OUTER HOUSE, COURT OF SESSION

[2019] CSOH 56

P934/18

OPINION OF LADY WISE

In the Petition

AA (AP)

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

for Judicial Review

Petitioner: Winter; Drummond Miller LLP
Respondent: Massaro; Office of the Advocate General

26 July 2019

[1] In this petition for judicial review brought against the Secretary of State for the Home Department, the petitioner is a national of Ghana, now aged 40. He challenges a decision by the Upper Tribunal ("UT") dated 12 June 2018 to refuse him permission to appeal against a decision of the First-tier Tribunal ("FTT"). The petitioner entered the UK in 2011 on a valid visitor's visa but has been present in the UK unlawfully since the expiry of that visa on 3 May 2012. He has been involved in a relationship with a British national, Ms JA, for some years and the petition states that the couple married on 28 February 2013. On 25 September

2015 the petitioner applied for leave to remain in the UK on the basis of that relationship. The application was refused on 30 March 2016. On 21 June 2017 the FTT refused an appeal against that decision. The petitioner was then refused permission to appeal to the UT first by the FTT on 14 December 2017 and subsequently by the UT on 12 June 2018. The petitioner contends that the UT erred in law by failing to give any, or at least, adequate reasons for refusing permission and also that the findings made by the UT were not supported, or adequately supported by the grounds before it.

The applicable law

[2] The general approach to a challenge of this sort was not in dispute. In approaching a decision of a specialist tribunal the court requires to exercise caution and should be slow to infer that such a tribunal has failed to follow its own self-direction or has failed to take into account a factor that it has not expressly mentioned – *MA (Somalia)* v *SSHD* [2011] 2 All ER 65. The UT was exercising an appellate function in deciding whether or not to grant permission and the purpose for which a reasoned decision is given should be acknowledged. On the issue of reasons, notices of decisions on permission to appeal issued by specialist tribunals are usually brief and to the point. Following *South Bucks District Council and another* v *Porter (No2)* [2004] 1 WLR 1953 at paragraph 36, the reasons for such a decision must be intelligible and they must be adequate. The important requirement is that the reasons must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal and controversial issues of importance. The court will not reduce a decision of a specialist tribunal unless any error is material and that applies equally to a reasons challenge. These propositions are more fully articulated in the decision of *CW* v *SSHD* [2016] CSOH 163 at paragraphs 29 – 34.

[3] There was equally little dispute in relation to the applicable tests for insurmountable obstacles in terms of the Immigration Rules as distinct from a proportionality assessment for the purposes of article 8 ECHR. The differences between the two tests were explained by Lord Reed in *R (Agyarko)* v *SSHD* [2017] 1 WLR 823 at paragraph 45 as follows:

> "By virtue of paragraph EX.1(b), 'insurmountable obstacles' are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in the case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in 'exceptional circumstances', in accordance with the Instructions: that is to say, in 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate'".

Accordingly, if the petitioner qualifies in terms of paragraph EX.1 of Appendix FM to the Rules his immigration history is irrelevant – *OA & Others (human rights; "new matter"; s120 (Nigeria)* [2019] UKUT 00065 (IAC) at paragraph 27.

[4] Since *Agyarko* was decided, the Court of Appeal has considered further the meaning and application of the "insurmountable obstacles" test in EX.1 to Appendix FM in light of the Supreme Court decisions. In *Mudibo* v *SSHD* [2017] EWCA Civ 1949 the Court of Appeal cited all of the relevant passages from *Agyarko* in relation to both insurmountable obstacles and the "exceptional circumstances" referred to in the Strasbourg jurisprudence in relation to the proportionality of removing an applicant who had article 8 family life protection but whose presence in the country was precarious. In *Mudibo*, the insurmountable obstacles claim amounted ultimately to mere assertion and the court held that permission had been rightly refused at both stages in the UT.

The FTT's decision

[5] Having recorded that the petitioner's application to remain was on the basis of his relationship with his British partner and because that partner was suffering from medical illnesses, the decision of the FTT narrates the following summary of evidence in so far as relevant to these judicial review proceedings:

