IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005516

First-tier Tribunal No: HU/52626/2022
IA/04146/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21 June 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SANU GEORGE
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Stedman of Imperium Chambers, Direct Access Barrister.
For the Respondent: Ms Rushforth, a Senior Home Office Presenting Officer.

Heard at Cardiff Civil Justice Centre on 12 June 2024

DECISION AND REASONS

1. The Appellant is a citizen of India born on 29 August 1985. He appealed the decision of the Respondent dated 7 April 2022 which refused his application for leave to remain on the basis of his family and private life in the UK.
2. That appeal came before First-tier Tribunal Judge Murray sitting at Newport on 20 September 2022.
3. Having considered the documentary and oral evidence Judge Murray set out her findings from [13] of the determination.
4. The Appellant's human rights application is predicated upon his relationship with Mr Andrew Smith, a British citizen, who has lived his entire life in the UK where his family live, including his elderly mother.
5. At [16] Judge Murray records that the Respondent accepted that the Appellant and Mr Smith are in a genuine and subsisting relationship but that the factors relied upon did not amount to insurmountable obstacles or very significant obstacles to integration.
6. At [26] Judge Murray wrote:

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> 26. However, whilst I accept that the Appellant and sponsor would find it difficult to return to India I find that the difficulties would not be very significant and entail serious hardship. There is no supporting evidence to show that either the Appellant or his partner would be unable to find work in India particularly in view of the Appellant's past residence there. He is clearly still acquainted with the language and culture and benefited from education in the UK. Whilst I accept that he is having a tremor investigated by a neurologist there is no diagnosis as yet. Also, there is a functioning health care system in India and it has not been shown that any treatment would be inaccessible or unaffordable. Further, whilst the Appellant is, I accept, reluctant to tell his family about his sexuality, according to his oral evidence he remains in touch with them and I do not accept that they would not support him on return. Further, the sponsor would be able to remain in contact with his family and make visits when needed. His mother is entitled to support from the state and whilst I accept the absence of daily face to face contact may be difficult, in view of the fact contact could continue virtually I do not accept that this amounts to an insurmountable obstacle.

7. The appeal was dismissed on human rights grounds against which the Appellant appealed. Permission to appeal was granted by Upper Tribunal Judge Sheridan on the basis that at [25] Judge Murray accepted that Mr Smith had close ties to his mother and sister but, because of a lack of supporting medical evidence, did not accept (or at least it did not make a clear finding) that she accepted, that they have terminal cancer. Judge Sheridan found it arguable that Judge Murray failed to reconcile her apparent rejection of the sponsor's evidence about his mother and sister having terminal cancer with the findings at [20] that Mr Smith was a credible witness.
8. The appeal was opposed by the Secretary of State in a Rule 24 response dated 20 December 2022.
9. Thereafter the appeal came before Upper Tribunal Judge Norton-Taylor on 10 November 2023. In a decision promulgated on 7 December 2023 it was found Judge Murray had materially erred in law and that decision set aside. At [7 – 8] Judge Norton-Taylor wrote:

> 7. I am satisfied that on a fair reading of paragraphs 24 - 26 the judge failed to make relevant findings. It is not incumbent on a judge to address each and every item of evidence in any given case, but the present appeal had a focus on the insurmountable obstacles issue and Mr Smith's evidence in respect of his mother and sister was clearly a core element of the evidence and it did require specific consideration and findings. In light of the other very favourable credibility findings in respect of Mr Smith's evidence, there was no reason, on the face of it, to have rejected his evidence on other matters and I am not prepared to accede to Mr Howells' submission that I should infer from paragraphs 24 and 25 that she was in fact rejecting Mr Smith's evidence in relation to his mother and sister. For that to have been the case, I would have expected to see clear findings of fact to that effect, together with supporting reasons, particularly when Mr Smith had been regarded as credible evidence in respect of other relevant matters.
>
> 8. Moving on, Mr Stedman realistically accepted that a number of the other factors put forward in respect of the insurmountable obstacles assessment were probably to be regarded as being fairly ordinary in the normal run of things; for example, the fact that Mr Smith had not been to India, that there may be some difficulty in finding employment, and such like. However, when all of those less important factors are be combined with what, on the face of it, was capable of amounting to a significant tie to this country on Mr Smith's part (i.e. the support provided to his mother and sister), a favourable finding on Mr Smith's evidence by the judge could (and I emphasise, not necessarily would) have led to a conclusion that there were insurmountable obstacles to this couple going to live together in India. In turn, if the insurmountable obstacles test had been satisfied, then EX.1 would have been met

