IAC-AH-DP-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Numbers: HU/03309/2020
HU/02528/2020; HU/01145/2020 (V)

**THE IMMIGRATION ACTS**

| **Heard on 30 June 2021** | **Decision & Reasons Promulgated** |
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| **At a remote hearing via Teams** | **On 16 August 2021** |

**Before**

**UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SMH**
**MIMH**
**MH**
**(ANONYMITY DIRECTIONS MADE)**

Respondents

**Representation:**
For the Appellant: Ms Willocks-Briscoe, Senior Home Office Presenting Officer
For the Respondent: Mr Richardson, Counsel

**DECISION AND REASONS (V)**

**Introduction**

1. The appellant ('the SSHD') has appealed against a decision of the First-tier Tribunal ('FTT') Judge Scott Baker, sent on 18 February 2021, allowing the respondents' appeals on Article 8, ECHR grounds.

2. I gave an ex-tempore judgment on 30 June 2021, dismissing the respondent's appeal. Regrettably due to a technical fault, the recording equipment did not record this judgment at an audible level. Both representatives were therefore invited to file and serve their notes of the ex-tempore judgment, which I now summarise in this decision. I am grateful to both representatives for their assistance in this regard.

**Background**

3. The first respondent is the spouse of a British citizen ('the sponsor'). The second and third respondents are their children.

4. As noted by the FTT, there was no credibility issue raised in the appeals and the undisputed background facts are recorded by the FTT at [12-23]. I therefore need only summarise the background facts here. The sponsor came to the UK in 2000. He married the first respondent in India in 2002, and the second and third respondents were born in 2002 and 2004 respectively. The respondents lived with the first respondent's brother until 2015, when they came to UK in order to settle with the sponsor, in accordance with the Immigration Rules, having been granted limited leave to enter the UK.

5. In May 2017 the sponsor suffered a heart-attack. The respondents' application to extend their leave was refused, which was the subject of an unsuccessful appeal – see the FTT's decision promulgated on 19 July 2019. Their further application was refused in a decision dated 20 February 2020. Although the sponsor was working at the time, he could not meet financial threshold of £24,800pa, because for health-related reasons he could only work limited hours and was earning approximately £22,000pa for the relevant period. In addition, the first respondent was unable to establish that she had passed English at level A2, albeit she had previously passed at level A1.

**FTT decision**

6. The FTT noted that the SSHD was of the view that there were no insurmountable obstacles to family life in India and referred to this reasoning at [3]. The FTT went on to record that it was undisputed that the respondents could not meet the requirements of the Rules in two respects: the first respondent had not passed level A2 English, and; the minimum income requirement was not met. The FTT noted that the family was intent on settling in the UK and did so lawfully, but that the sponsor's heart condition meant he could not work the required hours he had done previously – see [24] to [26].

7. The FTT acknowledged that the respondents were unable to meet the requirements of the Immigration Rules but concluded that the refusal of leave would result in unjustifiably harsh consequences, such that the appeal was allowed on Article 8 grounds. Although the FTT did not regard this to be "*the strongest of cases to be allowed under Article 8*" (see [38]), it concluded that the

factors on the respondents' side outweighed the public interest requirements in the proportionality assessment.

**Appeal to the Upper Tribunal ('UT')**

8. The SSHD applied for permission to appeal against the FTT's decision in three succinct grounds of appeal.

   (i) When conducting the balancing exercise, the FTT failed to take into account that it is the mere wish of the family to remain in the UK and they could exercise the choice to enjoy family life in India, and failed to give adequate weight to the public interest.

   (ii) The FTT used Article 8 as "*a general dispensing power*" without properly addressing the fact that the first respondent was unable to provide the requisite English language certificate and the requisite financial threshold could not be met.

   (iii) The FTT failed to pay regard to the 2019 FTT decision dismissing the respondents' appeals (albeit the SSHD accepted that the decision was not before the FTT).