> "5. The Appellant gave oral evidence in chief. He said that he had three sisters and a brother living in Ghana. His father died 15 years go and his mother died five years ago. Neither his brother nor his sisters would be able to give him financial support if he had to return to Ghana. His brother is a student and his sisters are married. When he was asked about adequacy of healthcare in Ghana he said that the equivalent of the NHS could only cater for minor ailments. He said the Sponsor suffered from serious conditions and he worried that there might be in an emergency he would not be able to call an ambulance because there is no ambulance service. He pointed out that she suffered from cancer in the knee and although they lived in Dundee she had to go to Aberdeen to have the operation because that was the only place where there was a specialist who could treat her. He said there was no expertise in Ghana.
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> 6. At this juncture, I had to ask him how he knew about the lack of medical support in Ghana and he replied that he was from the country and he had researched his wife's condition and available healthcare for it. I asked the Appellant some more questions to clarify my understanding. He told me that the Sponsor was working at a call centre in Dundee and was paid £1300 per month plus a bonus. She had been working for that employer for three years. He told me that the couple wanted to start a family and were in the first phase of having fertility treatment. They were about to start the second phase but were waiting for an appointment. He told me that he had no spoken to the Sponsor about what they would do if he had to return to Ghana. He said that she could not deal with it and when he looked at her medical conditions particularly when she was suffering he found it heart-breaking. I asked him why he could not return to Ghana to make an entry clearance application. He told me that he had already made two applications in this country and he was afraid that if he returned to Ghana he would be unsuccessful particularly as he felt he had done everything that was necessary with the previous applications and yet he had been unsuccessful.
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> 7. The Sponsor gave oral evidence in chief. She said that she found it difficult travelling to Glasgow from Dundee and had not slept well. She said that her asthma had been playing up. She was taken to paragraph 8 of her witness statement where she gave several reasons for why her health prevented her from going to Ghana. She said that she waiting for an operation to relieve the

problem of collapsed sinuses between her ears and nose. Even when the operation was completed she would be unable to fly because of pressure differential problems which would be very painful and potentially very dangerous. She produced a letter from Dr Jones confirming that she was unfit to fly because her eardrums would burst and her sinus tubes would collapse. She said that she had done research into medical care in Ghana and she did not think what she needed would be available. She said that when she had surgery and she had to go to Aberdeen for the operation. She said there was no one available in Ghana. When she was asked why she could not relocate to Ghana she referred to legal advice that she had received to the effect that there was no 100% guarantee that the Appellant would succeed in any out of country application that he made for entry clearance.

8. I asked the Sponsor some questions to clarify my understanding. She told me that she was working at a call centre and had been with them for three years. It was a permanent job and her salary was approximately £19,000 or £20,000 per year. She also received commissions. She said that she would support the Appellant if he had to make an out of country application but she did not know how she would be able to cope in his absence because he did a lot of things for her. She said that she needed regular massage of medication to help her damaged nerves. She told me she had a brother who lived in Buckie and she was in contact with him. She had a good relationship with him. He is in medical practice but she did not see him often. The couple were living in Dundee with Mr McDonagh, who is the Sponsor's stepfather."

[6] The operative section of the FTT's reasons is in the following terms (at paragraph 12);

"Having assessed all the evidence I am not satisfied that the Appellant would face insurmountable obstacles in returning to Ghana as that term is understood by the Supreme Court in *Agyarko*. I accept that the Appellant and the Sponsor will suffer inconvenience and perhaps some hardship and this will be difficult for them particularly given the Sponsor's various medical conditions and the fact that they are hoping to conceive a child together. I note from Dr Crawford's letter of 25 April 2017 [3 AB 6] that pressure changes that could be experienced during a flight would cause perforation in her tympanic membranes and induce significant pain and reduced hearing. From the wording of the letter, I regard this as a possibility and not a certainty. I accept that the Sponsor relies upon the Appellant to a considerable extent in relation to such things as the application of her medication as set out in paragraph 8 of her witness statement. However, she is a British citizen entitled to healthcare under the NHS and can rely on the health service to assist her with her medication and treatment. She also has her brother and stepfather who may be able to help her. The Appellant suffers from problems with her sinuses. I have noted a letter from Mr Stephen Jones a consultant ENT surgeon dated 19 April 2017. He notes that he believes that she is developing cholesteatoma and has arranged to see her again in six months' time to monitor it and has warned that she may require surgery. From this I deduce that surgery is not a certainty but simply a possibility. I have not seen any evidence that her cancer has returned after her surgery and I hope

> that she is still in remission. There is also a letter from Dr Duffy, her general practitioner dated 5 May 2016 in which he lists the various conditions that the Sponsor suffers from. He expresses the opinion that the sarcoma that she suffered from is life-threatening and requires specialist Ortho oncological assessment. He then opines that the conditions in Ghana will exacerbate her asthma and he believes that it would be difficult for her to live in a relatively underdeveloped country such as Ghana and she would not be able to receive adequate specialist are particularly in relation to her sarcoma. Whilst I have the greatest of respect for Dr Duffy as he has not demonstrated expertise in relation to comparative medicine and healthcare between the United Kingdom and Ghana and consequently I cannot give this aspect of his letter any weight. Having considered the medical and other evidence I accept that there might be obstacles to the Sponsor living in Ghana. There may be obstacles for the Appellant returning to Ghana since he has been living in this country since 2011. However, the obstacles they face do not amount to very significant difficulties. The Appellant knows Ghana having grown up in that country and lived there for 32 years. He has not lost all contact with Ghana. The Sponsor has indicated that she will continue to support the Appellant if he was to return to Ghana to make an out of country application and she appears to have a reasonable income to do that. They would be able to continue their relationship using modern means of communication."

