OUTER HOUSE, COURT OF SESSION

[2019] CSOH 43

P1221/17

OPINION OF LADY WISE

In the petition of

AS (AP)

Petitioner

for

JUDICIAL REVIEW

of

a decision of the Home Office dated 13 October 2017 refusing to treat the petitioner's further submissions as a fresh claim

Respondent

Petitioner: Winter; Drummond Miller LLP
Respondent: MacIver; Office of the Advocate General

12 June 2019

Introduction and background

[1] The petitioner is a citizen of India. He entered the United Kingdom as a visitor on 23 September 2006. Thereafter he overstayed. He met a British national, SCS, on 3 June 2010 and became engaged to her on 14 February 2012. The petitioner and his now wife, SCS, married on 15 April 2013 and have resided together for some years since the date of their marriage. On 31 May 2013 the petitioner made an application for leave to remain in the United Kingdom on the basis of his relationship and marriage. His application was refused

and an appeal to the First-Tier Tribunal ("FTT") was unsuccessful. Further submissions were made by the petitioner on 3 August 2017 which were rejected on 16 August 2017. The present petition concerns further submissions tendered by the petitioner on 6 October 2017 and rejected in a decision of the respondent of 13 October 2017. In those submissions the petitioner relied on his relationship with his wife and maintained that there were insurmountable obstacles, in accordance with paragraph EX.1 of appendix FM to the Immigration Rules, to their continuing family life in India, failing which that it would not be proportionate to expect such family life to continue there. A number of documents were produced with the submissions of 6 October 2017 including a report from a Mr Puri, referred to in the petition as an expert report. Mr Puri has legal qualifications obtained in London (LLB, LLM) and practices as an advocate in India. His report is lodged at number 6/3 of process. The petitioner also tendered in support of his submissions the Home Office's own Country Information and Guidance dated April 2015 concerning women fearing gender based harm or violence in India. The principal arguments presented to me at the hearing related to the respondent's failure to scrutinise the terms of both Mr Puri's report and the Country Guidance Report in the decision letter number 6/4 of process. In particular, the area of contention was whether the failure to have proper regard to those documents was a material error.

The applicable law

[2] There was little dispute at the hearing before me in relation to the general principles that apply to cases of this sort. Rule 353 of the Immigration Rules, insofar as material, provides that:

> "When a human rights or asylum claim has been refused…and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
> (i) had not already been considered;
>
> (ii) taken together with the previously considered material, created a realistic prospect of success notwithstanding its rejection…"

[3] The correct approach to applications under rule 353 is well settled. The respondent must, even if it rejects the submissions, consider whether the new material nonetheless is significantly different from the previous material and, taken with that previous material, creates a realistic prospect of success. The threshold is a low one and the question is only whether there is a realistic prospect of success in an application to the relevant adjudicator – *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA CIV 1495. So far as the correct approach to be adopted by the court in a judicial review of a decision by the respondent to refuse such a fresh claim is concerned, the court must ask first, whether the Secretary of State has asked him or herself the correct question and whether in addressing that has satisfied the question of anxious scrutiny. The Secretary of State's decision will be irrational if it is not taken on the basis of such anxious scrutiny - *WM (DRC)* cited above at paragraph 11 and *Dangol* v *Secretary of State for the Home Department* [2011] CSIH 20 at paragraph 7.

[4] As already indicated, the central issue in dispute in this case is whether the respondent's failure to analyse the additional material put forward by the petitioner in the form of the Country Guidance Report and Mr Puri's report constituted a material error. There was no dispute that it is insufficient for the petitioner simply to point to an error and that consideration requires to be given to whether any error made was a material one – *Ashiq*

v *SSHD* [2015] SC 602 at paragraph 23. In a case of this sort, where the respondent effectively concedes error, but contends that the error was not a material one, the onus is on the respondent to illustrate that the outcome would have been the same in the sense that there was no prospect that anyone carrying out the exercise properly would reach a different conclusion – *Khan* v *SSHD* [2015] SC 583 at paragraphs 11 and 12.

