Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/00065/2015**

THE IMMIGRATION ACTS

Heard at Field House
On 29th September 2015

Determination Promulgated
On 6th January 2016

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

RUBINA KHATI BK
(Anonymity order not made)

Respondent

Representation:
For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr S Dey, Haque and Hausman solicitors

DETERMINATION AND REASONS

1. The Secretary of State (SSHD) was granted permission to appeal a decision by FtT Judge Lodge who allowed Ms Khati's appeal against a decision to refuse to vary her leave to remain and to remove her under s47 Immigration Asylum and Nationality Act 2006.

Background

2. Ms Khati arrived in the UK on 17th June 2010 with entry clearance as a Tier 4 student with leave valid from 28th May 2010 until 31st May 2013. On 13th March 2013 she applied for and was granted further leave to remain as a Tier 4 student until 25th August 2014. On 25th August 2014 she applied for variation of leave to remain as the partner of a British Citizen.

3. The SSHD accepted that her application did not fall for refusal under Section S-LTR and that she met the relationship requirements, immigration status requirements and the English language requirements. The SSHD did not accept that she met the financial requirements and refused her application to vary her leave to remain under the Immigration Rules. The application was also refused on Article 8 grounds and a decision to remove was taken.

4. In [16], having set out the method of calculation, the FtT judge found that the sponsor (Ms Khati's partner) did not meet the financial requirements of the Rules and she could not therefore meet E-LTRP3.1.

5. The respondent had accepted that if Ms Khati met the requirements of Section EX then she would be eligible for leave to remain for a period not exceeding 30 months and would be eligible for settlement after a continuous period of 120 months with such leave. The First-tier Tribunal judge considered whether there were insurmountable obstacles to family life with her partner continuing outside the UK (EX.1.(b) and EX.2.) the only criteria she had to meet in order to succeed under the Rules.

Error of law

6. The SSHD sought and was granted permission to appeal on the grounds that the reasons given by the judge for finding there were insurmountable difficulties to family life continuing outside the UK ([18] and [19] of the determination) were not insurmountable difficulties; a period of re-adjustment to life in Nepal was not an insurmountable difficulty and that furthermore Ms Khati had the option of applying for entry clearance in Delhi. A period of separation would ensue but that was not disproportionate in the light of the requirement of the SSHD to maintain effective immigration control.

7. In *SSHD v SS (Congo) & ors* [2015] EWCA Civ 387 Richards LJ holds:

> "3. The new Rules are contained in Appendix FM to the Immigration Rules, which addresses the position of family members. Appendix FM constituted an attempt by the Secretary of State to reflect more precisely than before the relevant balance to be struck between the public interest and individual interest for the purpose of Article 8 of the European Convention of Human Rights (respect for private and family life), as incorporated in the Human Rights Act 1998 ("the HRA") ...
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> 33. In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very

> compelling reasons" (as referred to in *MF (Nigeria)* in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in *Nagre* at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., *Haleemudeen* at [44], per Beatson LJ."

8. Paragraph EX.1. and EX.2. read, in so far as relevant to Ms Khati as follows;

> 'EX.1. This paragraph applies if
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> (a) …
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> (b) the applicant has a genuine and 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, and there are insurmountable obstacles to family life with that partner continuing outside the UK.
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> EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the 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'

9. Appendix FM, which includes Section EX. is the manifestation, approved by Parliament, of the balance to be struck between the competing interests of the State and the individual as identified in Article 8. The Rules cannot and do not purport to cover the whole range of possible circumstances where Article 8 could have an impact (save in deportation) but they do cover a considerable spectrum of circumstances. Thus cases can fall clearly within the Rules in their determination. In particular the phrase "insurmountable obstacles" brings Strasbourg jurisprudence into the remit of the Immigration Rules in determining whether a family unit could and should be enabled to remain in the UK. That there may be other circumstances which are not covered by the Rules, remains open to consideration under what could be called 'more wide-ranging Article 8 considerations'[1].

10. "Insurmountable obstacles" is more demanding than a test of whether it would be reasonable to expect a couple to continue their family life outside the UK. It is a stringent test but it is not intended that it should be interpreted literally but in a sensible practical way. This concept is explained in *Agyarko* [2015] EWCA Civ 440:

> "21. The phrase "insurmountable obstacles" as used in this paragraph 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.
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> 22. This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase "insurmountable obstacles" has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under Article 8 exists for family members to be granted leave to remain or leave

[1] See for example *Nagre* [2013] EWHC 720

to enter a Contracting State: see e.g. *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34, para. [39] ("… whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them …"). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR 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).

