that in that appeal the judge found that the appellant's daughter was not deceased. The judge in that appeal was similarly not persuaded that the appellant did not have contact with her other daughter, T, in South Africa.

11. The FtJ concluded that despite the appellant being aware of the findings in the previous appeal, she had failed to provide documentary evidence "to corroborate" her ongoing assertion that one of her children had died in South Africa in 2009. She also found that she had given inconsistent evidence regarding whether or not she had a death certificate.

12. She found that the appellant's credibility was significantly undermined by DC's failure to refer to one of her daughters being deceased and his evidence that he had spoken to "them" on the phone, although he later said that he had only spoken to one of them, T. Further, she found DC's and the appellant's evidence inconsistent in terms of contact with T, concluding that DC's evidence was the more reliable in relation to contact having taken place in 2019, and not 2009 as the appellant had claimed. The FtJ concluded that the evidence of the appellant's other witnesses did not assist her with regard to the contact the appellant claimed to have with her children.

13. She further found that in travelling to the UK in 2003, the appellant never intended to return to South Africa.

14. As regards her relationship with DC, she said that she had doubts about the appellant's true feelings for him, stating that she appears to use him as she chooses at her appeal hearings. She also noted that the appellant admitted to being in a relationship with FH whilst in a relationship with DC, and had previously applied for leave to remain in the UK on the basis of her relationship with FH.

15. Nevertheless, the FtJ found that DC and the other witnesses called on behalf of the appellant appeared credible and their evidence was not challenged on behalf of the respondent. She concluded, therefore, that the appellant had moved in with DC in September 2017 and that they live together as a couple.

16. As regards paragraph 276ADE of the Rules, she concluded that the appellant would have family members to whom she could turn for support on return to South Africa. She also found, giving reasons, that there would not be very significant obstacles to the appellant's integration in South Africa. She said that she was "wholly unpersuaded" that the appellant would not be able to find employment in South Africa and DC would be able to continue to support her there on her return.

17. In terms of her relationship with DC, she concluded that there was family life between them. The length of time that she had lived and worked in the UK illegally was a relevant factor in the public interest in her removal, and her financial independence and ability to speak English were neutral factors.

18. Notwithstanding that DC is a British citizen who does not want to move to South Africa, the FtJ found that that was his choice. He had entered into a relationship with the appellant when her immigration status was precarious at best and for much of the time was unlawful.

19. She found that given she and DC have their own funds, that could be used to establish a home in South Africa with either of them seeking employment if they chose. Although DC was a "homebody" and has family in the UK, he could maintain his relationship with his relatives through visits and other means of communication. Whilst DC preferred to remain in the UK, if he wanted to maintain his relationship with the appellant he would have to consider adjusting this preference.

20. She thus concluded that the appellant's removal was proportionate.

Grounds and Submissions

21. In Ground 1 it is argued that the FtJ failed to give weight to the requirements of s.117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") which were favourable to the appellant, gave excessive weight to those matters which were unfavourable to her, and erred in her consideration of "compelling circumstances".

22. It is further argued that the FtJ misdirected herself when assessing whether there would be "unjustifiably harsh consequences" for her and DC in the refusal of leave to remain by failing to consider all the relevant factors.

23. Ground 2 contends that the FtJ erred in not considering paragraphs EX.1 and EX.2 of the Rules, and there was no consideration at all of Appendix FM.

24. Ground 3 relates to the FtJ's consideration of paragraph 276ADE(1)(vi) and contends that various factual matters were not considered by the FtJ and there were, otherwise, errors in the factual assessment.

25. In his submissions, to varying degrees Mr Slatter relied on the grounds of appeal. I was referred to *TZ (Pakistan) and PG (India) v Secretary of State for the Home Department* [2018] EWCA Civ 1109, in particular at [30]-[34] in relation to consideration of the insurmountable obstacles test within the Rules and its application to consideration of Article 8 outside the Rules.

26. It was conceded that what is said in the grounds at paragraph 3.2 in terms of financial independence and the ability to speak English is unarguable in the light of *AM (S 117B) Malawi* [2015] UKUT 0260 (IAC) (and see also *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58). The factors relevant to insurmountable obstacles were set out in the appellant's skeleton argument, for example DC's life in the UK in terms of family, employment and social and domestic ties and his age (65).

27. Although there was a concession before the FtJ as recorded at [8] of her decision, that only related to the issue as to the length of their relationship and the 'two year rule'. The FtJ still needed to consider EX.1 and EX.2 in terms of insurmountable obstacles and the various factors referred to in the skeleton argument that was before the FtJ.

28. It was wrong for the FtJ to have considered adverse to the appellant the fact that she had lived illegally in the UK in circumstances where her length of residence ought to have been a factor in her favour.

