Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19269/2019

THE IMMIGRATION ACTS

Heard at Bradford by Skype for business	**Decision & Reasons Promulgated**
On the 28 October 2020	**04 November 2020**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

TD
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Joshi, instructed Joshi Advocates
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Griffiths (hereinafter referred to as the "FtTJ") promulgated on the 6 April 2020, in which the appellant's appeal against the decision to refuse his human rights application dated 11 November 2019 was dismissed.

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2. I make an anonymity direction under Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008 as the facts concern the medical circumstances of a third party. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent.

3. The hearing took place on 28 October 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video as did the appellant who was able to see and hear the proceedings being conducted. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

4. I am grateful to Ms Joshi and Mr Diwnycz for their clear oral submissions.

Background:

5. The appellant is a national of Algeria. There is no record of the appellant's entry in the United Kingdom, but it is claimed that he entered in 2005 at the age of 20 years. He has remained in United Kingdom unlawfully since that time. He has a genuine and subsisting relationship with a British citizen with whom he lives.

6. On the 18 April 2019 he made a human rights application in an application for leave to remain in the UK on the basis of his family life with his partner and on the basis of his private life.

7. The application was refused in a decision made on the 11 November 2019. The decision letter states that the appellant had made a human rights claim in an application for leave to remain in the UK under Appendix FM to the immigration rules on the basis of her family life with her partner.

8. It was accepted that the eligibility relationship requirement was met (on the basis that that the appellant was a genuine subsisting relationship).

9. The reasons given for refusing the application can be summarised as follows. The respondent considered his application under paragraphs R-LTRP of Appendix FM but considered that he could not meet the eligibility immigration requirements (E-LTRP 2.1 of Appendix FM) because he was in the UK in breach of immigration laws and paragraph EX1 did not apply.

10. The respondent considered whether the appellant would be exempt from meeting certain eligibility requirements of Appendix FM because paragraph EX1 applied. It was accepted that the appellant had a genuine and subsisting relationship with his partner who was a British national and it was noted that

his partner was a carer for her elderly mother and therefore could not leave the UK. However the respondent did not accept that there were any insurmountable obstacles in accordance with paragraph EX2 of Appendix FM which means a very significant difficulties which will be faced by the appellant or her partner in continuing their family life together outside of the UK, and which could not be overcome or entail very serious hardship for her and her partner. The respondent took into account that his partner's elderly mother could be cared for by the NHS and whilst her care for her mother was undoubtedly important, it has not been objectively shown that this care could not be provided by a trained professional carer in his partner's absence. Further it was considered that the appellant could continue to sponsor a donkey from abroad and that he was not required to remain in the UK to do so.

11. His application was considered under the private life rules under paragraph 276 ADE, where it was noted that the appellant was a national Algeria who had entered the UK in January 2005 although he had not provided any evidence of entry in 2005 nor of any residence in the UK until 2012. If the claimed date of entry was accurate, he had lived in the UK for 13 years and it was not accepted that he lived in the UK continuously for 20 years, he was not between the ages of 18 and under 25 having lived in the UK for more than half his life and was over the age of 18 and therefore could not meet the requirements of paragraph 276 ADE(1 (iii)(iv) and (v). As to paragraph 276 ADE(1) (vi) the respondent did not accept that there would be very significant obstacles to his integration into Algeria if required to leave the UK because he resided in Algeria for at least the first 18 years of his life. He has stated that he spoke French and Arabic fluently of which Arabic is a recognised language in Algeria with French being widely spoken. It was considered that he would have retained cultural and linguistic connections to Algeria during his time in the UK. Consequently, he failed to meet the requirements of that part of the rule.

12. The respondent did not consider that there were any exceptional circumstances to warrant a grant of leave to remain and considered the issues that had been raised as to why it would be unjustifiably harsh for him to return to Algeria. The respondent took into account the basis of the application and that his partner is a carer for her elderly mother and cannot leave the UK. The decision noted that he had provided a copy of her mother's parking card for a disabled person and that he had stated his partner received carer's allowance. However, it was found that insufficient evidence had been provided that his partner was critical to the care of her mother. It was not objectively shown that his partner was the sole carer of her mother and that no one else, for example, a trained carer could cater for her mother's needs. The decision letter noted that it was evident from the provided disabled parking permit that his partner's mother was capable of driving herself and is placed question the claim that she required a full-time carer in the form of her daughter. Whilst his partner's care and attention from mother was welcomed and appreciated by mother, it had not been seen that this function could not be performed by anybody else. Therefore, it is not accepted that his partner was required to remain the UK to

look after his elderly mother. Furthermore, it was considered that if his partner wish to remain in the UK to care for her mother she would be able to visit the appellant in Algeria if he returned.

