



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/25367/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 25 June 2018

Decision & Reasons Promulgated  
On 09 July 2018

Before

DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MANOJ THAPA  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr N Bramble, Home Office Presenting Officer

For the Respondent: Ms A O'Callaghan, instructed by N.C. Brothers & Co Solicitors

**DECISION AND REASONS**

1. In a decision sent on 4 December 2017 Judge Adio of the First-tier Tribunal (FtT) allowed on human rights grounds the appeal of the respondent (hereafter the claimant) against the decision made by the appellant (hereafter the Entry Clearance Officer or ECO) to refuse entry clearance as an adult dependent relative.
2. The ECO was granted permission to challenge Judge Adio's decision on one ground only. The first limb of that ground was that the judge failed to identify anything

exceptional about the claimant's circumstances which would make the separation from his family "insurmountable" in light of the guidance given by the Upper Tribunal and higher courts on the meaning of "insurmountable obstacles", in particular Agyarko [2015] EWCA Civ 440. The second limb of the ECO's one ground was to contend that the judge failed to attach substantial weight to the public interest factors in play in this case, in particular that there was a lack of evidence that the claimant spoke English, or that he would not be a burden on the taxpayer given that the judge found the claimant would need treatment in the UK even though the evidence did not indicate he could afford private treatment.

3. The claimant's Rule 24 Response and skeleton argument submitted that the claimant was not required to undertake an insurmountable obstacles assessment under the dependent relative Rules. Further, the judge was entitled to find that the sponsor would be able to maintain the claimant without recourse to public funds and "the impact of his disability on public funds is not a consideration under s.117B of the NIAA 2002".
4. Mr Bramble said he accepted that the grounds were wrong to raise the issue of "insurmountable obstacles". He maintained however that the judge had failed to adequately address public interest factors weighing against the claimant.
5. Given Mr Bramble's contention that there is no "insurmountable obstacles" test in respect of entry clearance applications by adult dependent relatives, I need not address that limb of the ECO's grounds.
6. Three features of the judge's treatment of the claimant's appeal are noteworthy. First, he did not find that the claimant met the full requirements of the Immigration Rules, paras E-ECDR.2.4 and 2.5 in particular. The judge explains why at para 22:
 

"The requirements of paragraph 35 under Appendix FM-SE are strict. The contents of the letter do not totally fulfil the requirement laid out at paragraph 35 of Appendix FM-SE. There is also no indication why the private arrangement cannot be continued in Nepal. Due to the absence of independent medical evidence I find that the appeal cannot succeed under Appendix FM of the Immigration Rules with particular reference to paragraph Entry Clearance Officer-DR 1.1. With reference to Appendix FM-SE of the Immigration Rules, I find that an undertaking was submitted by the Sponsor and I find that the Appellant's parents have shown that they are able to maintain and accommodate him without recourse to public funds. The Sponsor has submitted his payslip for 2017 this shows that he earns over £39,000 per annum (also working part-time).
7. Second, as the judge makes clear within the same paragraph, he was nevertheless satisfied (i) that the claimant's parents had shown that they were able to maintain and accommodate him without recourse to public funds; and (ii) that an undertaking had now been given by the sponsor pursuant to para 35 of the Rules (it had not been supplied at the date of application or decision).

8. Third, the judge conceded that the claimant only failed to meet the requirements of the Rules “because of the lack of specified evidence” (para 27).
9. The consequence of the judge’s conclusion that the claimant did not meet the Rules was that the judge had to approach the public interest considerations against the background that the Rules broadly reflect the public interest: see Hesham Ali [2016] UKSC 60. At the same time, the judge was entitled to weigh in the proportionality assessment that the claimant met the requirements of the Rules save in respect of the para 35 sponsorship undertaking. Viewed in this light, it is difficult to see that the judge’s proportionality assessment failed to conduct a balancing exercise within the range of reasonable responses. Having found that the claimant enjoyed family life and that the decision constituted an interference with that family life, the judge duly noted a number of public interest factors weighing against the claimant, including the public interest in the maintenance of immigration control and the claimant’s lack of English language skills. The judge then set out factors in favour of the claimant or that negated some of the public interest considerations, in particular that because of his disability it would be discriminatory to hold his lack of English language skills against him; that he would not be a drain on public funds, that if the claimant did not join his parents there would be an emotional and mental impact on the sponsor. At paras 27 and 28 the judge observed:
- “27. There is also no one who can look after him on a long-term basis. And whilst the Appellant does not strictly satisfy the requirements of the Immigration Rules on adult dependent relatives because of the lack of specified evidence this does not detract from the emotional trauma and impact it will have on the family life if he is left to live without the rest of his family, namely his parents and his younger brother who he has lived with all his life apart from his father who had come to the UK a bit earlier. However his father was working very hard to reunite the family together. In view of the impact that separation will have on the Appellant’s parents and the younger brother as well as the Appellant himself I find that the Respondent’s decision is not a proportionate one.
28. I find that the required daily tasks that the Appellant needs help with from his parents and brother and due to his disability it is disproportionate for him to continue to reside without them in Nepal. To require the Appellant’s mother and brother to go back to Nepal to stay with him will be to undermine the family life that the Appellant’s mother and brother also have with the Appellant’s father in the UK. The only proportionate decision will be for the Appellant to join the rest of the family in the UK.”
10. In respect of the judge’s conduct of the balancing exercise, the respondent’s grounds do not take issue with any of it or of the weightings the judge attached to various considerations save in respect of the finding that the claimant would not be a drain on the public purse. This was an odd submission to begin with since the ECO’s grounds do not in terms challenge the judge’s clear finding at para 22 that his parents could maintain and accommodate him “without recourse to public funds”. Nevertheless, in view of the claimant’s disability and the accepted fact that he needed medical treatment in Nepal (see para 11) and that he needed treatment not available in Nepal,

it was reasonably foreseeable that if granted entry to the UK the claimant might well need to seek and obtain medical treatment.

11. There are two safeguards placed by the Rules to prevent costs to the public purse in this context. First, in respect of personal care, para 35 of the Rules requires a sponsor's undertaking, and although not given at the date of application or decision the judge was satisfied it has since been given. Second, the Rules make provision for a health surcharge and the ECO refusal decision noted that "[y]ou should note that you may be required to make a fresh Health Surcharge payment with any fresh application or if any appeal against this decision is successful" [emphasis added]. In light of those safeguards the judge's assessment at para 24 that "he will not... be a burden on the taxpayer" was both rational and reasonable.

### **Notice of Decision**

12. For the above reasons I conclude that the ECO's grounds fail to disclose an error of law in the judge's decision. I am not entitled to interfere with a judge's decision unless vitiated by legal error. Accordingly, the decision of the FtT judge shall stand.

No anonymity direction is made.

Signed

Date: 5 July 2018



Dr H H Storey  
Judge of the Upper Tribunal