29. Although the FtJ had referred at [28] to the fact that DC is a British citizen, she did not take into account his rights as such.

30. Although the FtJ referred to the appellant having money from the sale of her house in South Africa, the sterling equivalent is only £800 which would not be sufficient to re-establish herself as the FtJ suggested.

31. In his submissions Mr Tufan relied on *Sabir (Appendix FM – EX.1 not free standing)* [2014] UKUT 00063 (IAC) in terms of the application of paragraphs EX.1 and 2. At the date of the application for leave to remain the appellant had not been in a relationship for two years. Accordingly, the appellant could not get to paragraph EX.1. Furthermore, although the FtJ found that the appellant and DC were in a genuine and subsisting relationship, she made a series of negative findings.

32. Even if the FtJ ought to have considered EX.1, in the light of *Agyarko v Secretary of State for the Home Department* [2015] EWCA Civ 440 at [25], which was not overruled by the Supreme Court, there could not be said to be insurmountable obstacles to family life continuing in South Africa in this case. The FtJ had taken into account the fact that DC is a British citizen but also the fact that the appellant's stay had always been precarious. There would need to be exceptional circumstances not to require the appellant to apply for entry clearance from South Africa.

33. In his reply, Mr Slatter submitted that there did need to have been a consideration of EX.1 in the context of Article 8 outside the Rules. That was a *material* error on the part of the FtJ.

Assessment and Conclusions

34. I deal with the grounds and submissions in the order which appear to me to be the most logical, starting with those in relation to the FtJ's assessment of the appeal under the Rules, firstly in terms of private life, then family life, and lastly in relation to the outside of the Rules consideration.

35. In relation to the relevant private life requirements of the Rules, paragraph 276ADE states:

> "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
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> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

36. GEN.1.2. provides that in Appendix FM, materially for the present purposes, partner means:

"(i)…(iii); or

a person who has been living together with the applicant in a relationship akin to marriage or civil partnership for at least two years prior to the date of application."

37. EX.1. provides as follows, again so far as is material:

"This paragraph applies if…

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, 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."

38. In relation to a person who does not meet the requirements of the Rules under Appendix FM, GEN. 3.2 states the following:

"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."

39. S.117 of the 2002 Act, so far as relevant, states as follows:

"PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

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

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(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.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

40. The FtJ's assessment of the private life requirements of the Rules in terms of paragraph 276ADE is distilled in [22]-[24]. The grounds contend that "the discrepant evidence" could not be conclusive as to very significant obstacles to integration without reference to all other issues put forward by the appellant, including her relationship with DC and her fear of destitution on return to South Africa. However, it is clear from [23] of the FtJ's decision that she did not consider that the appellant would be destitute on return, referring to her ability to find employment and that DC could continue to support her financially were she to return.

41. On the question of whether she would have access to the funds she realised when she sold her house in South Africa before coming to the UK, the grounds suggest that those funds would no longer be available because the sale took place 15 years ago. However, at [20] the FtJ refers to the appellant's evidence that she still has those funds in her bank account. Admittedly, the fact that 15,000 Rand equates only to about £800 as the grounds suggest, it is not a sum that is likely to go very far but that was not the only, or indeed the main, reason for the FtJ's conclusion that there would not be very significant obstacles to her integration. Apart from her ability to find employment and that she would receive support from her partner, the FtJ referred to the appellant's cultural and linguistic ties to South Africa and that she lived for the majority of her life there.

42. It must also be remembered that the FtJ found at [22] that the appellant would have family members to turn to for support on her return, namely her daughters. She made a finding that she had not given credible evidence about one of her daughters having died in 2009, but regardless of that, she found that she has contact with her other daughter as well.

43. The FtJ undertook a comprehensive assessment of the issue of very significant obstacles to integration and there is no error of law in her decision in this respect.

44. In relation to family life, a central complaint is that there was no consideration by the FtJ of paragraphs EX.1 and EX.2 (insurmountable obstacles to family life continuing outside the UK). It is the case that apart from in her summary of the respondent's

decision, the FtJ did not refer to those paragraphs of the Rules. Mr Tufan submitted that the appellant does not have a route to consideration of EX.1 (and EX.2). That is because she could not meet the requirements of the Rules (as at the date of application) since DC was not a partner within the meaning of the Rules because the relationship was short of two years' duration.

45. It may be that the FtJ did not consider that paragraph of the Rules because it was conceded on behalf of the appellant that she could not meet the relationship requirements of the Rules (R-LTRP), reflecting Mr Tufan's submissions on the point.

