



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2021-001050

First-tier Tribunal No:
HU/50523/2021
IA/01725/
2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 12 December 2023**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

**Nadine Joy Stewart
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr S Vokes, counsel, instructed by Bassi Solicitors

For the Respondent: Mr P Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 8 June 2023

DECISION AND REASONS

1. The appellant is a national of Jamaica. She arrived in the United Kingdom as a visitor in March 2013 with leave valid until 14 July 2013. She was subsequently granted an extension of her leave to remain until 11 September 2013.
2. Between September 2013 and December 2015 the appellant made a series of applications for leave to remain on private and family life grounds

all of which were either rejected or refused. More recently in May 2016 she applied for leave to remain on family and private life grounds. That application was refused by the respondent on 8 November 2016. An appeal was dismissed by First-tier Tribunal Judge Chohan on 5 February 2018. However on 21 July 2018 and 10 June 2019 the appellant applied for leave to remain on family and private life grounds. The respondent refused to treat those claims as fresh claims under paragraph 353 of the immigration rules for reasons set out in decisions dated 24 May 2019 and 21 August 2020. Undeterred, on 18 November 2020 the appellant once again applied for leave to remain on family and private life grounds. That application was refused by the respondent for reasons set out in a decision dated 10 February 2021.

3. The appellant's appeal against the respondent's decision of 10 February 2021 was dismissed by First-tier Tribunal Judge Juss for reasons set out in his decision dated 21 September 2021.
4. The appellant claims Judge Juss failed to adequately consider the human rights claim made by the appellant. It is said that the judge failed to give "sufficient weight" to the fact that since the previous decision of Judge Chohan, the appellant had married her partner and that she is now living with him and is his primary carer. The appellant claims that she now has strong family and emotional ties to the UK and that she has severed all her familial and social ties to Jamaica. The appellant also claims her sister has a number of health issues and her sister is also dependent upon her. The appellant claims Mr Hill gave evidence regarding his health and his evidence is that he may require bypass surgery. The appellant claims Judge Juss failed to have regard to a letter from Dr M Singh dated 2 September 2021 that confirms Mr Hill is always very short of breath and minimal exertion makes him ill. The letter also confirms Mr Hill requires a lot of help and attention towards daily routines of life as his mobility is limited. The appellant would be unable to make an application for entry clearance to join Mr Hill in the UK because the appellant would not satisfy the eligibility financial requirements. In any event the appellant maintains there are very significant obstacles to her integration into Jamaica and the judge failed to consider the compassionate and compelling circumstances.
5. Permission to appeal was granted by Upper Tribunal Judge Rintoul on 25 January 2022. He considered it arguable that the judge failed to properly consider and give due weight to the letter from Dr Singh dated 2 September 2021. He went on to make the observation that whether that, and the other claimed errors were material, is less clear.

The hearing before me

6. On behalf of the appellant Mr Vokes submits that at paragraph [19] of his decision, Judge Juss refers to the letter from Dr Singh and at paragraph [23] Judge Juss referred to the previous decision of Judge Chohan. Mr Vokes submits that the Tribunal cannot be satisfied that Judge Juss looked at the letter from Dr Singh in reaching his decision. At paragraph [26], Judge Juss referred to historical evidence that was in the respondent's bundle and at paragraph [27] the judge noted Mr Hill takes tablets by way

of medication. Mr Vokes submits the judge ‘downplayed’ the significance of the ill-health of Mr Hill and carried out too simplistic an analysis of the claim. He submits the failure by Judge Juss to have proper regard to what was said by Dr Singh has infected the findings of the judge so that the decision is unreliable. He submits that if an error of law is found, the appellant should be given an opportunity to file and serve further evidence in support of the claim.

7. In reply, Mr Lawson relies upon the rule 24 response dated 22 March 2022. The respondent opposes the appeal and submits the judge reached findings that were open to him. Mr Lawson submits the letter from Dr Singh confirms the appellant suffers from moderately severe cardiomyopathy along with ventricular failure and obstructive sleep apnoea. The letter does not, Mr Lawson submits, confirm Mr Hill requires by-pass surgery. Dr Singh noted Mr Hill requires a lot of help with daily routines and that his mobility is limited, but as the judge said, Mr Hill is entitled to NHS care.

The decision of First-tier Tribunal Judge Juss

8. In *Agyarko -v- SSHD* [2015] EWCA Civ 440, the Court of Appeal considered the requirement in the Immigration Rules, Appendix FM s.EX.1(b), that there be “insurmountable obstacles” preventing an applicant from continuing their relationship outside the UK. Sales LJ said:

21. The phrase “insurmountable obstacles” as used in this paragraph of the Rules 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.

22. This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase “insurmountable obstacles” has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under Article 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see e.g. *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34 , para. [39] (“... whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them ...”). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by *Jeunesse v Netherlands* (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).

23. For clarity, two points should be made about the “insurmountable obstacles” criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way: see, e.g., the way in which the Grand Chamber approached that criterion in *Jeunesse v Netherlands* at para. [117]; also the observation by this

court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544 , at [49] (although it should be noted that the passage in the judgment of the *Upper Tribunal in Izuazu v Secretary of State for the Home Department* [2013] UKUT 45 (IAC); [2013] Imm AR 453 there referred to, at paras. [53]-[59], was making a rather different point, namely that explained in para. [24] below regarding the significance of the criterion in the context of an Article 8 assessment).