> and in light of TZ (Pakistan) [2018] EWCA Civ 1109, the Appellant would have succeeded without having to rely on a wider Article 8 proportionality exercise.

10. Judge Norton-Taylor preserved Judge Murray's finding the Appellant and Mr Smith are in a genuine and subsisting relationship.
11. A transfer order has been made as a result of which the matter comes before me today for the purposes of enabling the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

Discussion and analysis

12. The scope of the current hearing was defined by Judge Norton-Taylor at [11] of his error of law finding as being:

> "…The relevant issues to be decided at the remaking stage all relate to Article 8, with specific reference in the first instance to the question of insurmountable obstacles. If the test under EX.1.is met, as I have already mentioned, the Appellant could expect to succeed in his appeal. If it is not, then a wider Article 8 proportionality exercise will be conducted".

13. At [12] Judge Norton-Taylor wrote:

> 12. The Appellant is on notice that the burden remains with him to establish relevant facts. The absence of medical evidence before the judge is to be recalled and, as I understand it, the Appellant himself may have recently been diagnosed with a particular medical condition. Evidence relating to that should, if available, be produced. I will issue appropriate directions accompanying the error of law decision at the time that it is promulgated.

14. I have seen further evidence including a witness statement from Mrs Mary Smith, the mother of Mr Andrew Smith dated 23 December 2023.
15. Mrs Smith states she is 90 years of age and living with peritoneal cancer and has been receiving chemotherapy on a regular basis for the last two years. She states there is no cure and that her health is reviewed every six weeks in person by a consultant to which she is accompanied by her son Andrew. Mrs Smith states she cannot remember details of what is said clearly after the meetings and that Andrew helps to get a better understanding of what is happening to her and the decision she has been asked to make. She claims if Andrew was not nearby she would not know what she would do, as she has no one else who could provide her with the help he gives, both practical and emotional support, which she says will have a significant effect on her health.
16. Mrs Smith says she sees Andrew two to three times a week when he comes to her house. She lives alone, and relies upon Andrew to help her with housekeeping, cleaning, vacuuming, cooking meals and gardening, as she finds tasks difficult, even more so during treatment. She also relies upon Andrew to drive her for her food shopping as she no longer drives, and to drive her to the hospital on the day she needs blood tests and chemotherapy.
17. Mrs Smith states Andrew holds a Power of Attorney for her and looks after her finances and helps her understand correspondence and issues such as her pension, insurances, utility bills, and dealing with her bank, which she cannot do for herself.
18. At [8] – [9] Mrs Smith writes:

> 8. Andrew's continued presence is invaluable to me. My husband died 5 years ago and my daughter, Tracy, who lives 4 miles away, has been living with brain cancer since 2017. She is now in a wheelchair, but thankfully still with us. Andrew supports me

and his sister by driving me there and back on a weekly basis. Our time together is so valuable, and this supports her, Gavin her husband, grandson, and granddaughter by being available for sitting duties and this gives them a break from 24/7 caring needs at least once a week.

9. I cannot bear to think what I would do if Andrew had to leave the UK with his partner. I would have no one who could provide me with the practical and emotional help and would be at a complete loss. It would have a very significant impact on my health.