46. However, Mr Slatter's reliance on *TZ (Pakistan) and PG (India)* at [30]-[34] is apposite in the sense that the FtJ did need to consider the issue of insurmountable obstacles in order to evaluate under Article 8 the proportionality of the decision to refuse leave to remain. It is difficult to see how it could be said that the FtJ turned her mind to the question of insurmountable obstacles in circumstances where there is no express reference in her findings to that test. I am, therefore, satisfied that in this respect the FtJ erred in law.

47. However, that error of law would not in this case be material if the FtJ's findings reveal that there were no insurmountable obstacles to the couple's family life continuing in South Africa, or indeed if otherwise the facts could not meet the demanding test of insurmountable obstacles.

48. The FtJ found that the appellant had family in South Africa to whom she could turn for support and that she could potentially find employment there. She found, without legal error, that there would not be very significant obstacles to the appellant's integration. Those findings are all relevant to the couple's ability to sustain their relationship in South Africa.

49. At [29] she said that both the appellant and DC have their own funds which could be used to establish a home in South Africa with either of them being able to seek employment. She referred to DC being a "homebody" who could maintain relationships with his family in the UK through visits and modern means of communication. She acknowledged that he would prefer to live in the UK but said that he would have to adjust his preference if he wanted to continue his relationship with the appellant.

50. The FtJ's use of the term "homebody" is criticised in the grounds of appeal as minimising the facts in relation to DC's life in the UK. However, whilst the FtJ does not set out in express detail all the matters relied on in DC's witness statements and the other evidence, and as summarised in the appellant's skeleton argument at [37], it is evident from the FtJ's use of that expression that she recognised that the evidence was that DC's life is very home-centred.

51. It is apparent from the FtJ's findings that had she directed her mind to the question of whether there would be insurmountable obstacles to family life continuing in South Africa she would have answered the question in the negative, regardless of the fact that she did not refer to DC's age or to the fact that he is retired. It is clear from [28]

and [29] of her decision that she was of the firm view that his wish to remain in the UK was a matter of choice, and it could not on the facts, therefore, be regarded as a matter of insurmountable obstacles as defined in paragraph EX.2.

52. Accordingly, I am not satisfied that the error of law I have identified at [46] above is one that is material to the outcome of the appeal.

53. I said at [47] above that the error of law would not be material if the FtJ's findings reveal that there were no insurmountable obstacles to the couple's family life continuing in South Africa, or if otherwise the facts could not meet the demanding test of insurmountable obstacles. Even if it could be said that the FtJ failed to have proper regard to the whole range of matters that are relied on in support of the contention that there would be insurmountable obstacles to family life continuing in South Africa, the facts do not in any event support such a conclusion.

54. I have considered very carefully the evidence in relation to DC's life in the UK, including, for example, that apart from once he has not travelled abroad, preferring to take holidays in the UK. He lives a very simple, domesticated, quiet and home-centred life. He worked for the same employer all his life and has lived in the same house all his life, is now retired and is aged almost 66. He says, perhaps with some justification, that he has limited skills in terms of marketability but he has nevertheless worked as a greengrocer and as a gardener. He has close family in the UK with whom he keeps in close contact. He says that it would be "unthinkable" for him to move to South Africa.

55. Nevertheless, as has already been said, there are no very significant obstacles to the appellant's integration in South Africa. DC's circumstances do not reveal that there would be insurmountable obstacles to family life continuing there. Quite apart from the FtJ's conclusion that the appellant and DC would be able to find some employment, the fact is that DC has pension income that would continue. The circumstances do, as the FtJ found, reveal that it is a matter of choice for DC as to whether or not he wishes to return to South Africa with the appellant. The fact of his British citizenship does not on its own, or in combination with the other circumstances, reveal that there would be insurmountable obstacles to their continuing family life in South Africa.

56. However, the finding that there would be no insurmountable obstacles to family life in South Africa is not the end of the Article 8 enquiry but it is a significant part of it.

57. Although the FtJ did not refer to GEN 3.2, that paragraph of the Rules reflects aspects of the wider Article 8, outside the Rules consideration, that the FtJ assessed. Thus, at [28] she responded to the submission that the appellant's removal would have "unjustifiably harsh consequences" for the couple, including referring to DC's British citizenship.

58. The grounds cite *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302 at [19] and [20] in relation to the need for careful and anxious scrutiny of the situation of a British citizen in terms of their being expected to live

abroad in order to keep the marriage intact. The facts of that case were, of course, very different and there is now a wealth of additional authority from which to draw in determining Article 8 issues that involve British citizenship.

59. It is plainly not the case, that the mere fact of the British citizenship of a partner must lead to the conclusion that it would be disproportionate to refuse leave to remain to that person's partner. Plainly, neither domestic nor Strasbourg jurisprudence demands of such an answer. The FtJ in this case did refer to the DC's British citizenship and can be taken to have been aware of its significance, absent anything to indicate that she minimised its import.