13. The decision letter also made reference to entry clearance. It stated that the appellant had said that his partner would not be able to afford the maintenance requirements for entry clearance if he were to leave the UK and apply for entry clearance. However the respondent stated that it had not been objectively shown that his partner was a required carer for her mother and as such would be open to her to return to paid employment and to earn the required amount to meet the maintenance criteria for entry clearance. Alternatively, it would be open to her to relocate Algeria with the appellant negating the need to meet the financial requirements.

14. The last point raised related to the appellant's sponsorship of a donkey and that he had a love of horses and animals. Whilst it is accepted that he sponsored a donkey and a pony, it was considered that the sponsorships could continue from abroad.

15. The decision letter considered that the appellant had not provided any evidence of his entry to the UK of any residence until around 2012 – 2013. It was noted that he never had any leave to enter or remain in the UK and as defined by paragraph 117 B (4) little weight should be given to a private life or a relationship formed with a qualifying partner that is established by person at a time when the person is in the United Kingdom unlawfully.

16. As to the appellant's claim that he had no ties in Algeria, it was considered that when he left as claimed aged 18, he did not have any ties in France and Spain where he claimed he'd resided nor in the UK. It is considered that it already demonstrated his ability to adapt to life in another country as when he arrived in the UK had no knowledge or previous experience of life here. The appellant could do the same in return to Algeria country where he was born, raised and spent his formative years. The respondent did not find that there was any evidence to demonstrate that there were any" exceptional circumstances" established in his case.

The appeal before the First-tier Tribunal:

17. The appellant's appeal against the respondent's decision to refuse leave came before the First-tier Tribunal (Judge Griffith) on the 12 March 2020.

18. In a determination promulgated on the 6 April 2020, the FtTJ dismissed the appeal on human rights grounds, having considered that issue in the light of the appellant's compliance with the Immigration Rule in question and on Article 8 grounds. The judge heard evidence from the appellant with the assistance of an interpreter in the Algerian language and also heard evidence from his partner.

19. In summary, the First-tier Tribunal found that the appellant could not meet the requirements for a grant of leave to remain under Appendix FM of the Immigration Rules; specifically he could not meet the immigration requirements of the rules as he has never been granted leave to enter or remain in the UK.

20. By reference to his relationship with his partner, the judge accepted that he was in a genuine and subsisting relationship with his partner who is a British citizen. As to paragraph EX1 the FtTJ set out at [54] the decision in *Agyarko* [2017] UKSC 11 and also the decision of *Lal* [2019] EWCA Civ 1925.

21. The FtTJ then turned to the factors advanced on behalf of the appellant which it was stated amounted to "insurmountable obstacles". They were as follows; the appellant's lack of ties to Algeria and the fact that his partner cannot leave the UK because she is her mother's carer.

22. At [57] the FtTJ addressed the issue of "insurmountable obstacles" and the main issue which was the role his partner currently undertook as her mother's carer and on the basis that it was claimed that no one else would be available to undertake it. The judge noted that it was understandable that her mother, given a state of health did not wish to go into a home and prefer to be cared for by her daughter. The judge also found that it was "equally understandable that the appellant's partner would wish to continue caring for her mother, who is terminally ill." However, the judge stated "what has not been established, however, is that there is no reasonable alternative to the appellant's partner acting as her mother's carer. For as long as she remains in the UK looking after a mother, it is likely that social services will not intervene. Therefore, as attractive as the options might appear, I am satisfied that if (the appellant's partner) were not in the UK, or decided that of necessity or choice she had to return to work, suitable alternative arrangements could be made for her mother's care ."

23. At [58] the FtTJ stated that there was "very little other evidence addressing the very significant difficulties at the cover would face in continuing their family life outside the UK beyond general assertions arising from the appellant's lack of ties and his claim that the country is run by a Mafia."

24. The judge concluded that any claim based on lack of ties to Algeria or lack of family support could carry little or no weight. The judge also observed that there were no other issues raised, for example, about his partner's inability to speak the local language or her unfamiliarity with the culture.

25. As to whether family life could be established in Algeria, the FtTJ referred to the approach as explained in Lal and there was no evidence that it would be literally impossible family life to continue in Algeria because, for example, his partner would not be able to gain entry clearance. The judge noted that the evidence relied on as amounting to a "very significant difficulty" making it

impossible family life to continue outside of the UK centred around his partner's desire to remain in the UK to look after her mother, but the judge noted that there were alternatives available to mitigate that difficulty.

