IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000240
HU/52302/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 September 2024

Before

UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

Yvette Marcia Nelson
(no anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms Revill, Counsel instructed by Anthony Ogunfeibo & Co Solicitors
For the Respondent: Mr Wain, Senior Home Office Presenting Officer

Heard at Field House on 1 August 2023

DECISION AND REASONS

1. The Appellant is a national of Jamaica born on 14th September 1956. She seeks leave to remain in the United Kingdom on human rights grounds.

Background and Case History

2. The Appellant arrived the UK on the 8th March 2011 with leave to enter as a visitor. She came here to visit her daughter, who was living here with her young family. In this decision we shall refer to the Appellant's daughter as D. The Appellant had visited them before, and returned to Jamaica, but this time she stayed. On the 20th May 2019 she made an application on Article 8 grounds. When this was refused she appealed, and the matter came before First-tier Tribunal Nightingale. In her decision of the 4th February 2020 Judge Nightingale found that there was here a 'family life' for the purpose of Article 8, but dismissed

the appeal on the grounds that any interference with that family life would be proportionate to the legitimate aim of protecting the economy through the operation of immigration control.

3. The Appellant did not return to Jamaica, and no attempt was made to remove her. On the 3rd March 2022 she made a further application for leave to remain on Article 8 grounds. The Respondent was prepared to treat this as a 'fresh' claim, that is to say it was accepted that the Appellant had produced new material that had not previously been considered, and although the application was refused, it was accepted that this material created a realistic prospect of success on appeal. This second decision to refuse leave is dated the 4th February 2023, and it is against this decision that the present appeal is brought.

4. It was heard in the first instance by First-tier Tribunal Judge Peer on the 7th November 2023. The basis of the claim was that the bond between the Appellant, her daughter and grandchildren had strengthened and deepened in the years since the first appeal, and that there were particular reasons for that. The Appellant's daughter is a single mother whose relationship with the children's father had been marred by violence and coercive and controlling behaviour, and she continued to suffer the psychological consequences of that abuse. As a result she and the children were very dependent on the support and day to day assistance offered by the Appellant. The Appellant in turn was dependent upon them: she averred that her home in Jamaica has fallen into disrepair, that she has no relatives left on the island and that her links to the UK now outweighed those she had once had back home.

5. Judge Peer proceeded on the basis that the Appellant does enjoy a 'family life' in the UK, that being the *Devaseelan* finding of Judge Nightingale. She further accepted that refusing the Appellant leave to remain would present an interference with that family life. She did not however accept that the interference would have unjustifiably harsh consequences for the family. In particular Judge Peer concluded that there were no significant obstacles to the Appellant resuming her life in Jamaica, and that the family here – in particular the Appellant's daughter – would be able to cope without her. Contrary to the view taken by the Respondent, who had treated this matter as a fresh claim, Judge Peer did not think there was before her anything different from the material that had been presented to Judge Nightingale in 2020.

6. The Appellant appealed against the decision of Judge Peer to this Tribunal. Following a hearing on the 8th March 2024 we decided to set the decision of Judge Peer aside to a limited extent, having found an error in her approach to the proportionality assessment. The particulars of our decision are set out in Judge Wilding's written judgment of the 4th April 2024 but in summary we were not satisfied that Judge Peer had asked herself the right question when considering the impact of the Appellant's return to Jamaica. When Judge Peer had assessed the evidence about D she had focused on how she was coping at the date of the hearing, rather than how she was likely to react if her mother were removed from the family home. As a result important medical evidence - that there was likely to be a deterioration in D's mental wellbeing should that happen - was entirely left out of the balancing exercise.

7. The decision was further infected by an error of fact about how old that medical evidence was. The Tribunal repeatedly referred to the report being 2 ½ years old when it fact it had been prepared in the year before the hearing. It had not in any event been the position of the Respondent that the age of the medical

report was a reason to reduce the weight to be attached to it in circumstances where the conclusions – that D was suffering the long term consequences of having survived an abusive relationship – were unchallenged.

8. Having set the decision of Judge Peer aside for these reasons, we preserved her finding that there were not very significant obstacles to the Appellant's integration should she return to Jamaica. There was no error in her decision that the appeal should be dismissed on discrete 'private life' grounds.