Submissions for the petitioner

[5] Mr Winter explained that of the three grounds of challenge in the petition, two were based on the respondent's lack of consideration of the report of Mr Puri and the Home Office's own Country Guidance. The third argument related to entry clearance which was relevant only if there was a case for insurmountable obstacles bringing the petitioner within the Immigration Rules. In relation to Mr Puri's report, counsel anticipated from the respondent's note of argument that there might be a challenge to whether or not it could be classified as an expert report. The report is lodged within 6/3 of process and the first page confirms, after a narration of Mr Puri's academic qualifications, that in his practice as an advocate from 1999 to date he has had experience of administrative law matters in addition to family law and other civil work. Mr Winter submitted that an Immigration Judge would be able to rely on Mr Puri's report, particularly on issues such as the acquisition of visas and the obstacles and hardship which the petitioner's wife will face if she goes to India which is the only way that family life with the petitioner could continue. While it was accepted that Mr Puri was not an anthropologist, there was also some weight that could be attached to the paragraphs in the report relating to what life is like for foreigners in India. Mr Puri is a professional man who has lived his whole life in India and is therefore able to comment on such matters. Further, Mr Puri was well placed to know what the position with provision

of social insurance and medical benefits for those who are not citizens of India was concerned and the linguistic difficulties that would be encountered. It was important that the paragraphs in Mr Puri's report relating to violence perpetrated against women in India coincided with the views expressed in the Country Guidance Information. In essence, Mr Puri's report was an admissible adminicle supportive of at least some aspects of the further submissions claim. It is not mentioned in the respondent's decision letter at all, neither in the list of documents considered nor in the analysis.

[6] Under reference to the accepted test set out in *WM (DRC)* v *SSHD* EWCA CIV 1495 at paragraph 24, if the report of Mr Puri cannot be dismissed as simply implausible, then it was impossible to assert that an Immigration Judge could not properly come to the conclusion that the petitioner's claim is well-founded. Mr Winter anticipated also that counsel for the respondent would suggest that the same outcome should be reached in this case as the Inner House reached in *Ashiq* v *SSHD* [2015] SC 602 at paragraph 24, where consideration of the facts and circumstances of that case that an Immigration Judge would require to weigh against the public interest in the maintenance and enforcement of an effective immigration policy were set out. In the particular circumstances of the *Ashiq* case the court concluded that it was not unreasonable to expect the petitioner's wife to accompany him to Pakistan. Counsel drew attention to the different set of circumstances that pertained in the present case. For example, in *Ashiq* the marriage had been of short duration, whereas in the present case it had now subsisted for many years. More importantly, the petitioner's wife in *Ashiq* was a Pakistani national and not a British national; she spoke Punjabi and there were no health or gender issues. The circumstances of the present case involve a British national with complex health difficulties, having to contemplate accompanying her husband to a country where she does not speak the

language, might not be able to secure an appropriate visa, could not gain access to free medical care and similar facilities and would be entering a country where there are significant risks to women. Accordingly, Mr Winter submitted that the respondent would be unable to show that, had Mr Puri's report been scrutinised, the outcome would have been the same.

[7] So far as the Country Guidance Report was concerned, unlike Mr Puri's report this was listed in the decision letter as a document received and considered but there is no analysis of any of its terms. Reference was made to particular passages in the report (lodged within 6/3 of process at pages 11-55). These confirmed that women in India constitute a particular social group and are subjected to gender based violence. In light of that information the respondent's assertions that the petitioner's wife would be at no real risk and that in any event there was sufficiency of protection for her in India required to be assessed. In *R(Agyarko)* v *SSHD* [2017] 1 WLR 823, Lord Reed emphasised that all factors relevant to the specific case in question must be carefully considered and assessed (paragraph 57). Accordingly the treatment of women in India was a relevant consideration and it had been ignored. Violence and discrimination is State condoned and widespread in that country and it could not be said to be proportionate to expect the petitioner's wife to go there. Although much of the Country Guidance Information related to Indian women, Mr Puri in his report gave examples of violence against women who are not Indian, including Europeans. Importantly, it is not said in the respondent's answers that Mr Puri's information is incorrect and so the assessment within his report on this issue was a material factor to be assessed by the respondent. It could not be said that the further submissions were not significantly different from the material which had previously been considered because neither Mr Puri's report nor the Country Guidance Information had been available