[7] The FTT judge then considered whether the petitioner could qualify for leave to remain outside the Immigration Rules under article 8 ECHR and referred to the decision in *Agyarko*. The judge's conclusion was that there were no compelling reasons to allow leave outside the Rules and that it would not be disproportionate to refuse the appeal so that the petitioner would have to return. At the end of the judgment the FTT judge records sympathy with the petitioner and his partner and expresses the view that the best course of action might be for the petitioner to leave the UK and return to Ghana and make an application for entry clearance there. It is recorded that his partner has said she will support him in that and she has permanent employment with an income exceeding the minimum income requirement under Appendix FM of the Rules and that the relationship is accepted as genuine and subsisting and that the petitioner speaks English.

The UT decision

[8] The decision sought to be reduced in this case, dated 12 June 2018, was to refuse permission to appeal the decision of the FTT. The UT's reasons were stated briefly and are in the following terms:

> "The appellant's grounds are essentially a disagreement with the judge's decision on insurmountable obstacles under paragraph EX.1 of Appendix FM and compelling circumstances outside the Immigration Rules. The judge, however, undertook a full and careful assessment of all the evidence, he had full regard to the appellant's wife's medical condition and the medical reports submitted and he had regard to and followed the principles in the relevant case law. The judge provided clear and cogent reasons for concluding that the appellant could not meet the requirements of Appendix FM or paragraph 276ADE(1) and could not demonstrate that his circumstances were sufficiently compelling to justify a grant of leave outside the Immigration Rules. The judge's decision, that the respondent's decision was proportionate and did not breach the appellant's Article 8 human rights, was one that was unarguably properly open to him on the evidence before him and the grounds do not disclose any arguable errors of law."

Submissions on behalf of the petitioner

[9] Mr Winter for the petitioner submitted that it was sufficient for success in his petition that the grounds of appeal before the UT were illustrative of an arguable case. This court had only to assess whether the UT's decision was legally flawed as the ultimate decision on whether the FTT had erred in law would ultimately be a matter for the UT on appeal. The challenges to the FTT's decision included the reasoning and conclusion on insurmountable obstacles, the conclusion on proportionality outside the Rules and also the issue of entry clearance which had been introduced by the FTT without hearing argument. If the petitioner had an arguable appeal in relation to the first of these three arguments then that was sufficient and the proportionality issue would be otiose. It was accepted that if the insurmountable obstacles argument failed and proportionality was being considered then the "little weight" provision of section 117A and B of the Nationality, Immigration and

Asylum Act 2002 was relevant and the UK Supreme Court authority of *Rhuppiah* v *SSHD* [2018] 1 WLR 5536 would apply.

[10] Turning to the medical evidence that was before the FTT, this was lodged at number 6/6 of process. This illustrated that the petitioner's wife has a number of medical issues including chronic back pain, chronic knee pain and osteoarthritis, right proximal fibula chondrosarcoma and asthma. The general practitioner's view was that given the petitioner's partner's medical problems, particularly with the sarcoma and her unstable asthma, it would be difficult for her to live in a relatively under developed country such as Ghana as it would be unlikely that she would be able to receive adequate specialist care locally there. The general practitioner confirmed that sarcoma is a potentially life threatening illness requiring continuing specialist ortho-oncological assessment. He also considered it likely that the conditions in Ghana would exacerbate the petitioner's partner's already unstable asthma. The FTT judge had accepted that the petitioner and his partner were reliable witnesses. The petitioner had given evidence that there was no expertise in Ghana to treat his partner's health issues having researched his wife's condition and available health care. It had also been recorded that the couple were in the first stage of IVF treatment. The petitioner's partner did not think that what she needed in terms of medical care would be available in Ghana and she had confirmed that her earnings were over the minimum financial requirement under Appendix FM. The findings on insurmountable obstacles in the FTT decision were all recorded at paragraph 12 of the judgment. In essence the judge had accepted that the couple would suffer inconvenience and a move would be difficult for them having regard to the petitioner's partner's medical conditions and the fact that they are trying to conceive a child. There was also a possible risk to the petitioner's partner's hearing and it was accepted that for all medical matters she could only rely on the

NHS as a British national. The FTT also found that surgery for the petitioner's partner's sarcoma was a possibility but found that the general practitioner had not demonstrated any expertise in relation to Ghana and so decided not to give the letters from the GP any weight. The FTT concluded also that the parties would be able to continue their relationship using modern means of communication.

[11] The proposed grounds of appeal to the UT included an attack on the FTT's findings in relation to insurmountable obstacles all as set out at paragraph 12 of the FTT decision. In particular it was contended that the FTT had erred in law by arriving at findings on insurmountable obstacles that were not supported by the evidence. The FTT had found that there was a possibility of the petitioner's partner suffering reduced hearing were she to fly to Ghana, that there was a possibility of surgery for cholesteatoma and that she suffers from life threatening sarcoma requiring specialist ortho-oncological assessment. Accordingly, the conclusion that there were no insurmountable obstacles was not supported by the recorded evidence. Further, it was contended that when assessing insurmountable obstacles the FTT had appeared to take a contradictory approach. The tribunal appeared to find that the petitioner's partner could remain in the UK to receive medical treatment. It was said to be unclear whether this was a finding that the partner should remain in the UK while her husband was in Ghana and if so why in light of that there were no insurmountable obstacles given the disruption to their continuing family life that would result. Mr Winter contended that the FTT judge appeared to take a fairly literal approach to insurmountable obstacles notwithstanding the correct self-direction to the case of *Agyarko*.