23. For clarity, two points should be made about the "insurmountable obstacles" criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way: see, e.g., the way in which the Grand Chamber approached that criterion in *Jeunesse v Netherlands* at para. [117]; also the observation by this court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544, at [49] (although it should be noted that the passage in the judgment of the Upper Tribunal in *Izuazu v Secretary of State for the Home Department* [2013] UKUT 45 (IAC); [2013] Imm AR 453 there referred to, at paras. [53]-[59], was making a rather different point, namely that explained in para. [24] below regarding the significance of the criterion in the context of an Article 8 assessment).

24. Secondly, 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: see paras. [29]-[30] below."

11. *Agyarko* was a judicial review claim, not an appeal against a decision by the respondent to refuse leave to remain in the UK. The distinction between human rights grounds and public law grounds in judicial review and immigration appeals was considered by the President of the Upper Tribunal in *R (on the application of SA) v Secretary of State for the Home Department (human rights challenges: correct approach) IJR* [2015] UKUT 536 (IAC) where he held:

"(i) Tribunals should be alert to distinguish between human rights grounds and public law grounds.

(ii) In judicial review challenges which include Article 8 ECHR grounds, the question is not whether the impugned decision is vitiated by one or more of the established public law misdemeanours. Rather, the question is whether a breach of Article 8 has been demonstrated.

(iii) Provided that the above distinction is appreciated, judicial adjudication of issues of proportionality may legitimately be informed by public law principles.

(iv) The tribunal's approach to proportionality in immigration judicial reviews and immigration appeals differs. In judicial review, the role of the Tribunal is limited by the principle of the discretionary area of judgment, albeit the intensity of review will invariably depend upon the context. This inhibition does not apply in statutory appeals: Huang v SSHD.

(v) In human rights cases, the focus of the court or tribunal is always on the product of the decision making process under scrutiny, rather than the process

itself, except where Convention rights which have a procedural content are engaged."

12. The assessment of this is and must be highly fact specific. As was said in *Mukarkar* [2006] EWCA Civ 1045

> "38. Since neither Article 8 nor the case-law lays down any specific limits to what may reasonably be regard as "exceptional" in this context, a legal challenge would have to be one of perversity. That is not in terms asserted, and rightly so in my view. Nor is this conclusion inconsistent with the reasoning of Huang. Indeed there are some parallels with the case of Mrs Huang herself. Although she could not bring herself within rule 317, this court evidently thought that her "substantial family life" in the UK, and her other special circumstances, made her case a potential candidate for exceptional treatment under Article 8 (see Huang paras 6-9, 64).
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> Conclusion
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> 39. ...
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> 40. Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case (as is indeed illustrated by Mr Fountain's decision after the second hearing). The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected."

13. The FtT heard oral evidence and made findings of fact:

- The couple have a genuine and subsisting relationship
- The couple do not meet E-LTRP3.1 of the Rules
- The husband would support an application for entry clearance
- The husband would take holiday (a maximum of two weeks at a time) if Ms Khati were removed
- The husband had no prospects of employment in Nepal
- The husband had lived his whole life in England
- The husband was 50 years old
- The husband would be unlikely to master the Nepalese language, at least not for a very considerable period of time
- Ms Khati would have no difficulty returning to Nepal.

14. The FtT judge referred himself to *Izuazu* [2013] UKUT 45(IAC) and that it is the degree of difficulty that a couple face rather than the surmountability of the obstacle faced that is the focus of judicial assessment – as a fact not a test.

