Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15929/2019

THE IMMIGRATION ACTS

Heard at Field House (via Skype)	**Decision & Reasons Promulgated**
On 15 December 2020	**On 19 January 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

KARAMJEET KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rai, instructed by Gills Immigration Law
For the Respondent: Mr Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission granted by First-tier Tribunal Judge Buchanan, against the decision of First-tier Tribunal Judge Obhi ("the judge"). In her decision of 21 November 2019, the judge dismissed the appellant's appeal against the respondent's refusal of her human rights claim.

Background

2. The appellant is an Indian national. She was born on 14 January 1978 and is therefore 42 years old. She entered the United Kingdom on 29 November 2011, holding entry clearance as a student. The appellant subsequently attempted to secure further leave to remain in the United Kingdom by a number of different

routes. I need not set out the chronology but it seems that there were two applications for a derivative right to reside under the EU Treaties and five applications for leave to remain on human rights grounds between March 2013 and 29 November 2018.

3. The appellant has been in a relationship with a British citizen since 2016. He is Mr Sarup Inder Singh Mitha, who was born in India in December 1949 but has lived in the UK for more than 50 years. He is now 71 years old. Mr Mitha is a qualified optometrist and continues to work as a locum in that field. Latterly, the appellant's applications for leave to remain have taken her relationship with Mr Mitha as their focus.

4. In representations which were made by her solicitors on 28 November 2018, 2 June 2019, 11 June 2019 and 2 August 2019, the appellant advanced a human rights claim which was based, in essence, on her genuine and subsisting relationship with Mr Mitha. Submissions were made that this relationship could not continue in India and that it would be disproportionate to expect the appellant to return there to make an application for entry clearance. In respect of both of those submissions, the appellant relied on her relationship not only with the sponsor but also with his aged parents, Niranjan Singh Mitha and Jaswant Singh, born on 21 August 1926 and 15 August 1932 respectively. The sponsor's parents are Indian nationals who were admitted to the UK for settlement in September 2005.

5. On 10 September 2019, the respondent refused the appellant's human rights claim. Because the appellant was an overstayer, she was unable to meet the requirements of the Five-Year Route in Appendix FM of the Immigration Rules and the respondent turned immediately to the Ten-Year Route. She accepted that there were no concerns which might justify the refusal of the application on Suitability grounds. It was accepted that she met the relevant parts of the Eligibility Relationship requirements, in that she and Mr Mitha had a genuine and subsisting relationship. The respondent considered, therefore, whether this was a case to which the exception in paragraph EX1 of the Immigration Rules applied. She noted that there were no dependent children and that EX1(a) did not apply. As for paragraph EX1(b), the respondent reminded herself that what was required was an insurmountable obstacle to the continuation of family life abroad, and that the definition of such obstacles was a difficulty which could not be overcome or which would cause very serious hardship to sponsor or appellant (EX2 refers). The respondent did not accept that the sponsor's ill health or his employment required him to remain in the UK. Nor did she accept that any care provided to the sponsor's parents could not be provided by the NHS or local authority. She considered that the refusal of leave to remain was compliant with her obligations under section 6 of the Human Rights Act 1998.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. Her appeal was heard by the judge, sitting at Nottingham Justice Centre on 8 November 2019. She received bundles of documents from both parties and oral evidence from the appellant, the sponsor, and the sponsor's father (aged 93). She then heard submissions from the representatives.

7. The respondent submitted that there were no insurmountable obstacles to the family life continuing in India and that the decision was proportionate in Article 8 ECHR terms. For the appellant, Mr Rai made two principal submissions. The first was that the sponsor's parents were dependent upon the support and care provided by the appellant and the sponsor and that they could not be left in the United Kingdom without adequate care. The second was that the appellant would be very likely to meet the requirements for entry clearance as a spouse and that it was disproportionate to expect her to return to India to make an application for entry clearance.