previously. Without any explanation as to why the new evidence did not negate the findings of the previous Immigration Judge the respondent's view of the material was simply unknown. It did not matter that the basic case of the petitioner that there would be insurmountable obstacles in his wife going to India which failing that it would be disproportionate to require the couple to continue family life there had been unsuccessful because valid and convincing fresh evidence had been produced.

[8] In paragraph 20 of the decision letter number 6/4 of process the respondent stated in terms that the petitioner had provided no information or evidence to establish that there were any exceptional circumstances in his case. However, the exceptional circumstances (which would amount to insurmountable obstacles) arising from a combination of Mr Puri's report and the Country Guidance Report included the following factors:

- The cultural situation in which the petitioner's wife would find herself in India
- The linguistic difficulties facing her as outlined by Mr Puri
- An inability to secure paid employment in India in the future should her health improve
- The lack of any access to benefits or State allowances for the petitioner's wife
- The fact that she would face discrimination in a country with a high degree of violence towards women
- The uncertainty about whether she could secure a visa to stay in India.

[9] While it was acknowledged that the case of *Rhuppiah* v *Home Secretary* [2018] 1 WLR 5536 clarified the approach to the provision in section 117B of the Nationality Act 2002 (as amended) which provided that limited weight is to be afforded to a private life or relationship formed with a qualifying partner at a time when someone such as the petitioner was in the United Kingdom unlawfully, it was clear from the UK Supreme Court's decision

in that case that the provision could be overridden in exceptional circumstances. In particular at paragraph 49 of the judgment, Lord Wilson JSC confirmed that some flexibility was built into the provisions of section 117A(2)(a) such that applications will occasionally succeed even having regard to the provisions of section 117B. In the circumstances of the present case, where the respondent had failed to make any substantive assessment of the new material provided in Mr Puri's report or the Country Guidance Report the "little weight" provision could not be regarded as determinative. In relation to the Country Guidance Report in particular it was indisputable that the Home Office was obliged to take into account their own Country Guidance Information – *AN* v *SSHD* [2013] CSIH 111 at paragraph 25.

[10] Turning to the separate error alleged in relation to entry clearance, counsel referred to paragraph 22 of number 6/4 of process where the view of the Immigration Judge that there was nothing to prevent the petitioner from returning to India in order to seek entry clearance to return to the UK is set out. Mr Winter contended that the decision maker had not asked the correct question which failing had reached the wrong conclusion. The correct approach was whether there was a sensible reason for the applicant to have to return to India to apply for entry clearance from there. Reference was made to *MA (Pakistan)* v *SSHD* [2000] IMM AR 196 at paragraphs 7-9 in which the Court of Appeal had confirmed that the suggested approach in *Chickwamba* v *Home Secretary* [2008] 1 WLR 1420 was not restricted to cases where children were involved but applied to family cases more generally. The real question was not whether there were insurmountable obstacles to the petitioner returning to India in order to make an application for entry clearance from there, but whether there was any sensible reason as to why he should be required to do so. The refusal letter in this case made no reference to *Chickwamba* or the approach suggested in that case. It was clear that

sensible reasons included the prospective length and degree of disruption of family life (*SSHD* v *Hyat* [2013] IMM AR 1 at paragraphs 26-30). The decision maker in the present case had failed to recognise the significance of the petitioner's wife being settled in the UK and the importance of the State benefits she receives here since a change in her circumstances on 24 May 2017. While the petitioner's wife's income was not sufficient to bring the petitioner within the Immigration Rules, that consideration did not apply to the entry clearance argument. While this last argument for the petitioner was very much a secondary one, Mr Winter maintained that it would not be sufficient for the respondent to point to paragraph 23 of the decision letter as that did not relate to the emotional separation of the couple which could be for an open ended period should the petitioner require to return to India. In all the circumstances the decision should be reduced.

