Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13332/2019 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Remotely by Skype for Business On 26 November 2020	**Decision & Reasons Promulgated On 14 December 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

KAMI [T]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Allen, instructed by Paul John & Co Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Nepal who was born on 19 April 1972.

2. The appellant entered the United Kingdom on 16 June 2010 with entry clearance as a domestic worker which was extended until 9 December 2011. The appellant made a further application for leave as a domestic worker on 11 November 2011. That application was refused on 22 December 2011 and the appellant unsuccessfully appealed to the First-tier Tribunal. Permission to appeal was refused both by the First-tier Tribunal and the Upper Tribunal. The appellant became appeal rights exhausted on 1 June 2012.

3. On 5 April 2012, the appellant made an application for further leave to remain as a domestic worker but this was voided on 1 August 2012 as she still had an appeal pending on her previous application.

4. Following her unsuccessful appeal, on 23 August 2012 the appellant again applied for leave to remain as an overseas domestic worker. That application was refused on 26 March 2013 and, although the appellant had a right of appeal, she did not appeal.

5. On 25 October 2013, the appellant lodged a judicial review application but permission was refused and the application marked as totally without merit on 23 January 2014.

6. On 19 November 2014, the appellant made an application for leave based on Art 8 of the ECHR. This application was refused on 5 June 2015 and certified as being "clearly unfounded" under s.94 of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002").

7. On 20 February 2015 the appellant was served with a notice of liability to be removed as a person who had no leave to enter or remain.

8. On 11 February 2016, the appellant made further submissions which were rejected under para 353 of the Immigration Rules (HC 395 as amended) on 16 February 2016.

9. On 12 February 2016, the appellant applied for limited leave again based upon Art 8 of the ECHR. That application was rejected on 4 March 2016.

10. On 7 March 2016, the appellant claimed asylum. That application was refused on 5 September 2016 and was, again, certified as "clearly unfounded" under s.94 of the NIA Act 2002.

11. On 9 July 2018, the appellant again made a human rights application based upon her relationship with a Nepalese citizen who had settled status in the UK, Mr Chakra [L] ("the sponsor") and who was born on 21 May 1972. In addition, the appellant relied upon her relationship with the sponsor's daughter, Ms ("SL"), a Nepalese citizen who was born on 18 August 2004. She had moved to the UK to live with her father, the sponsor on 26 December 2016 and was granted indefinite leave to enter.

12. On 22 July 2019, the Secretary of State refused the appellant's application both under the "partner" rule (Section R-LTRP) in Appendix FM of the Immigration Rules and also under Art 8 outside the Rules. The respondent was not satisfied that the appellant had a genuine relationship with the sponsor or with his daughter, SL. As a consequence, the Secretary of State concluded that the appellant could not meet the eligibility requirements in R-LTRP.1.1.(d)(ii) under the ten-year route as a "partner". The Secretary of State did not go on to consider whether the appellant satisfied the requirements of para EX.1. of Appendix FM, namely whether there were "insurmountable obstacles" to her family life with her claimed partner and his daughter continuing in Nepal. Finally, the respondent concluded that the appellant's

removal would not result in unjustifiably harsh consequences so that her removal breached Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

13. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Abdar on 20 December 2019. The respondent was not represented at that hearing. The appellant, the sponsor and SL gave oral evidence before the judge. In addition, a number of documents were relied upon including a letters of support, documents from SL's school and in relation to the appellant's health.

14. The judge dismissed the appellant's appeal. First, unlike the Secretary of State, he accepted that the appellant had a genuine and subsisting relationship with the sponsor and with SL (see paras 22 – 24). Applying the relevant "partner" rule in Appendix FM (R-LTRP.1.1(a), (b) and (d)), the judge recognised that the appellant met the relevant eligibility requirements of the ten-year route as a "partner" and that, in order to succeed, she had to establish that para EX.1. applied to her, namely that there were "insurmountable obstacles" to family life with the sponsor continuing in Nepal.