8. The judge noted that the appellant had made a number of applications for status in the United Kingdom, but she proceeded, as had the respondent, on the basis that the relationship between the appellant and the sponsor was a genuine and subsisting one: [36]. She then stated that the issue for her was whether the couple could live in India or whether the appellant should make an application for entry clearance as a spouse. At [39], the judge stated that she had applied the test of insurmountable obstacles as considered by the Supreme Court in Agyarko [2017] UKSC 11; [2017] 1 WLR 823 and had concluded that it would be difficult for the couple to live in India but that the difficulties would not be insurmountable. The reasoning which underpinned that conclusion is largely to be found in the judge's [37], which I should set out in full:

> Mr Mitha has been in the UK for a very long time, he entered as an 18 year old in order to study and has lived here for over 50 two years. He has however retained fairly close links to his country of origin as his elderly parents continued to live in India until about 15 years ago when they came to the UK. He has a sister in the UK. I am told he has two sisters and that the other sister lives in the States. He last visited India three years ago, the country is not unknown to him, or entirely unfamiliar. He is almost 70 years of age, he tells me he is fit and healthy, to the point that he continues to work almost full time as a locum. He has some health concerns, but he is not physically dependent on his wife, and he also undertakes some of the care tasks in relation to his elderly parents. He was formerly married but his wife sadly passed away. He has grown up children and grandchildren. He is settled in the UK and it would be difficult for him to move his life back to India. However it is not impossible and there are no insurmountable obstacles, his parents live in the UK and are entitled to assistance from the local authority in relation to their health needs. Mr Mitha has a sister and he has children. His parents could request carers from the same ethnic background as themselves, or Mr Mitha could employ private carers to look after them if they chose to continue living in the UK . Both of his parents came to the UK when they were elderly, they too have lived the majority of their lives in India. Whilst they would have to pay for healthcare if they chose to return with him, Mr Mitha is able to afford the same. However they do not need to return, nor does he. He has choices to make, one of which is that he does return to remain in a relationship with the appellant. The other is to do what countless others who are

> married to foreign spouses do, support her in making an application for entry clearance from abroad.

9. At [40], the judge concluded that the appellant's reliance on the support she and the sponsor gave to his parents did not amount to an insurmountable obstacle because they had a daughter and grandchildren living in the UK and could count on support from the local authority.

10. At [41], the judge recalled what had been said in Agyarko about the balance of proportionality being a matter for the courts to consider in the individual cases before them, whilst attaching considerable weight at a general level to the policy enshrined in the Immigration Rules. She also considered, at [42], what had been said by Lord Reed at [51] of Agyarko about the manner in which the public interest in immigration control might be reduced where it was certain that an application for entry clearance would be certain to succeed. The judge also reminded herself, at [43], of the structured enquiry required by Razgar [2004] 2 AC 368.

11. The judge found that the first four Razgar questions were to be answered in the affirmative: [44]. She recalled the statutory public interest questions in Part 5A of the Nationality, Immigration and Asylum Act 2002: [45]. At [46], she did not accept that the appellant had been threatened by her ex-husband in India. Nor did she accept that the appellant was certain to be granted entry clearance in the event that she made an application for the same, as she did not have the information she required under Appendix FM-SE to reach that conclusion. The judge noted that the sponsor was prepared to support an application for entry clearance and she considered, at [47], that there were cogent reasons to expect her to take that course. At [48], the judge summarised her conclusions, finding that the sponsor's parents could receive adequate care in the event that the appellant left for India. She expressed concern, firstly, that the sponsor's father had come to court to give evidence at the age of 93 and, secondly, that the appellant had not sought to regularise her position by making an application for entry clearance. So it was that she dismissed the appeal.

The Appeal to the Upper Tribunal

12. There were three grounds of appeal to this Tribunal. The first was that the judge had misunderstood or misapplied the law as regards the threshold presented by EX1, by applying a test of impossibility in place of 'very serious hardship'. The second was that the judge had ignored or overlooked relevant evidence in reaching the conclusion she did in relation to EX1. The third ground was that the judge erred in her application of the Chikwamba [2008] 1 WLR 1420 principle. Judge Buchanan considered the second and third of these grounds to be arguable. I pause here to note that he did not expressly refuse permission on the first ground, although he was plainly unimpressed by it. He was correct to conclude that there was nothing in that complaint. Whilst the judge erroneously referred at [37] to it not being 'impossible' for the sponsor to relocate to India, it is plain from the rest of the decision that she had well in mind the correct threshold. So much is clear from her analysis of Agyarko and her self-directions. The use of the word 'impossible' in [37] was merely infelicitous and does not begin to establish that the judge fell into error.

13. Having reflected on what was said by Judge Buchanan, Mr Rai did not attempt to develop any oral submissions on ground one. In relation to grounds two and three, however, he submitted that the judge had fallen into clear legal error. Developing the submissions made in his skeleton argument, Mr Rai submitted that the judge had failed to take account of the sponsor's parents' dependence upon the sponsor and the appellant in concluding that there were no insurmountable obstacles to their return to India as a couple. The sponsor had been found by the judge to be a credible witness. He had given evidence about the health of his parents and their dependence upon him and his wife for three years or more. The judge's resolution of that issue was wholly inadequate, particularly when it was recalled that the respondent's guidance on insurmountable obstacles contemplated that such dependency could, depending on the facts, give rise to an insurmountable obstacle.

