



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16825/2019

THE IMMIGRATION ACTS

Heard at Field House
On 15th July 2021

Decision & Reasons Promulgated
On 5th August 2021

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

MARIE MIGNONETTE FRANCE
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Metzger, Counsel, instructed by Huneewoth Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer
Interpreter: Ms Nazlee Butt interpreted the Mauritian Creole and English languages

DECISION AND REASONS

1. This is an appeal by a citizen of Mauritius against the decision of the respondent on 7 October 2019 refusing her leave to remain in the United Kingdom on private and family life grounds. The decision has previously been determined unsatisfactorily. I ruled that there was an error of law in an earlier decision and directed that the appeal be reheard in the Upper Tribunal and it came before me.

2. The parties have served additional material and as a result of that Mr Melvin was able to make concessions which are realistic and extremely helpful. Whilst making it clear that the case was very much contested Mr Melvin accepted that the appellant enjoys a genuine and subsisting relationship with her husband and that in the event of an entry clearance application being made now on the available evidence the financial requirements of the Rules would be satisfied. He did not accept that the appellant would meet the English language requirements. She had passed an appropriate test at an appropriate standard but that was in 2016 and so too long ago to currently satisfy the requirements of the rules and there was no evidence that a more recent test had been taken.
3. In order to set his concessions in context Mr Melvin then outlined, in an appropriately summary form, his submissions to support the conclusion that there was no disproportionate interference in the private and family life consequent on the decision complained of.
4. There were two important applications before me. The first was to adduce further evidence and was unopposed. The second was to rely on new matters which Mr Melvin insisted, rightly, were a matter for him but he did accept that new matters were raised and should be considered. They related to the appellant's relationship with her new grandchild who was born after these proceedings had commenced and so clearly was not a consideration when the application was determined.
5. At the core of Mr Melvin's argument is the contention that the Immigration Rules do not permit a person to change categories from a visitor to a person on a route to settlement as a wife and if the appellant wished to enter the United Kingdom as a wife then she should have returned to Mauritius and made an application for that purpose under the rules.
6. In outline he submitted that the matters relied upon by the appellant, although genuine, on their proper analysis did not amount to sufficient reason to outweigh the public interest in it forcing immigration control.
7. It was part of his submissions but not something he submitted to be pivotable, that the appellant had been deceitful when she entered the United Kingdom on a visit visa because it was her intention to remain and that factor, he submitted, was an aggravating factor and weighed against allowing the application.
8. I set these matters up here because, in a sense, they "drew the battle lines". I am very aware of a substantial skeleton argument from Mr Metzger and submissions which I consider below. These remarks are not predetermining the appeal but are set out by way of introduction so that my decision is easier to follow. That, at least, is the intention.
9. There was considerable argument before me about procedural matters. Mr Melvin was concerned that the appeal was listed for a remote hearing when there was contested evidence and the witnesses were not under the supervision of a solicitor but (I think) in their own home. There was no independent way of monitoring assurances that they would not communicate with each other and indeed at one point he cross-examined on the basis that such communication had happened.
10. I declined to disallow the evidence or to adjourn. Although it was clear to anyone reading the papers that there were areas of dispute, it did not seem to me that this was a case that was based on allegations of wholesale dishonesty or a sophisticated web of lies. It was

more a matter of nuance and weight and a lot of the important evidence was in documentary form. In my judgment the arrangements did not significantly inhibit a fair hearing and certainly not in a way that impacted on the likely issues to be resolved. The appeal went ahead. I took detailed notes of the submissions and arguments at the time but I do not find it necessary to set them out here.