19. I have also seen a witness statement from a Mr Gavin Thompson, dated 23 December 2023. He states he is a British national and the husband of Tracey, who is Andrew's sister. Mr Thompson states that Tracey was diagnosed with a glioblastoma brain tumour in September 2017 which is stated to be an incurable condition. Tracey's condition has deteriorated over the five years she has lived with the tumour to the extent she has now declined to a point where she cannot move very much and needs constant care, which Mr Thompson provides.
20. Mr Thompson states that Andrew comes over on a Saturday and sits with Tracey which gives him a break and time to watch his local rugby team and spend time with his friends, including his son, and return refreshed.
21. Mr Thompson states Andrew also visits to provide him with help as he knows Tracey's routines for food and comfort breaks and knows how to keep her happy. He states that without Andrew's support his own mental health will be negatively affected. Knowing he is available at short notice and could be present to help at any time is a huge relief. Mr Thompson states that if Andrew had to leave the UK it would have a huge impact on their family both practically and emotionally.
22. A further piece of documentary evidence disclosed on the day by Mr Stedman is a letter from the Richard Weiser Parkinson's Centre in relation to Mr George.
23. Judge Norton-Taylor referred to Mr George having been diagnosed with a condition which the letter confirms is Young-Onset Parkinson's Disease. The letter indicates Mr George is treated by way of medication and it was not made out before me that any medication or treatment Mr George requires would not be available to him in India. Mr Stedman confirmed that he was not submitting such or that Mr George's medical condition was sufficient to reach the AM (Zimbabwe) Article 3 ECHR threshold in relation to medical claims but did submit it was a factor to be taken into account. I have done so.

The hearing

24. Ms Rushforth relied upon the reasons for refusal letter dated 7 April 2022.
25. The writer of that letter was not satisfied that the relationship between Mr George and Mr Smith is genuine and subsisting or that they intended to live together permanently in the UK, leading to refusal under paragraph E-LTRP.2.2 of Appendix FM of the Immigration Rules. The preserved finding of Judge Murray shows this requirement is satisfied.
26. In relation to the eligibility immigration status requirement, it is written:

> You do not meet the eligibility immigration status requirement E-LTRP.2.1. to 2.2 because it is noted that your previous leave as a Student ended on 30 January 2013. You have therefore been without valid leave in United Kingdom for 3297 days and paragraph 39E does not apply. You therefore fail to fulfil E-LTRP.2.2 of Appendix FM of the Immigration Rules.

27. That is a sustainable conclusion.
28. The decision-maker accepted that Mr George met the eligibility financial requirements of paragraph E-LTRP.3.1 to 3.4 which must refer to the minimum income limits in force at the date of the decision.

29. In relation to the Eligibility English Language Requirement, it is written:

> You do not meet the eligibility English language requirement of paragraph E-LTRP.4.1 to 4.2 because you have not provided evidence that you have achieved a qualification in English to level A1 of the Common European Framework of Reference for Languages as stated in Appendix O of the Immigration Rules. It is noted that none of the exceptions detailed in E-LTRP.4.1 to E-LTRP.4.2 apply in your case. You therefore failed to fulfil E-LTRP.4.1 to E-LTRP.4.2 of Appendix FM of the Immigration Rules.

30. That is a sustainable conclusion and remains the case.

31. In relation to Mr George's private life, it was not accepted he could meet the requirements of paragraph 276 ADE(1) the Immigration Rules for the following reasons:

