Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01803/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 July 2019	**On 10 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

EILEEN [G]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Nath, Counsel
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

Details of the Appellant

1. The appellant is a female citizen of Jamaica born on 27 April 1963 and was aged 55 at the date of the hearing before the First-tier Tribunal. The appellant, having arrived as a visitor on 17 August 2000, remained without leave. Having made an unsuccessful application in 2007, she was then granted a period of leave outside of the Immigration Rules, following a further application, from 2 May 2014 to 1 November 2016. A further application was made on 24 October 2016 which was refused by the respondent on 13 December 2017. In a decision promulgated on 4

December 2018 Judge of the First-tier Tribunal O'Malley dismissed the appellant's human rights appeal.

2. The appellant appeals with permission. The grounds before me were narrative. However, Mr Nath (who indicated this was a reasons challenge) confirmed that the appeal 'comes down to Section EX' and that the grounds in essence were:

   (1) that the judge had given inadequate reasons for her conclusions on the of the appellant's medical situation;

   (2) the judge gave inadequate reasons for finding that there were no insurmountable obstacles to family life in Jamaica and erred in failing to give adequate reasons for finding that any interference would be proportional, particularly considering the positive findings that the judge had made.

Discussion on Error of Law

3. Although Mr Nath initially indicated that the judge had failed to grant an adjournment to allow further medical evidence to be submitted, he withdrew that submission when it was pointed out to him that at [22] and [23] of the Decision and Reasons Judge O'Malley had considered that there had been an original date of the hearing on 29 August 2018 which had been adjourned as it had been stated the appellant was suffering from depression and those representing the appellant wished to obtain an expert report into her mental health and difficulties were identified in obtaining instructions. That adjournment was granted. Subsequently at the start of the hearing on 20 November Counsel was asked as to the position and it was confirmed that the appellant had provided witness statement but there was no medical report beyond the correspondence from the GP. The judge noted that there was no request to treat the appellant as a vulnerable witness and the judge did not make any such direction. No request for an adjournment was made or noted. Mr Nath conceded that this was the case.

4. The appellant had made a Rule 15(2A) application to submit further evidence in relation to the appellant's medical circumstances. This included an updated witness statement for the appellant, a copy of **J v The Secretary of State for the Home Department [2005] EWCA Civ 629**, a letter from Living Well Network dated 15 May 2019 and a letter from Edith Cavell Surgery dated 20 May 2019, patient report forms and crisis support information from Mental Health Assistance.

5. I have considered the Rule 15(2A) application. This was evidence that was not before the First-tier Tribunal which the appellant now seeks to upon in this error of law appeal. Rule 15(2A) requires, 'if a party wishes the Upper Tribunal to consider evidence that was not before the first-tier Tribunal' the notice must not only indicate the nature of the evidence, but also explain why it was not submitted to the First-tier Tribunal; and when considering whether to admit such evidence the Upper Tribunal must have

regard to whether there has been unreasonable delay in producing that evidence. Much of the evidence relates to the appellant's health issues which post dated the First-tier Tribunal and was not therefore in existence at the date of the hearing. However there was no adequate explanation for what I consider to be a considerable delay in producing any medical report despite an adjournment having been granted for 3 months in the First-tier Tribunal to allow one to be produced (and in any event no such medical report has been produced, the appellant relying on letters from her GP and the Living Well Network.

6. Although Mr Tarlow objected to the admission of this evidence, notwithstanding my reservations above, I have decided to admit this evidence including in my consideration of Mr Nath's argument about the judge's consideration of the appellant's medical conditions.

7. However, for the reasons set out below, I am not satisfied the additional evidence takes the appellant's error of law case any further. The evidence relates almost entirely to the circumstances after the hearing before the First-tier Tribunal in November 2018, promulgated on 3 December 2018. The appellant in her additional witness statement stated that she had for a number of years been seriously depressed. The appellant also mentioned her depression in her original, handwritten, witness statement stating that the refusal of her application by the respondent 'left me depress and suicidal' (sic).

8. The appellant also stated at [34] of her updated witness statement, that when she received the decision from the court she tried to kill herself. It was Mr Nath's submission, in line with the arguments considered in **J,** that the First-tier Tribunal, being aware of the appellant's previous issues with depression and it being stated in her witness statement before the First-tier Tribunal, her handwritten statement, that she had difficulties with depression and that when her application was refused she was left depressed and suicidal. It was Mr Nath's submission that the judge did not properly consider this eventuality and that it had been corroborated by what the appellant and Mr Nath claimed was her suicide attempt when her appeal was unsuccessful.