Submissions for the respondent

[11] Mr MacIver for the respondent contended that the decision maker had, correctly, applied the approach in *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495 by examining the material and concluding that the further submissions did not create a realistic prospect of success before an Immigration Judge. That the respondent had done so was apparent from paragraphs 5 and 27 of the decision letter number 6/4 of process. So far as anxious scrutiny was concerned, while there was no formal concession that the new material in the form of the Country Information and Guidance and Mr Puri's report were not considered, it was accepted that these had received no substantive consideration and that Mr Puri's report was not even listed as a document considered. Counsel accepted that he could not point to anything in the decision letter that could found a submission that Mr Puri's report was read and considered. The Country Guidance Information was slightly

different as this emanated from the Home Office, was listed in the documents considered and the respondent can be taken to be familiar with it. It was accepted that the court would regard the failure to illustrate that substantive consideration had been given to this new material as being an error but counsel submitted that the error was not material because there was nothing in the new documentation which would have led to a different conclusion. The country guidance information contained general conclusions only and nothing that provided particular support for the petitioner's submissions.

[12] Counsel for the respondent sought to place some emphasis on the recent decision of the UK Supreme Court in *Rhuppiah* v *SSHD* [2018] 1 WLR 5536. The way in which that case had evolved was to focus significance on how the provisions of section 117 B(4) and (5) should be applied. In the present case the petitioner's presence in the UK had been unlawful ever since his visitor's visa had expired. His relationship with his spouse started in 2010 and so he was squarely within the provisions of section 117B(4) such that little weight should be given to the relationship he had formed with a qualifying partner because it was established when he was in the United Kingdom unlawfully. Following *Rhuppiah* it was clear that the court must have regard to that little weight provision in considering the public interest question. However, as was apparent from paragraph 49 of *Rhuppiah*, notwithstanding the terms of sections 117A(2)(a) and 117B(4) and (5) it had to be anticipated that some applicants who fell within the provisions of section 117B would occasionally succeed. The terms of the legislation allow for exceptional cases where there are particularly strong features of the private life in question. Accordingly, in looking at whether the error of the respondent in this case was material it was appropriate to consider whether there were any particularly strong features that would merit overriding the "little weight" provision.

[13] So far as the early clearance argument was concerned, Mr MacIver submitted that this was a procedural question that related to a different approach that could be followed where an article 8 claim is refused and the issue is whether the unsuccessful applicant must go back to the country of origin and apply from there. It was accepted that the relevant case law was that of *Chickwamba* v *SSHD* [2008] 1 WLR 1420 but the case of *SSHD* v *Hyat* [2013] IMM AR 1 confirmed that such a return to apply for entry clearance does not provide a general answer and that the test was whether there is a sensible reason for requiring the applicant to do so. In any event there was a material difference between the circumstances of *Chickwamba* where an unsuccessful asylum seeker with children was married to a successful asylum seeker. As the wife would have succeeded had she been forced to return and seek entry clearance it was not sensible to force her to do so. The circumstances of the present case are that the petitioner could not meet the rules for re-entry to this country and so *Chickwamba* was of no assistance to him as it did not provide authority against the removal of a person who has no such entitlement.