9. FTT Judge Froom granted permission to appeal in a decision dated 17 March 2021.

10. At the beginning of the hearing before me Ms Willocks-Briscoe agreed with my summary of the grounds of appeal above and made brief oral submissions in support of these. After hearing from both representatives, I gave an ex-tempore decision, which I now summarise here.

**Discussion**

*Ground 1 – choice / public interest*

11. When the decision is read as a whole, the FTT accepted the respondent's submission that the family were unable to establish that there would be insurmountable obstacles to establishing family life in India – see in particular [3] and [21] to [25] of the FTT decision. It is regrettable that the FTT did not state this expressly but the decision has been structured on the basis that the Rules, including EX.1 of Appendix EU could not be met, and the real issue in dispute was whether notwithstanding this, the decision breached Article 8.

12. The FTT was entitled to make the finding at [28] that it would be unreasonable to expect the sponsor to return to India in the light of a combination of factors: his residence in the UK for over 20 years, his heart condition and employment in the UK. When the FTT referred to it not being reasonable to expect the sponsor to return to India, it did so when considering the *Razgar* questions 1 and 2.

13. When read as a whole, I am not satisfied that the FTT has replaced the test of insurmountable obstacles with one of reasonableness. It is clear that the FTT was mindful of the insurmountable obstacles test in EX.1 of the Rules. The FTT drew specific attention to [48] of R (Agyarko) v SSHD [2017] UKSC 11, which explains the position as follows:

> "… If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the "insurmountable obstacles" test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances"…"

14. Whilst the FTT did not expressly state that the test of insurmountable obstacles within the Rules could not be met, it cannot be said that the FTT was not mindful of it. It was not an issue in dispute. It appears to have been accepted on behalf of the respondents that the elevated threshold of demonstrating insurmountable obstacles for the purposes of the Rules, could not be met. The FTT was therefore well aware that although it considered that the sponsor's relocation to India would be unreasonable, there were no insurmountable obstacles preventing this. As highlighted in GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630 at [48] for the purposes of Article 8, insurmountable obstacles is a relevant factor (which this FTT was mindful of) and not *the* test.

15. In reality the FTT could not lawfully proceed upon the assumption that the sponsor would choose to leave the UK. He remained in the UK for many years prior to the respondents' arrival in 2015. Since then, the FTT found there were additional reasons rendering his choice to remain in the UK reasonable. The position of the respondents and especially the children therefore had to be analysed in the context of an acceptance that the sponsor would stay and, this being so, the family would be ruptured and fractured and the children would suffer from separation from their father when it was common ground that he was the bread winner and the children benefited from having two parents – see similar arguments accepted by the Court of Appeal in GM at [44] and [45].

16. I do not accept that the FTT did not give adequate consideration to the public interest or attach significant weight to it. It is sufficiently clear from [32-35] that the FTT was fully aware that the requirements of the Rules could not be met and that considerable weight must be attached to the public interest, as represented in the Rules. The FTT clearly understood the significance of the Rules not being met upon the weight to be attached to the public interest having expressly directed itself to this and the relevant authorities in support of that well-known proposition – see by way of example the FTT's reference to [46] and [47] of Agyarko at [32] and the further reference to the approach in Agyarko at [35] and [39]. It is at this juncture that the FTT also considered the public interest considerations pursuant to s. 117B of the Nationality,

Immigration and Asylum Act 2002. The grounds do not criticise the FTT's approach to the public interest considerations.

*Ground 2 – general dispensing power*

17. When the decision is read as a whole, the FTT applied the well-known principles in the authorities and did not simply utilise Article 8 as a general dispensing power. The FTT expressly directed itself to the considerable weight to be attached to the public interest and the need to identify unjustifiably harsh consequences. Ground 2 appears to criticise the FTT for not fully dealing with relevant matters, in particular the first respondent's failure to explain why she did not seek the return of her passport or make up the short fall in the income of the family. Although evidence could have been adduced on these matters, it is unclear whether the first respondent was asked about this. In any event, this would not have advanced the SSHD's position because the appeal was determined on the basis that the respondents did not meet these aspects of the Rules.

