Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/02570/2019**

THE IMMIGRATION ACTS

Heard at Cardiff	**Decision & Reasons Promulgated**
On 5 December 2019	**On 9 December 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

NILESHKUMAR BABULAL DAVE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Rehman, instructed by Lawfare solicitors
For the Respondent: Mr Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 1 September 1976 and is a male citizen of India. By a decision dated 31 January 2019, the Secretary of State refused the appellant leave to remain on family grounds. The appellant lives with a British citizen, VW, and her daughter, RW, who was aged 17 at the date of the First-tier Tribunal appeal but who is, at the date of the initial hearing in the Upper Tribunal, 18 years old. The First-tier Tribunal, in a decision promulgation on 11 April 2019, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The grant of permission purports to exclude permission for Ground 1 but has not done so in a way which complies with *Safi and others (permission to appeal decisions) [2018]* UKUT 00388 (IAC). Both representatives agreed that all grounds may be argued.

3. The appeal before the First-tier Tribunal turned in the first instance upon the application of Section 117B6 of Nationality Immigration and Asylum Act 2002 (as amended):

> In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom

the judge found that there existed no genuine and subsisting parental relationship between the appellant and RW. The appellant argues that it was wrong for the judge to find that there was no parental relationship solely because RW was, at the date of the First-tier Tribunal hearing, on the point of becoming an adult. It is asserted that the judge failed properly to consider the evidence showing the extent of the care provided by the appellant for RW. I find that the ground is without merit. I agree with Mr Howells, who appeared for the Secretary of State, that the judge's finding that the natural father of RW continues to enjoy a parental relationship with her natural father who also acts a 'father figure' for her led the judge to reach a finding which was wholly in accordance with the decision of the Upper Tribunal in *Ortega [2018]* UKUT 00298 (IAC). Part of the headnote of *Ortega* reads as follows:

> As stated in paragraph 44 of R (on the application of RK) v Secretary of State for the Home Department (Section 117B(6): "parental relationship") IJR [2016] UKUT 31 (IAC), if a non-biological parent ("third party") caring for a child claims to be a step-parent, the existence of such a relationship will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents .

The grounds do no more than to disagree with the reasoned finding of the judge.

4. Secondly, the judge went on to consider whether there exist insurmountable obstacles preventing the appellant and his partner enjoying family life together in India having correctly determined that the appellant might only rely upon the provisions of EX1 under the 'partner route' to settlement. As regards the proper interpretation of 'insurmountable obstacles', the judge correctly directed himself to the Supreme Court judgement in *Agyarko* [2017] UKSC 11. Mr Howells is right to submit that the appellant falls to be considered under the 10 years route to settlement (rather than the 5 years route) because he had made a human rights application (the subject of this appeal) when he had no valid leave to remain. The appellant submits that the judge's analysis is flawed and that the judge has failed to give proper weight to evidence which indicated that there would exist insurmountable obstacles preventing the couple enjoying their family life in India. I find that that

submission has no merit. The judge has at [47-53] sought to identify possible difficulties associated with relocation of family life to India raised by the appellant and his partner but he has given sound reasons for finding that those difficulties do not amount to insurmountable obstacles. The judge correctly directed himself to find that financial independence in the United Kingdom and an ability to speak English with neutral factors in the analysis under Section 117 of the 2002 Act (as amended). I entirely agree with Mr Howells that the grounds regarding the judge's analysis and insurmountable obstacles amount to no more than disagreement with the Tribunal's soundly reasoned and clear findings. I also agree with Mr Howells that the judgment in *Chikwamba* [2008] UKHL 40, which has been raised for the first time in the appeal to the Upper Tribunal, had not been put before the First-tier Tribunal and, in any event, has no relevance in the current appeal. The judge's finding that there existed no insurmountable obstacles to family life being enjoyed in India was determinative of the appeal; there remained no need whatsoever to consider whether the appellant might return alone to India to make an out of country application for entry clearance in the light of a finding that family life may continue in India.

5. The appeal, therefore, fails first because the judge did not fall into legal error in his application of section 117B6 and, secondly, because the grounds provide no basis at all for the Upper Tribunal to interfere with the judge's assessment of whether exist insurmountable obstacles preventing family life continuing in India. Finally, I note in passing that, even if I were to set aside the decision and to remake it or return the appeal to the First-tier Tribunal for that Tribunal to remake the decision, the appellant's relationship with RW would now be of no relevance; RW is 18 years old and no longer a child and the circumstances which any Tribunal would consider in determining the human rights appeal would be those appertaining as at the date of the hearing before it

Notice of Decision

This appeal is dismissed.

Signed Date 5 December 2019

Upper Tribunal Judge Lane