[12] So far as the assessment outside the Rules was concerned, the argument was similarly that a finding that there would not be unduly harsh consequences was not supported by the evidence referred to in relation to the petitioner's partner's medical

condition. Accordingly, even if the test for insurmountable obstacles was not met, unduly harsh consequences remained. In any event, it was noted that the FTT at paragraph 12 appeared to be operating on an assumption that the couple would be separated if the partner remained in the UK to receive medical treatment. The argument was that the FTT had erred by failing to find that such an approach was not proportionate because family life cannot be continued where parties are separated for a prolonged or indefinite period. So far as entry clearance was concerned the error was that the correct question on entry clearance had not been asked. The test was whether there was a sensible reason for the petitioner to return to apply for entry clearance. Had the correct question been asked the FTT would not have reached the decision it did because it appears to be accepted that the petitioner would meet the Immigration Rules. In any event, there had been a failure to apply *Chikwamba* v *SSHD* [2008] 1 WLR 1420 at paragraphs 40 and 44 where it was acknowledged that it was better for the appeal to be dealt with once and for all rather than the risks inherent in another refusal and further appeal. An entry clearance officer would not be in a better position to assess the claim. The FTT judge should not have introduced the matter of entry clearance in this way. It was enough for the "sensible reason" test that it was implicit that the petitioner would be able to meet the Rules and be able to come back to this country – *MA (Pakistan)* v *SSHD* [2010] Imm AR 196.

[13] Turning to the decision of the UT, the brief reasons had stated that the grounds were essentially a disagreement with the FTT's decision on insurmountable obstacles under the Rules and compelling circumstances outside those Rules. Mr Winter contended that the UT had failed to give any reasons or at least any adequate ones for refusing permission in relation to the entry clearance point. Although the approach of the FTT was summarised in the reasons there was no explanation as to how the proposed appeal on entry clearance had

been assessed. It was not clear what the relevance of insurmountable obstacles or exceptional circumstances was to the sensible reason test. The UT did not engage in any substantive way with the sensible reason test. Counsel acknowledged that the FTT had introduced the entry clearance of its own accord, but having done so it was bound to decide the issue in a legally correct manner and had failed to do that. All of the facts recorded by the FTT were supportive of the sensible reason test having been fulfilled. The significance of the entry clearance ground was that if the FTT had implicitly accepted that the Immigration Rules are met, it would then be disproportionate to have refused the appeal where there was no public interest in the removal of the petitioner on that basis. There was a real prospect of showing that the error on entry clearance was material. Further, the UT had failed to give any or failed to give adequate reasons for rejecting the appeal on insurmountable obstacles and separately on proportionality. It was contended that the UT had reached conclusions that were not reasoned or at least adequately reasoned. In particular, it was not explained why the UT found that clear and cogent reasons were given by the FTT when the grounds had made clear that there was a confused and contradictory approach to the issue of separation if the petitioner's partner remained in the UK for medical treatment. This affected both the insurmountable obstacles and the proportionality aspects of the case.

[14] Mr Winter submitted that there was a real prospect that the errors identified in relation to paragraph 12 of the FTT judgment were material and so should be argued on appeal. In light of the available medical evidence it was clear that the decision was not adequately supported by that evidence something that amounted to a legal deficiency justifying an appeal – *R* v *SSHD* [1999] SC(HL) 17 at 42A – B. The lack of support in the evidence for the conclusions of the FTT was also evident in the assessment outside the Immigration Rules. At paragraph 15 of the judgment the FTT had found that there would

not be unduly harsh consequences for the purposes of an article 8 proportionality assessment. Not only was that not supported by the evidence but insofar as it appeared to operate on an assumption that the parties would be separated while the petitioner's partner remained to receive medical treatment that amounted to an error in law given the lack of proportionality in separating parties for a prolonged or indefinite period – *Mansoor* v *SSHD* [2011] EWHC 832 (Admin) per Blake J at paragraph 16. The UT had failed to consider these errors in refusing permission to appeal. In light of the clear grounds of appeal stated in relation to all three of the matters discussed, the UT's conclusion that the grounds simply amounted to a disagreement with the outcome and that there was a full and careful assessment with full and cogent reasons been given by the FTT was unsupportable. It was acknowledged that the respondent would seek to rely on the case of *R (Mudibo)* v *SSHD* [2017] EWCA Civ 1949. However, that case was different on the facts to the petitioner's case. Neither the husband nor wife in *Mudibo* was a UK citizen and the claimant's husband did not give evidence. In this case the petitioner's wife is British and gave evidence before the FTT. The absence of detailed medical evidence in *Mudibo* was not a feature of the present case.

