Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03788/2020
UI/2021/001701

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 August 2022	**On 27 September 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY JUDGE OF THE UPPER TRIBUNAL JARVIS

Between

CHANCHALA MAJI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Stedman, instructed by Lawlane Solicitors
For the Respondent: Ms H. Gilmore, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a national of India, born on 16 December 1969. On 18 June 2021, First-tier Tribunal Judge Beg (hereafter "the Judge") dismissed the Appellant's statutory appeal against the decision of the Secretary of State (dated 24 February 2020) which refused her human rights claim made on 7 January 2020.

The decision under appeal

2. In the Judge's decision, the following material findings were made:

(a) The Judge noted that the Appellant's partner (Mr Upinder Kamat (hereafter "the Sponsor")) has Indefinite Leave to Remain in the UK and that he was hospitalised with the adverse effects of Covid pneumonia between 26 December 2020 and 23 March 2021, [13].

(b) The Judge concluded at [15] that there was no credible evidence before her that the Sponsor was not entitled to NHS care or care from his local authority. The Judge also noted that the Sponsor was no longer taking antibiotics and did not require any input from physiotherapists.

(c) The Judge also bore in mind that India was, at the time, on the red list in respect of the levels of Covid infections; she nonetheless emphasised that the Sponsor was only taking painkillers when he needed to. The Judge also made the unchallenged finding (as was specifically accepted by Mr Stedman in his oral submissions to us) that there was no detailed documentary evidence of the Sponsor's current state of health including an absence of information as to what level of care he required on a day-to-day basis, [18].

(d) At [19], the Judge concluded that the Appellant had not given credible evidence about her claim to have no family members with whom she is in contact in India. Again, this particular finding was accepted as perfectly lawful by Mr Stedman.

(e) At [22], the Judge made reference to the insurmountable obstacles test in EX.1. of Appendix FM as well as paragraph 276ADE of the Rules. The Judge concluded that there were no very significant obstacles to the Appellant reintegrating in India and noted that the Appellant maintains her linguistic and cultural identity with India and that she last entered the United Kingdom (from India) in 2019.

(f) In reference to the insurmountable obstacles test itself, at [29], the Judge noted that the Sponsor had provided his work payslips and bank statements (he also works as a domestic worker in the UK) and concluded that he would be able to do similar work in India; the Judge added that the Appellant also had the option of applying for entry clearance from India.

(g) The Judge also applied, as she was required to do so by primary legislation, the provisions in section 117B of the NIAA 2002. At [27], the Judge noted that the Appellant had established a family and private life whilst in the UK with limited Leave to Remain and that she was aware that this was only temporary Leave. The Judge also noted that the Appellant entered into a relationship with her Sponsor when

her Leave was precarious and as such little weight should be attached to her private life (in accordance with section 117B(5).)

(h) At [31], the Judge also considered the hypothetical scenario in which the Appellant was applying for entry clearance from India without the Sponsor and concluded that there would be no disproportionate interference with the Appellant's family life by such a temporary separation.

(i) The Judge overall concluded that there were no exceptional circumstances, as meaning that no unjustifiably harsh consequences flowed from the Respondent's decision.

The Appellant's Grounds of Appeal

3. We should say preliminarily that we found the Grounds of Appeal as settled on 30 June 2021, to be unhelpfully drafted. The observations contained in this document are not properly structured and are at times borderline misleading (see for instance para. 5 of the Grounds which plainly mis-characterises [10] of the decision of the Judge.)

4. The Upper Tribunal has equally not been particularly assisted by the grant of permission by Judge Boyes (dated 20 July 2021) which provides no reasons at all for considering that the Grounds of Appeal were entirely or partially arguable.

5. We have taken into account the Upper Tribunal's most recent reminder to Judges considering permission applications in Joseph (permission to appeal requirements) [2022] UKUT 00218 (IAC):

> *"4) All permission to appeal decisions should feature brief reasons. That includes a decision to grant permission to appeal. It is a useful exercise in judicial self-restraint to say why it is thought that the grounds are arguable, particularly where the grounds of appeal challenge findings of fact reached by the judge below."*

6. Setting aside the obvious inadequacies in the permission to appeal decision, in our view, and for the reasons which we lay out below, we consider that the high point of this case was the Appellant obtaining permission to appeal in the first place.

7. We nonetheless should make it clear that we are grateful to Mr Stedman for the pragmatic nature of his submissions before us. He helpfully reformulated the somewhat rambling nature of the Grounds of Appeal into, broadly, two main points:

Ground 1

(a) The Judge gave insufficient consideration to the impact upon the Sponsor as a material obstacle to the Appellant's integration into India based on his historical illness (Covid pneumonia) and the fact that he

had resided in the UK for over 20 years. The same point was made in respect of the Judge's assessment of the insurmountable obstacles test in EX.1. of Appendix FM.