> Eligibility
>
> All statements below relate to your age at the date of application. From the information you have provided, it is noted that you are a national of India and you entered the UK on 04 November 2010. You have therefore lived in the UK for 11 years and 3 months and it is not accepted you have lived continuously in the UK for at least 20 years. Consequently you fail to meet the requirements of paragraph 276ADE(1)(iii) of the Immigration Rules. You are over the age of 18. Consequently you fail to meet the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules. You are not aged between 18 and under 25 years. Consequently you fail to meet the requirements of paragraph 276ADE(1)(v) of the Immigration Rules. In order to meet the requirements of paragraph 276ADE(1)(vi), an applicant must show that they are aged 18 or above and that there would be very significant obstacles to their integration into the country to which they would have to go if required to leave the UK. It is not accepted that there would be very significant obstacles to your integration into India, if you were required to leave the UK because:
>
> • You have stated in your application that you speak Hindi, Malayalam and Tamil which are widely spoken in India and this will help you to adapt to life in India, socially and culturally;
> • You resided in India up to the age of 25, which includes your childhood, formative years and a significant portion of your adult life. It is accepted that you will have retained knowledge of the life, language and culture, and would not face significant obstacles to re-integrating into life in India once more;
> • It is noted that you commenced a relationship in the knowledge that you did not hold valid leave in the UK and you had no legitimate expectation to remain here indefinitely. Therefore from the outset, all parties should have been aware of the possibility that family life might not be able to continue in the UK;
> • You also claim that you have established a private life in the UK and will find it difficult to return to India. You have only had leave to enter in the UK as a student, and this is not a route to settlement. Further, this leave expired on 30 January 2013, therefore you were fully aware when developing any private life or ties that you had no expectation you would be remaining here indefinitely; and
> • Homosexuality is legal in India and there is no general risk for LGBT persons. Whilst it is accepted that discrimination may occur, you have not provided evidence to show that you and your sponsor would be at any particular risk. Consequently you fail to meet the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules.

32. In relation to exceptional circumstances, it is written:

> Exceptional Circumstances
>
> We have considered, under paragraph GEN.3.2. of Appendix FM, whether there are exceptional circumstances in your case which would render refusal a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for you or your family. In so doing we have taken into account, under paragraph GEN.3.3 of Appendix FM,

the best interests of any relevant child as a primary consideration. Based on the information you have provided we have decided that there are no such exceptional circumstances in your case. You have told us:
• You state that you have established a family and private life in the UK with your sponsor, whom you love. You also state that your sponsor is in employment in the UK. You state that your parents and siblings in India do not approve of your relationship. You further state that you have friends and a social circle in the UK; and
• You state that you have no ties to India except your parents and siblings who live in India. We have reached this decision because:
• You have not provided evidence to suggest that your family and private life cannot continue outside the UK. You have not provided evidence to suggest that your sponsor would not be able to return to India with you. You would be returning with him and will be able to help him to adjust to life outside the UK. It is noted that you commenced a relationship in the knowledge that you did not hold valid leave in the UK and you had no legitimate expectation to remain here indefinitely. Therefore from the outset, all parties should have been aware of the possibility that family life might not be able to continue in the UK. Homosexuality is legal in India and there is no general risk for LGBT persons. Whilst it is accepted that discrimination may occur, you have not provided evidence to show that you and your sponsor would be at any particular risk. You claim that you wish to remain in the UK because your sponsor has a job here; however, you have provided no evidence to suggest that yourself or your sponsor would not be able to find alternative employment in India. You have also told us that you have close ties in the UK. Whilst it is accepted that you may have made friends and other contacts whilst living in the UK, the fact remains that you are a national of India and upon your return you can keep in contact with any UK based friends and other associates through modern channels of communication; and
• You resided in India up to the age of 25, which includes your childhood, formative years and a significant portion of your adult life. It is accepted that you will have retained knowledge of the life, language and culture, and would not face significant obstacles to re-integrating into life in India once more

Refusal Paragraph under the 5-year and 10-year Partner Routes and 10-year Private Life Route

In light of the above, your application is refused under paragraph D-LTRP.1.3. with reference to paragraph R-LTRP.1.1.(a), (b), (c)(i), (ii), (d)(i), (ii) and (iii) of Appendix FM, and under paragraph 276CE with reference to paragraph 276ADE(1)(i),(iii), (iv), (v), and (vi) of the Immigration Rules. Accordingly, you do not qualify for leave to remain under the 5 or 10-year partner routes of Appendix FM, or the 10-year private life route of Part 7 of the Immigration Rules.

