



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/25712/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 1 April 2016**

**Decision & Reasons
On 28 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR HENRY RUDOLPH LEWIS
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer

For the Respondent: Mr R Sharma, Counsel, instructed by Perera & Co
Solicitors

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department. The respondent is Mr Rudolph Lewis, a Jamaican national born on 6 January 1966. However, for the sake of convenience I shall continue to refer to the parties as they were referred to before the First-tier Tribunal. The Secretary of State will continue to be called the respondent and the appellant, Mr Lewis, who is the respondent, will continue to be called the appellant.
2. The appellant appealed against a decision of the respondent to refuse to allow him further leave to remain on the basis of his relationship with a

British citizen and it was found that it constituted insurmountable obstacles of them being removed as a couple and to continue their family life outside the United Kingdom. First-tier Tribunal Judge Raymond allowed the appellant's appeal on 10 September 2015.

3. The respondent was granted permission to appeal by Judge of the First-tier Tribunal Frankish on 22 January 2016 who stated that it is arguable that the judge materially erred in law by finding that an illegal immigrant's relationship with a British citizen grown-up child amounted to insurmountable obstacles to their continuing their relationship in his home country
4. The First-tier Tribunal Judge in his findings in his determination dated 28 August 2015 stated the following, which I summarise. It is not disputed that the appellant entered the United Kingdom on 20 January 2003 with leave to remain as a visitor valid until 14 July 2003. The appellant relied on his application for the present appeal upon his relationship with Mrs Faith Marcia Forbes-Johnson, his sponsor, who is a naturalised British citizen as of 19 July 2005 but was born in Jamaica on 19 July 1970.
5. The judge found at paragraph 32 that whilst the immigration history of the appellant is not to his credit and not least because he would seem to have formed a previous relationship with a woman called Ruth from whom he claims to have hidden his immigration status because he did not trust her in this regard that overlapped to some extent with the one he has since formed with the sponsor. Given that the respondent concedes the genuineness of the present relationship which meets the criteria of suitability and eligibility under the Rules save that of being illegally in the United Kingdom (E-LTRP.2.2) his position therefore falls for consideration under EX.1, which is not freestanding, and he referred to the case of **Sabir (Appendix FM - EX.1 not free standing) [2014] UKUT 00063 (IAC)**.
6. At paragraph 33 the judge states the following:

"I accept that there would be insurmountable obstacles to the sponsor relocating to Jamaica with the appellant if he were removed so as to continue to enjoy their family life together as a couple. The sponsor Ms Forbes-Johnson has obviously built her core economic life in the UK where she has lived for some seventeen years since 1998, as evidenced by her 2013 P60s, and where her daughter Anna-Kay born in 1988 has grown up since age 12 with whom I accept she has a very close bond facilitated by their close proximity to each other, even if her daughter is living a separate adult life and where they both have very extensive family connections as evidenced by the letters of support cited in the preceding."
7. At paragraph 34 the judge stated that in the circumstances she accepts that it would be unduly harsh and unreasonable to expect the sponsor to turn her whole world upside down so as to be able to continue her family life with the appellant in Jamaica where it must be quite evident on any commonsense basis that she would not be able to rely upon the substantial economic and emotional roots that she has the benefits of in the United Kingdom. The judge agreed with the respondent that the

appellant cannot qualify under paragraph 276ADE(vi) as to private life on the basis that he has lost all ties with Jamaica.

8. The judge stated that as already observed the appellant has chosen to stay illegally in the United Kingdom for some ten years which he could have used to re-establish himself in Jamaica. He did not accept that the appellant had to stay in the United Kingdom. Many people, around the world, the judge stated have to rebuild their lives after natural catastrophes. The judge stated that the appellant had succeeded under the Immigration Rules and he did not consider that there are any exceptional circumstances to justify consideration of the appellant's position outside of the Immigration Rules. The judge allowed the appellant's appeal under the Immigration Rules.
9. The respondent's grounds of appeal state that the judge made a material misdirection in law. The reasons given by the judge are not adequate to amount to a finding that there are insurmountable obstacles that would prevent the sponsor and the appellant leading their family life outside the United Kingdom. These amount to the facts that the sponsor is British, has family and a job here and that they both wish to continue to live in the UK. The sponsor has an adult daughter in the UK but as the judge states she is "living in a separate adult life". There was no evidence of ties beyond normal emotional ties or of any individual dependency.
10. The Secretary of State relied on the case of **VW and MO (Uganda) v SSHD [2008] UKAIT 00021** at paragraph 34 where it is stated:

"Again and again the court has emphasised that an applicant cannot normally succeed if all he can show is that he or she would prefer to conduct his family life in the host member state. More must be shown than that relocation abroad would cause difficulty or hardship."
11. The judge continued that the appellant and his wife have sought to rely on the fact that his wife is British and has family and a job here as insurmountable obstacles. The Judge of the First-tier Tribunal agrees with this. It is respectfully submitted that in making this finding the Judge of the First-tier Tribunal erred in law because insurmountable obstacles is a high threshold and an individual's preference or choice does not meet the requirements. The sponsor could maintain her relationships with the appellant albeit with the modern modes of communication would be a little different. Furthermore, these relationships could be maintained through visits.
12. At the hearing I heard arguments from both parties as to whether there is an error of law in the determination. Mr Avery said that the key is insurmountable obstacles and what exactly that means. He said that the judge's findings are at paragraph 33 of the determination and accepted that they are very brief. The judge found that the sponsor has built her life in this country with an adult daughter. This is the only reasoning of the judge. The judge has not properly applied the test or given sufficient reasons as to why this test was met given that it is a high test. He has referred to the case of **Agyarko & Ors, R (on the application of) v The Secretary of State for the Home Department [2015] EWCA Civ 440.**

Mr Avery said that it is difficult to see that the factors identified in the appellant's appeal can satisfy the test as set out in **Agyarko**.

