Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17519/2019

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 27th April 2021	**On 24th May 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

RAVNEET [K]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Abbas, Imperium Group Immigration Specialists
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of India. She appealed the respondent's decision of 11th October 2019 to refuse her application for leave to remain in the UK on human rights grounds. Her appeal to the First-tier Tribunal ("FtT") was dismissed by First-tier Tribunal Judge Rowlands for reasons set out in a decision promulgated on 27th February 2020.

Background

2. The appellant arrived in the United Kingdom on 15th May 2007, aged 13, with entry clearance as a visitor valid until 27th of September 2007. As a child she had no control over matters, but the family remained in the United Kingdom unlawfully after the appellant's entry clearance expired. Her immigration history is referred to in the respondent's decision, but that is at odds with the appellant's account of her immigration as set out in paragraph [2] of the decision of Judge Rowlands. At paragraph [13], Judge Rowlands accepted that the immigration history referred to by the appellant is correct. It is uncontroversial that an application for leave to remain made by the appellant was refused by the respondent on 18th December 2017. Her appeal against that decision was dismissed by First-tier Tribunal Judge Richards-Clarke for reasons set out in a decision promulgated on 20th June 2018. Although the appellant was granted permission to appeal to the Upper Tribunal, following a hearing on 12th September 2018, Deputy Upper Tribunal Judge Murray dismissed the appeal for reasons set out in a decision promulgated on 9th October 2018.

3. On 1st March 2019, the appellant made a further application for leave to remain on human rights grounds, and in particular, on the basis of the appellant's family life with her child who I shall refer to in this decision as [JK]. That application was refused by the respondent for reasons set out in a decision dated 11th October 2019. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Rowlands for reasons set out in his decision promulgated on 27th February 2020.

4. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Nightingale on 18th May 2020 on limited grounds. In granting permission, she said:

> "…it is arguable that the Judge fell into error in referring repeatedly to "insurmountable obstacles" rather than "very significant obstacles" to reintegration in accordance with paragraph 276ADE(1)(vi). This is particularly arguable in light of the judge's reference to "insurmountable

> obstacles to their removal" at paragraph 19. This ground is arguable. It is also arguable that the judge did not consider the nationality of the appellant's child, and in particular, the separation of the child from her father."

The appeal before me

5. At the hearing before me, Mr Abbas accepts the grant of permission to appeal is limited. He submits there are three strands to the grounds upon which permission has been granted. I refer to the parties submissions upon the three criticisms made by the appellant, before drawing the threads together.

Paragraph 276ADE(1)(vi) of the Immigration Rules

6. First, the appellant relies upon the erroneous reference by Judge Rowlands at paragraph [16] of his decision to paragraph 276ADE(1)(vi) requiring the appellant to show "*.. that there are insurmountable obstacles to her integration in India..*". The reference to "*insurmountable obstacles*" as the test, is repeated at paragraphs [17] , [18] and [19] of the decision in which the judge considered whether the requirements of the immigration rules are met. At paragraph [19], Judge Rowlands refers to the best interests of the child and in the end, concludes that he is not satisfied that there are "*... insurmountable obstacles to the appellant's removal to India.*".

7. Mr Abbas submits the focus of the Judge was upon whether there are insurmountable obstacles to the appellant's integration in India and whether there are insurmountable obstacles to the appellant's removal to India, whereas paragraph 276ADE(1)(vi) required the appellant to establish that there would be very significant obstacles to her integration into India. He submits the erroneous reference to 'insurmountable obstacles' is such that the decision is infected by a material error of law. Mr Abbas refers to the decision of the Upper Tribunal in Treebhawan and Others (NIAA 2002 Part 5 - compelling circumstances [2017] UKUT 13 in which a Presidential panel of

the Upper Tribunal considered what is meant by "very significant obstacles". It said, at [37]:

> "The other limb of the test, 'very significant obstacles', erects a self-evidently elevated threshold, such that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even where multiplied, will generally be insufficient in this context."

8. Mr Abbas submits that at paragraph [18] of the decision, Judge Rowlands refers to the objective material that establishes that single women are marginalised and face social stigma. He submits that is sufficient to establish that there are very significant obstacles to the appellant's integration into India.

9. At the outset, Mr Bates candidly and quite properly accepts that in referring to "insurmountable obstacles" to integration in India, Judge Rowlands failed to refer to the correct wording of the test as set out in paragraph 276ADE(1)(vi), but he submits, any error is immaterial. He submits Judge Rowlands correctly noted, at [13], that the previous decision of Judge Richards-Clarke promulgated on 1st June 2018 forms the starting point for his consideration of the Article 8 claim. Judge Richards-Clarke was not satisfied that there would be very significant obstacles to the appellant's integration into India. That is the test set out in paragraph 276ADE(1)(vi). Mr Bates submits the appellant's first ground is 'form over substance' and on any view, whether considered as *"insurmountable obstacles to integration"* or *"very significant obstacles to integration"*, the appellant was unable to establish on the evidence that there would be obstacles to her integration into India.