Submissions for the respondent

[15] Mr Massaro for the respondent accepted that, as the "insurmountable obstacles" test in paragraph EX.1 of the Immigration Rules became relevant only where someone could not satisfy the eligibility requirements of those Rules because he was in the UK unlawfully, considerations of immigration control were not relevant when applying that test. Conversely, if consideration was being given to a situation outside the Rules, then section 117A(2) of the Nationality, Immigration and Asylum Act 2002 applied which

required the respondent to have particular regard to the consideration in section 117B(4)(b), namely that little weight should be given to the petitioner's relationship as it was established when the petitioner was in the UK unlawfully. In either situation, the onus was squarely on the petitioner to establish that he was entitled to leave to remain.

[16] Counsel submitted that the UT's decision was adequately reasoned, with one possible exception in relation to the entry clearance point. It was accepted that the reasons of the UT did not deal directly with that ground but it was contended that such an omission was not material. The petitioner's grounds of appeal were primarily that the FTT's conclusion was not supported by the evidence both in relation to unsurmountable obstacles and the proportionality assessment outside the Rules. There was also the alleged contradictory approach in relation to whether the petitioner's partner would remain in the UK. The UT's response which, in accordance with practice, was supported by only brief reasons, was that the grounds are essentially a disagreement with the FTT's decision. Mr Massaro submitted that there was no contradiction within paragraph 12 of the FTT's reasons and so there was no need for the UT to mention that point. It was clear from the UT's reference to there being "clear and cogent reasons" for the insurmountable obstacles claim failing that no contradiction had been found. There would only be an error on the part of the FTT if the judge had assumed that the petitioner's partner would stay in the United Kingdom, which he did not do. The UT recognised that the FTT judge had cited the correct test for insurmountable obstacles by reference to the case of *R (Agyarko)* v *SSHD* [2017] 1 WLR 823. The reasoning in paragraph 12 is then clear and it can easily be inferred that the judge realised that a choice had to be made by the couple in the event that the petitioner had to return to Ghana. His partner could go too or she could stay in the UK where she has access to NHS treatment. The insurmountable obstacles argument

surrounded the question of whether the petitioner's partner could, if she so chooses, go to Ghana. The only relevant obstacles that were said to arise emanated from the medical evidence. The immigration judge accepted that the petitioner's partner has medical conditions and that some of these were serious. The potential difficulties involved in air travel were acknowledged. The petitioner's criticism was that the tribunal should have accepted the evidence offered by the petitioner in relation to a comparison between health care in this country and that available in Ghana. Had the tribunal accepted that evidence it would have erred in law because expert evidence was required on that matter. No expert witnesses were led to give oral evidence on the part of the petitioner. The medical evidence provided was from the treating general practitioner and did not comply with the requirements for expert evidence as set out in *Kennedy* v (*Cordia Services) LLP* [2016] SC (UKSC) 59 per Lord Reed and Lord Hodge at paragraphs 39 – 57. The tribunal judge noted at paragraph 12 that it was unclear what exactly the medical evidence disclosed and that the petitioner's partner's prognosis was unclear. Critically, he was not satisfied that the general practitioner had any expertise of medical care in Ghana such that he or she could offer a view on the position there. One of the letters provided by the GP simply recorded what he had been told by the petitioner's wife.

[17] The onus was on the petitioner to establish insurmountable obstacles, which has been described as a "high hurdle to be overcome by an applicant" by Sales LJ at the Court of Appeal stage of *Agyarko* [2016] 1 WLR 390. In the UK Supreme Court Lord Reed described it as a stringent test (*Agyarko* at para 43). It was for the petitioner to produce the medical evidence and establish his case to the tribunal's satisfaction. While there was material from the general practitioner the doctor was not led in evidence and so not cross-examined. The part of that medical evidence upon which the FTT judge made clear he could not rely was

the opinion expressed in relation to the position in Ghana. There was no information to suggest that the general practitioner had conducted any research on comparative healthcare or had any expertise or experience of the healthcare situation in Ghana. So far as any risk of flying was concerned the GP did not express a view that the petitioner's partner should not fly, rather he simply narrated what the ENT consultant had said about that. Accordingly, the two particular pieces of medical evidence that the petitioner founded upon were ones which the FTT judge had been entitled to disregard as they were evidence of matters on which the GP was not qualified to speak. Put another way, the petitioner and to some extent the GP could give evidence of what treatment the petitioner's wife requires. The petitioner was able to comment insofar as he had researched the matter on whether he thought such treatment would be available for his wife in Ghana but neither he nor the GP could express any view on whether that treatment would be equivalent to that available in the UK. Even on the matter of what treatment the petitioner's wife would require in Ghana it was unclear what it was specifically that she required and so about which there was any question in relation to its availability in Ghana. The GP could give information as to what as a matter of fact the petitioner's wife required by way of treatment but could not follow through and express an opinion on whether what was required was available in Ghana. In particular, it was simply not open to the general practitioner to state that regular specialist orthopaedic oncological surveillance was not available in Ghana. It was that which the tribunal has put to one side and it could not be said that such a conclusion was not permissible.