26. At [60] the FtTJ returned to the issue of his partners mother and noted that his partner "has a choice, albeit is a difficult one given her mother's state of health, as to whether she remains in the UK or accompanies the appellant to Algeria. I am not satisfied, however, on the evidence that it would be impossible for the couple to continue family life in Algeria or that living there would entail very serious hardship for them, sufficient to meet the high test for insurmountable obstacles in paragraph EX1(b) of the rules because there were no insurmountable obstacles to family life continuing outside of the United Kingdom.

27. At paragraphs [61]-[67] the judge went on to consider the proportionality of the appellant's removal under Article 8 of the ECHR but concluded that it would not be a disproportionate interference with his right to respect for private and family life. Having adopted the balance sheet approached the judge set out the factors in favour of the respondent and in support of immigration control. They were:

- the appellant and his partner cannot show compliance with the immigration rules and in particular paragraph EX1 (b) as regards insurmountable obstacles.
- The appellant has been in the UK unlawfully since 2005 and will have had no expectation that in the absence of show compliance with the rules he would be allowed to remain in the UK.
- His relationship with his partner was commenced at a time when he was in the UK illegally.
- The fact that he spoke English and his financial situation were "neutral factors".
- He could not meet the immigration rules in relation to his private life or to show that there were "very significant obstacles to his integration". The judge found at [66] that there is little or no evidence offered in support of his private life claim beyond general assertions and that the high test required for establishing significant obstacles integration had not been met given that he spoke the language, was in good health, had to work experience given that he intended to return there five years ago, that was evidence that he felt capable of reintegration.

28. The factors weighing in favour of family life were as follows:

- his length of residence in the United Kingdom.
- He has a genuine and subsisting relationship with his partner.
- There were no character issues to be taken into account

The judge finally concluded at [67] that the "maintenance of effective immigration controls in the public interest. I have been unable to identify any exceptional circumstances on the evidence before me to add to the facts in the balance sheet in favour of family and private life. I therefore find the appellant has been able to demonstrate exceptional circumstances as to outweigh the public interest in his removal that would cause the respondent's decision to have unjustifiably harsh consequences and render it disproportionate."

29. Permission to appeal was issued on the 16 April 2020 and on 15 June 2020, permission to appeal was refused by FtTJ Wilson. The application was renewed and on the 20 July 2020 Upper Tribunal judge Rintoul granted permission stating:-

> "It is arguable that the judge erred in her assessment of whether the appellant's partner could reasonably be expected to leave her terminally ill mother for whom she cares. Permission is therefore granted on ground 1.
>
> Whilst there may be less merit in grounds 2(iii) and(iv) permission is granted on all grounds."

The hearing before the Upper Tribunal:

30. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 14 August 2020, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face to face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.

31. Ms Joshi on behalf of the appellant relied upon the written grounds of appeal.

32. There was no Rule 24 response filed on behalf of the respondent. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions.

The grounds:

33. The appellant appeals on three grounds:-

    (1) First, that the First-tier Tribunal materially erred in law by making perverse or irrational findings on matters that were material to the outcome. Ground one refers to the appellant's partners mother being terminally ill. The grounds refer to paragraph 57 – 65 at the decision and that the judge had identified that his partners mother was terminally ill having suffered a stroke from undergoing treatment for cancer. The judge in the same paragraph stated, "what has not been established however is that there is no reason alternative to (the appellant's partner) acting as a mother's carer." However, at paragraph 9 the judge found "the appellant's partner's desire to remain in the UK to look after a mother, but I found

above that there are alternatives available to mitigate that difficulty." Further at paragraph 62 the judge found "the appellant's partners mother will be fully entitled to NHS care and support from social services".

(2) The grounds refer to the partners oral evidence that she stated she received carers allowance as a mother's carer and that there was no replacement by the state. She further gave evidence at the social services expect the family members look after her mother and that carers were only to administer medication that they did not provide any written confirmation to this effect. The grounds therefore state was unclear what evidence the judge was referring to in support of a finding that there were alternative to her mother's care as the NHS and social services will provide support.

(3) It was also submitted that the respondent provided no evidence in the respondent's bundle.

(4) It was disputed that it was not the partners desire to care for a mother but that there was no replacement for the care she provided by the state.

(5) It was therefore submitted that the judge's finding that there are alternatives to her mother's care in the absence of evidence is an irrational finding on a matter that was material to the outcome.