[14] Turning to the decision letter number 6/4 of process, counsel pointed out that the respondent's decision did not rely solely on the idea of the petitioner's wife relocating to India. At paragraph 23 consideration is given to the petitioner's wife's health including mental health and reference is made to the services that are available which include that the petitioner's wife has an adult daughter living nearby and it is implicit from that paragraph that the respondent concludes that the availability of State and personal services are sufficient to mitigate the effects of separation of the petitioner and his wife if she is to remain here. It was said that the petition makes no complaint about the conclusion in paragraph 23. Turning to paragraphs 23-27 of the decision letter generally, while these do not mirror the approach set out in *Rhuppiah* as the UK Supreme Court decision post-dated the letter, the

outcome would be the same under either approach. It was submitted that the petitioner's article 8 claim could be resolved in one of two ways, namely by his spouse relocating with him to India or alternatively by her staying here following his removal. Even if the report of Mr Puri was accepted and so the first option was not possible, the second option of the petitioner's wife staying here would be possible so long as that outcome was not disproportionate. Paragraph 23 of the decision letter considered a second option, that of the wife staying in this country and if its terms are adequate then the report of Mr Puri was irrelevant. Even taking the case of *Rhuppiah* into account, the only difference would have been that paragraph 23 might have articulated that account had been taken of whether this was an exceptional case such that even having regard to the little weight provision it would be disproportionate to separate the couple, but it would have concluded in any event that this would not be an exceptional case. It was noteworthy that paragraph 27 does refer in terms to there being no exceptional circumstances.

[15] Counsel submitted that in any event the new material provided did not support a contention that it was not feasible for the couple to relocate to India. The Country Guidance Information has some general information about violence against women but this was not specific to the petitioner's wife's situation and could not be said to amount to an insurmountable obstacle. It was accepted that a different view could be taken but an Immigration Judge in the present case would have regard to the general conclusion that in most cases relocation to India is permissible. There has already been a finding by an Immigration Judge in this case that relocation of the petitioner's wife to India is permissible and that is recorded in the decision letter at paragraph 13. Turning to Mr Puri's report, it was accepted that the author had experience in administrative law but family law is also mentioned and it was not clear what the extent of his expertise was. On balance it was

accepted that he could speak to issues relating to visas but it was not conceded that Mr Puri was able to speak about state benefits. Counsel pointed to various passages of Mr Puri's report which he stated either had no legal content or where the view given was not an expert one, such as in relation to gender violence in India. So far as the examples given of women, including western women being assaulted and raped, counsel did not dispute on behalf of the respondent that these events had taken place but that was insufficient to conclude that it would be intolerable for the petitioner's spouse to live in India. In any event, Mr Puri confirmed in his report that the petitioner's wife could apply for a visa and is eligible for one albeit that there was no guarantee that it would be issued. It was therefore evident that Mr Puri was not ruling out the possibility of a spouse relocating to India.

[16] Drawing those threads together, while it had to be accepted that Mr Puri had on the face of it legal expertise that an Immigration Judge would take into account, the failure to consider his report was not material because relocation to India was not ruled out by it and in any event would only take the petitioner so far given that there was an alternative of his spouse remaining here. The test that would now be applied by an Immigration Judge is that articulated in *Rhuppiah.* As there was evidence that it would be possible for the petitioner's wife to relocate to India there could be no question of the parts of Mr Puri's report that amounted to expert testimony allowing a conclusion that the article 8 case should succeed. So far as the case inside the rules (the EX1 test) which talks of there being insurmountable obstacles to family life continuing, in *Agyarko* v *SSHD* [2017] 1 WLR 823 the UK Supreme Court had confirmed that that expression should not be taken literally and that the issue is whether there are "very significant difficulties" on family life continuing on a return. Mr MacIvor submitted that the expert part of Mr Puri's report fell way short of meeting that test. For all these reasons, the respondent's failure to give substantive consideration to the

Puri report and the Country Guidance Information was not material. In any event, the submissions in relation to the content of the material were very much an esto or fall-back position for the respondent. It was emphasised that if the court accepted that paragraph 23 of the decision letter was sufficient to conclude that appropriate consideration had been given to the petitioner's wife remaining in the UK and a conclusion reached that it was not disproportionate that she do so then the submissions on the lack of materiality of the respondent's error did not matter.

