



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19919/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 4th February, 2014

Determination Promulgated
On 4th March 2014

Before

Upper Tribunal Judge Chalkley

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS JULIET DONNA MARIA MORGAN

Respondent

Representation:

For the Respondent: Mr G Harrison, Home Office Presenting Officer
For the Respondent: Mr M Harris of Counsel instructed by Smart Law Solicitors

DETERMINATION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department to whom I shall refer as the “claimant”.
2. The respondent is a citizen of Jamaica, who was born on 14th June, 1967. She appeals against the decision of the claimant taken on 15th May, 2013, to refuse to vary her leave to enter or remain in the United Kingdom on the basis of her family and private life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and to remove her from the United Kingdom. The respondent subsequently appealed and her appeal was heard by

First-tier Tribunal Judge Pickup who, in a determination promulgated on 29th October, 2003, dismissed the respondent's appeal. The respondent sought to challenge the judge's determination and in granting permission Upper Tribunal Judge Freeman said this:

“While the meaning of ‘insurmountable obstacles’ (to the pursuit of family life in the parties’ country of origin) did not directly arise in *MG (Nigeria)* [2013] EWCA Civ. 1192, which was in any event a deportation case, the Court of Appeal did hear argument on it, and said this at paragraph 49:

‘if insurmountable obstacles are literally obstacles which it is impossible to surmount, their scope is very limited indeed. We shall confine ourselves to saying that we incline to the view that, for the reasons stated in detail by the UT in *Izuazu* at paras 53 to 59, such a stringent approach would be contrary to Article 8.’

The Upper Tribunal may wish to consider the general approach to be taken in non-deportation cases, where this point is in issue, before deciding how it should be applied to the facts of this case.”

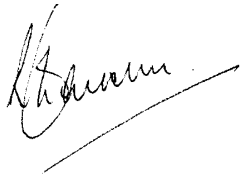
3. First-tier Tribunal Judge Pickup noted that the respondent entered the United Kingdom on 31st July, 2007 as a work permit holder with leave subsequently extended to 9th April, 2013. On 12th February, 2013 she married Mr Guy Emmanuel Foster, a British citizen. She made her application on 14th April, 2013.
4. It appears to have been agreed that the respondent could not meet the financial requirements of E-LTRP 3.1 and the judge noted that in order to meet the exception EX1 the respondent had to show that she had a genuine and subsisting relationship with a partner who is in the United Kingdom, who is a British citizen and that there are insurmountable obstacles to family life with that partner continuing outside the UK. He said, “in essence this is a proportionality balancing exercise between the interests of the state on the one hand and those of the respondent and her husband on the other”.
5. The judge noted that Mr Foster was not only a British citizen who has lived in the United Kingdom for 50 years, but he has three adult children, two of whom are in the United Kingdom and whom he sees on a regular basis. He is retired and is 80 years of age. Mr Foster last visited Jamaica in 2005, or 2006, when he first met the respondent at a relative's funeral. He met her again in 2007 in Birmingham and thereafter a relationship began which has resulted in their marriage. Sadly, Mr Foster was diagnosed with prostate cancer in 2006 and was subsequently treated with radiotherapy in 2007. He is in remission and requires monitoring by a urologist every six months to ensure that he is still free of symptoms. He suffers from high blood pressure and moderate kidney impairment.
6. The judge noted that the respondent had been away from Jamaica for seven years. He found that there was no particular reason why the respondent could not return and re-establish her life there. He bore in mind that Mr Foster, the respondent's husband, has been away from Jamaica for a very long time except for a brief visit in 2005 or 2006. He noted that Mr Foster is settled in the United Kingdom and a British citizen and also accepts that at the age of 80, with his present health conditions, it would not be easy for Mr Foster to relocate. However he found that it would not be impossible for him to do so and found that there were no insurmountable obstacles to him doing so. He found that the respondent had not shown that there were any insurmountable obstacles to continuing family life in Jamaica.
7. The respondent's grounds of challenge suggest that the judge was wrong to assess the question of proportionality on the basis of whether there were any insurmountable obstacles. In doing so the judge had clearly applied too high a standard because he had found that it would not be impossible for the respondent and her husband to relocate to Jamaica. By suggesting that it was not impossible the judge had demonstrated that he had erred. Mr Harrison for the Secretary of

State told me that he relied on the Reasons for Refusal Letter but was not going to add anything further. I advised Counsel that I did not need to hear any submissions from him.

8. In the case of *Gulshan (Article 8 – new rules – correct approach)* [2013] UKUT 00640 (IAC) Mr Justice Cranston, sitting as a Judge of the Upper Tribunal and sitting with Upper Tribunal Judge Taylor noted the exception at EX1 in paragraph 22 and paragraph 23 considered the case law in drawing conclusions at paragraph 24(c) he said:

“The term ‘insurmountable obstacles’ in provisions such as Section EX1 are not obstacles which are impossible to surmount (*MF (Nigeria)*). They concern the practical possibilities of relocation. In the absence of such insurmountable obstacles if removal is to be disproportionate it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh by any test.”

9. It cannot, in my view, be said that to expect the respondent’s husband, Mr Foster, to relocate to Jamaica is not unjustifiably harsh. Not only is he a man of 80 years with immediate family in the United Kingdom, he is a British subject and has been in the United Kingdom for 50 years. To expect him to relocate with his current medical conditions is, in my opinion, unjustifiably harsh and entirely an entirely disproportionate response on the part of the claimant. I concluded that the First-tier Tribunal Judge did err in law and I substitute my decision for his.
9. The respondent’s appeal is allowed.



Upper Tribunal Judge Chalkley