IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20800/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 23rd March 2022	**On the 19 April 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

MR JASPAL SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Reynolds, Counsel instructed by Capital One Solicitors
For the Respondent: Ms S Lecointe, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India born on 2nd November 1983 (now aged 38 years) and he claims he entered the UK in 2004 (illegally) and has remained unlawfully since.

2. On 25th June 2019 he made an application to remain in the UK on the basis of his private life and his lengthy residence in the UK although the Secretary of State also considered Appendix FM. That application was refused on 2nd December 2019. The respondent also in that refusal letter stated he had applied for a residence card in 2013 which the appellant denies.

3. The appellant appealed under Section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") on the basis that his removal would be unlawful under section 6 of the Human Rights Act 1998. He submitted that he had spent his formative years in India but arrived in the UK at the age of 20 years and he maintained he had not worked in India. He also advanced that he had lost all contact with his family in India owing to a feud with his brother when his father sold family land to fund the appellant's trip to the UK. The appellant has a family life with his partner, Parvinder Kaur, whom he met in 2017 at a Gurdwara in the UK, and her own biological son, his stepson (ES) born on 25th May 2016 and for whom the appellant had some caring duties. The stepson is an EEA national being an Irish national and his partner, Ms Kaur, has a five years' derivative residence card granted as a carer of the EEA child. The partner is also an Indian national who asserted in her witness statement [9] that she had been disowned by her family owing to her having a child out of wedlock.

4. The respondent's refusal letter detailed, when addressing section 55 of the Borders Citizenship and Immigration Act 2009, that the appellant's return to India would have a minimal effect on the child and that should the partner wish to return to India with him the child was not at a critical point in their schooling and so the inconvenience of relocation and any transition period would be proportionate.

5. The appellant's appeal before First-tier Tribunal Judge Roots on 12th February 2021 was dismissed on 1st March 2021 on human rights grounds. The First-tier Tribunal Judge found that the appellant could not avail himself of paragraph EX.1(b) under Appendix FM of the Immigration Rules because his partner did not have the requisite leave under EX.1. The rules had, however, changed and by the date of the hearing before the First-tier Tribunal included a partner who is '*in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3. (d)*'.

6. The relevant requirements under Appendix FM, in so far as material, are set out below:

> *"E-LTRP.1.2. The applicant's partner must be –*
>
> *(a) a British Citizen in the UK;*
>
> *(b) present and settled in the UK;*

(c) in the UK with refugee leave or with humanitarian protection;

(d) in the UK with limited leave under Appendix EU, in accordance with paragraph GEN.1.3.(d); or

(e) in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay, in accordance with paragraph GEN.1.3. (e)".

"EX.1. This paragraph applies if

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child who –

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; 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, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), 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".

Specifically GEN.1.3.(d) provides:

"(d) *references to a person being 'in the UK with limited leave under Appendix EU' means an EEA national in the UK who holds valid limited leave to enter or remain granted under paragraph EU3 of Appendix EU to these Rules on the basis of meeting condition 1 in paragraph EU14 of that appendix".*

7. Condition 1 in paragraph EU14 of Appendix EU to the Immigration Rules provides as follows:

"EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application and in an application made by the required date, condition 1 or 2 set out in the following table is met:

1. (a) The applicant is:

(i) a relevant EEA citizen; or

(ii) a family member of a relevant EEA citizen; or

(iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or

(iv) a person with a derivative right to reside; or

(v) a person with a Zambrano right to reside; and

(b) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU11 of this Appendix solely because they have completed a continuous qualifying period of less than five years".

Condition 1 includes *'(iv) a person with a derivative right of residence'*.

8. Consequently, on appeal to the Upper Tribunal, the First-tier Tribunal decision was set aside because the judge had failed to address the

relevant part of EX.1(b) and whether there were insurmountable obstacles to family life with that partner continuing outside the UK. That in turn would influence the findings in relation to private life. It was remarked, however, in the error of law decision, that the First-tier Tribunal should have clearly addressed the question of insurmountable obstacles and in the light of the partner's and child's possible return to India.

