Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/20319/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 9th October 2015

Decision and Reasons Promulgated
On 20th October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

L C C
(Anonymity direction made)

Respondent

Representation:
For the Appellant: Ms E Savage
For the Respondent: Appellant in Person

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, or her family because of the minority of the appellant's husband's. For the same reason an anonymity direction was made at first instance. No public interest is served in identifying the appellant or her family.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Black, promulgated on 22 June 2015, which allowed the Appellant's appeal.

Background

3. The Appellant was born on 21 July 1977 and is a national of Jamaica.

4. On 16 April 2014 the Secretary of State refused the Appellant's application for leave to remain in the UK under appendix FM and paragraph 276 ADE, and decided to remove the appellant from the UK.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Black ("the Judge") allowed the appeal against the Respondent's decision under the Immigration Rules.

6. Grounds of appeal were lodged and on 7 September 2015 Judge Grimmett gave permission to appeal stating *inter alia*

> "The respondent asserts that the high test of insurmountable obstacles is not met simply by virtue of possibility of disruption to the relationship of the appellant's husband with his minor children in the UK. This point is arguable"

The Hearing

7. Ms Savage, for the respondent, adopted the terms of the grounds of appeal and referred me to the case of Agyarko v SSHD [2015] EWCA Civ 440. Ms Savage emphasised [21] & [28] of that case, and argued that the judge had failed to correctly apply the necessary test, and so had fallen into material error of law by failing to acknowledge the high threshold created by the expression "*insurmountable obstacles*". She argued that infrequent and irregular contact between the appellant's husband and his minor children does not amount to an insurmountable obstacle to removal.

8. The appellant was present. She was not represented and was clearly nervous. I explained to the appellant that an appeal can only be made on a point of law, & that an argument had been presented that the decision which had gone in her favour in June 2015 contains a material error of law. I told her that I understood that her position is that there is no material error of law contained in the decision and that I know that she wants the decision to stand. She confirmed to me that that was her position & that she had nothing further to add.

Analysis

9. This case turns entirely on interpretation of the phrase "*insurmountable obstacles*" as it is used in paragraph EX.1(b) of the rules. The respondent accepts that the appellant has a genuine and subsisting relationship with her

husband and that the appellant meets the eligibility requirements of appendix FM. The respondent does not accept that the appellant fulfils the criteria of paragraph 276 ADE because the respondent believes that the appellant has not lost ties to Jamaica.

10. The judge found that the appellant entered the UK in December 2001; although she has remained in the UK since then she has not have leave to remain in the UK since 30 September 2002. The judge found that the appellant and her husband had been living together since 2008, and married in August 2012. The appellant's husband has two children from a previous relationship both of the children are under 10 years of age. The appellant's husband enjoys contact to his two children each weekend.

11. The judge found that the appellant husband is a British citizen who has never been to Jamaica, and that the impact of the respondent's decision would be to force the appellant's husband to choose between severing his relationship with his children by moving to Jamaica, or severing his relationship with his wife by remaining in the UK

12. In R (on the application of Agyarko) [2015] EWCA Civ 440 it was held that the phrase "*insurmountable obstacles*" as used in paragraph EX.1 of the Rules "*...clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom*". "*...The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the European Court of Human Rights regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so)*. "

13. Paragraph 24 of Agyarko says "*the* "*insurmountable obstacles*" *criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which need to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However, in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account, not an absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8.*"

14. At paragraph 26 of that decision "*The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so*."

15. At [24] the Judge correctly takes guidance from the case of Agyarko. At [25] & [26] he reminds himself of the cases of R (on the application of Onkarsingh Nagre) [2013] EWHC 720 & Gulshan (Article 8 – new rules – correct

approach) [2013]UKUT 640 (IAC). Having correctly directed himself in law the judge considers the impact of the respondent's decision and at [30] finds *"... That the impact on the children is such that there are insurmountable obstacles to the appellant's continuing family life in Jamaica"*

16. The decision made by the judge may be one that the respondent does not like. It may be that another judge considering the same facts and circumstances might reach a different conclusion. But in this case the judge has not misdirected himself in law and has quite clearly considered the facts and circumstances particular to the appellant's case when interpreting the phrase "*insurmountable obstacles*". It is at least implicit that the judge distinguishes the facts and circumstances in this appellant's case from the facts and circumstances applicable in the case of Agyarko.

17. In R (on the application of Kaur) v SSHD [2015] EWHC 766 (Admin) it was held that the SSHD had not properly considered the insurmountable obstacles that a middle-aged wife and her husband would face if returned to India as the husband had lived in the UK for 18 years, was a British citizen, was unlikely because of his age to find employment and they had no accommodation in India.

18. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

19. It is not an arguable error of law for a Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for a Judge to fail to deal with every factual issue under argument. Disagreement with a Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. I find that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

20. I therefore find that no errors of law have been established and that the Judge's determination should stand.

DECISION

21. The appeal is dismissed.

Signed Date 19 October 2015

Deputy Upper Tribunal Judge Doyle