18. I do not regard the grounds as amounting to a reasons challenge, but, if I am wrong about this, I am satisfied that the FTT has given tolerably clear reasons for the conclusion that the refusal of leave would lead unjustifiably harsh consequences for the purposes of the Article 8 proportionality assessment. The FTT identified the material aspects of the claim demonstrating why it was unjustifiably harsh to refuse. Whilst these might have been expressed more clearly, the decision needs to be read as a whole. When it is, the FTT may have reached a generous decision, but it cannot be said to be perverse (which in any event was not argued in the grounds of appeal). The FTT was entitled to take the following matters into account:

    (a) The family has at all times sought to comply with the requirements of the Rules and the respondents were on 'the pathway to settled status'. This puts them in a stronger position than those not on such a pathway and this needs to be taken into account as one of the 'pros' in the proportionality assessment – see GM at [34].

    (b) The respondents were unable to meet the requirements of the Rules for two main reasons, each of which have mitigating features. First, the health of the sponsor, which was outside of his control and clear efforts were made to get as close to the minimum income requirements as possible. Second, although the first respondent did not attain level A2 English, she was still able to evidence basic English language skills. As the FTT observed, the issue was not that she was unable to speak English but that the SSHD retained the passport she required to sit the further requisite English test.

    (c) Although the FTT did not regard the best interests of the children to be determinative (see [27]), it was entitled to factor these in: they

came to the UK lawfully at ages 13 and 11 in 2015 and spent formative years in the UK, with every expectation that they would be permitted to settle but for the unexpected deterioration in the sponsor's health.

(d) Although the insurmountable obstacles test could not be met, the FTT regarded the sponsor's return to India to be unreasonable.

19. The FTT expressly applied considered the s. 117B public interest considerations and balanced the weighty public interest against the 'pros' considered cumulatively, before reaching the conclusion that the refusal of leave would lead to unjustifiably harsh consequences. Whilst this might be considered a generous conclusion, it is not infected by an error of law.

*Ground 3 – 2018 FTT decision*

20. It is clear from [17] of the FTT's decision, that the SSHD, who was represented at the hearing before the FTT, did not seek to rely upon the earlier refusal or the 2019 FTT decision.

21. The 2019 FTT decision was belatedly provided to the UT pursuant to a rule 15(2A) application on 29 June 2021 (the day before the UT hearing). No explanation was provided as to why it was provided so late. The grounds of appeal make no attempt to explain which previous findings should have informed this FTT's 'starting point'. This is significant because the FTT made it clear at [11] that there is no issue of credibility in the appeals. There has been no appeal against that finding. The grounds do not submit that the FTT made a material mistake of fact causing unfairness. The 2019 FTT decision could and should have been before the FTT, if it was being relied upon. It was not relied upon either in the decision under appeal or at the hearing. It is important that all parties respect finality of litigation. In the absence of any explanation as to the reasons for the late submission of the 2019 FTT decision or in what manner it is said it would have led to a different result, I decline to admit the 2019 FTT decision.

22. If I am wrong about that and the decision should be admitted, I have not been given a single submission explaining the relevance of the 2019 FTT decision in identifying an error of law in the FTT's decision other than the vague reference to it forming a 'starting point'. This has not been particularised or reconciled with the FTT's apparently uncontroversial indication that credibility was not in issue. Although I note the findings on suitability in the 2019 FTT decision, these findings are not relied upon in the SSHD's decision under appeal dated 20 February 2020, which take no issue with suitability. The FTT did not make an error of law in failing to consider a document that was not before it, in the particular circumstances of this case.

**Notice of decision**

23. The FTT decision does not contain an error of law and I do not set it aside.

**Direction regarding anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: *Ms M Plimmer* Dated: 12 August 2021
Upper Tribunal Judge Plimmer