(6) As to ground 2, entitled "not an x factor", it is submitted that:

(i) the appellant and his partner had an eight year relationship and their bond during the currency of their relationship strengthened due to exceptional factors such as her partner's father's death, her mother falling ill, mother having to have a full-time carer, partner having to leave her job to look after a mother, mother's deteriorating health as the medical condition is terminal. The relationship is therefore beyond normal emotional ties between two partners relying on Kugathas paragraphs 1425. It is asserted that the judge failed to take this material into account which would have led to the finding that there are "exceptional factors".

(ii) The appellant is one of his partner and the partner have to choose between her mother's care and a partner is contrary to the instructions that reiterate that the barrier must be one which either cannot be overcome or which it is unreasonable to expect a person to overcome (Agyarko at paragraph 18). The judge found at [64] that she accepted that the appellant's partner could not currently support an application entry clearance but that it was not impossible for her to find full-time work in order to do so. The grounds assert that the burden of proof is not "impossible" but on balance "unreasonable". On the facts of the appeal it will be on balance unreasonable for the appellant's partner not care for a mother, find a full-time job so as to meet the financial and maintenance requirements under appendix FM in order to be able to sponsor the appellant's entry clearance

application. It is asserted that the judge had failed to assess exceptional factors under the "appropriate burden of proof" and as a result the findings are irrational.

(iii) It is further asserted that there was no finding relating to the appellant's physical and emotional support to his partner's mother. It is asserted that the appellant also had an emotional bond with her mother as he carried out tasks for her. Whilst the judge referred to this at [59]'s the ground state that the appellant carries out household tasks as well as cooked and spends time with her mother in order to provide a company and emotional support (paragraph 5 of the witness statement). The judge had found that the support provided by the appellant in caring for his partners mother was not crucial and could be replaced but in the absence of supporting evidence that was an irrational finding stop the judge therefore failed to make a finding relating to the consequence of the support provided by the appellant to the mother on the partners well-being, suggesting that the partner is not alone to care for the mother and has emotional and physical support in his partners mother's care. The grounds assert that there was no finding by the judge on the partners well-being in the absence of support provided by the appellant to the mother

(iv) it is further asserted that due to code 19 it was a further factor which demonstrated that it was unreasonable to expect the appellant's partner to continue family life with the appellant in Algeria. It is stated that it would be unreasonable to place a mother in a care home due to code 19 and the risks that were hiring care homes. It is also asserted that it would be unreasonable for the appellant and partner to travel to Algeria to join their family life due to the code 19 risk. The judge failed to take into account the practicality of the appellant's removal and the domino consequential effect upon two other British citizens.

(v) It is submitted that the decision is in error and conflicts have remained unresolved by the decision.

34. There was no rule 24 response on behalf of the Secretary of State. Mr Diwnycz submitted that it was a matter of choice for the appellant's partner spouse to care for her mother. He submitted that he was not aware of any filial duty to undertake such care and that despite her decision to care for her mother she was under no legal duty to do so and therefore it remained a matter of choice.

35. He submitted there was no error in the judge's assessment of the medical evidence and that in relation to the "Covid point" it was a valid one when considering removal but would only be relevant if an error of law was found.

36. He therefore submitted the decision of the FtTJ was one open to her to make.

Decision on error of law:

37. The issue under EX1 and whether there were insurmountable obstacles to family life outside of the UK was addressed by the FtTJ at [55 – 59]. There is no challenge to the finding made at [55] where the judge attached no weight to the appellant's claim that he had a "scaring experience" in his home country. Nor again the finding at [56] relating to the appellant's assertion as to lack of ties; the judge having found that he had lived in Algeria until he was 20 years of age.

Paragraph EX.1. reads as follows (so far as relevant):

> " EX.1. This paragraph applies if
>
> (a) ...; or
>
> (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. The Supreme Court in Agyarko considered the meaning of the "insurmountable obstacles" requirement at [43] to [45] of the judgment as follows:

> "43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to "un obstacle majeur" (*Sen v The Netherlands* (2003) 36 EHRR 7 , para 40), or to "major impediments" (*Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798 , para 48), or to "the test of 'insurmountable obstacles' or 'major impediments'" (*IAA v United Kingdom* (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could "realistically" be expected to move (*Sezen v The Netherlands* (2006) 43 EHRR 30 , para 47). "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119.

> 44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "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." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.
>
> 45. By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate."

39. The Supreme Court held that the requirements were Article 8 compliant, recognising that the requirements reflected the Minister's view of where the public interest lay.