Reply on behalf of the petitioner

[17] In reply, Mr Winter emphasised that the "little weight" provision in the 2002 Act was relevant only outside the rules. The petitioner's primary position was that if there was more than a fanciful prospect of an Immigration Judge, looking at the new material, concluding that there were insurmountable obstacles, as defined in *Agyarko* to the petitioner and his wife settling in India then the petitioner would be inside the rules. Accordingly, the primary argument and the one that logically came first was whether the respondent failing to consider Mr Puri's report and the country guidance information was a material error because an Immigration Judge considering those materials could conclude that insurmountable obstacles would face the petitioner and his wife if they went to India. If there was such a prospect then the petitioner would come within the rules. In the fall back Article 8 claim, the position in relation to proportionality applied equally to the position of the petitioner's wife if she required to stay in the UK on her husband's return to India. This was covered in paragraph 19 of the petition which avers in terms that even if there are no insurmountable obstacles, the respondent had failed to assess whether in light of the information separation of the couple for a prolonged or indefinite period was proportionate.

Accordingly, even if the material was insufficient to bring the petitioner and his wife within the insurmountable obstacles category of the rules, the new material provided was also relevant to the fall-back position of it being disproportionate to expect the couple to separate physically and emotionally. Paragraph 23 of the refusal letter simply failed to consider the consequences of the couple separating and in particular to consider whether such a result would be disproportionate. As indicated, the entry clearance point was very much a subsidiary one although it was pointed out that in the case of *MA (Pakistan)* v *SSHD* [2000] IMMAR AR 196 where there was no policy or procedural situation, the principles of *Chickwamba* still applied.

Discussion

[18] The context of the further submissions made by the petitioner that led to the decision of 13 October 2017 on the part of the respondent was that previous claims had been made and refused in July and August of that year. The difference between the earlier submissions made with a view to presentation of a fresh claim and those that led to the decision of 13 October 2017 was the addition of the Country Information and Guidance in relation to women fearing gender based harm or violence in India and the detailed report of Mr Puri. There was in addition a certain amount of material updating the situation in relation to the petitioner's wife's health and state benefits position but the new material that precipitated these further submissions appears to have been these two reports. It was not in dispute that the first document, the country guidance information, was listed as having been received but with nothing in the decision letter (6/4 of process) to indicate that any substantive consideration had been given to it. So far as Mr Puri's detailed report is concerned it is not even listed as a document received in support of the application and no mention of it is

made in the body of the decision letter at all. The format of the decision letter is of interest. Having listed certain documents received the respondent cites passages from the relevant authorities, including *WM (DRC)* v *SSHD* [2006] EWCA Civ 1495 on the legal approach to be taken to the consideration of further representations and there was no dispute that this was a correct self-direction. The next section is headed "Immigration Judge's findings" and there is substantial narration of the determination of the Immigration Judge on 9 May 2014. Again, there is nothing improper or even controversial in the respondent using those previous findings as a starting point and relying on them. It should be noted, however, that some 3 and a half years had passed since the Immigration Judge's findings and that the clear obligation of the respondent in October 2017 was to consider new material with anxious scrutiny, albeit to assess it when taken together with previously available material. The decision letter then addresses the article 8 claim and includes a section on consideration of leave outside the rules before concluding that the submissions tendered did not amount to a fresh claim and that the new submissions, taken together with the previously considered material, did not create a realistic prospect of success.