[18] On the issue of the alleged contradiction in paragraph 12, counsel accepted that it was not relevant to the assessment being made by the FTT that the petitioner's wife receives treatment in this jurisdiction and it was acknowledged also that it was unhelpful to have included references to her brother and step-father in the context of her medical condition.

However, the immigration judge's decision was not dependent on any finding that the petitioner's wife would remain in the UK, a matter that was clearly left open. The inclusion of irrelevant material did not affect the overall clear and cogent findings of the immigration judge. In any event, it was clear from paragraph 15 that the FTT understood the correct format which was to consider leave to remain outside the Immigration Rules as a discrete approach, and one what involved the relevant proportionality exercise. The petitioner's argument in relation to a case outside the Rules relied on the same issue as had been raised for insurmountable obstacles. If it was accepted that all matters had been fully taken into account in relation to the argument inside the rules then it was difficult to see how the petitioner could succeed outside the Rules, standing the requirement of taking the need for effective immigration control into account as part of the proportionality exercise and the provisions of section 117B of the 2002 Act.

[19] Turning to the entry clearance point and the proposed fourth ground of appeal, it was acknowledged that the FTT judge had expressed a view on an aspect of the case that was not put to him by the petitioner at all. It was clear from paragraph 16 of the judgment that the decision had already been taken to refuse the appeal and that the judge then expressed a hope in relation to a possible alternative route but without any actual view on outcome. The petitioner's argument in relation to entry clearance misunderstood what it was that the FTT judge was doing in paragraph 16 of the judgment. The matter of entry clearance was one for the respondent and there are detailed rules that the petitioner says he could meet, although he would always have to sit an English language test. There is no suggestion in any of the materials that the respondent has ever been asked to consider the issue of entry clearance in this case. It was an argument that could have been advanced by the petitioner but was not and so it was a speculative point. The difference between this

case and that of *Chikwamba* was that the "sensible reason" test could apply as an exception where a party could prove that she would qualify for leave as it did in the case of *MA (Pakistan)* v *SSHD* [2010] Imm AR 196. There, it was in the respondent's decision letter that there was an explicit acceptance that the claimant's application would be successful if he was applying for entry clearance. The present case was very different where there was no such simplistic acceptance. All that had happened was that the FTT judge had taken it upon himself to express a hope that if that route was gone down clearance should be granted. A suggestion made by a judge on an issue that is not part of the case cannot amount to a material error. The argument on entry clearance was wholly without merit and accordingly it did not matter that the UT had not made specific reference to it. In all the circumstances the petition should be dismissed.

Reply on behalf of the petitioner

[20] In a succinct reply Mr Winter submitted that there was no substance in the expert evidence point because the Home Office had not been represented before the FTT and so no issue of the admissibility of evidence arose. The tribunal clearly thought that the evidence from the GP was relevant and it was a question of what weight should be attached to it. If the evidence was reliable the tribunal required to give the same weight to it as it would to expert evidence but the issue of weight was a matter for the tribunal and the judge had found the evidence of the petitioner and his wife reliable. Any lack of expertise had to be seen in that context. Secondly, even if it could be said on the available material that there was treatment available in Ghana, the fact of the petitioner's wife's reduced hearing meant that she was at risk on a flight and so this ought to have been dealt with as a separate point from the availability of treatment in Ghana. On the contradiction point it was submitted

that the findings of the tribunal on insurmountable obstacles were inextricably bound up with its findings on separation of the couple. It was not sufficient for the UT to refer to "clear and cogent reasons" having been given by the FTT for refusal of the petitioner's appeal because that was a conclusion itself and not a reason for refusing permission to appeal. So far as entry clearance was concerned and ground 4 of the proposed appeal, if it was accepted that the UT had erred by failing to address this matter it was material because the onus was on the respondent to show that the outcome would definitely have been the same which was a high threshold – *Khan* v *SSHD* [2015] SC 583. The hurdle that the petitioner required to meet before the UT, in contrast, was arguability which was a relatively low threshold.