15. On that issue, the judge reached his findings at paras 26–33 as follows:

> "26. The Appellant's evidence is that there are insurmountable obstacles to continuing their family life in Nepal mainly due to the Appellant's relationship with the sponsor and Miss [L] in the UK. The sponsor and Miss [L] are settled in the UK, the latter joining the Appellant and sponsor in December 2016. The Appellant's contention is that Miss [L] is in school, which would be disrupted if the Appellant was to return to Nepal or if the sponsor and, in turn, Miss [L] had to follow the Appellant to Nepal.
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> 27. The Appellant also has abdominal pain for which the Appellant is receiving treatment in the UK. The Appellant is concerned about not being able to receive the treatment in Nepal and the treatment being of inferior standard compared to the UK.
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> 28. On the evidence, on balance, I am not satisfied that there would be insurmountable obstacles to the Appellant and Sponsor's family life continuing outside the UK. The Appellant accepts, see page 23 of the Respondent's bundle, having friends and relatives in Nepal and I also find the fact of the Appellant having spent the vast majority of her life in Nepal, the Appellant would have the wherewithal to find her feet on return, which would ease the inconvenience the Appellant may face.
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> 29. The sponsor and Miss [L] are not obliged to return to Nepal with the Appellant. However, should they wish to do so to continue their family life together, I find that they would not face insurmountable obstacles in doing so. The sponsor has been in the UK since February 2011 and settled since 2016, as confirmed in oral evidence, which is less than the amount of time the Appellant has been in the UK. The sponsor is a chef by trade and in all the circumstances, I find that the Appellant and the sponsor could continue their lives together in Nepal, if so desired.

30. I do not find the consideration concerning Miss [L] to be more cogent in the Appellant's favour. However, I am not persuaded, on balance, for that consideration to suffice to find there to be insurmountable obstacles. Miss [L] is not obliged to return to Nepal and if she were to return with the Appellant and the sponsor after three years of being in the UK, I find that she would be able to do so without significant difficulties, particularly with the continuing love and support of the Appellant and sponsor.

31. I have no reason to find that the Appellant and the sponsor do not have family remaining in Nepal who would be able to offer them support and both would be able to work in Nepal and build a life together, albeit perhaps not the standard of living the Appellant and sponsor may desire.

32. I have sparse medical evidence on the Appellant's condition and I am not satisfied that the Appellant has discharged the burden on the Appellant to establish the medical condition or any lack of availability of treatment in Nepal would create insurmountable obstacles to the Appellant and the sponsor continuing their family life together in Nepal.

33. In the circumstances and in the round, on balance, I do not find any of the difficulties, exclusively or in combination, would lead to insurmountable obstacles to the Appellant or the sponsor in continuing their family life together outside the UK."

16. The judge then went on to find that first, there were not "very significant obstacles" to the appellant's integration on return to Nepal and so she could not succeed under para 276ADE(1)(vi) of the Immigration Rules; and secondly, the public interest outweighed any interference with the appellant's private and family life such that her removal would be proportionate and not a breach of Art 8.

The Appeal to the Upper Tribunal

17. The appellant sought permission to appeal to the Upper Tribunal on three grounds. First, in finding that there were not insurmountable obstacles to family life between the appellant and sponsor continuing in Nepal, the judge failed properly to take into account the best interests of SL given that she was 15 years of age and in year 11 in the middle of studying for her GCSEs and was settled in the UK. Secondly, the judge erred in law in concluding that SL would be able to remain in the UK on her own. Thirdly, the judge failed properly to consider the Chikwamba principle.

18. On 29 April 2020, the First-tier Tribunal (Judge N J Osborne) granted the appellant permission to appeal.

19. Initially, in the light of the COVID-19 crisis, the Upper Tribunal (UTJ Sheridan) issued directions on 23 June 2020 expressing the provisional view that the error of law issue and whether the decision should be set aside could be determined without a hearing. The parties were invited to make submissions both on whether a hearing should take place and also on the merits of the appeal. In response, it would appear that only the appellant made submissions in reply. In those submissions dated 9 July 2020, the appellant requested that there be a hearing. As a consequence, on the

Upper Tribunal (Judge Mandalia) issued directions directing that there should be a remote hearing of the appeal by Skype.

20. That appeal was listed before me on 26 November 2020. I was based in court in the Cardiff Civil Justice Centre and Ms Allen, who represented the appellant, and Mr Howells, who represented the Secretary of State, joined the hearing by Skype for Business.

The Submissions

21. On behalf of the appellant, Ms Allen relied upon grounds 1 and 2. Ms Allen placed no reliance upon ground 3 and the Chikwamba principle. She accepted that it had no application as the appellant could not establish with certainty that she would meet the requirements of the Rules if she sought entry clearance. In particular, the appellant, was found by the judge not to have adequate English speaking skills (see para 42) and she did not have the required English Language certificate to meet the requirements of the Rules.

22. As regards ground 1, Ms Allen submitted that the judge accepted that the appellant had a genuine relationship with the sponsor (as her partner) and with his daughter, SL. However, in finding that there would not be "insurmountable obstacles" to the appellant and her partner continuing their family life in Nepal, the judge failed to consider the best interests of SL. She submitted that the judge had made no reference to her best interests in the determination. The judge, Ms Allen submitted, failed to take into account that SL was in the middle of her GCSEs (being in year 11) at the time of the decision. In reaching the finding that there were no "significant difficulties" in SL returning to Nepal in order to accompany the sponsor to continue his family life with the appellant, Ms Allen submitted that the judge failed to take into account the impact upon SL and also that she had indefinite leave to enter.