9. In particular, it was noted that the child was not and is not now a qualifying child either under Section 117B(6), because the child has not lived in the UK for a continuous period of 7 years or more at the date of the hearing, nor under the Rules, Appendix FM, specifically EX.1(a) because the child was not a British citizen, or had not lived in the UK continuously for at least the 7 years immediately preceding the date of application.

10. The appeal was retained in the Upper Tribunal for redetermination. Mr Reynolds confirmed at the hearing before us that there were no grounds in relation to European Union law or under the EU Settlement Scheme.

11. For the resumed hearing the following documents were provided:

    (i) an appellant's bundle of 109 pages which included witness statements from the appellant and his partner dated 5th February 2021 and a private 'child custody agreement' dated 28th October 2021. Also attached was a skeleton argument

    (ii) a Home Office bundle of 30 pages which included a skeleton argument dated 11th January 2022.

Law

12. The Immigration Rules including EX.1(b) and EX.2 are set out above. The critical question with reference to 'insurmountable obstacles' in EX.2 is whether the couple would be able to live in India "without serious hardship".

13. Further, GEN.3.2 of the Immigration Rules sets out:

> *"(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.

…"

14. When considering the application of the test of insurmountable obstacles the Court of Appeal in **Lal v Secretary of State** [2019] EWCA Civ 1925 at [38] held that the test could not be shown just by establishing that the individual concerned would perceive the difficulty as insurmountable and be deterred by it from relocating to India. The court underlined the stringency of the requirement and proceeded:

> *"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."*

15. Additionally at [68] the Court of Appeal observed the difference between the tests of 'insurmountable obstacles' in which the criterion is whether the couple would be able to live in India "*without serious hardship*", and 'exceptional circumstances' as follows:

> '*In considering, however, whether there are "exceptional circumstances", the applicable test is whether refusing leave to remain would result in "unjustifiably harsh consequences" for the applicant or their partner, such that refusal would not be proportionate: see the passage from the Secretary of State's instructions to officials quoted at paragraph 11 above and the Agyarko case at paras 54-60. The essential difference (reflected in the word "unjustifiably") is that the latter test requires the tribunal not just to assess the degree of hardship which the applicant or their partner would suffer, but to balance the impact of refusing leave to remain on their family life against the strength of the public interest in such refusal in all the circumstances of the particular case.*

Submissions

16. Following lengthy cross examination by Ms Lecointe of both the appellant and his partner she requested we dismiss the appeal. Ms Lecointe relied on the reasons for refusal letter. There were no insurmountable obstacles to prevent the appellant from returning to India and there was nothing to prevent the appellant, partner and child from continuing their family life there.

17. The Appellant alternatively has the option to make an application from India to join his family although there was no undertaking that it will be successful; that option, however, is open to anyone who marries an individual with pre settled status in the UK. The child was born in Ireland and at primary school and that was not an insurmountable obstacle. The appellant claimed there was no work in India but there no evidence to show he could not earn a living. The partner could work and there was no evidence to contradict the suggestion the appellant would be able to work. Both are healthy and resourceful in the UK and the partner worked in beauty industry and in the care industry. There would be nothing to prevent themselves from living and supporting themselves in India. The couple were, in two days, to be married and there was no reason why they could not stay with her family. The partner had travelled to India and stayed with her parents.

18. We were invited to consider the credibility of the evidence on the basis of the contradictions and to reject the assertions that there was no work, the child could not live there, and that no one would accept the child or the partner. Nor was there independent evidence that the appellant's own family would not accept him, only the oral testimony of the appellant. The partner was aware of his immigration status when she met the appellant and that he was here unlawfully. We were referred to paragraph 39 of **R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM– *Chikwamba* – temporary separation – proportionality)** IJR [2015] UKUT 189 (IAC) [39]. There were simply no exceptional circumstances or unjustifiably harsh consequences should they relocate to India.