11. It is accepted that the appellant has a history of visiting the United Kingdom. She came first in May 2012 and returned in 2013, 2015, 2016 and 2017, and, as far as I can see, it is accepted that she behaved responsibly and in accordance with her visitor's visa on each of those occasions. On the most recent occasion she asked to remain before her leave lapsed.
12. I turn now to the terms of the decision complained of.
13. I summarise the Reasons for Refusal. This confirmed that the application did not fail because of suitability reasons but because the applicant was not eligible because she was in the United Kingdom with leave as a visitor and the rules did not permit a visitor to apply to settle as a spouse. Additionally, the Secretary of State did not accept that the relationship between the appellant and her husband was genuine and subsisting. This, according to the Reasons for Refusal, arose from her stating in the application that she was not living with her partner.
14. The Secretary of State did not accept there would be "very significant obstacles" to the appellant's integration into Mauritius but this is not the point of this appeal. Although the appellant said it would be difficult to return because of a change in family circumstances it certainly was not suggested that she could not return to her country of nationality where she had lived for many years. The gravamen of the appeal is the assertion that she helped care for her husband who has glaucoma. The Secretary of State took the view that other people could provide the necessary care and there would be no "unjustifiably harsh consequences" in the event of her returning to Mauritius. Her children were adult. She claimed a relationship with her grandchildren but it was not claimed to be a parental relationship.
15. The appellant gave evidence before me and adopted statements made on 23 November 2019 and 12 July 2021. An interpreter attended the hearing. The appellant wanted to show her English language skills and, unusually, I permitted her to give her evidence in English and to turn to the interpreter for help if required. The interpreter had to interpret questions on several occasions but the appellant answered the questions in English intelligibly without need for further assistance.
16. In her statement of 23 November 2019 the appellant confirmed that she arrived in the United Kingdom in April 2018 as a visitor and subsequently applied for leave to remain on human rights grounds. She married her husband on 22 July 1978 and they have three children.
17. She outlined some of the problems they had had shared in their married life. The details are not relevant to my decision but add to the picture of a couple who are committed to one another and have been for about 43 years.
18. The appellant explained that she was qualified and worked as a registered nurse for 41 years in the public health sector in Mauritius and was a community health nurse.
19. The wording of paragraph 6 of the witness statement might be significant. She says there:

“I retired five years early in May 2018 prior to retirement age of 65 years old in order to be able to come to the UK to join my husband, children and grandchildren. My husband’s health has deteriorated severely and I need to stay to look after him.”

20. The appellant then explained how her husband had worked as a crane operator, that their children were entitled to British citizenship so they decided to send them to the United Kingdom for their education. The two older children are graduates and all three are in work.
21. The appellant explained that her husband suffered from glaucoma and came to the United Kingdom with their daughter in 2012 as his eyes were deteriorating. Medical treatment was not good in Mauritius. The health service there was overburdened and her husband took advantage of the much better health service available to him in the United Kingdom. It must be emphasised that he was entitled to that because he is British.
22. The appellant said at paragraph 11:

“The main reason for my appeal to stay is to join my family who are all settled here and to assist my husband on a daily basis as he is quite elderly and his condition keeps deteriorating. He constantly needs someone to accompany him to the GP and hospital appointments due to his vision and also someone to help him communicate as English is not his first language”.
23. She then outlined his medical conditions. As well as glaucoma he has a propensity to develop kidney stones and he has an enlarged prostate.
24. The appellant then outlined the kind of care that she provided in the United Kingdom. It is important that these things are not skipped over. It was Mr Metzger’s contention that, cumulatively, they were significant and important to the appellant’s husband’s welfare.
25. She said the first thing she has to do in the morning is help administer his eyedrops. This is something that she had to do several times a day.
26. She accompanied him to his medical appointments and accompanied him everywhere he needed to go because his vision was poor and his renal problems made it hard for him to walk and he needed physical support.
27. She also helped look after her then youngest grandson. She prepared his lunch and cooked and collected the oldest grandchild from school.
28. The appellant explained how living in Mauritius on her own was trying for her. She lived in a part of Mauritius with a fairly high crime rate and her age was making her vulnerable.
29. She also explained how her eldest son had suffered mental health problems.
30. She then gave details about cash payments on her retirement but as it is now accepted that the financial requirements of the Rules can be met I see no point in considering further that strand of evidence.
31. In her supplemental statement dated 12 July 2021 she confirmed the contents of her earlier statement and then said how she had built strong bonds with her grandchildren. At paragraph 3 she said:

“My husband is 70 years old; he has various medical complications and needs daily care. My husband suffers from glaucoma and cataract. He needs me mostly to administer his eyedrops of which he now has eight different eyedrops that need to be administered

multiple times at different times of the day. I accompany him to his medical appointments which is now very frequent and has moved further away from her house. Due to the specialist care required, we now need to attend the Peterborough City Hospital which is about 27 miles away from our house each way and takes us two hours to get to on three different bus exchanges; compared to Hinchingsbrooke Hospital which was within walking distance from our house. We must take six buses to get there and back, and he can barely even see the bus number and find his way around the hospital”.