14. For the respondent, Mr Melvin submitted that the judge had dealt adequately with the evidence and arguments presented to her. The consideration at [37] onwards was demonstrably holistic, encompassing the extent of the need for care and the alternative provision which might be available. The reality, as the judge had found, was that the sponsor had visited India quite regularly and could live there. The judge had conducted an adequate and lawful balancing exercise under Article 8 ECHR.

15. Mr Rai responded briefly, submitting that the judge had noted that the appellant was a carer for the sponsor's parents and that they treated her as a daughter.

Analysis

16. Having considered the submissions made orally and in writing by Mr Rai, I have come to the clear conclusion that there is no legal error in the decision of the judge. There are, as I have already noted, two grounds of appeal now advanced by Mr Rai. I consider them in turn.

17. The first submission is that the judge omitted relevant matters from her consideration of whether there are insurmountable obstacles to the sponsor and the appellant living together in India. The relevant matter is said to be the sponsor's oral evidence that his sister in the UK would be unable to care for his parents.

18. The relevant evidence was recorded by the judge at [20], in which the sponsor was noted to have said that his sister 'has her own commitments'. There is no reason to think that the judge lost sight of that evidence in reaching the conclusions which she reached at [37] and [40], however. I note that the judge's conclusion was that the sponsor's sister and his nieces could support his parents 'practically' and that they could receive assistance from the local authority. The judge did not, contrary to Mr Rai's submissions, rely principally on the notion of the sponsor's sister and her family providing day-to-day care for the elderly parents. She relied, instead, on two points in deciding that there would not be very serious hardship if the sponsor and the appellant relocated to India.

19. The first possibility was the availability of local authority care. The judge analysed that possibility with some care, turning her mind to matters such as the

ability of the local authority to provide carers of the same ethnicity, for example. She was entitled to conclude – for the reasons that she gave – that the sponsor's parents would receive adequate care in the event that he and the appellant relocated to India and left them in the UK. That conclusion did not turn on the ability of the sponsor's sister to 'step in'; it turned on the local authority's obligation to provide care and the absence of evidence to show that it would not discharge that obligation. As in BL (Jamaica) v SSHD [2016] EWCA Civ 357, I consider that the judge was entitled to proceed on the basis that the local authority would perform its duties under the law.

20. The second point taken by the judge is not addressed in ground two. She noted that the sponsor's parents would have a choice about whether to leave the United Kingdom with the sponsor and the appellant. She noted that the sponsor could pay for them to receive medical care in India. These points – taken by the judge in [37] – were also open to her. The sponsor's parents are settled in the UK; they are not British citizens. In the event that they are dependent upon care provided by the sponsor and the appellant, that care can be provided in the UK or in India. There is no presumption that it should be received in the UK and, in the absence of any other insurmountable obstacles to relocation, I cannot see anything wrong in law with the judge's conclusion that all four adults could relocate to India, where the relationship could continue. The judge was cognisant of the other difficulties which there might be, but she was also aware of the steps which could be taken to address those difficulties: the sponsor could continue to work; he has family there; he has visited the country and is not distanced from it; private medical care could be sought for the sponsor's parents. As Mr Melvin noted, this was the kind of holistic assessment required by cases such as Lal v SSHD [2019] EWCA Civ 1925; [2020] 1 WLR 858.

21. I do not consider ground two to disclose an error of law on the part of the judge for the reasons above.

22. I turn to the third ground, by which Mr Rai submits that the judge's treatment of his Chikwamaba argument was erroneous. The argument, in particular, is that the judge left material matters out of account in concluding that she had insufficient evidence to show that the appellant would be *certain* to be granted entry clearance in the event that she made an application for the same. That mode of expression was not the judge's own; she took it from what had been said by Lord Reed at [51] of Agyarko. The judge set out the relevant part of that decision and noted, at [46] of her decision, that she had asked the representatives for their submissions upon it.