19. Mr Reynolds invited us to allow the appeal. He submitted that EX.1 and EX.2 of Appendix FM were engaged, and the appellant had been here illegally for nearly 18 years. He had entirely distanced himself from India and there was credible evidence that he had no contact with his family owing to a falling out. He would have no support network and had no skills, and he would be unable to work and would be destitute. The partner was under no obligation to leave the UK as she has pre settled status. If she were to return with him, she had no reliable network and she also would find herself destitute. Her family would be very reluctant to house them, and they lived in a village in Rajasthan where there was no work. There would be insurmountable obstacles to any form of life in India.

20. The child was to be considered and he under 7. He is an EEA national and had spent most of his life in England. He would be ostracised, on the evidence of his mother, as born out of wedlock and he had no cultural contact with India. It was accepted that the child spoke Punjabi.

Analysis

21. '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. The test is stringent.

22. We find the appellant would not have very significant obstacles in relocating to India and our reasons are given below. First, we do not accept he would be unable to secure employment. We noted his witness statement but his assertions as to difficulties were just that, and bare assertions will not suffice in terms of establishing very significant difficulties in either integrating in India or continuing a relationship. He is a healthy resourceful man, having lived illegally in the UK for 18 years and has managed to survive financially without relatives and particularly until he met his now partner in 2017, some 12/13 years later. He has been able to undertake cleaning and gardening and odd jobs according to [7] of his witness statement, and he also performed tasks at the Gurdwara. We were not provided with statistics on the unemployment rates in India and he told us that he had merely derived his information about the job market from the news and social media on Facebook. Initially he also stated that women did not work in India but revised that oral statement to his partner only being able to undertake housework if she returned to India. In effect there was no firm evidence that either the appellant or his partner would be unable to work and exist financially.

23. The appellant in his witness statement maintained that whilst in India he was more interested in his social life between the ages of 16 and 21 and *'never worked or helped my father with the farming'* but he did spend his formative life in India and evidently, during his schooling, made friends and socialised. Albeit he said that he was estranged from his family, we were given evidence that his father paid for his trip to the UK, and it would be most surprising if the father would thereafter cut the appellant off. In his witness statement the appellant detailed that his brother received the remaining farmland. That said we find there is no need for the appellant to rely on his family and he could operate independently and elsewhere in India.

24. He has been active in the Gurdwara for many years and met his wife there and therefore has not been estranged from the Indian culture and customs during his time in the UK. He still speaks Punjabi, and his activities further indicate his ability to socialise within the Sikh community and the maintenance of his Indian cultural connection which will assist him on integration in India.

25. There was no evidence that even if the appellant were estranged from his family (and there was no indication they were a threat) that he could not derive support from his parents-in-law. The appellant told us (contrary to the partner's evidence) that he had spoken to his partner's family (the parents), and we simply do not accept that he would be unable to establish himself in India either independently on return or by living temporarily with them. We do not consider this is speculation bearing in mind we were consistently told by both the appellant and partner that

they were to be married within the week and the partner and child and stayed with her parents when in India.

26. The appellant's partner is an Indian national who initially emigrated to Ireland from India in 2011. She speaks Punjabi with her partner and child, and she gave evidence through an interpreter at the hearing. She confirmed in oral evidence, contrary to her witness statement in which she asserted that she was disowned, that she did have contact with her parents and indeed that they had accepted an invitation to her wedding to the appellant (due to take place on 26th March 2022) and had applied for visas to attend. She confirmed that she visited her parents with her child in 2019 for one month and (contrary to the appellant's evidence that she stayed for the majority of time with her sister) gave oral evidence that she remained with her parents for the entirety of her visit. That belies her witness statement of February 2021 in which she claimed she was disowned. Although the partner stated that she, the appellant and her son could not live in India or with her parents forever we do not consider this would preclude temporary accommodation. We note that the parents were willing to spend money on visas and travel to the UK for the wedding. We conclude that the partner and her parents, whatever their previous differences, have reconciled and we were not told by the partner that they would refuse to house the family even for a short while whilst the family established themselves independently. Clearly the family in India have sufficient monies to fund a visit to the UK to attend the wedding of their daughter.