32. She also confirmed that she did housekeeping and other chores for her husband.
33. Her husband had further surgery in his right eye in March 2021.
34. She then confirmed she had nothing left for her in Mauritius. Her mother had died in January 2020.
35. Her daughter gave birth to the appellant’s grandson in February 2021. She described him as “not well” and currently receiving hospital treatment in Cambridge. His mother had moved to be with the appellant and others because she needed support and the appellant could not leave her husband. She said her daughter was suffering from postnatal depression and sometimes breaks down and cannot cope.
36. The appellant then explained that she was getting older and finding life more stressful. She then said that travelling back and forth from Mauritius to the United Kingdom would be expensive. A return plane ticket cost four months’ pension. There are also restrictions on travelling. At the time of writing Mauritius had closed its borders for the second time in the year.
37. She then explained that her husband’s physical health had deteriorated significantly since the case was last before the courts. In March 2021 the consultant said that, unless there was urgent treatment, her husband would lose the sight in his right eye and there was surgery planned for March 2021 and also for cataract surgery in July 2021.
38. The appellant then talked about the problems arising from his recurring kidney stones. Essentially they caused pain. Procedures were undertaken to break up the stone but she explained how “on the numerous occasions he has had this procedure, he has needed to have a stent inserted through his water passage and left inside him and then required more personal care than only myself as his wife was able to provide.”
39. It is expected that there would be surgery soon for his enlarged prostate.
40. They had got used to each other in the United Kingdom and it would be hard for him to adapt to someone else. He would struggle without her.
41. She then explained that she had no meaningful contact left in Mauritius, after her mother’s death. She said that she had a house in Mauritius and had inherited it from her father. When she left one of her nephews asked temporarily to live there and has now made it his own home and does not want to move out. This has led to tension between her and her brother who are no longer on speaking terms.
42. In an effort to address the “covid crisis” the authorities in Mauritius had introduced extremely severe restrictions on people’s liberty, such as limiting them to only one day a week out of the house to do essential shopping and the borders have been closed twice since the pandemic.

43. She also needed to support her daughter. I consider later the evidence about her grandchild. Suffice it to say here that he is a very poor little boy.
44. The baby's father is self-employed and it is very difficult for him to provide any kind of practical care and attend to his job. The appellant described herself as a strong anchor for the whole family.
45. The appellant was cross-examined.
46. I have indicated above that I considered the wording of paragraph 6 of her first statement to be potentially significant. Mr Melvin took her to it. She said there:

"I worked as a registered nurse for 41 years in the public health sector in Mauritius and obtained a Certificate in Community Health Nursing in 2005 and a Diploma in Nursing in December 2015. I retired five years early in May 2018 prior to a retirement age of 65 years old in order to be able to come to the UK to join my husband, children and grandchildren. My husband's health has deteriorated severely and I need to stay to look after him".
47. It was put to the appellant that whilst it may be the case that her husband's health has deteriorated she had said that she retired early in May 2018 before her usual retirement age to travel to the United Kingdom to join her husband and family. She was asked if that was right why she had applied for a visit visa? The appellant claimed not to understand the point. She then said that she had come on a visit visa because it was not her intention to stay and she was asked to stay when she saw her husband and realised how his health has declined.
48. She accepted that she was in communication with her family and was asked to explain why, if that were the case, she did not realise how her husband's health had deteriorated. She replied that being told is not the same as seeing it with your own eyes.
49. She was asked why she had not applied for a visa to settle as a wife. She said she had retired because her health was not good and she could not work because she had high blood pressure and her children and husband were far away.
50. She was then asked what she had planned to do when she had returned to Mauritius if, as she claimed, it was her intention to return. She had no real answer to that.
51. She was then asked directly if it was her intention to circumvent the Rules and she denied that.
52. She accepted that she had sold her domestic appliances to her nephew who was using them but said that was after she had applied for her visa to settle. She said that her husband needed her more than had been the case previously.
53. She was then asked why, when she saw the state of her husband, she did not return to Mauritius promptly and then apply to return as a spouse. She said she was worrying about her husband's health which was deteriorating and about the children's limited ability to provide him the care that he needed. She was his wife and also a nurse and could look after him better than anyone else and wanted to be with him.
54. The appellant was asked if she had made inquiries about how long it would take to get a spousal visa and she said she did not know.