9. The appeal now resumes before us for the decision to be re-made. At the hearing we heard live evidence from the Appellant and D, and submissions from the representatives. We reserved our decision, which we now give.

The Decision Re-Made

10. This appeal is brought under s82 (1)(b) of the Nationality Immigration and Asylum Act 2002, because the Secretary of State has decided to refuse a human rights claim made by the Appellant. The ground of appeal is set out at s84(2) of the NIAA 2002:

> 84. Grounds of appeal
>
> …
>
> (2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

11. The introductory text of the Human Rights Act 1998 explains that it is an Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights. Section 6(1) of reads:

> 6. Acts of public authorities.
>
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

12. The Convention right invoked in this appeal is Article 8:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

13. It is accepted that there is, for the purpose of Article 8 (1), a family life between the Appellant, her daughter and grandchildren. This was the finding made by Judge Nightingale in 2020 and the Respondent does not now seek to re-open that matter.

14. It is not disputed that the Respondent has the power in law to make the decision, or that the decision would result in an interference with the family life shared between the parties.

15. The only question for this Tribunal is whether the interference is, in all the circumstances, proportionate. In any matter concerning Article 8 in this Tribunal, we must have regard to the public interest considerations set out in s117B of Nationality Immigration and Asylum Act 2002.

16. We begin by reminding ourselves, in accordance with section 117B(1), of the public interest in refusing to grant leave to those who cannot meet the requirements of the Immigration Rules. Ms Revill accepts that the Appellant does not qualify for leave under any rule. She has been an overstayer since 2011 and that must weigh against her in the balancing exercise.

17. Section 117B (2) of the NIAA 2002 is provides that is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English are less of a burden on taxpayers, and are better able to integrate into society. The Appellant is from Jamaica, an English-speaking country, and it is accepted that she is fluent. This is not therefore a public interest consideration that weighs against her.

18. Section 117B(3) provides that it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such person are not a burden on taxpayers, and are better able to integrate into society. The Appellant does not work, and has not done so since she came to the UK. She does not have private means. She candidly acknowledges that she has made use of the NHS since she arrived here, and accepts that she did not have permission to do so. Mr Wain rightly reminds us that this is a matter that must therefore be weighed against her. It is however also right to acknowledge that she has not herself had any direct recourse to public funds. She is entirely dependent on her daughter for her day to day maintenance and we accept that she will continue to be so. There is no issue as to overcrowding and the family are, through D's self-employed income and the contributions made by her son, financially independent. In Rhuppiah v SSHD [2018] UKSC 58 the Supreme Court held that dependence on family income can constitute financial independence for the purpose of this sub-section. To that extent this is therefore a neutral factor in our consideration.

19. Insofar as it is relevant here, we note that sub-sections 117B(4) and (5) stipulate that little weight should be given to a private life that is established by a person when that person is in the UK unlawfully or has precarious immigration status. The Appellant has lived in the UK for some 13 years, and whilst we accept that she will have established a private life in this country during that time, for instance making friends and attending church, we must therefore only attach a little weight to that matter, since she has been an overstayer for virtually the entire period, with a short time of precarious leave as a visitor.

20. Section 117B(6) is of no direct application here. It provides that the public interest shall not require a person's removal from the UK where they have a genuine and subsisting relationship with a qualifying child. There is no dispute here that two of D's children are 'qualifying' in that they are British citizens under the age of 18; nor is there any suggestion that it would be reasonable to expect them to leave the UK. It is not however contended that their relationship with their grandmother amounts to her acting as a parent. Ms Revill rather puts her case on the basis that the Appellant plays a "quasi-parental" role.

21. In his submissions Mr Wain indicated that there are no other public interest considerations weighing against the Appellant – she does not, for instance, have any criminal convictions.

22. Turning to those matters weighing in the Appellant's favour we begin this analysis with reference to s55 of the Borders, Citizenship and Immigration Act 2009 which provides that in discharging her function in maintaining immigration law the Secretary of State must make arrangements to safeguard and promote the welfare of children who are in the UK. This reflects the UK's obligations under Article 3(1) of the United Nations' Convention on the Rights of the Child:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

23. In ZH (Tanzania) v SSHD [2011] UKSC 4 the Secretary of State acknowledged that any decision taken without regard for these principles will not be "in accordance with the law" for the purpose of Article 8(2) [at §24]. The Court held that in the immigration context, the best interests of the child must be a primary consideration in any decision affecting children. Relevant to this will be the level of the child's integration in this country; where and with whom the child is to live; and the strength of the child's relationships with parents or other family members which will be severed if a member of the family has to move away. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child.