33. What is clearly missing from the evidence that has been provided in support of this appeal is any medical evidence relating to either Mary Smith or her daughter Tracey, Mr Smith's relatives. This was a point raised by Ms Rushforth in discussions at the start of the hearing. No satisfactory explanation has been provided for why such evidence has not been made available. No adjournment application was made to obtain such evidence. This omission is of some importance as the core of Mr George's case relates to his partner Mr Smith and his connection, both practical and emotional, to his mother Mary and sister Tracey.
34. The Appellant's case set out in Mr Stedman's skeleton argument reads:

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11. Based on all the circumstances of the couple there would be very significant difficulties for this couple seeking to re-establish family life outside of the UK
12. In particular the Appellant's partner would be forced to sever close ties with his family and friends including his elderly mother. He would also find it extremely difficult to readjust to a country of which he has no knowledge or experience. It

would be an extremely different life, environment and lifestyle, socially and culturally and there would be additional hardship given he is a gay man.

13. For the reasons given, the Tribunal is invited to allow the appeal by reference to the Immigration Rules as set out above. GEN.3.1
14. In the alternative, it is submitted that GEN.3.1 applies. There are plainly exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result in unjustifiably harsh consequences for the Appellant and his partner.

35. It was accepted by Mr Stedman that the question of whether there are insurmountable obstacles requires appropriate proof to the required standard.
36. In R (Agyarko) v Secretary of State the Home Department [2017] UKSC 11 it was stated that the question of whether there are insurmountable obstacles is to be understood in a practical and realistic sense, and that it is a stringent test.
37. Although Ms Rushforth did not dispute the lay evidence regarding the diagnosis for Mary Smith and her daughter Tracey, she submitted there was no evidence of a formal assessment of the care needs of Mrs Smith or Tracey.
38. Although he was found to be a credible witness, as was Mr George, by Judge Murray, I have to assess what weight I can give to the evidence that has been given to me today. There was no submission made by Ms Rushworth that either of the witness was not credible.
39. The failure to provide medical evidence, despite it clearly being an issue and a point commented upon by Judge Norton-Taylor, means that although the specific cancer is known it is not known what the symptoms are, what the impact of the cancer is upon Mrs Smith from a medical perspective, what prognosis she has received, the emotional/psychological impact of the cancer, any element of dependency created by the cancer, the nature of the chemotherapy being provided and whether it is proving to be a successful holding measure, when she was diagnosed with the cancer, whether there is any opinion as to improvement/ her future and related timeline. There is also no professional assessment as to her needs.
40. Mr Smith in his witness statement stated he sees his mother two to three times a week which he confirmed in his oral evidence and also that he provides support on other occasions when required. It also became clear from the evidence that there is other support available, namely from a neighbour, and other support to which Mrs Smith may be entitled from the NHS or adult social services to meet her needs. I appreciate the evidence indicated that she may not wish to use such services, but that does not mean that she is not entitled to them or that it would be unreasonable to expect her to make use of the same if Mr Smith was not available. There is also evidence that indicated Mrs Smith is able to do some things for herself.
41. I accept that although Mr Smith makes a real contribution in relation to his sister Tracey, by effectively providing respite care whilst Tracey's husband and other family members are able to enjoy social time, it was again not made out that help would not be available if Mr Smith left the United Kingdom or what the effect upon Tracey would be in relation to her care and/or welfare. I accept the evidence of Mr Smith that when he goes on Saturday he sometimes takes his mother so she can visit Tracey and they can see each other but, again, the evidence did not show that this opportunity for Mrs Smith and her daughter to spend time together would be lost if Mr Smith had to leave the UK.
42. In his submissions Mr Stedman accepted that the main issue related to Mrs Smith. He submitted that her son Andrew provided the quality of care needed but also argued that this is a family relationship and that it came to more than just whether the care Mrs Smith required could be provided by others. It was argued

the family relationship and the impact of Mr Smith leaving could not be disposed of in the manner suggested by the Secretary of State.