40. As the Supreme Court also made clear, even where those requirements are not met, an applicant may still be granted leave if the consequences of removal result are "unjustifiably harsh". However, as the Supreme Court went on to say when looking at the grant of leave to remain outside the Rules, this will only arise in exceptional circumstances. The rationale for that approach is explained at [54] and [55] of the judgment as follows:

> "54. As explained in para 49 above, the European court has said that, in cases concerned with precarious family life, it is "likely" only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. That reflects the weight

attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious. The court has repeatedly acknowledged that "a state is entitled, as a matter of well-established international law, and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there" (*Jeunesse*, para 100). As the court has made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a fait accompli. On the contrary, "where confronted with a fait accompli the removal of the non-national family member by the authorities would be incompatible with article 8 only in exceptional circumstances" (*Jeunesse*, para 114).

55. That statement reflects the strength of the claim which will normally be required if the contracting state's interest in immigration control is to be outweighed. In the *Jeunesse* case, for example, the Dutch authorities' tolerance of the applicant's unlawful presence in that country for a very prolonged period, during which she developed strong family and social ties there, led the court to conclude that the circumstances were exceptional and that a fair balance had not been struck (paras 121-122). As the court put it, in view of the particular circumstances of the case, it was questionable whether general immigration considerations could be regarded as sufficient justification for refusing the applicant residence in the host state (para 121)."

41. In the case of Lal v SSHD [2019] EWCA Civ 1925 at paragraph 35 of that decision the Court of Appeal gave its view as to the correct interpretation of insurmountable obstacles. The Court of Appeal indicated in paragraphs 36 and 37:

"36. In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK. If not, the decision-maker needs finally to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both).

37. To apply the test in what Lord Reed in the *Agyarko* case at para 43 called 'a practical and realistic sense', it is relevant and necessary in addressing these questions to have regard to the particular characteristics and circumstances of the individual(s) concerned. Thus, in the present case where it was established by evidence to the satisfaction of the tribunal that the applicant's partner is particularly sensitive to heat, it was relevant for the tribunal to take this fact into account in assessing the level of difficulty which Mr Wilmshurst would face and the degree of hardship that would be entailed if he were required to move to India to continue his relationship. We do not accept, however, that an obstacle to the applicant's

> partner moving to India is shown to be insurmountable - in either of the ways contemplated by paragraph EX.2. - just by establishing that the individual concerned would perceive the difficulty as insurmountable and would in fact be deterred by it from relocating to India. The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to an applicant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together".

42. In paragraph 41 of the decision the Court of Appeal pointed out that the question of the difficulties a person might face on relocation did not necessarily require objective confirmation by third party evidence, stating:

> "The question is one of fact and there is nothing wrong in principle with basing a finding about a person's sensitivity to heat on evidence given by the person concerned and members of their family, as the FtT judge did in this case, if such evidence is regarded as sufficiently compelling".

43. The FtTJ addressed the real issue at [57]. The FtTJ considered that carers were available and were in attendance four times a day in order to give her medication. The judge noted that it was understandable that her mother, given a state of health did not wish to go into a home and prefer to be cared for by her daughter. The judge also found that it was "equally understandable that the appellant's partner would wish to continue caring for her mother, who is terminally ill." However, the judge stated "what has not been established, however, is that there is no reasonable alternative to the appellant's partner acting as her mother's carer. For as long as she remains in the UK looking after a mother, it is likely that social services will not intervene. Therefore, as attractive as the options might appear, I am satisfied that if (the appellant's partner) were not in the UK, or decided that of necessity or choice she had to return to work, suitable alternative arrangements could be made for her mother's care ."

44. At [59] the FtTJ referred to the approach as explained in Lal and stated " there was no evidence that it would be literally impossible family life to continue in Algeria because, for example, his partner would not be able to gain entry clearance. The judge noted that the evidence relied on as amounting to a "very significant difficulty" making it impossible family life to continue outside of the UK centred around his partner's desire to remain in the UK to look after her mother, but the judge noted that "there were alternatives available to mitigate that difficulty".

45. Having carefully considered both the written grounds and the oral submissions of the parties, I am satisfied that the FtTJ erred in her assessment of this issue.

46. Whilst the FtTJ recited the test at [54] and made reference to part of the decision in Lal at [59] I am satisfied that the FtTJ did not apply that test to the particular circumstances of this appeal and secondly, failed to take into account material

evidence when reaching the overall decision both when considering the exercise under the rules and addressing the issue outside of the rules which the FtTJ did at [62].

47. As the decision in *Agyarko* sets out, the test is to be understood in a "practical and realistic" sense rather than referring to obstacles which make it literally impossible for the family to live together. The "very significant difficulties" as set out in EX2 means that the appellant's partner would face "very serious difficulties in continuing her family life outside the UK and which could not be overcome or would entail very serious hardship".