23. This was also, Ms Allen submitted, important in considering the appellant's claim outside the Rules as para EX.1. applied, not only to a partner but also to a child with whom the individual has a subsisting parental relationship, but only if the child is *either* a British citizen *or* has lived in the UK for at least seven years. Unlike the case of a partner, who could be *either* a British citizen *or* a person settled in the UK, the Rule could not apply to SL as she was neither a British citizen nor had she been in the UK for at least seven years, but she did have indefinite leave to enter.

24. Secondly, Ms Allen submitted that, in para 30 of his determination, the judge appears to have contemplated that SL could remain in the UK on her own whilst the sponsor (her father) went back to Nepal with the appellant to continue their family life. That, she submitted, clearly failed to have regard to the fact that SL was 15 years of age and in school.

25. On behalf of the respondent, Mr Howells accepted that the issue was whether there were "insurmountable obstacles" to the sponsor returning to Nepal to continue family life with the appellant. The position of SL was relevant to that. However, Mr Howells submitted that, at para 26 of the determination, the judge specifically

referred to the disruption to SL, who was at school, if the appellant returned to Nepal and the sponsor (accompanied by SL) went to Nepal. Mr Howells referred me to the proper approach to the issue of "insurmountable obstacles" and that it was a 'stringent test' relying on R (Agyarko) and Another v SSHD [2017] UKSC 11 at [43] and [44] per Lord Reed. He submitted that it was properly open to the judge to find in para 30 that SL could return "without significant difficulties, particularly with the continuing love and support of the appellant and sponsor".

26. As regards the second ground, Mr Howells submitted that the judge had not, in para 30, concluded that SL could remain in the UK on her own. He submitted that the judge had considered the appellant, sponsor and SL as a 'family unit' and that the sponsor and SL would either both stay in the UK or both would go back to Nepal. He relied on paras 29, 30, 43 of the determination.

Discussion

27. In order to succeed under the ten-year 'partner' route relied upon in Appendix FM, namely Section R-LTRP.1.1(a), (b) and (d), the appellant has to meet both the suitability requirements in Section S-LTR and the eligibility requirements in E-LTRP.1.2–1.12 and E-LTRP.2.1 and 2.2 and para EX.1.

28. As a result of the judge's positive finding that the appellant had a genuine and subsisting relationship with the sponsor as his partner, and that that was a relationship akin to marriage and that they had lived together for three years, the only issue under the Rules was the application of para EX.1.

29. Paragraph EX.1 provides as follows:

> "This paragraph applies if
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> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who –
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
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> (bb) is in the UK;
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> (cc) is a British Citizen or has lived in the UK continuously for at least the seven years immediately preceding the application; and
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> (ii) it would not be reasonable to expect the child to leave the UK; or
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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."

30. Paragraph EX.2 defines "insurmountable obstacles" as:

> "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."

31. As Ms Allen pointed out in her submissions, the appellant could not seek to rely upon subpara (a) of EX.1 because, although the judge accepted that she had a "genuine and subsisting parental relationship" with SL, SL was not a British citizen and had not lived continuously in the UK for at least seven years as she had only come to the UK in December 2016. Unlike subpara (b), the eligible "child" does not include a child who is "settled" in the sense of having indefinite leave to enter or remain. By contrast, a "partner" who is settled is an eligible partner for the purposes of para EX.1. It is not clear whether that was a deliberate omission in the rule but, in any event, I agree with Ms Allen that the impact upon a child with settled status would be a relevant consideration in determining whether a decision was a disproportionate interference with the family life of that child as a result of the removal of the parent. The matter does not have any direct relevance to the outcome of the appeal at this stage and I need say no more about it.

32. The meaning of "insurmountable obstacles" was considered by the Supreme Court in Agyarko where, at [43]–[44], Lord Reed said this:

> "43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to "un obstacle majeur" (*Sen v The Netherlands* (2003) 36 EHRR 7, para 40), or to "major impediments" (*Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798, para 48), or to "the test of 'insurmountable obstacles' or 'major impediments'" (*IAA v United Kingdom* (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could "realistically" be expected to move (*Sezen v The Netherlands* (2006) 43 EHRR 30, para 47). "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119.
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> 44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "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." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2."

33. As Mr Howells submitted, it sets a "stringent test". It must however be applied in a "practical and realistic sense" and does not require the obstacles to be "literally impossible for the family to live together" outside the UK.