24. In Zoumbas v SSHD [2023] UKSC 74 the Supreme Court were asked to apply these principles. The Court adopted this agreed position of the parties as an accurate distillation of the law after ZH (Tanzania):

> (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

25. The Appellant has three grandchildren living in the UK today. For the purpose of this decision we refer to them as C1 (a boy born in Jamaica in 2001), C2 (a boy born in the UK in 2007) and C3 (a girl born in the UK in 2010). All three of them remain living in the family home with her and their mother, albeit that C1 is now 23 years old. There is no suggestion that it would be reasonable to expect any of these British children to leave the UK in order to preserve this family life.

26. Having had regard to all of the evidence before us we are satisfied, for the following reasons, that it would be strongly in the best interests of the Appellant's minor grandchildren if she were to be permitted to remain here with them. The consistent and credible evidence of the witnesses is that the Appellant is very close to each of the children. She offers not only practical support in the household (cooking, cleaning, washing etc) but plays a "quasi-parental" role in offering comfort, emotional support and advice, helping with homework, teaching right and wrong etc. She has been a long term feature of the children's lives. When the Appellant arrived in the UK, C2 was a toddler and C3 a baby. She has therefore been a member of their household for as long as they can remember. In her evidence the Appellant candidly admitted that the children are now old enough to maintain a relationship of sorts with her by 'modern means of communication' ie by messaging apps, video calls etc. She was however adamant that it would "not be the same" if she was living in Jamaica: this is an assessment with which we wholeheartedly agree. At the moment, these children come back from school to find their grandmother at home. She has prepared them something to eat, gives them a hug and talks them through their day. That physical proximity is, we accept, important for the children in making them feel secure and loved.

27. That sense of security and permanence is particularly important to these children, whose relationship with their own father has been so difficult and disrupted. The children witnessed domestic violence against their mother, and we see no reason to reject D's evidence that their father was also psychologically and physically abusive towards them. After the intervention of the family's local domestic violence service he left the family home when the children were small. There was a brief attempt at reconciliation in 2013 but that did not work out. He subsequently took D to court in order to secure contact with the children – as she puts it "to get back at me" – but was unsuccessful. None of the children have seen him since approximately 2020. In our view this is an important aspect of the family history that contextualises the closeness of these children to their grandmother. It is also intimately connected to another aspect of this appeal that we shall come to: the support and comfort that the Appellant is able to give her daughter.

28. The Appellant also shares a strong bond with her eldest grandson. C1 is now a young man of 23 years of age, and her pride and love for him was evident from the way she reacted when asked about him. She described him as a 'respectable' boy who worked hard for his family – he is now working as a mechanic and brings home his wage to contribute to the household. The Appellant told us that she is "extremely close" to C1. Both witnesses spoke of how this bond was instantaneous and powerful from the time of his birth. D described how when C1 was a newborn she struggled to settle him – even when feeding he would still cry at night. She took him in to her mother's room and he settled immediately. He always loved being with his grandmother and always looked to her for guidance.

29. In respect of D we were provided with reports by two psychiatrists. The first is the report that was before Judge Peers. It was written in 2022 by Dr Akindele Akioye, a locum consultant liaison psychiatrist based at the of the Queen Alexander Hospital. The second was commissioned as an update for the purpose of this remaking. It is dated the 26th June 2024 and is written by Dr Tim Ojo, who worked for over 30 years in the NHS, including in senior leadership roles, before retiring. Before we go on to evaluate the information provided in these reports, we address the criticisms made of them by Mr Wain. On behalf of the Respondent Mr Wain asked us to note that Dr Akioye does not preface his report with confirmation that he understands his duty to the court as an impartial expert witness. It is not clear whether Dr Ojo had access to D's medical records. We accept that these criticisms are well made. Where they take us is rather less clear, since the Respondent has never challenged the central findings of both reports: that D has suffered from depression and anxiety since approximately 2006 when she was identified as being subject to domestic violence by her ex-husband. Judge Peers described those diagnoses as "unsurprising" in the circumstances and that is an assessment with which we agree. Insofar as the doctors have both based their assessments on D's self-reporting, that is self-evident and true. We read them on that basis, and in the round with her direct evidence to us, which we found to be compelling and credible. Having had regard to all of that evidence, we find as follows.