9. The letter from the Living Well Network dated 15 May 2019 indicates that the Living Well Network hub is a primary care service and that the appellant was introduced to them at the beginning of 2019 and that she was presenting with suicidal ideation at the sheer hopelessness of her situation. The letter notes that the appellant had tried to self-harm by scratching at her wrist and that she had been taken to St Thomas's Hospital earlier in 2019 after collapsing at home as she had stopped eating. The letter also mentions physical health issues. There is a further letter dated 20 May 2019 from the appellant's GP surgery certifying that she has a number of health problems including depression, obsessive compulsive disorder, insomnia, sleep deprivation and essential hypertension and that she had presented in November 2018 with an acute mental crisis having cut her own wrists and was depressed over her

immigration status. She was admitted to hospital in December 2018 with a severe viral illness and saw the psychiatric liaison worker there who advised she was still depressed. The GP indicates that they saw her again in February 2019 to review her depression and her anti-depressant medication. She was still having thoughts of self-harm. The letter from the GP notes that the appellant continued to work three hours a day but reported poor sleep. The appellant had a telephone consultation in relation to her OCD in April 2019.

10. In summary it was Mr Nath's submission that the judge had inadequately considered the difficulties with the appellant's health including in particular, following the arguments made in **J**, the possible risk of suicide if the appellant were to be refused. The appellant's additional 15(2A) documents included patient report forms from the Ambulance Service and a further patient report forms from the London Ambulance Service. The forms note that the appellant had been 'turned down for leave to remain status' the previous day. The notes indicated that the appellant had scratched herself and was expressing desire to further self-harm. The hand written report also indicates that the appellant had "cut arm - wound is superficial" the previous day. The notes, as highlighted by Mr Nath, also indicated that the appellant had thoughts to take overdose. However, the notes state both that the appellant did not go through with cutting her wrist 'due to impact on her grandchildren' and that, in relation to future overdose the appellant also denied intent due to the impact on grandchildren. The notes go on to again record that the appellant's family are a protective factor. The ambulance notes also confirmed that the appellant did not need taken to hospital and that she should engage with her GP.

11. Mr Nath's submission is without merit. The appellant, although in her original witness statement mentioned thoughts of self-harm/suicide and was given an adjournment in August 2018 for three months, produced no further evidence (other than GP correspondence considered by the judge). There was no request to treat her as a vulnerable witness at the hearing before Judge O'Malley.

12. The judge set out the evidence in some considerable detail from [22] to [49] and the submissions from [50] to [59]. The judge noted that the appellant explained that her treatment for her mental health condition was medication only and that she had applied for more counselling through the GP but did not qualify for that. The appellant confirmed that she had not had depression in Jamaica and that it had only come on when she had received the refusal from the Home Office. I also note that in the recording of the submissions, by the judge, there was no submission that the appellant would be at risk of suicide or further self-harm if the appeal were to be refused, along the lines of the arguments made, (although the extent of the argument relied on by Mr Nath was ultimately rejected by the Court of Appeal) in **J**.

13. It is difficult to understand how the judge in this case could have reached any other conclusion. The judge at [69] set out the ages of the appellant, 55 and her partner at 68, the judge having accepted their relationship. The judge found that they were both in good health. Although the narrative grounds complained that this was a factual error, I disagree. This finding was made in the context of the entirety of the judge's findings including at [69], which set out the difficulties which the appellant and her partner have. The judge went on at [69] to find:

> "… In assessing the impact of her mental health I accept her honest evidence that she has continued to be able to work in a demanding care role, both day and night shifts. I accept that she is treated with medication and that she has previously had counselling but was not considered suitable for further counselling when she requested this recently. I note that the GP letter, dated 2 September 2018 does not detail any suicidal thoughts, although this was included in an earlier letter, and accept that this is the up-to-date position".

14. The 15(2A) evidence, at its highest, showed that the appellant has had some further difficulties, including with her mental health. As noted above the 'attempts' in December 2018 appears to have been superficial, the ambulance attending the following day and deciding that hospitalisation was not required. It was also recorded by the London Ambulance Service that her grandchildren were a protective factor which had ultimately prevented her from going through with a suicide attempt and although the appellant has had thoughts, to take an overdose, she "denies intent due to impact on her grandchildren".

15. The additional evidence including from the Living Well Network and GP detail the depression and thoughts of self-harm, but the evidence also details that she continues to work, albeit this is now for "very few hours". The inpatient discharge letter dated 17 December 2018 from Guy's and St Thomas' hospital details treatment for a physical illness which is recorded as 'influenza' with 'no comorbidities'. Although the most recent GP letter confirms that during this admission the appellant also saw psychiatric liaison in relation to her ongoing depression, the letter from The Living Well Network dated 15 May 2019 refers to the appellant being admitted to St Thomas' as it was 'clear she had stopped eating'. This strongly suggests that the underlying complaint was a mental one, whereas the medical evidence from St Thomas' confirms she had flu and which her GP referred to as a 'severe viral illness'.