Ground 2

(b) Additionally, he submitted that the mischaracterisation by the Secretary of State of the Appellant's immigration history had adversely impacted the Judge's assessment of the Appendix FM rules and the potential for the Appellant to obtain entry clearance.

8. On the basis of the way the case was put by Mr Stedman we therefore only concentrate on the two broad points summarised above.

Ground 1 - The Sponsor's health condition and length of residence

9. In respect of the first complaint about the Judge's failure to fully factor in the Sponsor's health condition and length of lawful residence in the United Kingdom into her consideration of either the very significant obstacles test in 276ADE(1)(vi) or in respect of her assessment of insurmountable obstacles under EX.1.(b) of Appendix FM, we conclude that there is nothing in this point.

10. It is trite that the threshold test of insurmountable obstacles is a demanding one, as per Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 11 at [43 & 44]:

> *"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.*
>
> *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."

11. In respect of very significant obstacles, the Court of Appeal in Parveen v The Secretary of State for the Home Department [2018] EWCA Civ 932, said at [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."*

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"."

12. Firstly then, it is our conclusion that it is tolerably clear that the Judge made lawful findings on the extent of the medical evidence which detailed the Sponsor's Covid pneumonia.

13. At [18], the Judge made the express finding that there was no documentary evidence of the Sponsor's care needs or state of health at the date of the hearing, and Mr Stedman on behalf of the Appellant expressly accepted the lawfulness of that finding. In other words, the Judge concluded that the Appellant had failed to establish, the burden being upon her at the date of the hearing, that her partner was still materially affected by his experience of Covid pneumonia earlier that year.

14. Additionally, the Judge made the clear finding that both the Appellant and her partner could work in India (see [16] & [29]), which again has not been challenged by Mr Stedman and was perfectly open to the Judge to conclude on the evidence before her.

15. We therefore find that the issue of the Sponsor's health, on the basis of these perfectly lawful findings, could not possibly have made any material difference (in favour of the Appellant) to the assessment of insurmountable obstacles or very significant obstacles.

16. For completeness we also see no merit in Mr Stedman's reference to the fact that the Sponsor has resided in the United Kingdom for 20 years. Again, it is clear from the authorities which we have cited, that the two legal tests relevant to this aspect of the Appellant's grounds of challenge could not be met simply because the Sponsor has resided in the United Kingdom for 20 years; there would plainly have to be something more and there are no such additional factors in this case.

Ground 2 - The Appellant's immigration history

17. In respect of the secondary point relating to the Appellant's immigration history, we have to note that Mr Stedman's submission on this aspect of the appeal materially changed during the hearing. Initially he was plainly under the misapprehension, (as also was the author of the grounds of appeal), that the Judge had adopted the Secretary of State's ill-informed view of the Appellant's immigration history.

18. It is absolutely clear to us that the Judge did properly understand that the Appellant had been residing lawfully in the United Kingdom for significant periods of time between her first entry on 6 May 2008 as a domestic worker and her human rights application in 2020. This is precisely how the Judge describes the Appellant's chronology at [10] of the judgment. The Judge also noted the Appellant's evidence (and the associated legal submission) that her current application for human rights was made on 7 January 2020 before her Leave expired on 11 January 2020.

19. The fact that the Judge understood that the Appellant had not been an overstayer, in agreement with the Appellant's detailed chronology and skeleton argument, is also reflected at [27] of the judgment in which she found the following:

> *"I find that the Appellant established a family and private life when she was in this country with limited leave to remain. In evidence she said she was aware that she only had temporary leave. She also entered into a relationship with Mr Kamat when her leave to remain was precarious. Accordingly little weight must be attached to her private life."*

20. During discussion with the panel, Mr Stedman accepted that [27] was perfectly accurate despite his earlier submission that the Judge had sought to apply section 117B(4)(a) against the Appellant.

21. It is clear to us that the Judge only sought to apply section 117B(5) of the Act at [27] and this reflects the fact that the Judge understood that the Appellant's numerous grants of limited Leave to Remain meant that her private life in the United Kingdom was, by application of the statute, precarious.

22. We should note that Mr Stedman also sought to develop the issue relating to the Appellant's immigration history in a further way. He initially submitted that it was materially relevant that the Appellant had limited Leave to Remain at the time she made her application because of the immigration status requirements in R-LTRP of Appendix FM.

23. Again, after further discussion with the panel, Mr Stedman was constrained to accept that the last grant of Leave to Remain (from 11 July 2019 until 11 January 2020 (see paragraph 3 of the Appellant's skeleton argument to the First-tier Tribunal)) also fell foul of E-LTR P.2.1.(b) on the basis that the Leave was only for six months.