55. She was not re-examined but at the end of her evidence she offered the information that she had been looking after her mother who died in January 2020.
56. The appellant's husband, Mr Jean Aurele France gave evidence and adopted his statements of 23 November 2019 and 12 July 2021.
57. In his first statement he introduced himself as the husband of the appellant who, he said, had arrived in the United Kingdom in April 2018 on a visit visa from Mauritius and had remained there.
58. He explained that he had been born in Salomon Island in August 1950. He had met his wife about 50 years ago and they had been married since July 1978. He said that he had British citizenship as a result of being born on the British Indian Ocean Territories and then forcefully evicted from his homeland and "deported" to Mauritius to make way for a UK-US military installation. His children all received British citizenship and settled in the United Kingdom as they were entitled to do.
59. He then said he relied heavily on his wife for his day-to-day tasks, especially administering his medicines and he needed her to be with him. He described her as his "rock and pillar". He was particularly grateful for the assistance given to him by administering eyedrops and also personal care. She accompanied him when he left the home and as he was losing his sight that was particularly advantageous.
60. He referred to his propensity to develop kidney stones and the treatment he was expecting for that.
61. He then explained how his wife assisted in the childcare of their grandchildren.
62. He said he could not return to Mauritius. He had deteriorating vision and the health service there was not adequate.
63. He explained that he needed eyedrops twelve times a day and his wife was able and willing to do that and understood what was required.
64. He explained that from 2012 to 2018 he had spent a long time apart from the appellant. They were careful to comply with immigration control. Either he would go to Mauritius or the appellant would come to the United Kingdom.
65. In his more recent statement he repeated some of the things said earlier, pointing out that he was now married for 43 years. He described his health as "significantly deteriorating" and said he could barely see in his right eye and his left eye had had three procedures and surgeries and had developed a cataract, as well as the glaucoma. He explained how there was very high pressure within the eye and he was given emergency tablets in March 2021 to try and save the sight of his right eye.
66. He continued to suffer from recurring kidney stones and the need for a stent to be inserted that required intimate personal care.
67. He also had an enlarged prostate.
68. His wife continued to help run the family in the home and look after the grandchildren.
69. He explained particularly that their youngest grandchild, born in February 2021, had various medical complications and that the child's (obviously their daughter) had come to live with them so she could provide care for the grandchild and their daughter Mariam.

70. He regarded the borders to Mauritius being closed in February 2021.
71. He could not imagine managing without his wife. She was a great help to him.
72. In answer to questions in cross-examination he confirmed that he had arrived in the United Kingdom in 2012. He had eye problems then but his condition was worsening.
73. It was put to him he had given the impression that treatment is better in the United Kingdom. He said he had been having treatment in Mauritius but he was encouraged by the doctor in Mauritius to get treatment in the United Kingdom. He then almost immediately changed his answer to say that the doctor in the United Kingdom told him that the treatment was better than he would get in Mauritius.
74. He had always lived with his children. He had returned to Mauritius three or four times between 2012 and 2018. When he had gone to Mauritius he had stayed with family members.
75. He denied that there was any intention for his wife to settle in the United Kingdom when she came as a visitor in 2018. The plan was to arrive in April and return in May but when she arrived she changed her mind.
76. There was then some confusion about when his wife retired. Mr Melvin accused him of responding to "off camera" prompting which he denied.
77. He was not re-examined.
78. The appellant's son Mr Jean Martin Luther France gave evidence and adopted statements made on 25 November 2019 and 12 July 2021.
79. In his first statement he explained that he was born in 1988.
80. His mother arrived in the United Kingdom in April 2018 and remained there. She had applied for leave to remain on human rights "family life" basis.
81. He set out facts about his parents' personal history which is helpful to understand the case but did not add to the witness statements already considered.
82. He explained that he left to live in the United Kingdom in 2006, his brother joined him in 2010 and his sister in 2012. His father came to the United Kingdom with his sister but his mother could not join them because she was not qualified. He felt it right that they should be entitled to live together after such a long marriage.
83. He outlined his father's medical conditions but this evidence too has been considered. He explained that as well as looking after his father's medical needs and supporting him as he had lost his sight his mother helped her husband with translation and communication.
84. He then said how the appellant was important in the life of her grandchildren, being his two boys.
85. He made the point that his mother had visited the United Kingdom on six month visas on many occasions, often taking unpaid leave from work to extend a holiday but she had always returned to Mauritius when she should and have never overstayed. She came from a rather deprived area of Mauritius where there was much crime and it was difficult for her on her own to secure the house properly.
86. His mother's health was also deteriorating and she coped on her own.

87. He then gave evidence about their financial circumstances but this is not controversial and he said that his mother was learning English.
88. In his more recent statement he adopted the earlier statement but said he now had a third child and appreciated his mother's involvement in the life of that grandchild too. His father's health was poorer and he required more assistance. He also explained how after his sister Mariam had given birth it was a very difficult time. There were lots of severe medical complications, including postnatal depression.
89. He insisted that his mother had never intended to overstay the visit visa but his father was "terribly ill" when the visa was about to expire and that prompted her to remain.
90. Mr Melvin pointed out that the witness had said in his statement that his mother retired in April 2018. He claimed not to be able to recall if that was the same month as she came to the United Kingdom but he insisted she retired after she had arrived and after she had seen how his father's health deteriorated. He claimed not to have known how long his mother spent contemplating retirement.
91. He had said that he had been looking after his father before his mother arrived but it was difficult to meet his father's needs and do his work.
92. He asked if he could explain why his mother had not returned to Mauritius and applied to return as a wife. His answer might have been very revealing. He said:

"Naivety, not thinking that she would not be able to change the basis of the stay, not understanding the importance of capacity. She knew they had the money and they had been married for 40 years and felt it was the best to be here."
93. He added that it costs in the thousands of pounds to go to Mauritius and he did not think it would be a problem to apply whilst in the United Kingdom. It was put to him that this suggested the family had not taken advice before his mother applied for her visit visa. He said that was not necessarily the case but he did not expect there to be a problem until advised by solicitors.
94. He was not re-examined.
95. Maryam Ketty Axelle France gave evidence and adopted statements dated 25 November 2019 and 12 July 2021.
96. In her statement of 25 November 2019 she commented on the appellant's personality and her importance to the family and the difficulties the appellant would have on her own.
97. In her more recent statement of 12 July 2021 she set out some of the difficulties she experienced in her recent pregnancy and her son's poor health. His medical conditions include neonatal seizures, kernicterus (which I understand to be a kind of brain damage that can cause cerebral palsy and hearing loss in babies and sometimes problems in vision), patent ductus arteriosus (which I understand is a condition that was once commonly called "hole in the heart") and presumed ABO incompatibility (which I understand is a difficulty in receiving blood by transfusion that makes surgery particularly dangerous).
98. Additionally the witness said that she suffered from postnatal depression.

99. Her partner was supportive but had a high pressure job and she had moved to be with her parents because the baby needed 24 hour supervision. Her mother had been extremely helpful as indeed she was with the other grandchildren.
100. She said that when her mother came last to the United Kingdom she had not intended to overstay a visit visa but her father was unwell when the visa was due to expire.
101. She described her mother as the “glue” that held together the family.
102. She was cross-examined.
103. She could not remember when her mother retired as a nurse.
104. She said that her son was suspected of a variety of medical conditions and may be assessed sooner than was thought but there were hearing problems, movement problems and other things.
105. She said that her mother had a brother in Mauritius but did not really talk to him. She thought her mother sold the house in about 2018 but was not sure.
106. I do have other written evidence which I have considered, including a statement from the appellant other son and from the appellant’s daughter’s partner but these can be summarised fairly as “more of the same” and do not add much if anything to the evidence. Nevertheless I am aware of them and have considered them.
107. It is right to record there is medical evidence supporting the evidence I have noted about the condition of both the appellant’s husband and grandchild.
108. I remind myself this is a human rights based appeal turning on Article 8 of the European Convention on Human Rights. It is for the appellant to prove the facts on which she relies on the balance of probabilities and that the decision complained of interferes with the human rights, in this case the private and family life, of the appellant and/or those who depend on her presence in the United Kingdom. Once that is established it is for the Secretary of State to justify any interference. If it is not proportionate it is not lawful.
109. The balancing exercise between public interest and individual rights is illuminated by the Rules and I am obliged to take account of part 5A of the Nationality, Immigration and Asylum Act 2002.
110. It is, I think, common ground that the appeal cannot succeed under the Rules. The appellant does not have the necessary status for transfer to leave as a spouse. That said, I am satisfied that she substantially satisfies the Rules in other respects. The financial requirements of the Rules are clearly met. Mr Melvin has conceded as much and has made the concession after conscientious inspection of the evidence. There is nothing to discuss on this point but it does not the end of the matter. The appellant is also required to prove her competence in the English language by passing a particular test at a required standard. She has not done that. The appellant has provided a certificate but it is now old and no longer applicable because of the effluxion of time. Nevertheless since then she has spent time in the United Kingdom and by her performance before me has proved her claim to be using the English language and using it competently. I can think of no sensible reason to suspect that the pass that she achieved when she took the examination in 2016 would not be achieved if she sat the test again. The appellant speaks English to the required standard even though she does not have the necessary paperwork to prove it.

Mr Metzger has pointed out that in any event the appellant will be 65 fairly soon and no longer obliged to comply with the language Rules. It is likely that that if she did return to Mauritius she would not make an application until after her 65th birthday in September.