16. I am of the view that the medical evidence does not support, as Mr Nath and the grounds of appeal suggest, that there were further suicide "attempts". Rather there is evidence that the appellant, who suffers from depression, has superficially self-harmed and has had some thoughts of self harm, but that she denies intent to complete suicide because of the protective factors. Even if such evidence had been available at the First-tier Tribunal it is more than evident that the appellant would not have met the high threshold in respect of suicide risk in Article 3/Article 8 cases (and

indeed such was not the case before the First-tier Tribunal). The appellant is belatedly seeking to recharacterise her appeal.

17. In any event, none of that evidence was before the judge and the judge did not fall into any error of law in the consideration of the evidence that was before her. As already noted, despite an adjournment being granted of three months no further medical evidence was produced. Any further, albeit mild, deterioration in the appellant's mental health that might have occurred following her unsuccessful appeal does not establish that Judge O'Malley fell into an error of law. Judge O'Malley accepted that the appellant suffered from depression as a reaction to the respondent's decision and that 'her condition has not resolved while the uncertainty continues'. That the appellant might continue to suffer such difficulties when her appeal was unsuccessful is perhaps not unsurprising and would have been in the judge's mind. However, it was entirely open to her to find as she did that, given the low level of medical management, that she had not been suitable for counselling and that there were no suicidal thoughts detailed in the most recent GP letter, the appellant (and her partner) remained generally in good health. Those findings incorporated the difficulties both experienced. Those reasons were adequate, open to Judge O'Malley and cannot be said to be irrational.

18. The judge went on to direct herself correctly in relation to insurmountable obstacles under Appendix FM, EX.1. Although it was submitted at the very end of the hearing that the judge did not properly take into consideration the length of time that the sponsor has spent in the UK and the difficulties in relocating to Jamaica, that is not the case. The judge recorded in evidence that the sponsor gained British citizenship in the 1970s and had been in the UK for 53 years. The judge clearly had this in mind and took this into consideration including that the sponsor was of retirement age and took into account the medical evidence. Considering all the factors, including in light of the relevant jurisprudence including **R (on the application of Korobtsova) [2015] EWHC 970** the judge found that the appellant's and the sponsor's circumstances, including his age and that he had familiarity with Jamaica including taking visits there every year, staying for three months or sometimes six weeks, would bring them "within the remit of insurmountable obstacles".

19. There was also no error in the judge's consideration, in the context of the accepted facts that the sponsor goes on his own to visit Jamaica without the appellant every year for six weeks to three months and that the couple (although it is accepted they are in a relationship by the judge) do not live together, that a separation would not in itself amount to insurmountable obstacles to the continuance of their family life.

20. The judge took into consideration all the circumstances including the strong connections that both the appellant and her partner have with Jamaica and gave reasons that were open to her. Although I accept, as set out in the grounds for permission and as rehearsed by Mr Nath, that the judge made a number of positive findings including as to the relationship

and that the appellant and sponsor were found to be honest and helpful witnesses, that in itself does not mean that the judge had to necessarily reach a decision in the appellant's favour. It was incumbent on the judge to assess all the evidence in accordance with the relevant jurisprudence.

21. The judge had set out the relevant jurisprudence from [11] and following including **Agyarko [2017] UKSC 11** which clarified the definition of insurmountable obstacles at EX.2. as meaning:

> "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner".

In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

22. Although Mr Nath submitted that *Chikwamba* and **Agyarko** essentially meant that the appeal should have succeeded, that was a makeweight argument and did not disclose any error of law in the judge's reasoned findings, material or otherwise and I note that the judge directed herself appropriately, including as to **TZ (Pakistan) v SSHD [2018] EWCA Civ 1109** which included the consideration, by the Court of Appeal, that the outcome of a subsequent entry clearance application was 'by no means certain'. That was also the case before the First-tier Tribunal.

23. The judge took into consideration all of these issues in a comprehensive consideration of Section EX, paragraph 276ADE and Article 8 outside of the Immigration Rules. This involved consideration of all the factors including the length of time in the UK of the appellant and her partner, their ages and various medical conditions. It is difficult to see, on the evidence before the First-tier Tribunal, how any other Tribunal would have reached a different conclusion. Even if that there were not the case, there is no error of law in the decision reached by Judge O'Malley.

Notice of Decision

24. The decision of the First-tier Tribunal does not contain an error of law and shall stand.

No anonymity direction was sought or is made.

Signed Date: 8 June 2019

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed therefore no fee award is made.

Signed Date: 8 June 2019

Deputy Upper Tribunal Judge Hutchinson