15. Mr Duffy relied in particular on [45], [50] and [51] of *Agyarko*:

> "45. The Upper Tribunal held that it could not be said that there were insurmountable obstacles to family life continuing with Mr Ijiekhuamhen in Nigeria, within the meaning of section EX.1(b) of Appendix FM. Judge Craig referred to the letter of support from Mr Ijiekhuamhen and observed, "these factors could not possibly persuade any decision-maker that there were insurmountable obstacles to family life continuing in Nigeria" ([8]). He went on, at para. [9], as follows:
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> > "The fact that the applicant's partner would have to change jobs is not an insurmountable obstacle and nor is the suggestion, as advanced, that there are fake drugs circulating in Nigeria which the partner does not wish the applicant to take. Were there an Article 3 claim open to the applicant, no doubt it would be made. As I understand the argument now advanced, it is that the applicant is undergoing fertility treatment in this country which she wants to continue. That is not an insurmountable obstacle to the couple going to Nigeria if they choose to do so. It is a matter for them; nobody is making a British citizen leave this country but if this couple want to enjoy family life together in this country they are only entitled to do so if they satisfy the requirements within the rules, which in this case they do not."
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> ...
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> 50. First, as regards the appeal in respect of refusal of leave to remain under the Rules, in view of the stringency of the test in section EX.1(b) (see above), I agree with Judge Craig's assessment that the factors relied upon by Mrs Ikuga could not possibly persuade any decision-maker that there were insurmountable obstacles to family life continuing in Nigeria, within the meaning of that provision. Therefore, he was right to refuse to grant permission to apply for judicial review on this ground.
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> 51. Secondly, as regards the appeal in respect of refusal of leave to remain outside the Rules on the basis of Article 8, I again consider that Judge Craig's assessment cannot be faulted. The position is indistinguishable from that in Mrs Agyarko's case, discussed above. Mrs Ikuga's case involves precarious family life, with no children. No compelling medical circumstances have been shown to exist. The claim for leave to remain had not been put to the Secretary of State on the basis of *Chikwamba*, and in any event no materials were submitted which might show that leave to enter would have to be granted under Appendix FM if applied for. There was no arguable case that Mrs Ikuga could show that exceptional circumstances existed to support the conclusion that Article 8 required that she should be granted leave to remain."

16. He submitted that there was, in essence, very little difference in the instant set of facts to those facts in the *Agyarko* case and that in effect the Court of Appeal were saying that the factors set out in the instant appeal could not amount to insurmountable obstacles. He submitted that this was a case where the First-tier Tribunal judge had misdirected himself in law rather than a perversity challenge; the reasons given by the judge do not amount to insurmountable obstacles.

17. But in this particular case for this particular couple the judge looked at the evidence (documentary and oral) and found that this family unit would not be able to continue outside the UK. The husband would be able to visit for two-week periods only. This was not a case where the husband was merely saying that he just didn't want to go to live in Nepal – the couple had considered and concluded that it was simply not possible because of his age, lack of language skills and lack of ability to obtain employment. The family relationship would simply cease to exist if she were removed.

18. Although the SSHD relies upon the ability of the applicant to make an entry clearance application, that does not form a part of the consideration under the Rules. The Rules require a finding of 'insurmountable obstacles to the continuation of family life outside the UK'. A two-week holiday was a matter that was factored in.

19. As said in *Mukarkar* these decisions are difficult and fact sensitive. There may be a range of views reached by different judge but this judge has made sustainable findings on the facts and evidence before him. That the Upper Tribunal judge who refused permission to judicially review a decision of the Secretary of State was upheld in *Agyarko* does not impact on this appeal, which is a statutory appeal, and, in the words of the President of the Upper Tribunal, the focus is on the product and not the process.

20. In so far as the judge's decision in the instant appeal that there were insurmountable obstacles to family life continuing outside the UK, that decision is neither perverse nor irrational. Although generous it is a decision, which on the facts and evidence as presented to the judge, he was entitled to reach.

21. EX.1.1 and EX.2. are not free standing. In order to benefit from the EX provisions, an applicant has to meet R-LTRP which sets out the criteria to be fulfilled for leave to remain as a partner. In particular, in so far as Ms Khati is concerned, she would have to meet R-LTRP.1.1(d)(ii) which requires her to fulfil E-LTRP.1.2–1.12 and E-LTRP.2.1-2.2. Her partner is not required to meet the financial criteria of E-LTRP3.1. The respondent accepted that Ms Khati met the requirements of E-LTRP.1.2-1.12 and E-LTRP.2.1-2.2.

22. Accordingly there is no error of law in the finding that Ms Khati meets the requirements of the Immigration Rules.

23. The grounds upon which permission to appeal was granted do not, in terms, submit that the judge has erred in law in allowing the appeal on Article 8 terms. It is possible that the reference to being able to make an application for entry clearance is an indirect submission under Article 8. But the First-tier Tribunal on the basis of the findings of fact made has considered the interference in this couple's family life. The judge considered Part 5A Nationality Immigration and Asylum Act 2002 and in particular s117B. He gave specific consideration to the suggestion that she could travel to Delhi to make an entry clearance application and specifically weighed the public interest in the maintenance of effective immigration control against the facts found. It would indeed be unusual in any event for an appeal to succeed under the Immigration Rules and yet fail on Article 8 grounds.

24. There is no error of law in the decision of the First-tier Tribunal judge.

25. I do not set aside the decision.

26. The decision of the First-tier Tribunal Judge stands.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

Date 4th January 2016

Upper Tribunal Judge Coker