48. At [57] and [59] the FtTJ's assessment referred to the issue relating to his partners mother's care and that it had not been established that there was "no reasonable alternative to (his partner) acting as her mother's carer." The FtTJ reached the conclusion that social services would intervene if she was not caring for her mother and that if she was not in the UK or she had the choice to go back to work "suitable alternative arrangements could be made."

49. Again at [59] the judge found that "there are alternatives to mitigate the difficulties" and concluded that they could be carried out by "someone else".

50. However, whilst the FtTJ made reference to the test of "very significant difficulties", there was no reference as to whether the circumstances would entail "very serious hardship" by reference to the evidence.

51. Furthermore, whilst at [59] the FtTJ cited the decision in Lal and "there was no evidence that it would be literally impossible family life to continue in Algeria", the FtTJ did not go on to address the rest of the test as set out in Lal which went on to state that "whether taking account of any steps which could be reasonably (my emphasis) be taken to avoid or mitigate the difficulties, it would nevertheless entail very serious hardship".

52. In my judgement the FtTJ did not consider whether the alternative she identified was "reasonable" when reaching a decision that it had not been established that no reasonable alternative was available or that alternatively there were circumstances which could amount to "very serious hardship".

53. As to the alternative care arrangements, the only finding made was at best inferential on the basis that the appellant's mother would be fully entitled to NHS care and support from the social services. However, what was missing was any consideration of the evidence of the appellant's partner and what actual care could be provided. There was no evidence that her mother would receive the type of care that she was currently receiving from a daughter as opposed to any "entitlement" that arose due to her situation or as a British citizen. The evidence before the tribunal from the appellant's partner was that she received a carer allowance as her carer, having giving up her well-paid employment to do so because there was no replacement for the type of care that she could give by the state.

54. Whilst the judge made reference to the other carers who came to administer medicine, this was the extent of their role and the evidence before the tribunal was that the social services expected members of the family to take on that responsibility. In this respect the judge failed to take into account that it was not the appellant's "desire" look after her mother but that there was no replacement for the type of care she required which could be given by the state which is why she had given up that well-paid employment which had been evidenced by her salary slips.

55. Whilst the judge did not consider the appellant to be an impressive witness, it does not appear that that view was extended to his partners evidence and there is no reason why her account as to why she was caring for her mother was one that should not have been accepted.

56. It is also unclear what evidence there was in support of her finding that there were "reasonable alternatives" from the evidence was before the tribunal.

57. I am also satisfied that in reaching the decision the judge failed to take account of the type of care that was undertaken by the appellant's partner. Whilst the FtTJ considered what might be "practical" assistance that could be given by alternative carers, in my judgement there was no consideration of the emotional care the appellant's partner provided for her mother which could not be replicated by the state. This was particularly important given the nature of her illness.

58. On the factual evidence there was family life not only between the appellant and his partner but also between the appellant's partner and her mother. There is no dispute from the evidence of their relationship went beyond normal emotional ties and there existed real and effective support provided by the appellant's partner to her mother. The only finding made is that it was the appellant's partners preference to look after her mother (at [57] and that she had not established that there were no reasonable alternatives. However, in my view there is no assessment of what was "reasonable" in the context of the factual claim or what "suitable arrangements" would be.

59. The decisions in *Agyarko* and *Lal* make it plain when addressing the question there is a need to have regard to the particular characteristics and circumstances of the individuals concerned. In that context, there was clear evidence from the appellant, which the judge accepted, that the appellant's mother did not want to go into a care home (at 40]. Nor did her daughter wish her to given the evidence that she was in the final stages of her illness (at [22]).

60. There was no assessment of the consequences of the ending of support for the appellant's partners mother and the very significant hardship that would entail for the appellant's partners mother with whom she shared family life.

61. In relation to the issue of placing her mother in a care home, the grounds refer to COVID -19 and that this would be unreasonable to place her mother in such

an establishment due to the present circumstances of the virus. As Mr Diwnycz submitted at the time of the hearing on 12 March 2020 the country had not entered lockdown, and this may have been the reason why it did not feature in the judge's mind as a relevant consideration. However, the decision was not completed until 6 April 2020 by this time there was evidence that care homes were being disproportionately affected by the virus. I conclude that this is not necessarily a feature that would have been readily apparent to the judge but there was evidence before the tribunal that the appellant's partner was greatly concerned of such an arrangement that it would not meet others needs and thus would entail "very serious hardship" if she were to leave the United Kingdom to enable family life to continue outside of the UK. In the alternative to leave the UK and settle in Algeria with her partner would lead to "unjustifiably harsh consequences".