30. D has been emotionally traumatised by her relationship with her husband. He was also physically violent towards the children and she believes that her eldest son in particular has continued to be effected by this. That has continued to be a source of pain for her and she does not feel that she has been able to get over it. Over the years she has suffered from persistent low mood – she bursts into tears for no reason and has periods when she is unable to do anything, even get out of bed or attend to her personal care. She has not for instance been able to have any other relationships since she divorced. Her primary focus has been on her children. She describes her mother as the "rock" underpinning the family. She told Dr Akioye that she thinks that she would have been "unable to cope" without her. In her "darkest moments" she contemplated taking an overdose but was prevented from doing so by her mother's support and her Christian faith. At those points the Appellant was the one who entirely "filled the gap" and stepped in to look after the children. In oral evidence D described how, when she is having a bad day, her mother holds her and they pray together.

31. When she was still married D was encouraged by her mother to go to the GP to arrange counselling – this was at a time when the abuse had reached "extreme proportions". She did start it but found it difficult to maintain, in part because of her husband's control over her movements. In the years since, she has intermittently been offered counselling, by the GP and by a local domestic violence service, but again but she struggled to attend because of a lack of motivation and low mood; more recently she has been busy working on her own business. She hopes to resume therapy in the near future. D has also been prescribed anti-depressants by her GP which did help to lift her mood. She told Mr Akioye that these "took the edge off" her emotional distress but they had to be discontinued after she developed an allergic reaction to them.

32. D has her own business as a seamstress and at times, particularly around the time of the divorce, she felt unable to work due to stress. Things have improved with the assistance of her mother but there are still times when she finds it difficult to manage.

33. Dr Akioye considered D's symptoms and history against the criteria in DSM V and diagnoses her with Depression and Anxious Distress. Her residual emotional trauma manifests as social anxiety and the avoidance of close or intimate relationships. Although she has managed to resume her business she remains "avoidant of social settings and is mostly dependent upon her mother for emotional support and connection". Dr Akioye writes that her "mental health remains fragile with a demonstration of low self-esteem, lack of self-worth and social anxiety". She remains heavily reliant on her mother. He concludes that D is, with the support of her mother, on a trajectory of recovery. However her mental health is "finely balanced with a likelihood of deterioration if current supportive arrangements are not in place". Dr Ojo, conducting his assessment approximately two years later, concurs with much of what Dr Akioye has to say. Dr Ojo finds D to be suffering from a Recurrent Depressive Disorder of moderate severity. He agrees that the impact of her mother leaving the UK would be detrimental to D's mental health and wellbeing.

34. The Appellant's own evidence about D was unchallenged, candid and credible. She frankly acknowledges that her daughter's situation is now better than it was during her separation from her former husband and in the aftermath of that relationship. However she maintains that from what she sees on a day to day basis, her daughter is still "not back to her normal self". She tries to "shield" her daughter from the pressure of looking after the household and two teenagers, and the Appellant is concerned that if she were to leave, her daughter faces the prospect of her mental wellbeing deteriorating again. In oral evidence both witnesses agreed with Mr Wain that this is not a case of D being physically or mentally incapable of looking after the household or attending to her children's needs. It is rather that she struggles to do so, and some days are worse than others.

35. Although Ms Revill acknowledges that the Appellant cannot meet the requirements of (what was then) paragraph 276ADE(1)(vi) of the Rules and show that there are very significant obstacles to her integration in Jamaica, she maintained before us that the Appellant's situation on return to Jamaica is not entirely irrelevant to the mater before us. The Appellant herself points out that she has been out of that country for some 13 years and that she "would not know where to start" if she returned there. Mr Wain noted that both D and the Appellant had previously said that there were no family members left in Jamaica, and that Dr Ojo had recorded in his report D's distress at having recently been scammed by her brother who asked her for money to set up a business, then left the country, it is believed for Belize. Mr Wain asked each witness in turn about the presence of this brother. Both women gave the same reply. He has always travelled in and out of Jamaica, and their relationship with him been difficult. When they said that there were no relatives in Jamaica that was true at the time. He has never supported his mother or D and they have now lost contact with him again as he has disappeared with D's money. The consistent evidence is that – the intermittent presence of this man aside – that the Appellant no longer has any living relatives in Jamaica since her father passed away in 2008. We accept D's evidence that the Appellant's isolation in Jamaica is something that is deeply concerning to them both. As she puts it in her letter to the Home Office: "if my mother was compelled to leave the UK we would both suffer terribly as she would be all alone in Jamaica with no one to turn to".