The nationality of the child

10. The appellant claims Judge Rowlands proceeds upon the premise that the child [JK] is an Indian citizen. At paragraph [19], he refers to [JK] as an 'Indian citizen', whereas she was born in the UK and her birth has not been registered with the Indian authorities and she has not been registered as an Indian national.

11. Mr Abbas submits that the Judge's consideration of the best interests of the child should have followed a proper consideration of the circumstances that the appellant herself would face. The background material establishes that as a single woman she would be marginalised and face social stigma. That will inevitably impact upon her daughter.

The child's contact with her father

12. The appellant claims that in considering the best interests of the child at paragraph [19], Judge Rowlands failed to consider the impact that removal of the child from the UK with the appellant, will have upon the child's relationship with her father.

13. As to the nationality of [JK] and her contact with her father, Mr Bates submits the appellant's case before the Tribunal was set out in the appellant's skeleton argument. The skeleton argument refers to a number of authorities and said, at paragraph [18]:

> "It is submitted that it is in the best interests of the child the appellant should remain in the UK. The country information clearly shows that the appellant will face discrimination, and this will inevitably affect the child."

14. The appellant did not claim before the First-tier Tribunal that the child would not be entitled to Indian citizenship or would face difficulty in entering India. Neither did the appellant claim that the child's removal to India would have an impact upon her relationship with her father. The focus was upon the difficulties the appellant would face, and the impact of that upon her daughter.

Discussion

15. I am grateful to Mr Abbas and Mr Bates for their helpful and concise submissions directed to the particular criticisms made of the decision of First-tier Tribunal Judge Rowlands. Having heard the submissions and having

carefully read the decision of Judge Rowlands I conclude that the decision of Judge Rowlands is not vitiated by a material error of law.

16. True it is that in considering whether the appellant meets the requirements for leave to remain on the grounds of private life as set out in paragraph 276ADE(1)(vi) of the immigration rules, the Judge refers to "insurmountable obstacles" rather than "very significant obstacles", but in my judgement that was not material to the outcome of this appeal.

17. In Agyarko –v- SSHD [2015] EWCA Civ 440, the Court of Appeal considered the requirement in the Immigration Rules, Appendix FM s.EX.1(b), that there be "insurmountable obstacles" preventing an applicant from continuing their relationships outside the UK. Sales LJ said:

> "21. The phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.
>
> 22. This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase "insurmountable obstacles" has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under Article 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see e.g. *Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34* , para. [39] ("… whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them …"). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).
>
> 23. For clarity, two points should be made about the "insurmountable obstacles" criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way: see, e.g., the way in which the Grand Chamber approached that criterion in Jeunesse v Netherlands at para. [117]; also the observation by this court in *MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192; [2014] 1 WLR 544* , at [49] (although it should be noted that the passage in the judgment of the *Upper Tribunal in Izuazu v Secretary of*

> *State for the Home Department [2013] UKUT 45 (IAC); [2013] Imm AR 453 there referred* to, at paras. [53]-[59], was making a rather different point, namely that explained in para. [24] below regarding the significance of the criterion in the context of an Article 8 assessment).
>
> 24. Secondly, the "insurmountable obstacles" criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which need to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However, in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account, not an absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8 : see paras. [29]-[30] below."

18. In Parveen v SSHD [2018] EWCA Civ 932, the Court of Appeal considered the relevant provision, paragraph 276ADE(1)(vi) which applies where an applicant has lived continuously in the UK for less than 20 years and "*there would be very significant obstacles to their integration in the country of return*". Underhill LJ said:

> "8. Since the grant of permission this Court has had occasion to consider the meaning of the phrase "very significant obstacles to integration", not in fact in paragraph 276ADE(1)(vi) but as it appears in paragraph 399A of the Immigration Rules and in section 117C (4) of the Nationality Immigration and Asylum Act 2002, which relate to the deportation of foreign criminals. In *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813, [2016] 4 WLR 152, Sales LJ said, at para. 14 of his judgment:
>
> > "In my view, the concept of a foreign criminal's 'integration' into the country to which it is proposed that he be deported … is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."
>
> 9. That passage focuses more on the concept of integration than on what is meant by "very significant obstacles". The latter point was recently addressed by the Upper Tribunal (McCloskey J and UTJ