111. I am particularly anxious to work out what is the due weight to give to the public interest requirement that the appellant is not permitted to change categories.
112. This is illuminated by my conclusion that the appellant and her witnesses have not been completely frank with me. If it were the case that the appellant entered the United Kingdom intending to return and then changed her mind because of the condition of her husband then she could have said so clearly and unequivocally in her statement and she did not do that. I am satisfied that at the very least she had the possibility of remaining in the United Kingdom in her mind when she last applied for a visa.
113. There is no correspondence relating to her retirement or transfer of assets in Mauritius that might indicate when she formed the intention to remain in the United Kingdom.
114. Her children cannot truly know her intentions but I found that her son was particularly credible when he talked about the family not realising how difficult it would be to change capacity. Indeed it is hard to see from the perspective of an honest lay person unaware of the requirements of Immigration Rules that change of capacity is not a straightforward matter. Broadly it is not permitted at all between certain categories and “visitor” to “spouse” is such a category.
115. I did ask Mr Melvin if he could explain the importance of not being able to change capacity but he could do little more than repeat that the Rules made the requirements they did and had been approved by Parliament.
116. That of course is undoubtedly correct. I have reread the speech of Lord Brown of Eaton-under-Heywood in **Chikwamba v SSHD [2008] UKHL 40**. Lord Brown was clearly aware of the relevant policy embodied in the Rules but, if I may say so, appeared to struggle to see the rationale for it. It was not easy to discern just what evil was being addressed by making it hard for someone to change categories. Although assisted by very experienced Counsel, not much was done to satisfy his concerns, leading him to say at paragraph 44:

“Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an Article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad.”
117. This appeal does not primarily involve a child. However the obligations under Article 8 are to promote a person’s private and family life and that includes promoting a person’s marriage. Where married people wish to live together the law should favour that outcome because living with a spouse is an important human right. This does not mean that all foreign nationals can live in the United Kingdom with their British resident spouses. The “right” is qualified. The most obvious qualification concerns finances but those are met in this case. Another concerns the person’s willingness to integrate into the United Kingdom and this is typified by their willingness or ability to learn the English language. This appellant clearly satisfies those requirements.
118. The requirement she does not satisfy is the requirement to apply from her country of nationality. With respect to Mr Melvin I struggle to see the point of this. Of course I respect the Rules but I am required to conduct an Article 8 balancing exercise and there is

little before me which indicates the sort of weight I ought to give to that element of public policy reflected in the Rules.

119. I have considered too Mr Metzzer's skeleton argument and submissions. I find little in part 5A of the 2002 Act that assists me. I recognise how effective immigration control is in the public interest but that does not really illuminate the question that is troubling me in this case. Clearly this is not a case of an appellant being a burden on the taxpayer or unable to integrate into society.
120. I make it plain that the appellant has established "family life", not only with her husband but also with her adult children and grandchildren. I accept that evidence that the appellant is a pivotal part of their lives and so is important to them all and they depend on her at least to some extent because of the care that she provides. However, not all family life attracts equal weight. The relationship between her adult children and her grandchildren is not something I find particularly significant save for the present relationship between the appellant and her daughter and her daughter's son. Clearly grandparents often play an important part in the lives of their grandchildren and indeed their own children as supporters and sometimes surrogate parents, but these are not ordinarily reasons to allow someone to remain in the United Kingdom on the basis they have acquired a human right and are even less likely to be reasons to say that a short interruption to comply with procedures is disproportionate. If I may be permitted to paraphrase Mr Melvin's closing submissions, a person does not acquire a human right to remain in the United Kingdom by meeting her grandchildren from school. The weight needed to overbalance the ordinary requirements of the immigration rules should not normally be given to relationships of that kind.
121. The appellant's relationship with her daughter and her grandchild is rather different. I have to make the decision based on how things are when I make my decision and at the date of hearing that relationship is particularly important both between the appellant and her daughter and the appellant and her grandson because the grandchild and his mother have particular needs which the appellant answers. I do not suggest that this should be seen as a long-term solution to their problems. I fear that the grandson might need a lot of support for a long time to come but the mother will be more able to meet his needs as she recovers from the trauma of giving birth. However presently that relationship is important and at the time of making the decision I give it significant weight.
122. However the really weighty factor here is the relationship between the appellant and her husband. It is clear that he could manage without his wife for a while. He is not a helpless man. He is a man who will face up to his difficulties without his wife's assistance as he has done previously but his health is declining. He will be supported by his children in the United Kingdom and will, no doubt, be able to access other kinds of care although I do agree with Mr Metzzer that it is hard to see the public interest in increasing the appellant's husband's dependency on the state for healthcare. If there is no alternative he will do that but there is an alternative and the alternative is the care of his wife who is not only emotionally well equipped by reason of a long marriage but is also particularly trained by reason of being a nurse. It would be an enormous interference with his "private and family life" to be deprived of that support and very hard to justify when she is so suited to provide it. Regrettably I do not know how long the separation might be. Obviously the longer the separation the greater the interference and the harder it is to

justify. No proper evidence was adduced on this and that is an omission in the appellant's case that necessarily weakens it. It is regrettable that she did not address this point. I do accept that at the time of making my decision she would not be allowed into Mauritius because that is the unchallenged evidence before me. I do not know how long it would take to process an application if she left and I do not know how she would manage in Mauritius in the event of her return. I accept that her relationship with her family in Mauritius is estranged. She does have access to some capital. She could maintain herself if that were necessary but it would be undesirable if that reduce her funds to the point where she could not satisfy the financial requirements of the Rules. I do not know if that is the case as it has just not been considered and I have no evidence about what it might cost.