62. For those reasons I am satisfied that the FtTJ erred in law and that the decision should be set aside.

63. As to the remaking of the decision, neither party sought an adjournment to file any further evidence and were content for the tribunal to remake the decision on the evidence that was before it. Miss Joshi in her submissions referred to the legal test set out in Agyarko and confirmed in Lal and that on the factual circumstances of this particular appellant taken with those of his partner, that the evidence demonstrated that there were very serious difficulties in continuing family life outside of the UK for the appellant and his partner which would entail "very serious hardship" and that there were no steps that reasonably could be taken to avoid or mitigate the difficulties. She placed weight upon the evidence of the appellant's partner supported by the appellant as to the level of care that was undertaken and that no evidence had been provided to demonstrate that that care could be undertaken by an identified others.

64. Mr Diwnycz did not seek to make any further submissions noting that this was a "finely drawn appeal."

65. When remaking this decision, neither party disputes the factual matters set out in the FtTJ's decision. I will summarise those facts.

66. The appellant met his partner in 2012 and for the last eight years they have lived together in a genuine and subsisting relationship. The appellant left Algeria aged 20 and thus has lived in the United Kingdom since that time unlawfully. He has been United Kingdom for 15 years without leave. The appellant is emotionally dependent upon her partner in the light of her mother's illness and the stress that this is put upon her (paragraph 38) and that she does not know how she would cope in the absence of her partner (at [38].

67. The appellant's partners mother is suffering from a terminal illness and as a result in or about 2017 his partner gave up her well plaid employment to act as

a carer to her mother. Her father had died in or about 2013 and there had been further life events which had caused her upset and distress. In September 2019, her mother had a stroke which had resulted in her not being mobile (at [20]). The appellant's partner cares for her mother for prolonged periods of time from 1.20-7 PM each day and there are four other carers who administer her medication who stay for short periods of time (at [20]).

68. The appellant's partners mother is described as in her final stages of illness and that she has been told that her medication is not effective. The appellant also assists his partner in caring for her mother (at [32]) although not to the same extent as his partner.

69. The appellant has not returned to Algeria since he left at the age of 20 and he previously had lived with his grandmother. It is unclear whether she has died or whether he does not know her whereabouts (at [56]). The appellant is able to speak English, his previously had work experience as a kitchen porter, decorating and working in a car wash (at [27]).

70. This is a human rights claim and the only ground of appeal available to the appellant was that the respondent's decision was unlawful under s6 of the Human Rights Act 1998.If Article 8 is engaged, as on the facts of this appeal, the Tribunal may need to look at the extent to which an appellant is said to have failed to meet the requirements of the rules, because that may inform the proportionality balancing exercise that must follow.

71. When undertaking an assessment under the Immigration Rules relating to private life under Paragraph 276ADE, there is no dispute that he cannot meet those requirements given his length of residence of 15 years nor can it be said that there are very significant obstacles to his reintegration to Algeria in the light of the FtTJ's findings set out at [66].

72. I now turn to EX1 and the issue of whether there are "insurmountable obstacles". I have set out earlier the applicable test both identified in the Supreme Court's decision in Agyarko and in the more recent decision of the Court of Appeal in Lal. In considering this issue are in my myself that this is a stringent test.

73. Having considered the particular circumstances of the appellant's partner and the particular individual circumstances that arise on the facts of this case, I am satisfied that there are very significant difficulties in continuing family life together outside of the UK which even if they could be overcome, by alternative care for example, would entail very serious hardship.

74. Those difficulties are recited above. The appellant's partner is a full-time carer for her terminally ill mother and having considered the evidence, which is not in dispute, had the type of care she required been available, it is not likely that she would have given up her well paid employment to carry out that care. Her evidence, which was not challenged, is that she provides care for her mother

which not only extends to her physical well-being but also her emotional well-being. There is no evidence before the tribunal that the type of physical care or importantly the emotional care undertaken by the appellant's partner could reasonably or practically be provided by the state. It is not a matter of choice or of desire but in my judgement the evidence demonstrates that the appellant's partners care for her mother is because her mother requires the physical and emotional care that a daughter can provide at a critical stage of her life.

75. Whilst I accept the appellant also carries out some tasks for the appellant's mother, as the FtTJ found, those tasks are not extensive (at [57]). However, in the light of the evidence they are likely to have the effect of complementing the care given by partner and must go some way to alleviating some of the pressure upon her.