[19] As there is nothing to indicate that the respondent gave active and substantial consideration to the two new documents that were said to be particularly significant, it is unsurprising that there was an effective concession of error on the part of the respondent. As already indicated, the issue is one of the materiality or otherwise of that failure. It is important to understand, however, that the petitioner's primary submission and the matter that had to be addressed by the respondent in the decision letter of 13 October 2017 was that he and his wife would face insurmountable obstacles if they were required to return to India to continue their relationship. Any consideration of proportionality in assessing the article 8 claim outside the rules becomes live only if the error in failing to give proper consideration

to the Country Guidance Information and Mr Puri's report would inevitably have led to the same decision on the insurmountable obstacles question. That requires scrutiny of the material that the decision letter does not analyse. Looking at that material, it must always be borne in mind that the exercise is consideration of that material together with other material already submitted. In relation to an insurmountable obstacles assessment, all factors require to be taken into account, but it is not a proportionality assessment of the type envisaged by consideration of article 8 outside the rules. In *R(Agyarko)* v *SSHD* [2017] 1 WLR 823, at paragraph 45, Lord Reed explained the relationship between the two different tests as follows:

> "By virtue of paragraph EX.I (b), 'insurmountable obstacles' are treated as a requirement for the grant of leave under the Rules in cases which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in the case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in 'exceptional circumstances', in accordance with the Instructions: that is to say, in 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate'."

There being no dispute that the onus is on the respondent in this case to illustrate that the same decision would have been reached had there been proper consideration of that material, it is appropriate to analyse the basis on which counsel for the respondent submitted that the new material did not support the petitioner's contention that he and his wife would face very serious difficulties in continuing their family life together outside the UK. In summary, his arguments were that the Country Guidance Report was in general terms and not specific to Mrs SCS's situation and that in most cases relocation to India was permissible. So far as Mr Puri's report was concerned, Mr McIver contended that some

aspects of the report are outside even the stated expertise of Mr Puri and that the report did not go so far as to say that the petitioner's wife could not apply for a visa, just that there was no guarantee that one would be issued. The possibility of her relocating to India could not be ruled out. However, the correct approach, as enunciated by Lord Reed in *Agyarko,* must be whether Mrs SCS would face very serious difficulties in continuing family life with the petitioner outside the UK, not whether it would be strictly possible for her to do so.

[20] I am not convinced that the report of Mr Puri can be dismissed as "simply implausible", the term used by Buxton LJ in *WM (DRC)* v *SSHD* [2006] EWCA Civ 1495 at paragraph 24 in concluding that unless it was so implausible, it was impossible to say that an adjudicator could not properly conclude that a claim was well founded. There was no dispute that the report would be admissible and would require to be considered by an Immigration Judge. On the face of it Mr Puri is a well-qualified British educated advocate qualified and practising in his own jurisdiction, namely India. His report is a combination of matters clearly within the legal expertise and experience of the author such as the legal requirements for visas and social security benefits in India on the one hand and on the other, information about the country, its treatment of women and foreigners generally that are not legal matters but about which the author of the report speaks as a professional person to issues of fact within his knowledge. Importantly, on the issue of violence against women there is considerable consistency between Mr Puri's report and the Home Office's own Country Guidance on violence against women in India. It was not suggested that the examples given in Mr Puri's report of women, including western women, being assaulted and raped were anything other than accurate. The report runs to some 33 pages and gives considerable detail on the issues of visas, financial obstacles, absence of comprehensive medical care provided by the state and lack of eligibility of foreigners for such services as

are available, in addition to that issue of gender violence. It is not for me to decide whether this new material will in fact ultimately persuade an Immigration Judge that the petitioner and his wife would face very serious difficulties if they tried to continue their family life in India. However, it is on the face of it relevant material that goes to the heart of whether a British citizen who has lived here all of her life, does not normally travel and has certain medical conditions would be able to cope with the considerable challenges of attempting to settle in a country where her legal ability to do so is no higher than having a right to apply for a visa, the threshold test for which is "very high" (Puri report page 32) and where significant linguistic and cultural barriers would be faced. Those are matters which are squarely raised by the new material such that an adjudicator could interpret it as supporting an insurmountable obstacles claim. The respondent's own Country Guidance Information which as indicated is consistent on the issue of violence against women with Mr Puri's report, was clearly within the respondent's knowledge and is not referred to even in passing in the reasoning within the decision letter. An Immigration Judge would give careful consideration to that documentation, emanating as it does from the respondent.