43. Mr Stedman submitted that there was evidence of a strong emotional connection between Mr Smith and his mother and sister and that his presence in the UK was critical to his mother's mental and emotional state but, again, there is no evidence from a psychiatrist/psychologist or any medically qualified individual such as a GP dealing with the issue of Mrs Smith's psychological/emotional state and the impact of Mr Smith having to leave the UK.

44. Paragraph of EX.1 Appendix FM applies if…

> (b) the applicant has a genuine 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 that there are insurmountable obstacles to family life without partner continuing outside the UK.

45. It is a preserved finding that the Appellant and Mr Smith are in a genuine and subsisting relationship and that Mr Smith is a British citizen.

46. Paragraph EX.2.Appendix FM defines 'insurmountable obstacles' to family life continuing outside the UK as follows:

> EX.2. for the purposes of paragraph EX.1.(b) "insurmountable obstacles" means a 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.

47. It was not made out on the evidence that it would be impossible for the Appellant and Mr Smith to continue their family life together overseas, per se. It was not made out they would not be able to gain entry to India or that it is unrealistic or impractical to expect them to continue their family life there. I take into account the points raised by Mr Smith in relation to such a proposal, discussed by Judge Murray and Judge Norton-Taylor. The Secretary of State's guidance makes it clear that a significant degree of hardship or inconvenience does not amount to insurmountable obstacles even if a British citizen partner who has lived in the UK all their life, has friends and family here, works here and speaks only English, has to uproot and relocate halfway across the world. That is a finding in accordance with the decision in Jeunesse, v The Netherlands (Application No. 12738/10) of the Grand Chamber of the European Court of Human Rights. That was a case involving the relocation of a family to Suriname even though the children, the eldest of whom was at secondary school, were Dutch nationals who had lived all their lives in Holland and had never visited Suriname.

48. I was not referred to anything by way of country-of-origin information, relevant national laws, attitudes and/or the general situation in India, that would support a claim otherwise in relation to these issues.

49. As noted above the significant difficulty claimed is the loss of the role Mr Smith plays in providing support for his mother and Tracey, and the impact of the same on the individuals concerned. The difficulty, in light of the failure to provide all relevant evidence, is that although I accept there may be significant difficulties in having to arrange alternative care if Mr Smith had to go to India to continue the relationship, it was not made out, either physically or emotionally, that would amount to very significant difficulties. The inclusion of the word "very" indicating a high threshold.

50. If it was accepted there are very significant difficulties, then consideration would have to be given to whether Mr Smith will face very serious hardship entail by overcoming the obstacle. It was not made out on the evidence that Mr Smith would suffer very serious hardship by making the necessary arrangements for care to be provided for his mother in his absence. The impression given by Mr Smith is that he is an organised individual who will do all that he can to ensure his mother's needs and those of his sister are met as best as they can be. I accept an element of hardship would relate to the emotional consequences, as it was not disputed he provides physical and emotional support for his mother, and I accept he is likely himself to experience concerns if he is not able to provide the assistance he has, and in relation to his mother both as a result of her cancer and being 90 years of age. There was, again, no medical evidence made available to assist in relation to these issues to establish the consequence of Mr Smith going to live with Mr George in India.
51. Therefore, in relation to the question of whether the difficulty is one that would make it impossible for the Appellant and Mr Smith to continue family life outside the UK, I do not find this aspect of the test has been shown to be satisfied on the evidence.
52. Ms Rushforth's submission in relation to the lack of medical evidence related to both the physical and emotional aspects of the appeal. It cannot be disputed that Mrs Smith as a British citizen with health needs is entitled to assistance from the NHS and/or Social Services/her Local Authority Adult care services if Mr Smith was unavailable. It was not made out that alternative provision would not be sufficient to meet Mrs Smith's needs, even if not to the same degree as that she currently enjoys with the assistance of her son. There are steps which could reasonably be taken by such services to avoid or mitigate the difficulties claimed by Mr Smith. There is insufficient evidence to prove otherwise.
53. I have also considered whether, taking account of steps that could reasonably be taken, it would nevertheless entail very serious hardship for the Appellant or Mr Smith, or both. In making that assessment it is necessary to take into account the particular characteristics of the individuals concerned. I have done so.
54. I accept Mr Smith's subjective view that he believes there are insurmountable obstacles based upon his personal profile, but as noted by the Court of Appeal in CL v Secretary of State for the Home Department [2019] EWCA Civ 1925, to treat the insurmountable obstacles test by establishing an individual's concern about how they perceive the difficulties are insurmountable would substantially dilute the intended stringency of the test and give an unfair 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 [37].
55. It is also settled law that an applicant is required to provide an evidential foundation for assertions there are insurmountable obstacles to their family life continuing outside United Kingdom – see R (Kaur) v Secretary of State for the Home Department [2018] EWCA Civ 1423 (21 June 2018) . The failure to provide medical evidence has a material impact upon the evidential foundation of the claims being made in opposing the Secretary of State's decision.
56. Returning to Ms Rushforth's submission regarding the lack of medical evidence beyond the oral evidence that I have received, as stated above, that situation is unexplained, especially when early determinations clearly focused upon the need for such evidence to be provided. Whilst I accept Mr Smith's evidence in relation to the fact he will be very upset and concerned for his mother, and Mrs Smith's evidence in relation to what she claims will be the impact upon her, there is insufficient medical evidence in relation to the impact of Mr Smith's removal. This