27. Nor were we persuaded that the fact that the stepson had been born out of wedlock would constitute an insurmountable obstacle to the appellant and partner living in India. They are to be married imminently and before any return. The partner has the support of her parents and to the outside world they are living as a married couple. We are simply not persuaded that there would be any discrimination which would constitute an insurmountable obstacle. Even if the appellant does not have family in India, the partner has parents, and siblings and nieces/nephews in India.

28. We turn to a consideration of the child which is a primary consideration. When considering section 55 of the Borders, Citizenship and Immigration Act 2009 the best interests of the child are a primary consideration although not a trump card. In **EV (Philippines)** [2014] EWCA Civ 874 at [58] the question in relation to the child was set out as follows:

> *'In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?'*

29. The child is a European Union citizen having citizenship of Ireland. He is not a British citizen. It was rejected in the error of law decision that the child, owing to being an EEA national, should be construed as a qualifying child on purposive grounds particularly in the light of Section 33(2A) of the Immigration Act 1971 such that (subject to section 8(5) which has no bearing here), references to a person being settled in the United Kingdom are references to his being '*ordinarily resident there without being subject under the immigration laws to <u>any</u> restriction on the period for which he may remain'*. We were provided with no further documentary evidence as to the child's status and we note that the United Kingdom is no longer part of the European Union. Even if he had rights to future education and healthcare in this country we were not advised and would not accept that India lacks an education system and healthcare.

30. The child is now 6 years old and at primary school. We were told he speaks Punjabi at home and has grandparents, aunts and uncles and cousins in India. Clearly the key figure in his life is his mother and the appellant states that he fulfils a daily caring role when his mother is at work. The best interests of the child are to remain with his mother and preferably with his mother and the appellant should mother decide to remain in a family unit with the appellant, **<u>Zoumbas</u>** [2013] UKSC 74. The child is very young and has only just started school and is only at the primary stage. At his young age his world will consist essentially of his immediate family. We were not told of any special educational needs or health needs. He is not a British citizen and no issue was raised that the child could not, from an immigration point, relocate to India. We were not told that the child did not retain Indian nationality or could not obtain entry to India. We conclude that child would be adaptable and could be schooled either in the UK or in India. His extended family are in India, and it would be in his best interests to have contact with them. We do not accept that he, as part of the family unit, would be destitute for the reasons given above, should his mother choose to remove to India to be with the appellant. It is a choice she will have to make.

31. When the appellant and his partner were asked why the partner and child could not return to India, we received a variety of responses such as merely it would not be possible because the child was born out of wedlock, alternatively they simply could not leave each other, and that the child was born outside India and goes to school in the UK. These were not persuasive explanations even if the evidence of the appellant and his partner had diverged in a number of significant ways. For example the appellant denied that the partner had stayed with her parents for the entirety of her stay in India in 2019 when she contradicted that. Secondly, he confirmed he had spoken to her parents, and she had connected them. She denied he had spoken to them. We conclude she would have known that was incorrect having had contact with her parents over the wedding to which they were invited and were intending to attend. We therefore give little weight to the assertions by the appellant and his partner as to the difficulties of relocation for the family including the child.

32. We do not accept that it would be unreasonable to expect the child to remove to India with the parents. The child's biological father has no contact with the child and therefore would not pose an obstacle to the child leaving. Indeed the child left Ireland without any reported problem. We were shown no evidence that his biological father would object to the family's relocation to India. We do not conclude that it would be to the child's detriment, rather the reverse in terms of his extended family and his ability to access a strand of his cultural heritage. His best interests could equally be found to be in India as in the UK where he has no wider family. He is not a qualifying child for the purposes of Section 117 of the Nationality, Immigration and Asylum Act 2002 nor under EX.1 of Appendix FM of the Immigration Rules.