123. Doing the best that I can, I am satisfied that if there was immediate separation the appellant could not return to the United Kingdom for some months and whilst the appellant and her family in the United Kingdom could cope without her it would be a burden. Her husband's medical needs are significant. Eyedrops have to be administered many times every day and have to be administered with some precision. I accept Mr Metzger's submission that I should not treat the need to medicate as if it involved a proprietary eye solution that people might have because they experienced sore eyes. The medication requires precise measuring and delivery and the appellant's husband cannot see what he needs to do.
124. Further I find that declining sight anticipating blindness is a very fearsome thing and not something to be done by the appellant's husband on his own if that can be avoided by proper means. It is a problem that benefits from practical assistance rather than emotional support from afar.
125. I also understand that the very real possibility of recurring kidney stones and the provision of a stent creates highly personal needs that the appellant would prefer to share with his wife, especially as she is a nurse, rather than with his children or strangers. I do not make much of this. Many people cope with all kinds of personal indignities when faced with medical needs but it is another element in the case the points in favour of allowing the appeal.
126. I am persuaded that refusing leave and the associated need for the appellant to depart from the United Kingdom would interfere significantly with her and her husband's private and family life. Other people would be impacted. Presently her daughter and grandchild depend on her to a high degree; much more than her other children and grandchildren who simply benefit from her input. Depriving them of her immediate care would have a significant interference that on its own might be sufficient to allow the appeal but the decision does not depend on that.
127. I cannot work out what public benefit there would be in requiring this particular person in all of the circumstances to go back and make an application.
128. I hope it is understood by the appellant and anyone who might be interested in the case that my decision to allow the appeal is not to be seen as some sort of green light for flouting the Immigration Rules. Whatever Parliament's reasons are Parliament has endorsed a system of Immigration Rules which strongly discourages transfer of category. If the appellant had taken advice in Mauritius when, I am quite satisfied, the idea of

settling in the United Kingdom was beginning to dawn, she may well have achieved what she wanted much more easily than has proved to be the case. In particular, has Mr Melvin pointed out, the appellant would be on the “five year route”, rather than the “ten year route” to settlement.

129. Nevertheless, the appellant’s husband suffers from set of significant and disabling health difficulties. I am persuaded that the decision complained of amounts to a disproportionate interference with the appellant’s and her husband’s private and family life and I allow the appeal.

Notice of Decision

130. This appeal is allowed.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 23 July 2021



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU 16825 2019

THE IMMIGRATION ACTS

Heard at Field House
On 5 January 2021

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE PERKINS

Between

MARIE MIGNONETTE FRANCE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Metzger, Counsel instructed by Huneewoth Solicitors

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

REASONS FOR FINDING ERROR OF LAW

1. This is an appeal against the decision of the First-tier Tribunal dismissing the appeal of the appellant, a female citizen of Mauritius against the decision of the Secretary of State on 7 October 2019 refusing her leave to remain in the United Kingdom on private and family life grounds. There is no need for and I do not make any order restricting publicity.
2. The short point is that the appellant entered the United Kingdom as a visitor as she had done previously but this time she did not return at the expiration of her leave but wanted to stay. She says, in extreme summary form, that her husband is poorly, his health has deteriorated and that it is necessary to support him and indeed her grandchildren and son

in the United Kingdom and that refusing her permission interferes disproportionately with her private and family life and their private and family lives.