applies also to Mr Smith himself. It was not made out that the tasks he chooses to perform could not be performed by others. It was not made out that if he had to go to India to continue family life there with Mr George that it will result in any practical or emotional consequence to him such as to amount to a very serious hardship.

57. I accept there are close bonds with Mr Smith's own family unit but that, per se, is not sufficient.

58. I find on the basis of the evidence provided the Appellant has failed to establish there are insurmountable obstacles that would prevent the family life he enjoys with his partner, Mr Smith, continuing outside the UK. While such evidence may exist, it was not provided.

59. Ms Rushforth in her submissions went on to address Article 8 ECHR outside the Immigration Rules.

60. Reference was made to [34] of the decision of Judge Murray. I agree with Ms Rushforth's submission that that finding was not set aside by Upper Tribunal Judge Norton-Taylor.

61. In that paragraph Judge Murray writes:

> 34. I find that this is not a case to which the principal in Chikwamba applies as the Appellant does not arguably meet the Immigration Rules as he does not meet the English language requirement.

62. That is a sustainable finding on the facts. If Mr George returns to India he will be able to make the necessary arrangements to obtain the requisite English-language certificate as he gave his evidence in English and clearly has some command of English language as a result of the time he has been in the UK, albeit illegally.

63. Ms Rushforth relied on section 117B of the Nationality, Immigration and Asylum Act 2002 in support of her argument that little weight should be given to Mr George's private life formed in the UK, which has been established during the time that his leave has been precarious and, following the end of his period of lawful leave, unlawful. That is a sustainable submission.

64. I also accept the submission that the weight to be given to the family life relied upon by Mr George should also be reduced. The evidence clearly supports a finding that it was known very early on in the relationship that Mr George was in the UK illegally. The relationship was therefore developed at a time he had no lawful leave to remain in the UK and no legitimate expectation he will be allowed to remain to continue and develop his family life. That is a sustainable submission and one in accordance with European law, including cases such as Y v Russia (Application no. 2011/07) where it was found:

> 104. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (for instance, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). 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 (see *Jerry Olajide Sarumi v. the United Kingdom* (dec.), no. 43279/98, 26 January 1999; and *Andrey Sheabashov v. Latvia* (dec.), no. 50065/99, 22 May 1999). Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances (see *Abdulaziz, Cabales and Balkandali,* cited above, § 68; *Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November

1998; and *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999; *Rodrigues da Silva and Hoogkamer*, cited above, ibid.).