76. I also take into account that if the appellant was required to leave the United Kingdom with his partner for family life to be established in Algeria, the evidence before the tribunal is that the only realistic option for the appellant's partners mother would be to be in a care home. The evidence before the tribunal is that this is not something that either her mother would want at a stage of illness nor what the appellant's partner could envisage for her. Such a move would in my judgement entail very serious hardship in the light of the COVID risk in view of her age and is not a step that I consider would be one that would reasonably mitigate any difficulty in the very serious hardship that they would face showing that the test of insurmountable obstacles is met.

77. Even if I were wrong, as the decision in Agyarko sets out, even when the requirements are not met, an applicant may still be granted leave if the consequences of removal are "unjustifiably harsh" (at [54 – 55] of that decision).

78. In carry out that assessment, I am satisfied that there is family life between the appellant and his partner who are in a genuine subsisting relationship of some length. There is also family life established between the appellant's partner and her mother for the reasons I have already referred to.

79. A court must accord "*considerable weight*" to the policy of the Secretary of State at a "*general level*": *Agyarko* paragraph [47] and paragraphs [56] - [57]; and see also *Ali* paragraphs [44] - [46], [50] and [53]. This includes the policy weightings set out in Part 5A (sections 117A- 117D) of the Nationality, Immigration and Asylum Act 2002 (inserted by the Immigration Act 2014).

80. As provided by section 117A (1), Part 5A applies where a Court or Tribunal is required to determine whether a decision made under the Immigration Acts breaches Article 8 and as a result would be unlawful under Section 6 of the Human Rights Act 1998. Section 117A (2) requires the Court or Tribunal, in considering whether an interference with a person's right to respect for private and family life is justified under article 8(2), to have regard in all cases to the considerations listed in section 117B.

Section 117B states as follows: -

"**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."

81. To ensure consistency with the HRA 1998 and the ECHR, section 117B must, however, have injected into it a limited degree of flexibility so that the application of the statutory provisions would always lead to an end result consistent with Article 8: *Rhuppiah* (ibid) paragraphs [36] and [49].

82. I also take into account the decision of GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630. The Court of Appeal set out a helpful summary as follows:

a. the rules and section 117B must be construed to ensure consistency with article 8;

b. the national UK authorities have a margin of appreciation, which is not unlimited but is nonetheless real and important, when setting the weighting to be applied to various factors in the overall proportionality assessment;

c. the proportionality test for an assessment outside the rules is whether a "fair balance" is struck between competing public and private interests;

d. the proportionality test needs to be applied on the "circumstances of the individual case";

e. there is a requirement for proper evidence and mere assertion by an applicant as to his or her personal circumstances and as to the evidence will not however necessarily be accepted as adequate; and

f. the list of relevant factors to be considered in a proportionality assessment is "not closed" and there is in principle no limit to the factors which might, in a given case, be relevant to an evaluation under article 8, which is a fact sensitive exercise.

83. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or Tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see Hesham Ali v SSHD [2016] UKSC 60 and see R (MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43].

84. The public interest in effective immigration control is engaged (at S117B (1)). The appellant formed his relationship with his partner when he was in the UK unlawfully and as a consequence little weight can be attached that relationship (see s117(4) and also to the private life that he has established albeit a lengthy one of 15 years. Financial independence in the United Kingdom and an ability to speak English would be neutral factors in the analysis under Section 117 of the 2002 Act (as amended).

85. On the other side of the balance, I attach some weight to the nature of the relationship the appellant has with his partner in the context of the support that he provides in the very difficult circumstances and mitigate the hardship she currently has in looking after her mother. Whilst the evidence does not demonstrate he carries out extensive caring abilities, what he does provide some respite for his partner and upon whom she is emotionally dependent.

86. On the present circumstances the appellant's partner cannot support an entry clearance application so that family life can be maintained. To do so she would have to relinquish the care of her mother, and the consequences of that would

mean that in all likelihood she would be in a care home which would entail all the difficulties already set out above.

87. Whilst it is not necessary to identify any "unique" or any "exceptional" factor (see Agyarko at [47], [60]), in my judgement the circumstances that relate to the appellant's partner and the care of her mother are compelling on the evidence for the reasons already outlined. In my judgement those circumstances are of such weight to demonstrate that when the interference with the appellant's family and private life is balanced against the public interest, the consequences of removal are "unjustifiably harsh."

88. For the reasons given above, I am satisfied that the decision of the FtTJ made an error on a point of law and the decision set aside. I remake the appeal: I allow the appeal on Article 8 grounds.

Notice of Decision

89. The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision is set aside; I remake the appeal: I allow the appeal on Article 8 grounds.

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008 as the facts concern the medical circumstances of a third party. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent.

Signed *Upper Tribunal Judge Reeds*

Dated 29 October 2020

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.