24. This plainly means that the Appellant did not meet the immigration status requirements of Appendix FM and therefore, for that reason alone, could not argue that she met the requirements in R-LTRP.1.1.(c) – i.e. the five-year route to settlement.

25. We should also add for completeness that Mr Stedman argued that the refusal letter could be read as not challenging the Appellant's application in respect of the financial or English language requirements of the Appendix (E-LTR P.3.1. & E-LTR P.4.1.). We add that it is very clear to us that the Appellant did not argue, either in oral submissions at the FtT hearing or in her grounds of appeal or skeleton argument to the First-tier Tribunal, that she could in fact meet the full requirements of the five year route under Appendix FM; nor was it ever argued that the silence in the Respondent's refusal letter in respect of the financial and English requirements should be read as a tacit concession. We therefore consider that such an argument is not open to the Appellant at this stage in the proceedings.

26. We should also add, bearing in mind that Mr Stedman made a number of references to the Judge's assessment of the potential for the Appellant to obtain entry clearance, that we can see nothing materially wrong with the Judge's conclusions at [30 & 31].

27. On the Judge's earlier findings, in which she had lawfully concluded that there were no legal bars to the Appellant's or her partner's lives continuing in India, the Appellant had to show there were otherwise exceptional circumstances (applying GEN.3.2. of Appendix FM.)

28. In this particular case therefore, there was no particular need for the Judge to also consider whether or not the parties could be separated for a temporary period of time in order for the Appellant to make an application for entry clearance. This is clearly underscored by the absence of any reference to an argument based on Chikwamba v SSHD [2008] UKHL 40 in

the Appellant's skeleton argument to the First-tier Tribunal dated 20 October 2020.

29. Mr Stedman speculated that the Judge may have looked at the question of entry clearance on the basis that she may have concluded that the Appellant would meet all of the requirements in Appendix FM for entry clearance.

30. We do not consider that this submission gets the Appellant very far. Firstly, this argument has not been made in the Grounds of Appeal before us and Mr Stedman did not seek permission to amend the Grounds; secondly, even if the argument had been before us, it is plain that the Judge took the case at its highest when considering the issue of entry clearance of her own motion.

31. Thirdly, the Appellant did not argue and/or did not produce the relevant evidence to even begin the assertion that she would automatically be granted entry clearance if outside of the UK (where the Judge had already concluded that there would be no breach of Article 8 by the parties relocating to India as a couple). On this basis, the principle in Chikwamba simply could not apply in the Appellant's case, see Younas (section 117B (6) (b); Chikwamba; Zambrano) Pakistan [2020] UKUT 12, ("Younas"):

> *"94. The second question is whether an application for entry clearance from abroad will be granted. If the Appellant will not be granted entry clearance the Chikwamba principle is not relevant. A tribunal must determine this for itself based on the evidence before it, the burden being on the Appellant: see Chen at 39. In this case, we have found, for the reasons explained above, that, on the balance of probabilities, the Appellant will be granted entry clearance if she makes an application from Pakistan to join her partner."*

32. Furthermore, Younas makes clear that even if the "Chikwamba principle" does apply, this is not determinative of the Article 8(2) ECHR balancing exercise:

> *"99. The fourth question is whether the interference with the appellant's (and her family's) right to respect for their private and family life arising from her being required to leave the UK for a temporary period is justified under article 8(2). This requires a proportionality evaluation (i.e. a balance of public interest factors) where consideration is given to all material considerations including (in particular) those enumerated in section 117B of the 2002 Act."*

33. We therefore add, that if the argument had been before us, we would conclude that the Judge did give lawful reasons for finding that any hypothetical temporary separation was proportionate in all the circumstances and that there were no exceptional circumstances, bearing in mind that the Appellant only ever had temporary Leave to Remain in the UK and was well aware of this when she developed her family life with the Sponsor. Such a finding is entirely compatible with cases such as JEUNESSE v. THE NETHERLANDS - 12738/10 - Grand Chamber Judgment [2014] ECHR 1036 at [108]:

"Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-established case-law that, where this is the case, 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 (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, p. 94, § 68; Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998; Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999; M. v. the United Kingdom (dec.), no. 25087/06, 24 June 2008; Rodrigues da Silva and Hoogkamer v. the Netherlands, cited above, § 39; Arvelo Aponte v. the Netherlands, cited above, §§ 57-58; and Butt v. Norway, cited above, § 78)."

Notice of decision

34. We therefore conclude that the making of the decision by the First-tier Tribunal did not involve any error on a point of law by reference to s. 12(1) of the Tribunal, Courts and Enforcement Act 2007 and the appeal is therefore dismissed.

Signed  Date

Deputy Judge of the Upper Tribunal Jarvis

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