33. In essence there was nothing to prevent the family from forming a legitimate life in India as submitted by Ms Lecointe. We simply do not accept that the fact the appellant and partner do not have property in India, as asserted by the partner, was a reason for not relocating; nothing we were told meets the stringent test for insurmountable obstacles or described any form of 'serious hardship' which the appellant, his partner and child would encounter. All speak Punjabi, have each other to turn to for support and both are Indian nationals without significant health concerns and who are able to work. Nothing in the evidence suggested any serious hardship should they relocate to India.

34. Should the partner decide to remain in the UK, we were told that the appellant was the key carer for the children because the partner worked on nightshifts as a healthcare assistant and this arrangement would be interrupted. We do not accept that as a weighty reason for finding in the appellant's favour. The family would be parted and although the appellant has adopted a caring role, the child is now at school full time and we were not persuaded on the mere testimony of the appellant and his partner without any further objective evidence that, should this relationship be interrupted either permanently or temporarily, the child would be seriously affected. There was no evidence that the partner had sought an alteration to her shift pattern such that she could work during the days when the child was at school, should she decide not to accompany the appellant to India, or that she could not resume her previous day time work as a beautician. We realise that this may prompt a reduction in income but the partner, despite having no family in the UK, clearly managed, including financially, prior to meeting the appellant and works and is also in receipt of child benefit in the sum of approximately £80 per month. The child's father has had no contact with the child nor provided any maintenance and she managed until she met the appellant.

35. Indeed, this appeal was characterised by a lack of evidence, and we heed the judgment of Holroyde LJ in **Secretary of State v R (Kaur)** [2018] EWCA Civ 1423 at [56] where he stated

> '*The matters put forward certainly provided good reasons why both would much prefer to continue their family life in this country; but*

> *they did not come close to establishing any insurmountable obstacle which would meet the stringent test in paragraph EX.1(b). In the recent case of R (Mudibo) v SSHD [2017] EWCA Civ 1949 this court has emphasised the distinction, in this context, between evidence and mere assertion. The facts and decision in Jeunesse, referred to by Lord Reed in the passages which I have quoted above, show how high the bar is set'.*

36. Nor are we persuaded should the partner decide to remain in the UK that the effect on the child would be such that there would be any serious consequences. We were shown a private custody agreement between the appellant and his partner, but this added little to the information we had already been given. It does not undermine the parental responsibility of the mother for the child. We were not in receipt of any private social worker report detailing the effect on the stepson should the appellant be removed from the UK and separated from him.

37. In terms of his private life, the appellant has not lived in the UK for 20 years. The question further to paragraph 276ADE(1)(vi) is whether there are very significant obstacles to integration in India, **Secretary of State v Kamara** [2016] EWCA Civ 813 which held that

> *"'integration' calls for a broad evaluative judgment of whether the individual will be enough of an insider in terms of understanding how life in that other country is conducted and a capacity to participate in it, have a reasonable opportunity to be accepted, operate on a day-to-day basis and to build up within a reasonable time a variety of human relationships".*

Mere hardship, hurdles and inconvenience do not fulfil the requisite test.

38. Even if we accept that the appellant has been in the UK since 2004 and we note there was minimal evidence to that effect, we are not persuaded, with **Kamara** [2016] EWCA Civ 813 in mind, that he would not be able to integrate into Indian society, be accepted as an insider and build within a reasonable time frame a variety of human relationship. There is no evidence he is anything other than fit and healthy, his formative years until 20 years were spent in India where he was educated and socialised, and he speaks Punjabi. He claimed that he could not obtain work, but we have addressed that issue above. We do not accept that he could not live independently. He has been resourceful and worked in the UK even without permission by finding odd jobs and gardening work and there is no reason to suppose he could not do the same in India, but with the advantage of being there lawfully. He must have retained knowledge of the Indian culture, not least his partner is Indian and his involvement in the Gurdwara where indeed he met his partner in 2017. His status will have prevented him from integrating in UK society. He could continue to attend places of congregational worship in India. We appreciate that should his partner remain in the UK that will affect his private life but that is a matter for the appellant and his partner to decide upon.