13. Mr Sharma relied on his skeleton argument and said that the respondent's appeal is a veiled rationality challenge. He agreed that the key issue in this appeal was insurmountable obstacles. The judge, he said, identified the full test at paragraph 19 of the determination where he states: "Whether the sponsor faces insurmountable obstacles to continuing her claimed relationship with the appellant in Jamaica is the core issue in this appeal."
14. The judge took into account all relevant factors. He took into account that the sponsor has a close relationship with an adult daughter. At paragraph 33 the judge noted that they have a very close bond. He took into account that the sponsor's core economic life is in this country. She has lived in this country for seven years. She has a daughter born in 1988 who has lived in this country since the age of 12. The judge made clear findings which are sustainable.
15. The judge has taken into account all relevant factors and the respondent has not pointed to any irrelevant factors taken into account by the judge. He noted that in the case of **Secretary of State for the Home Department v AH (Sudan) & Ors [2007] UKHL 49** the House of Lords clarified the test to be applied when interfering with the decision of the specialist Tribunals, which essentially states that the judges alone are the judges of the facts and it is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It was further noted in the case that Appellate Courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.
16. He also relied on the case of **MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49** at paragraphs 44 and 45 which in essence states that:

"The role of the court is to correct errors of law. Examples of such errors include misinterpreting the ECHR; misdirecting themselves by propounding the wrong test on some legal question such as the burden or standard of proof; procedural impropriety such as a breach of the rules of natural justice; and the familiar errors of omitting a relevant factor or taking into account an irrelevant factor or reaching a conclusion on the facts which is irrational."
17. He noted that in **Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC)** that when reaching a final conclusion it can be seen that the Upper Tribunal addressed whether the decision was open to the First-tier Tribunal Judge on the evidence heard, in essence whether the decision was rational. It is submitted that the ground of appeal in this matter ought to have been considered a rationality challenge. He also referred to the case of **Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC**

720 (Admin) where the following could be said to be true at paragraph 50.

My Finding as to whether there is an Error of Law in the Determination

18. The First-tier Tribunal Judge's reasoning is essentially at paragraph 33 and it would be helpful if I set it out in full:

"I accept that there would be insurmountable obstacles to the sponsor relocating to Jamaica with the appellant if he were removed so as to continue to enjoy their family life together as a couple. The sponsor Ms Forbes-Johnson has obviously built her core economic life in the UK where she has lived for some seventeen years since 1998, as evidenced by her 2013 P60s, and where her daughter Anna-Kay born in 1988 has grown up since the age of 12, with whom I accept she has a very close bond facilitated by their close proximity to each other, even if her daughter is living a separate adult life, and where they both have very extensive family connections as evidenced by the letters of support cited in the preceding."

19. At paragraph 34 the judge states:

"In the circumstances I accept that it would be unduly harsh and unreasonable to expect the sponsor to turn her whole world upside down so as to be able to continue her family life with the appellant in Jamaica where it must be quite evident on any commonsense basis that she would not be able to rely upon the substantial economic and emotional roots that she has the benefits of in the United Kingdom."

The complaint made by the respondent essentially is the lack of reasoning and not applying the test of insurmountable obstacles correctly, which is where the error in fact lies.

20. In the case of **Agyarko** at paragraph 21 I am guided by what insurmountable obstacles as used in the Rules says. It states that it clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom. This indicates to me that the submissions of the Home Office Presenting Officer have merit that there must be something over and above inconvenience to the appellant's sponsor.

21. I agree that the considerations taken into account by the judge to find that insurmountable obstacles are present can satisfy the test as set out in **Agyarko**. Essentially the reasons given were that the sponsor has her core economic life in this country, that she has lived here for seventeen years and her adult daughter was born in 1988 and has lived in this country since the age of 12 and that they have a very close bond with each other. Arguably these factors do not reach the very high test of insurmountable obstacles to family life being established in the appellant's home country. The test must be applied in a sensible and practical way as the insurmountable obstacles criteria as used in the Rules to define one of the preconditions set out in Section Exhibit 1(d). They need to be satisfied before an applicant can claim to be entitled to be granted leave to remain

under the Rules. In that context it is not simply a factor to be taken into account.

22. I find that the circumstances of the appellant's sponsor are really weak and cannot amount to insurmountable obstacles, even at a stretch. The mere fact that she has lived in this country and has a job in this country and is obviously reluctant to relocate to Jamaica to continue her family life with the appellant cannot constitute insurmountable obstacles or that it would be particularly harsh for her to do so as identified in the stringent test.
23. The upshot is I find that the judge has made an error of law in allowing the appellant's appeal under the Immigration Rules. I therefore set aside the decision and remake it. I find that the appellant has not satisfied the test of insurmountable obstacles in EX.1 in order for the appellant to be granted further leave to remain in the United Kingdom. It will be her choice if she wants to accompany the appellant to Jamaica and continue with family life with him in that country or they can continue with their relationship by her visiting the appellant in Jamaica and through modern means of communication. There are no insurmountable obstacles such that they cannot continue to continue to enjoy family life together in Jamaica.
24. It has been accepted that the sponsor's daughter living a separate adult life and there has been no suggestion or evidence that her ties with the sponsor and the appellant go beyond normal emotional ties or of any individual dependency and has her own life.
25. I therefore remake the decision and dismiss the appellant's appeal.

Notice of Decision

Appeal dismissed.

No anonymity direction is made.

Signed

Date 6th day of April 2016

Deputy Upper Tribunal Judge Chana

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 6th day of April 2016

Deputy Upper Tribunal Judge Chana