Discussion

[21] The general approach to a challenge of this sort is, as indicated at paragraph 2 above, well settled. It is not for this court to reach a concluded view as to whether or not the FTT erred in law, rather the issue is whether the grounds presented to the UT were arguable and so whether the UT erred in a material way in refusing permission to appeal. In order to reach a view on that matter, of course, the operative section of the FTT's reasons requires to be scrutinised; that section (paragraph 12 of the FTT judgment) is set out in full at paragraph [6] above. Dealing first with the submission that the UT erred in law in relation to the FTT's findings on the medical evidence, I acknowledge that this was a situation where the respondent was not represented before the FTT and so all of the medical evidence was available as material for the FTT judge to consider. Accordingly, I accept Counsel for the petitioner's submissions that no question of the admissibility of the material arose. It is slightly unclear the extent to which the FTT distinguished between evidence given by the

petitioner, his wife and in written form from the general practitioner about the nature of the petitioner's wife's illnesses on the one hand and the evidence of whether and to what extent the necessary specialist treatment would be available for the petitioner's wife in Ghana on the other. For example, the judgment records (at paragraph 6) that the petitioner explained how he knew about the lack of medical support in Ghana for the specialist treatment his wife required. The FTT judge was entitled to give little weight to the parts of the general practitioner's report that purported to give an expert view on such matters, when no qualifications, experience or research into those matters were indicated. However, the evidence of the petitioner and his wife was found to be credible and reliable, and although those witnesses had no specialist knowledge to offer on a comparison between the availability of a particular treatment in this country and that in Ghana, the petitioner had given information on the issue that he had gleaned from research. What had to be conveyed was whether or not, taking the evidence as a whole, the FTT judge considered that the petitioner and his wife could continue family life together in Ghana or whether there were very significant difficulties for one of them that would lead to that established family life being fractured. It is stated in terms in paragraph 12 of the FTT judgment that it was accepted on the basis of the medical and other evidence that there may be obstacles to the petitioner's wife living in Ghana. The issue was then whether those obstacles amounted to very significant difficulties as that term is understood following the decision in *R (Agyarko)* v *SSHD* [2017] 1 WLR 823.

[22] On the basis that the FTT judge had before him clear evidence of the serious health difficulties faced by the petitioner's wife that provided the backdrop for consideration of the test of unsurmountable obstacles as now understood, he required to address squarely whether *"…the applicant or their partner would face very serious difficulties in continuing their*

family life together outside the UK, which could not be overcome or would entail very serious hardship." (*Agyarko* at paragraph 45). It seems to me that the central issue in this case is not so much whether the FTT was entitled to rely only on the facts of the petitioner's wife's conditions and treatment, together with the general evidence from the petitioner about the availability of health services in Ghana, but whether the reasoning of the tribunal is illustrative of an error in law. If the FTT considered that it had not been established that very significant difficulties would face the petitioner's wife in going with him to Ghana, there should be a finding to that effect, with reasons.

[23] It is contended on behalf of the petitioner that the FTT's reasoning was internally inconsistent or contradictory. Counsel for the respondent accepted that, for the purposes of an unsurmountable obstacles argument, it would be an error if the FTT assumed that the parties would be separated with the petitioner returning to Ghana and his wife remaining in the UK to receive medical treatment because it would then be the difficulties presented by that situation that would require to be assessed. It is important to note in this context that paragraph 12 of the FTT judgment separates the obstacles that might be faced by the petitioner and those that might be faced by his wife (referred to as the sponsor in the FTT judgment). There is no difficulty in treating the parties separately at the initial stage. It is clear from *Agyarko* that it is contemplated that one of the parties might face serious difficulties in continuing family life together outside the UK when the other would not. Assuming for present purposes that, on the basis of the FTT's conclusion, there would be no significant difficulties for the appellant returning to Ghana, the question then becomes whether, because of difficulties that might be faced by his wife the couple would face very serious difficulties in continuing their family life together in that jurisdiction. It is on this aspect that the FTT's reasoning appears contradictory in several respects. The order in

which matters are addressed illustrates this. First, the conclusion stated at the outset of paragraph 12 is that the judge is not satisfied that the petitioner (appellant) would face insurmountable difficulties in returning to Ghana. There is a reference to the UK Supreme Court decision in *Agyarko* and there is then what must be taken as the consideration of whether the couple would face serious difficulties in going to Ghana together. It is accepted that they will suffer "perhaps some hardship" and the relevant part of the medical evidence is then narrated. There is an acceptance that the petitioner's wife relies on him to a considerable extent in relation to the application of her medication. Then there follows the statement about her being a British citizen entitled to healthcare under the NHS with a brother and step-father here who may be able to help her. Counsel for the respondent was constrained to accept that those statements were at best irrelevant in the context of an unsurmountable obstacles assessment. It seems to me, however, that there is a strong argument that, on the contrary, they are included as an integral part of the insurmountable obstacles reasoning in paragraph 12. The statements appear before the continued consideration of the medical evidence and the part in which the judge records that Dr Duffy has not demonstrated expertise in relation to comparative medicine and healthcare between the United Kingdom and Ghana. Following that part of the reasoning, the possible obstacles for the petitioner are recorded and the conclusion given that the obstacles **for him** do not amount to very significant difficulties. Then there is the conclusion that the petitioner's wife has indicated that she will continue to support him if he returns to Ghana to make an out of country application. This in my view serves to reinforce that the only reasoning given in relation to the petitioner's wife (as opposed to the petitioner) is expressed in terms that assume she will remain in this country, both with the earlier references to the NHS and her family here and also in the conclusion. Finally, the assumption of the FTT judge is further

evident in the last sentence of paragraph 12 which refers to the couple continuing their relationship using modern means of communication.