[21] I have set out the way in which the decision letter is framed in this case. Many of the findings of the Immigration Judge in 2014 that the respondent seeks to rely on in the decision now challenged relate to the petitioner's immigration history and his spouse's medical condition. The former issue is of course not part of the exercise of determining insurmountable obstacles and the latter was not sufficient on its own to present those obstacles. The important question that the petitioner sought to raise is whether, against the background of that information about his wife's medical condition and related circumstances, the additional challenges that she would face in India, as outlined in and supported by Mr Puri's report together with the Country Guidance Information, resulted in

a fresh claim of insurmountable obstacles being satisfied. I conclude that an Immigration Judge could find in the Petitioner's favour on insurmountable obstacles on a proper analysis of the new material taken together with the existing material. To put it another way, I cannot conclude that the outcome would have been the same had the respondent properly scrutinised the new material.

[22] It follows from my conclusion that the respondent's failure to give substantive consideration to the additional material was a material error in that had it been scrutinised the outcome may not have been the same on the issue of insurmountable obstacles, that the possible article 8 claim outside the rules does not require separate consideration. However, the material provided in respect of that position was the same. The petitioner acknowledges that following the case of *Rhuppiah* v *Home Secretary* [2018] 1 WLR 5536 there would effectively require to be exceptional circumstances before a claim outside the rules could succeed. In that context, counsel for the respondent contended that, even if the report of Mr Puri was accepted such that it could not be assumed that the petitioner's wife could accompany him to India, the decision letter had dealt with a second option of Mrs SCS remaining in this country and if the reasons given indicating that she could do so are adequate then the petitioner could not succeed in his article 8 ground. It seems to me that paragraph 23 of the decision letter does not address the article 8 case directly enough. No consideration is given to the impact on the couple's family life of the petitioner returning to India and his wife remaining here. While Mrs SCS' physical medical condition can of course be properly treated in this country and she has some family support here, there is no conclusion reached on whether and if so why, having regard to the various factors involved in the necessary balancing exercise, including that the relationship was formed when the petitioner was not in this country lawfully, the article 8 claim necessarily fails. In essence I

am not convinced that there is any discernible conclusion on the proportionality question on a hypothesis that Mrs SCS would remain in the UK.

[23] The submissions advanced by the petitioner to the respondent that led to the decision of 13 October 2017 were directed at the hurdles that the petitioner's wife would require to overcome to continue family life with her husband outside this jurisdiction and whether it was feasible to do so. The failure to give any substantive consideration to the new material also affects the article 8 decision outside the rules, albeit that the petitioner's case is weaker outside the rules given the "little weight" provisions of section 117A and B of the 2002 Act and the importance of the need for effective immigration control in the article 8 proportionality exercise. As indicated, however, it is unnecessary for me to reach any definitive conclusion on this point.

[24] For the sake of completeness I will deal with the entry clearance argument. On the basis of the relevant authorities of *Chickwamba* v *SSHD* [2008] 1 WLR 1420 and *SSHD* v *Hyat* [2013] IMM AR 1 it is clear that the test is whether there is a sensible reason for requiring an applicant to return to their home country to apply for such clearance. The decision whether it would be sensible in any given case is a fact sensitive one. It is an argument that would only arise if the petitioner could not establish insurmountable obstacles within the rules and in light of the decision I have reached on that it is unnecessary to say more.

Disposal

[25] For the reasons given, I conclude that the respondent's error in failing to give any proper consideration to the new documentation provided in support of the petitioner's fresh claim was a material error. Accordingly I will grant the prayer of the petition and reduce the decision of 13 October 2017, reserving meantime all questions of expenses.