> Francis) in *Treebhawon v Secretary of State for the Home Department* [2017] UKUT 13 (IAC). At para. 37 of its judgment the UT said:
>
> > "The other limb of the test, 'very significant obstacles', erects a self-evidently elevated threshold, such that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even where multiplied, will generally be insufficient in this context."
>
> 10. I have to say that I do not find that a very useful gloss on the words of the rule. It is fair enough to observe that the words "very significant" connote an "elevated" threshold, and I have no difficulty with the observation that the test will not be met by "mere inconvenience or upheaval". But I am not sure that saying that "mere" hardship or difficulty or hurdles, even if multiplied, will not "generally" suffice adds anything of substance. The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as "very significant".”

19. The phrase ‘insurmountable obstacles’, involves a stringent test, to be interpreted in a sensible and practical, rather than a purely literal way. The phrase “very significant” equally connotes an "elevated" threshold, and as Underhill LJ noted in Parveen v SSHD, that test will not be met by "mere inconvenience or upheaval". In the end, the task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as "very significant".

20. In the decision of Judge Richards-Clarke promulgated on 20th June 2018, the Judge had considered, at [25] to [28] whether there would be very significant obstacles to the appellant’s integration into India. Judge Rowlands referred to the decision of First-tier Tribunal Judge Richards-Clarke in June 2018, and at paragraph [16] of his decision, he referred to the passage of time since that decision. At paragraph [17] he also noted that the appellant is no longer in a relationship with her husband, and they have a child together, aged 8 months. He referred to the appellant’s claim that “*... The existence of the child and its best interests amount to an insurmountable obstacle and the fact that, if returned, she would be a lone female with a child ...*”. Judge Rowlands accepted, at [18], that if the appellant returned to India now, it would be as a separated

woman. He referred to the background material relied upon by the appellant and said:

> "... The Appellant's objective evidence shows that there are approximately 36 million women who fall into the category of single women in various forms and that they are marginalised and face social stigma. She may well face financial hardship as well, but I do not accept this raises insurmountable obstacles for her. She is well educated, speaks the language and has a lot more going for her than most single women."

21. At paragraph [19], Judge Rowlands refers to the best interests of the child. I accept Judge Rowlands erroneously stated that the appellant's skeleton argument argues that the child would face discrimination. The appellant's claim as set out in the skeleton argument was that "... *The country information clearly shows that the appellant will face discrimination, and this will inevitably affect the child* ". He went on to say at paragraph [19]:

> "... At the moment neither of the child's parents have leave to remain and there is the possibility of them both being removed. Her grandparents are also without leave and presumably her paternal grandparents live in India. The child is an Indian citizen and I believe her best interests are to be with her mother in India. For all these reasons I am not satisfied that there are insurmountable obstacles to the appellant's removal to India. I am therefore satisfied that she could not meet the immigration rules."

22. I also accept that Judge Rowlands refers in paragraph [19] to the child as an Indian citizen. He cannot be criticised for doing so. At page 3 *(of 8)* of the respondent's decision, when considering whether the Eligibility Relationship Requirements' for leave to remain as a parent are met, the respondent referred to the nationality of the appellant and the child's father and said:

> "... Both you and the father of your child are Indian nationals and you have failed to provide any evidence that your child is not an Indian national…"

23. At the bottom of page 5 (*of 8)* of the respondent's decision, the respondent stated:

> "Your daughter would be returning to India with you as a family unit. You can help your daughter adapt to life in India. The country which you grew up in. Your daughter is an Indian national so they can therefore start to enjoy all of the benefits and advantages that citizenship entails"

24. In the undated grounds of appeal that were settled by the appellant's representatives that were attached to the Form "IAFT-5, Appeal against your Home Office decision", the appellant did not challenge the respondent's claim that her daughter is an Indian national. The grounds of appeal simply state, at [3.6]; "*It is in the best interests and welfare of the appellant's child that leave to remain is granted*". At the hearing of her appeal, the appellant relied upon a witness statement dated 16th December 2019 that is to be found on pages 14 to 18 of the appellant's bundle. She refers to the birth of her daughter, but again, did not say that her daughter is not an Indian national. Neither was such a claim made in the appellant's skeleton argument.