3. It is also part of her case, although not established on the evidence, that she would be able to satisfy the Rules for admission as a wife in the event of her return to Mauritius and making the application.
4. The Secretary of State is very concerned that the public interest in not permitting people who enter as visitors to remain in any capacity and for any reason is fully recognised. Of course it does not follow that no case can succeed on Article 8 grounds but, according to the Secretary of State, it should not be an easy route. I note that but her general concerns are of limited importance when considering the decision that has been made.
5. Mr Metzger subjected the Decision and Reasons to a very thorough and searching dissection and made several points but without being disrespectful to them I think they can be summarised by considering paragraph 38 of the Decision and Reasons. There the judge said:

“The appellant submits that she has a close relationship with her children and grandchildren. I am prepared to accept that an Article 8, family life, is engaged.”
6. This at the very best is equivocal. It is certainly open to the reading that the judge found that there was a family life existing between the appellant and her children and grandchildren. As Mr Metzger recognised in his addresses to me this, on the face of it, is not an obvious finding but it is there. It can only be a rational finding if it is accepted that there is something more than ordinary human family concerns in the relationship with the adult children and the grandchildren. Whilst the judge appears to have accepted that there is “family life” and I find, with Mr Metzger’s help, the that judge lost sight of that when he came to the balancing exercise. There is reference for example to dealing with adults but that is not particularly important if the adults enjoy “family life”. The judge has not explained what he means about the family life he appears to have found exists with the appellant and her grandchildren.
7. The fundamental point is that the findings are inconsistent with the superficiality of the balancing exercise and although Ms Isherwood has characteristically been very determined in her submissions and has made perfectly realistic and sensible points, the problem identified at the start of this paragraph is one that will not go away and, I find, undermines the determination as a whole.
8. Another matter that concerns me is the absence of clear findings about just what support the appellant gives and what support her husband needs. There is evidence that is clear that he has certain health problems. The known health problems do not of themselves seem particularly severe. There is glaucoma but that is a condition that covers a very wide spectrum of disability from something that is little more than concerning although possibly very concerning because of its long-term consequences to something that is very severe indeed. I do not think the appellant is at the higher end of the scale but there have been no clear findings.
9. Mr Metzger has emphasised that there was evidence that the appellant’s husband depends heavily on his wife. This is something about which clear findings need to be made. The judge has indicated how some people manage perfectly well on their own, as this

appellant may have done, but that is not really the point. There is a subjective element here and there should be a clear finding on what the appellant's husband actually needs her to do, not if similarly disabled people would be dependent but if in fact there is dependency here and that will illuminate but probably not determine the balancing exercise.

10. I am also concerned about findings that suggest that the appellant's son should be prepared to interrupt his education to the point of suspending his university course as a stopgap while the appellant makes an application to return. Again this might be wholly consistent with a decision to dismiss the appeal but it is not obviously right and it is not explained. The finding needs to be explained and considered, rather than reduced to an observation which seems to be lost in the balancing exercise.
11. If I am not careful I will fall into the danger of doing what I set out to avoid at the start which is to make an overly detailed examination of the decision. The point that I stand by and the point that satisfies me that the decision is unsound is that the findings that there is family life are inconsistent with the lack of detail shown in the balancing exercise.
12. There is one finding here that must be preserved. It is the finding set out in paragraphs 36 and 37 of the Decision and Reasons and that is that the appellant had not shown she could not return to her home in Mauritius. This finding was not challenged before me nor is there any reason why it should have been and will be a starting point in any further reconsideration. As I have indicated in argument I regard it as a **Devaseelan** point (see Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702). It is capable of being shifted by further evidence but that is where any further reconsideration must start.
13. I also make it plain that there has been no finding that the appellant would in fact satisfy the requirements of the Rules for return as a wife. It may well be that she does but as I understand it the **Chikwamba** points (see Chikwamba v SSHD [2008] UKHL but also **Younas (section 117B (6) (b); Chikwamba; Zambrano)** [2020] UKUT 129 (IAC)) really depend on a clear finding that a person does satisfy the Rules and the balancing exercise must be informed by a clear finding. This might be something that the parties can sort out before a further hearing and the Secretary of State be invited to concede the point provided that satisfactory evidence has been made. The appeal really should not be decided on an assumption. There should either be a concession or there should be evidence and a clear finding.
14. I have decided to set aside the decision of the First-tier Tribunal for the reasons I have given. The matter will be heard again in the Upper Tribunal because I find there are matters of some subtlety in the appeal that would perhaps benefit from a hearing here.
15. I make my decision now but I direct that the appeal should not be set down until the first open date after 5 March. This is because the appellant has indicated that she wishes to serve further evidence which may well be of assistance. I am not saying that evidence should be admitted. I am saying that I understand why it might be an entirely sensible application. Some of the fresh evidence is before me and I intended to give the appellant more than enough time to get everything in order and make a timely application before the hearing to rely on further evidence if that is what she wishes to do.

16. I direct that an interpreter in Mauritian Creole is available and I invite the appellant's solicitors to indicate if that is not required.
17. Mr Metzger has had a long involvement in this case. I direct that it should be listed at his convenience if reasonably practicable.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 15 January 2021