60. In addition, just as the appellant relies on *TZ (Pakistan) and PG (India)* in relation to the issue of insurmountable obstacles, the analysis in that decision is equally important in the following passages:

> "25. The settled jurisprudence of the ECtHR is that it is likely to be only in an exceptional case that article 8 will necessitate a grant of leave to remain where a non-settled migrant has commenced family life in the UK at a time when his or her immigration status is precarious (see, for example *Jeunesse v Netherlands* (2016) 60 EHRR 17 at [100] and [114]). That general principle applies to any consideration of the Rules which involves engaging with a requirement or requirements that possess an article 8 element (often wrongly described as an article 8 consideration within the Rules) and to the consideration of article 8 outside the Rules. Where precariousness exists it affects the weight to be attached to family life in the balancing exercise. That is because article 8 does not guarantee a right to choose one's country of residence. Both the unlawful overstayer and the temporary migrant have no right to remain in the UK simply because they enter into a relationship with a British citizen during their unlawful or temporary stay. The principle was accepted in *Agyarko* at [49] to [54] leading to a statement of general principle at [57]:
>
> > "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."
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> 26. The effect upon the weight to be attached to family life will depend upon what the outcome of immigration control would otherwise be i.e. the weight of the public interest in removal. *Agyarko* overtly recognised that precariousness includes both those who are in the UK unlawfully and those who are here temporarily (see [51] and [54]). To that extent, the decision of this court to the same effect in *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803, [2016] 1 WLR 4203 is binding.
>
> 27. Section 117B of the Nationality, Immigration and Asylum Act 2002 is also relevant to the weight to be given to private and family life that are established by a person at a time when that person's immigration status is precarious. In every consideration of any requirement of the Rules that possesses an article 8 element and of article 8 outside of the Rules, if the applicant's immigration status is precarious, then little weight is to be given

> to private life or to a relationship formed with a qualifying partner. The same provision also identifies two factors that are to be taken into account in every article 8 consideration: whether the applicant can speak English and whether the applicant is financially independent.
>
> 28. The consideration of article 8 outside the Rules is a proportionality evaluation i.e. a balance of public interest factors. Some factors are heavily weighted. The most obvious example is the public policy in immigration control. The weight depends on the legislative and factual context. Whether someone is in the UK unlawfully or temporarily and the reason for that circumstance will affect the weight to be given to the public interest in his or her removal and the weight to be given to family and/or private life (see the examples given in *Agyarko* at [51] and [52] which include the distinction between being in the UK unlawfully and temporarily). Decisions such as those in *Chikwamba* and *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] AC 1159 describe examples of how the weight or cogency of the public interest is affected. It is accordingly appropriate for the court to give weight when considering the proportionality of interference with article 8 outside of the Rules to factors that have been identified by the Strasbourg court, for example, the effect of protracted delay, the rights of a British partner who has always lived here and whether it can reasonably be expected that s/he will follow the removed person to keep their relationship intact: that is, by way of example, the circumstances identified in *EB (Kosovo)* or the circumstance described in *Chikwamba* where the removal of an appellant who is the spouse of a British citizen could be followed by a right of re-entry."

61. As is clear from *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11, in cases such as the present, a very strong or compelling claim is required to outweigh the public interest in immigration control.

62. As to some of the other criticisms of the FtJ's decision in the grounds, it was conceded on behalf of the appellant before me that the grounds are misconceived in the contention that the FtJ erred in her conclusion that the appellant's ability to speak English and her financial independence were neutral factors.

63. Although the FtJ referred to the appellant having worked illegally in the UK, which is probably a legitimate observation, she said at [27] that the length of time that the appellant had "lived and worked" illegally in the UK was relevant to the public interest in removal, leading to the criticism that she had attributed negative weight to the length of the appellant's residence when she should have seen her length of residence as a positive factor.

64. I can see some merit in that criticism, but it is not in fact the case that the FtJ failed to consider the appellant's length of residence as a factor in her favour. At [23] in the considering her private life, she clearly identified it as a positive factor. Whilst what the FtJ said at [27] about working *and living* illegally in the UK is open to criticism, I cannot see that it is a matter that was material to the outcome.

65. In summary, whilst I am satisfied that the FtJ erred in law as identified at [46] above, I am not satisfied that that error of law is material, either on the facts as found, or on the facts otherwise relied on. The appellant's appeal is therefore dismissed.

Decision

66. The decision of the First-tier Tribunal involved the making of an error on a point of law, but its decision is not set aside and the decision to dismiss the appeal stands.

Upper Tribunal Judge Kopieczek 2/4/20

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email