25. In any event, Mr Abbas quite properly acknowledged in his submissions before me that in MK (India) Statelessness [2017] EWHC 1365 (Admin), the Court set out at paragraph [9], the relevant 'Indian Law' regarding nationality, taken from the material that was relied upon. Broadly put, where the birth of a child was outside India on or after 3 December 2004, the child is not a citizen unless the birth is registered at an Indian consulate' in such form and in such manner as may be prescribed'. If the registration is after the child's first birthday it needs 'the permission of the Central Government'. The court considered evidence adduced by the respondent which was to the effect that enquiries of an Indian minister and two consular officials indicates that in practice there is no difference between registration before the child's first birthday and registration after that date. The Indian officials said that there is 'no restriction' on later registration. Thus the relevant statutory provision requiring the permission of the Central Government does not in practice imply the exercise of a discretion, and permission is given routinely. There are also possibilities for applying for registration as a citizen where a person born outside India comes to live in India while still a minor, and there are provisions for the backdating (if necessary) of the Central government permission. Mr Abbas quite properly acknowledges that it is possible for the child therefore to acquire Indian citizenship.

26. I reject the appellant's claim that in considering the best interests of the child, Judge Rowlands failed to consider the impact that removal of the child from the UK with the appellant will have upon the child's relationship with her father. There was a statement made by Mr Gurjinder Singh, the appellant's former partner, dated 17th December 2019 at pages 19 and 20 of the appellant's bundle. The statement is in the vaguest of terms and says nothing about his relationship with his daughter. He confirms that he does not have any immigration status in the UK but has made an application to regularise his stay. At paragraph [4] he states:

> "I would like to apply for custody for my daughter, but I cannot afford it. I want [JK] to live with my family and me because we are better suited to take care of her. Also, because of Ravneet's mental health issues I think it is better [JK] is with me. Ravneet's mood is always going up and down, this is not good for [JK]."

27. The appellant's skeleton argument filed in advance of the hearing before the Tribunal did not advance a claim that the removal of the appellant and her daughter to India would impact upon the relationship between the child and her father. The only evidence before the Tribunal is what is recorded at paragraph [7] of the decision of Judge Rowlands. The appellant confirmed her former partner does help and has contact with his daughter. The evidence was that [JK] goes to him at his sister's home at weekends. Again, that is the vaguest of evidence and tells the Judge nothing about the impact that the removal of the appellant and her daughter to India would have on the relationship between [JK] and her father. Separation of a child and parent where there is some contact will inevitably have some impact but that must be considered, as Judge Rowlands did here, against the reality that the appellant's former partner has no lawful basis to be in the UK. The assessment must be conducted in the 'real world' context based upon the evidence and circumstance as they are. On the paucity of evidence, it was plainly open to the Judge to conclude as he did at paragraph [19]:

> "… At the moment neither of the child's parents have leave to remain and there is the possibility of them both being removed. Her grandparents are also without leave and presumably her paternal

> grandparents live in India. The child is an Indian citizen and I believe her best interests are to be with her mother in India. For those reasons I am not satisfied that there are insurmountable obstacles to the appellant's removal to India ..."

28. The reference to *"insurmountable obstacles to the appellant's removal to India"*, in paragraph [19] is in my judgement immaterial. The matters referred to by Judge Rowlands in paragraph [19] relate to the obstacles to integration rather than any obstacles to the removal of the appellant and her daughter to India.

29. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 confirms that the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the rules. That was plainly the approach adopted by Judge Rowlands at paragraphs [13] to [23] of his decision.

30. In my judgement, read as a whole, Judge Rowlands reached conclusions that were properly open to him on the evidence before the Tribunal. The Judge referred to the obstacles to integration that were relied upon by the appellant. Quite simply, there is nothing in the evidence before the Tribunal that establishes that the stringent test set out in paragraph 276ADE(1)(vi) could be met. I am quite satisfied that the error in referring to "insurmountable obstacles to integration" rather than "very significant obstacles" is immaterial, as is the reference to [JK] being an Indian national.

31. The findings made by the judge were findings that were properly open to the judge on the evidence and cannot be said to be perverse, irrational or findings that were not supported by the evidence. The assessment of such a claim is always a highly fact sensitive task. The FtT judge was required to consider the evidence as a whole. Although I accept the decision could have been better expressed, it is not a counsel of perfection.

32. In reaching his decision, Judge Rowland carried out an overall proportionality assessment and whether a fair balance has been struck between the individual and public interest, noting the express statutory provision set out in s117B of the 2002 Act. He referred to factors that weigh in favour of the appellant such as the circumstances of the various applications made on behalf of the appellant previously and that any delay, appears to have been no fault of hers. It was in my judgement open to judge Rowlands to conclude that the removal of the appellant is in all the circumstances proportionate.

33. It follows that I dismiss this appeal.

Notice of Decision

34. The appeal is dismissed. The decision of First-tier Tribunal Judge Rowlands stands.

V. Mandalia Date 7th May 2021

Upper Tribunal Judge Mandalia