65. It was also submitted there has been, and will be in the future, considerable cost to the NHS by Mr George as a result of his own medical needs. That is a sustainable submission.
66. Ms Rushforth also submitted that it was not disproportionate for Mr George to return to India alone, to make an application for leave to enter as lawfully as the partner of Mr Smith, which would not necessarily require Mr Smith to have to leave the UK.
67. Although Mr Stedman indicated that such a proposal was problematic as Mr Smith will be out of the UK for a considerable time whilst the application was made, which would have an adverse effect upon his mother and sister Tracey, that was not necessarily made out. It was not made out, in particular, that any short period of separation while Mr George returned to India to make the application, with Mr Smith remaining in the UK, would make any interference in their family life as a result of a temporary separation disproportionate on the facts of this case. On that basis, Mr Smith could continue with his current regime of looking after his mother and providing support for his sister. There was no evidential basis for the submission that Mr Smith would have to be out of the UK whilst the application was made.
68. The issue of cost was raised and whether there were sufficient funds to meet the maintenance requirements under the Immigration Rules. It was not made out there are insufficient resources available to cover any visa application fee, any related healthcare charges, or the cost of an approved English language test and certificate.
69. It was not made out Mr George does not have family in India with whom he could stay and who could provide support and assistance for him, if required. It was not made out it that will be unreasonable to expect him to do. It was also not made out there are insufficient resources to enable the Appellant to stay in a hotel or guesthouse if he would find that more acceptable.
70. In relation to the argument as to timescale, Mr Stedman submitted such separation would be for a disproportionate period of time, but current processing times in relation to settlement visas for applications made out of the UK are said to be 24 weeks. There is nothing in the evidence to show that would be a disproportionate or unreasonable period of time/separation to secure a legal right for the Appellant and Mr Smith to be able to spend the rest of their lives together as they claim is their mutual wish.
71. Following the amendments to the Immigration Rules an applicant for a settlement visa normally need to prove a combined income of at least £29,000 per year. No specific evidence was led in relation to this aspect. I have in the bundle copy Nationwide Building Society statements for Mr Smith which show a number of substantial payments being made and transfers out into another account in Mr Smith's name. It was not made out that the financial requirements of the Rules could not be met if an application was made.
72. Mr George's recent diagnosis has been considered but does not establish that a short period away from Mr Smith whilst he made an application to re-enter lawfully would be disproportionate. It is not made out that Mr George requires intensive medical intervention or that he would not be able to take sufficient medication with him whilst he made the necessary application.
73. The Secretary of State has a margin of appreciation in relation to Article 8 ECHR and, in relation to this matter, has decided to exercise that by refusing Mr George's application.

74. I can understand Mr George's desire to remain in the UK with Mr Smith, from the evidence. The question is whether the Secretary of State has established that any interference in any protected right, of the Appellant, Mr Smith or any other person affected by the decision, is proportionate when weighed against the public interest. I find on balance, when considering each and every aspect of the evidence cumulatively with the required degree of anxious scrutiny, including those points taken into account and considered as part of the insurmountable obstacle exercise, that the Secretary of State has discharge that burden.

Notice of Decision

75. I substitute a decision to dismiss the appeal under both the Immigration Rules and Article 8 ECHR.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 June 2024

Postscript

76. I make an additional comment as a postscript as it does not form part of the decision-making process and was not relevant to the points that have led to the decision I have made above.
77. If it had been accepted that insurmountable obstacles to family life continuing outside the UK on the basis of Mrs Smith's situation and Andrew Smith's support for his mother exist, such insurmountable obstacle would only be relevant during the time that Mrs Smith remains with us. It was not made out that any of the other issues relied upon are sufficient, individually or cumulatively to meet the stringent insurmountable obstacle test, including those relating to Tracey.
78. That would have meant any period of leave granted to Mr George would probably have been limited in light of the Secretary of State's discretionary powers. In light of Mrs Smith's age and health it may have been seen as a hollow victory as the period of leave would only have been for a relatively short period of time.
79. It may therefore be the most appropriate outcome in any of the scenarios for Mr George to return to India to make the application to re-enter the UK lawfully as he will then be able to live with Mr Smith as his partner without any degree of uncertainty.