[24] It is apparent from the above scrutiny of paragraph 12 of the FTT judgment that, when the position of the petitioner's wife was considered by the judge in the context of giving reasons for his conclusion, it was not in the context of her returning to Ghana with her husband at all. Accordingly, it is arguable that what the judge concluded was that the petitioner's wife should remain in the United Kingdom while her husband was in Ghana. If so, the significant difficulties that they would then face would have had to be discussed and a view on the significance or otherwise of the difficulties reached. As indicated, Counsel for the respondent's position was that any references to the petitioner's wife remaining in this country were irrelevant and not part of the insurmountable obstacles assessment. On that hypothesis, the only stated relevant conclusion of the judge about the petitioner's wife was simply that there might be obstacles to her living in Ghana. There is no assessment of the gravity of those obstacles and whether they present significant difficulties as understood in *Agyarko.* A failure to conduct that exercise would be a material error.

[25] Turning to the UT's reasons, the apparently contradictory approach of the FTT judge highlighted above is simply not addressed. Counsel for the respondent submitted that there was no need to address the argument about internal contradiction because the reasons were not contradictory. However, I disagree that the inclusion of what was described as irrelevant material did not affect the overall findings of the immigration judge. It goes to the heart of the issue of a lack of clarity and cogency of those findings and the conclusion. The UT simply does not acknowledge the absence of any clear conclusion on whether the petitioner's wife will be able to go to Ghana with him. Had the FTT judge proceeded on the basis that, there being a lack of expertise on the part of the GP, he would proceed on the

basis that the specialist treatment the petitioner's wife requires is in fact available in Ghana then that could have been articulated in the judgment. This case can be distinguished easily from the situation that arose in *Mudibo* v *SSHD* [2017] EWCA Civ 1949. In that case, where a party's medical condition was relied upon in support of an argument that there would be insurmountable obstacles were he to be returned to Tanzania, the court found that on the basis of medical evidence that was brief and relatively old and where the insurmountable obstacles claim amounted to mere assertion, a claim for judicial review had no real chance of success and that permission to appeal had been rightly refused. In the present case there is quite detailed and recent medical evidence from the treating practitioner confirming that as a matter of fact the petitioner's wife requires specialist medical care, for which she has required to attend a clinic outside the area in which she lives. There was a concern that there would be risk to her hearing on a flight. That is the basis on which it was said that it would be very difficult for her to go and live in Ghana and that is the issue that the reasoning of the FTT does not apparently resolve. It was incumbent on the UT, in my view, to address the apparent confusion in paragraph 12 of the FTT's judgment between whether the hypothesis on which the decision was reached was the petitioner's wife going to Ghana or not. Accordingly, I consider that this aspect of the petitioner's argument is well founded. There is no difficulty with the brevity of the UT's reasons, but they fail to address this arguable point. Such a failure amounts to a material error.

[26] In light of the view I have reached, there is no need to address the question of proportionality, which may arise if insurmountable obstacles cannot be established. I note, however, that at paragraph 15 of the FTT judgment the absence of unduly harsh consequences for the petitioner and his wife are said to be absent "for the reasons that I have given above". That can only be a reference back to paragraph 12 which, as indicated, lacks

clarity on which of two possible scenarios has been used for the continuation of family life and assessment of obstacles within it. So far as entry clearance is concerned, counsel for the respondent accepted that the UT had failed to address directly the ground of appeal in relation to that. Had it not been for the view I have reached on a failure to grapple with the inconsistencies in paragraph 12 of the FTT judgment, I would not have regarded the error to address entry clearance as a material one, particularly as the issue of entry clearance had not been part of the petitioner's argument. That said, the FTT's view on entry clearance is illuminating, as it tends to support a conclusion that in addressing each of the arguments on insurmountable obstacles and leave outside the rules, the FTT judge was pursuing in his own mind an outcome whereby the petitioner would return to Ghana for a period without his wife in order to apply for entry clearance. That again serves to reinforce, in my view, that far from being irrelevant references, the statements in paragraph 12 about the circumstances that would subsist here in the UK for the petitioner's wife without her husband were an integral part of the FTT's reasoning on insurmountable obstacles. Counsel for the respondent having conceded that it would be an error on the part of the FTT if the judge had assumed that the petitioner's partner would stay in the United Kingdom, I am in no doubt that it is this aspect of the case, which I regard as eminently arguable, that should have been addressed in the UT's reasons. The failure to give a conclusion with reasons on a clearly stated set of facts would amount to a material error as it is not possible to say whether the outcome would have been the same had the FTT judge expressed a clear view on whether his decision was based on the petitioner's wife going to Ghana or remaining in the UK.

Disposal

[27] For the reasons given I conclude that the decision of the Upper Tribunal refusing permission to appeal should be reduced. I will sustain the petitioner's second plea in law and reduce the decision of 12 June 2018 reserving meantime all questions of expenses.