23. The judge's conclusion was that she did not 'have the information that would need to be provided [to an Entry Clearance Officer] under Appendix FM-SE of the Immigration Rules'. Mr Rai criticises this because there was before the judge a selection of material to show that the sponsor was earning significant sums from his work as a locum optometrist. I note that there was a bank statement with a significant credit balance, showing regular sums paid in by Specsavers, for example. The judge was entirely correct, however, to conclude as she did. As Upper Tribunal Judge Gill explained in R (Chen) v SSHD [2015] UKUT 189 (IAC); [2015] Imm AR 867, the onus is on the individual who relies upon a submission such as this to establish that an application for entry clearance from

abroad *would* be granted: [39] refers. In order to establish that she would be granted entry clearance as a spouse, the appellant was required to show that she met all of the requirements in Appendix FM of the Immigration Rules. As the judge noted, that Appendix does not stand alone; Appendix FM-SE provides a raft of additional evidential stipulations as regards the Financial Requirements which must be satisfied.

24. A self-employed individual such as the sponsor is required to provide the evidence listed in paragraph 7 of FM-SE, the focus of which is plainly to establish the taxable income received by the individual in the tax year preceding the application. The evidence adduced before the judge omitted many of the documents required, however. Although there were SA302 forms, they were for the years 2011-2016. There was no self-assessment tax return. There was no evidence of the tax payable, paid and unpaid for the last full financial year. The bank statements did not cover a full year.

25. Mr Rai's submission was that it was likely, in view of the fact that Specsavers confirmed in its letter that the sponsor was earning an average of £5500 per month, that the Financial Requirements would be met. But to proceed down that route would be to confuse the certainty required by Agyarko and Chen with something very much less. Considering the limited evidence before the judge, she was entirely correct to find that the appellant was unable to show that she would certainly be granted entry clearance if she made the application.

26. Mr Rai makes a discrete point at [16] of his grounds of appeal; which is that the respondent had taken no issue with the Financial Requirements in the notice of decision. The suggestion, therefore, is that the judge had no reason to consider whether or not the appellant would not succeed in an application for entry clearance on that basis. This submission proceeds on a misunderstanding of the Immigration Rules, however. As I endeavoured to explain at the start of this decision, the respondent's consideration in the letter of refusal focused on the Ten-Year Route under in Appendix FM. There would have been no point in the respondent considering the requirements of the Five-Year Route because the appellant could not have hoped to satisfy the Immigration Status Requirement. The respondent was not silent about the Financial Requirements because she tacitly accepted that they were met; she was silent about that issue because she simply did not consider it. When the judge came to consider for herself whether the appellant would meet the Financial Requirements of the entry clearance rules from abroad, that was a matter upon which there was nothing said by the respondent. It was in those circumstances that the judge was entirely correct, with respect, to consider the point for herself.

27. In any event, as the judge went on to note, there are cogent reasons, rooted in the statutory public interest considerations and this appellant's immigration history, to require her to leave the country to make an application for entry clearance. She has made application after application, many of which the judge considered to have been spurious, and she has endeavoured to remain in the UK by any means possible.

28. I should also consider the point made by Mr Rai at [19] of the grounds. He maintains there that the judge was wrong to criticise the appellant's

representatives for the attendance of the sponsor's father at court. He submits that the judge focused on her concern about this, rather than noting that the attendance of this elderly man spoke cogently to the extent of his dependence upon the appellant and the sponsor. I do not consider the judge to have lost focus in this way and she clearly understood (and recorded) exactly what was said by the sponsor's father about the appellant and her role in his life. The judge was entitled to express concern about the fact that a 93 year old man with various health problems had made his way to court to give evidence which was ultimately unchallenged. Mr Rai makes the point that the appellant's representatives could not have known that his evidence would be accepted until that was said by the Presenting Officer. That is simply incorrect; the age and frailty of the sponsor's father could have been communicated to the respondent in advance of the hearing and she could have been asked whether she wished to challenge the statement he had made in advance of the hearing. It is entirely unclear to me why that was not done.

29. Drawing these threads together, I consider that the judge reached a decision which was open to her when she concluded that the appellant could not meet the requirements of the Immigration Rules and that her removal would not be contrary to Article 8 ECHR. There is no proper basis for thinking that the FtT – which is an expert Tribunal – did anything other than understand and apply the law correctly in its specialist field. The judge's decision contained a careful analysis of the authorities and an appreciation of the applicable provisions of primary and secondary legislation. Her analysis of the facts and her application of those findings to the relevant law resulted in a decision which was not only open to her; it was clearly correct.

Notice of Decision

The appellant's appeal against the decision of the First-tier Tribunal is dismissed and that decision shall stand.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 February 2021