36. The bundle contains photographs of what is said to be the Appellant's house in Jamaica. Its shows a simple brick structure, with its roof and door frame in a state of partial collapse. This photo had been taken by an old family friend, Mr Higgins.

Mr Wain put it to the Appellant that she could turn to Mr Higgins for help on return. The Appellant said that he was not that kind of friend. We accept her evidence that she has not in fact had any contact with him since he sent that picture for the original appeal.

37. Mr Wain then suggested to the Appellant that she could use money she may be entitled to under the voluntary return scheme – up to £3000 – to repair the house, re-establish herself and perhaps pay for tickets for the family to visit her. The Appellant agreed that she could, although she did not think it would go far. The repairs required are extensive, and tickets to Jamaica from the UK can cost around £1200. Ms Revill initially objected to Mr Wain's point here. She relied on the Upper Tribunal decision in SA (Iraq) (removal destination; Iraq; undertakings) [2022] UKUT 00037 (IAC) to submit that by analogy it would not be appropriate for us to attach weight to money that the Appellant could only obtain if she agreed to voluntary departure. She withdrew that submission when it was pointed out that the decision in SA (Iraq) is concerned with a protection claim where the right of appeal under s84(1)(a) turns on the "removal of the appellant"; in this human rights appeal we are simply concerned with whether the decision to refuse leave is unlawful (see our §10 above). We are satisfied that this is a factor which we are entitled to take into account when assessing proportionality. We would however agree that in the grand scheme of things any sum under the scheme is likely to have much of a significant impact the Appellant's ability to maintain her family relationships, the key issue in the appeal. We further accept that the challenges that the Appellant is likely to face – whilst not reaching the high threshold of 'very significant obstacles' - are nevertheless a real concern for the family.

38. We remind ourselves that the public interest lies in refusing leave to someone who does not meet the requirements of the immigration rules: we have kept that in the forefront of our minds throughout our deliberations. We have further added weight to the public interest side of the scales for the public funds that the Appellant has, albeit indirectly, had recourse to in her unauthorised use of the NHS.

39. We are nevertheless satisfied that on the particular facts of this case there would be unjustifiably harsh consequences for this family if the Appellant were to be refused leave and had to return to Jamaica. She has been a vital part of this family's life for many years and although she is not a parent we agree with and adopt Ms Revill's characterisation of her relationship with her grandchildren as being a "quasi-parental" one. In the absence of their father, and in the difficult circumstances of their mother's fluctuating mental ill-health, the Appellant has indeed been a "rock" for all of them. Although we agree that there are certainly shortcomings in both of the psychiatric reports it remains the case that the central conclusions are unchallenged, and unremarkable. D has, as a result of the abusive relationship with her husband, been left with long-term depression and anxiety which has, at its worst points, left her feeling hopeless and unable to function on a day to day basis as a parent. It may well be that the presence of her mother in the family home has to some extent facilitated this, in that D has – to put it crudely – known she can lie in bed because her mother will act *in loco parentis*. It does not seem to us to now matter. The fact is that during these ups and downs it is the Appellant who has fulfilled this role, and after so many years of dependency we do have real concerns about D's ability to cope without her. We see no reason to go behind the conclusion of the psychiatrists here that the removal of the Appellant from the family home would likely result in a deterioration in D's functioning and wellbeing. That in turn is likely to have a

significantly detrimental impact on the children, in particular C3 who is about to embark on a crucial stage of her education in taking her GCSEs. We have found that it would be strongly in the children's best interests if the Appellant were to remain in the family home, and we bear in mind the guidance in Zoumbas that although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant. Taking all of the above into account we are satisfied that in this case those best interests, taken with the likely impact on D, is sufficient to tip the balance in favour of the Appellant. We therefore allow the appeal.

Notice of Decision

40. The appeal is allowed.

41. There is no order for anonymity in respect of the Appellant.

Upper Tribunal Judge Bruce
4th August 2024