34. The Court of Appeal in Lal v SSHD [2019] EWCA Civ 1925 gave guidance as to the application of the "insurmountable obstacles" test in para EX.1 at [36]–[37] as follows:

> "36. In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK. If not, the decision-maker needs finally to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both).
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> 37. To apply the test in what Lord Reed in the *Agyarko* case at para 43 called "a practical and realistic sense", it is relevant and necessary in addressing these questions to have regard to the particular characteristics and circumstances of the individual(s) concerned. Thus, in the present case where it was established by evidence to the satisfaction of the tribunal that the applicant's partner is particularly sensitive to heat, it was relevant for the tribunal to take this fact into account in assessing the level of difficulty which Mr Wilmshurst would face and the degree of hardship that would be entailed if he were required to move to India to continue his relationship. We do not accept, however, that an obstacle to the applicant's partner moving to India is shown to be insurmountable – in either of the ways contemplated by paragraph EX.2. – just by establishing that the individual concerned would perceive the difficulty as insurmountable and would in fact be deterred by it from relocating to India. The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to an applicant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together."

35. In assessing whether there were "insurmountable obstacles" to the appellant and sponsor continuing their family life in Nepal, their position could not be divorced from that of SL. In reality, SL could only live in the UK if her father (at least)

remained in the UK. I do not mean to say that a teenage child could never remain in the UK, whilst at school, without a parent in all circumstances. That is self-evidently not the case, for example, where the child is at a private boarding school. Alternatively, the child might have very close family with whom she could live whilst attending school. Neither of those situations presented themselves in this appeal. The reality was that a 15 year old girl, in year 11 attending a state school in London (Queens Park Community School) could only remain in the UK and attend school if her father (the sponsor) remained in the UK. As a result, therefore, whether there were insurmountable obstacles to her father returning to Nepal with the appellant, involved an assessment of the impact upon SL, her best interests and her immigration status, given that she had indefinite leave to enter.

36. Although, in ground 2, Ms Allen pressed the argument that in para 30 the judge had contemplated SL remaining in the UK on her own, I am not persuaded that that is in fact what he was contemplating. Reading the determination as a whole, I accept Mr Howells' submission that the judge considered the sponsor and SL as a unit. They would either both return to Nepal together or they would both remain in the UK together.

37. Although, therefore, I do not accept ground 2 is made out, I do accept that ground 1 is established.

38. In assessing the circumstances of SL in the UK, as part of the assessment of whether there were insurmountable obstacles to the sponsor returning to Nepal, it was incumbent upon the judge to consider the "best interests" of SL. As Ms Allen submitted, at no point in his determination did the judge specifically refer to SL's "best interests". He did refer to SL's circumstances. Mr Howells drew my attention to para 26 of the determination (set out above) where the judge referred to SL being in school and that that would be disrupted if the appellant was to return to Nepal together with the sponsor and SL. However, in para 26 the judge was, as he specifically says, stating what was the appellant's contention. Thereafter, he made no further reference to SL's circumstances, in particular the (arguably) critical stage of her education having completed one and a bit years of a two year GCSE programme and that she had indefinite leave to enter.

39. In paras 27–33, the judge referred to the appellant's health; he referred to the fact that the appellant, and indeed SL, have previously lived for most of their lives in Nepal; they had family there who could provide support; and the sponsor was a chef by trade. All of these matters went to whether, once in Nepal, there were "insurmountable obstacles" to family as a "unit" living there. At para 30, in concluding that SL could return "without significant difficulties", the judge solely focussed upon the fact that she had only been in the UK for three years and she would return, continuing to have the "love and support" of the appellant and sponsor. What none of this addressed was whether, given the claimed impact upon SL's education if she returned to Nepal with the sponsor, that presented a significant difficulty which, as a practical matter, created "insurmountable obstacles" to the sponsor leaving the UK (necessarily with his daughter, SL) to live with the appellant

in Nepal. In failing to grapple with the impact upon SL's education if she returned to Nepal with her father, the judge erred in law in reaching his adverse finding that there were not "insurmountable obstacles" to the appellant and sponsor continuing their family life in Nepal.

40. For those reasons, the judge erred in law in finding that the appellant did not meet the requirements of the 'partner' rule and that finding cannot stand.

41. The necessary consequence of that is also that the judge's decision to dismiss the appeal under Art 8, including outside the Rules was materially flawed in law and cannot stand.

Decision

42. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 involved the making of a material error of law. That decision cannot stand and is set aside.

43. Both representatives agreed that, if that were my conclusion, the proper disposal of the appeal was to remit it to the First-tier Tribunal for the decision to be remade. However, the judge's positive findings in respect of the genuine and subsisting nature of the appellant's relationships both with the sponsor and SL in paras 22–24 should be preserved.

44. The appeal is remitted to the First-tier Tribunal for the decision under Art 8 to be remade with those preserved findings.

Signed

Andrew Grubb

Judge of the Upper Tribunal
3 December 2020