39. In terms of Article 8 outside the rule in terms of private life and applying the 5 stage **Razgar v SSHD** [2004] UKHL 27 test, the appellant has formed a private and family life for article 8 purposes in UK, and the interference would be sufficiently serious to engage article 8. The decision is for the legitimate aim of ensuring immigration control and is in accordance with the law.

40. Adopting the balance sheet approach, on the positive side there will be an effect on his partner and her son if they do not accompany him to India, **Beoku-Betts v SSHD** [2008] UKHL 9 and he will be deprived of his partner, but this relationship was commenced when both knew of his status. We accept the appellant has been in the UK for a lengthy time but, again, he has known his illegal status from the outset. In terms of proportionality we must apply Section 117B of the 2002 Act. There was no evidence that he was financially dependent on public resources although we were given no information about his access to the National Health Service. He speaks some English, but this is, at best, a neutral factor, **Rhuppiah v SSHD** [2018] UKSC 58.

41. On the negative side of the balance sheet, the appellant cannot comply with the Immigration rules either under EX.1(a) or (b) or under paragraph 276 ADE. Those rules set out the position of the Secretary of State in terms of the public interest and carry weight.

42. We are not persuaded that the Secretary of State has delayed in removing him. He only came to light when he made his application for LTR in 2019 (if we accept his denial that he made an EEA application in 2013) and the refusal decision was promptly made.

43. Additionally under Section 117B

> *"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."*

44. The appellant falls within both provisions (a) and (b). Little weight should be afforded to the relationship with the partner under Section 117B, because she accepts, she knew of the appellant's immigration status when they met. It is clear, however that the relationship with the child will be affected and that does not fall within those provisions, but we conclude that the child's primary relationship, although no doubt familiar with the appellant, is with his mother and that will continue. The appellant has always known of his immigration status and formed his relationships knowing of the possibility of being removed.

45. Ms Lecointe referred to **Chikwamba v SSHD** [2008] UKHL 40 and **Chen** and submitted that the appellant could remove himself and make an entry clearance application. There was no real explanation from the appellant or his partner as to why he could not return to India on a temporary basis and make an application for a spousal visa. As set out in **Chen**,

> '*there may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40'.*

46. As noted in **Chen** the burden is on the applicant to show that temporary separation would be a significant interference with his family life and although the appellant asserted his caring duties there was no evidence that temporary (or permanent for that matter) childcare could not be arranged nor that the child would be emotionally affected by the separation. There were no statements from friends or the school on this point. When considering temporary separation, we repeat that both appellant and partner knew of the appellant's unlawful immigration status when she met him and developed her relationship with him.

47. Further, reliance on **Chikwamba** does not obviate the public interest as set out by Section 117B and as **Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC)** held,

> *"An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest".*

48. It is not for us to consider whether the application from abroad would be successful but the latest salary payslips within the bundle showed the partner earned £16,288 gross as of 31st January 2021 and with her monthly pay of £1,421.22, that would amount to at least £19,130 pro rata and exceed the spousal financial requirements.

49. We accept the partner and child have no obligation to return but we reject the submission that any of them either individually or jointly would be destitute on return or face unjustifiably harsh consequences. There is clearly family support, and they are far from being ostracised by the partner's family as claimed before the First-tier Tribunal. Further to **R (Agyarko)** [2017] UKSC 11 on the evidence before us, there were simply no unjustifiably harsh consequences on the removal of either the appellant

alone or on the family's removal to India. We have taken full account of all considerations weighing for and against the refusal and considered the best interests of the child as a primary consideration, but find the refusal does not prejudice the appellant's family life in a manner that amounts to a disproportionate breach of the fundamental rights protected by Article 8.

50. We therefore dismiss the appeal.

Notice of Decision

The appeal is dismissed.

Signed Helen Rimington Date 13th April 2022

Upper Tribunal Judge Rimington