24. Secondly, the “insurmountable obstacles” criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which 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. However, in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account, not an absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8 : see paras. [29]-[30] below.

9. The ‘insurmountable obstacle’ relied upon by the appellant and her partner is the health of the appellant’s partner and the on-going treatment that he receives and requires. The phrase ‘insurmountable obstacles’, involves a stringent test, as defined in EX.2 and is to be interpreted in a sensible and practical, rather than a purely literal way. The appellant was required to establish ‘very significant difficulties which would be faced by her or her partner in continuing their family life outside the UK and which could not be overcome or would entail a very serious hardship.
10. The appellant’s claim is summarised at paragraph [3] of the decision of the First-tier Tribunal. The respondent’s reasons for refusing the application for further leave to remain are summarised at paragraphs [4] to [7] of the decision. The appellant, her partner Mr Steve Hill, and her sister Mrs Petal Stewart-Holder, gave evidence. The evidence is outlined at paragraphs [9] to [17] of the decision.
11. Judge Juss referred to the previous decision of FtT Judge Chohan promulgated on 5 February 2018. The appellant was not married to Mr Hill at the time of that decision and Judge Chohan found the appellant had failed to establish a family life with Mr Hill. Judge Juss noted, at [24], that the appellant is now married to Mr Hill and the appellant claims that since the previous decision there has been a deterioration in Mr Hill’s health. Their evidence was that he has been informed that ‘by-pass surgery’ will be the next step if things don’t change. Judge Juss said that in the absence of medical evidence to establish that Mr Hill is in a more critical condition, he could not place any reliance on that claim. At paragraph [26] Judge Juss said that in the absence of an up-to-date medical report it is not possible to conclude that his condition has deteriorated to such an extent that he and the appellant should not be separated, even temporarily. He noted that given Mr Hill has settled status in the UK, and he is entitled to receive an appropriate level of support from the NHS or social services as his care needs dictate.

12. Judge Juss referred to the reliance placed by the appellant upon the care she provides to her sister at paragraph [25]. He said that whilst family life may exist between the two sisters, it is not such as to make it disproportionate for the appellant to be required to return to Jamaica to make a lawful settlement application to come and join Mr Hill in the UK as his wife. Again he noted, at [27], that if care is needed by the appellant's sister it can be provided by the NHS.
13. Judge Juss noted the appellant's presence in the UK for a decade but was not satisfied that the appellant would face any difficulty in reintegrating back into Jamaican society. He found the appellant cannot succeed under the immigration rules and was satisfied that the appellant has not discharged the burden on her, that it would be unjustifiably harsh to expect her to return to Jamaica. He referred to s117B of the Nationality, Immigration and Asylum Act 2002 and concluded that the appellant has failed to demonstrate that removal would be disproportionate to the public interest in the maintenance of effective immigration control.
14. Judge Juss referred to the letter from Dr Singh at paragraph [19] of his decision. He noted the letter refers to 'heart failure' and although Judge Juss does not quote from the letter verbatim, it is clear that the judge had regard to the evidence before him. I do not accept the submission by Mr Vokes that I cannot be satisfied that the judge looked at the letter from Dr Singh in reaching his decision. There was only one letter from Dr Singh in the evidence before the Tribunal. It had been uploaded by the appellant's representatives on 6 September 2021 and it is referred to by the judge. Although given the limited nature of that letter, it may have been preferable for the judge to quote from the letter, a judge is not required to set out the content at any length.
15. The appellant's bundle comprised, as Judge Juss noted at paragraph [9] of his decision of 404 pages. The focus of the evidence in the appellant's bundle was upon the health of the appellant's sister, with very little evidence regarding the health of Mr Hill. There was evidence of an outpatient appointment on 24 March 2016 (*Appellant's bundle, page 60*), but no evidence regarding the outcome of that appointment. The evidence before the Tribunal regarding the health of Mr Hill was somewhat dated and the judge noted, at [14], that in cross-examination Mr Hill accepted he had visited Jamaica in 2019. It was in the end the paucity of evidence to support the claim that Mr Hill's health has deteriorated to the extent claimed by the appellant that led the judge to conclude that on the evidence available, the appellant's removal is not disproportionate to the legitimate aim of immigration control. In any event, the respondent had noted in her decision that Mr Hill can receive cardiology treatment in Jamaica and referred to treatment available for heart conditions. The evidence relied upon by the appellant failed to engage with the claim made by the respondent in any way. Any failure by the judge therefore to recite what was said by Dr Singh in his letter dated 2 September 2021 was immaterial.

16. I am satisfied that in reaching his decision the judge had regard to all relevant evidence and that the findings and conclusions that he reached were open to him on the evidence before the Tribunal and cannot be said to be perverse, irrational or findings that were not supported by the evidence. The assessment of such a claim is always a highly fact sensitive task. The FtT judge was required to consider the evidence as a whole. He clearly did so. The judge carried out an overall proportionality assessment and whether a fair balance has been struck between the individual and public interest, noting the express statutory provision set out in s117B of the 2002 Act.
17. It was in my judgement open to judge Juss to conclude that the removal of the appellant is in all the circumstances proportionate for the reasons that he gave.
18. It follows that I dismiss the appeal.

Notice of Decision

19. The appeal is dismissed. The decision of Judge Juss dated 21 September 2021 stands.

V. L. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 November 2023