



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Ce-File Number: UI-2022-  
005592**  
**First-tier Tribunal No:  
HU/53330/2021**  
IA/13273/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On the 03 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**LLOYD ANTHONY TOMLINSON**

(NO ANONYMITY ORDER MADE)

Respondent

**Representation:**

For the Appellant: Mr T Lindsay, Senior Presenting Officer

For the Respondent: Mr D Balroop, Counsel, instructed by Duncan Lewis Solicitors

**Heard at Field House on 13 April 2023 and 24 April 2023**

**DECISION AND REASONS**

**Introduction**

1. The appellant is referred to as the Secretary of State, and the respondent as Mr. Tomlinson.
2. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal Karbani ('the Judge') to allow Mr. Tomlinson's human rights (article 8 ECHR) appeal by a decision dated 16 September 2022.

3. Mr. Tomlinson's human rights appeal arises from a decision of the Secretary of State not to revoke an extant deportation order made on 20 January 2014 and enforced on 6 March 2016. The challenged decision in this matter was issued six and a half years after the Secretary of State enforced Mr. Tomlinson's deportation.

### **Relevant Facts**

4. Mr. Tomlinson is a national of Jamaica and is presently aged 41.
5. He arrived in the United Kingdom on 28 December 2000 and was granted leave to enter for six months. He made an in-time application for leave to remain as a student, which was refused by the Secretary of State on 28 September 2002.
6. Mr. Tomlinson applied for leave to remain on human rights (article 8) grounds on 12 November 2005. He submitted additional representations on 4 April 2011. The Secretary of State served an enforcement notice on 18 May 2011.
7. On 9 November 2011, Mr. Tomlinson was convicted at Wood Green Crown Court of possessing a prohibited weapon. He was sentenced by HHJ May to the statutory minimum sentence of five years' imprisonment. The firearm, a loaded sawn-off shotgun, was found in a sports bag located in an unlocked cupboard at his home.
8. By a decision dated 21 January 2014, the Secretary of State set out reasons for her decision to deport.
9. Mr. Tomlinson's appeal was dismissed by a decision of Judge of the First-tier Tribunal Chamberlain dated 16 October 2014, and he was deported to Jamaica on 6 March 2016.
10. Following his deportation, Mr. Tomlinson continued his relationship with his now wife, a British citizen, and they were married in Jamaica on 16 June 2018.
11. Mrs. Tomlinson relocated to France in February 2019, and Mr. Tomlinson joined her in that country in June 2019. They resided in France, with Mrs. Tomlinson returning to the United Kingdom on occasion for medical appointments, until she permanently returned to the United Kingdom in July 2020. Mr. Tomlinson continues to reside in France.
12. Mrs. Tomlinson has several serious health concerns including both an inherited genetic disorder and a recent diagnosis of cancer. At the hearing before the First-tier Tribunal she required wheelchair assistance.
13. On 4 July 2020, Mr. Tomlinson was refused entry to the United Kingdom from France. On 21 September 2021 he applied to revoke his extant deportation order. The Secretary of State refused the application by a decision dated 7 June 2021. In reaching her decision the Secretary of State

noted that Mrs. Tomlinson had ongoing physical and mental health issues for which she was receiving treatment. It was observed at paragraph 33 of the decision:

'33. Notwithstanding this, it is considered that Mrs Tomlinson can remain in the UK where she can benefit from NHS treatment and support for her ongoing medical conditions. It is noted from the NHS Letter dated 21 January 2021 that during periods of stress she has availed herself of support from friends and her mother. She has also sought assistance from the NHS in respect of her mental health and it is considered that this can continue in the UK. It is considered that practical and financial support from the state will continue to be available to her as required, as will the support network of family and friends referred to in representations and the medical evidence provided.'

14. In respect of Mr. Tomlinson's family life with his wife the Secretary of State concluded at paragraph 35 of the decision:

'35. Therefore, having considered all available information, it is not accepted that your client would have met the requirements of the exception to deportation on the basis of family life with a partner had it been applicable in this case.'

15. Turning to 'other very compelling circumstances' the Secretary of State concluded at paragraph 56:

'56. It is noted from your client's representations on 24 September 2021 that his wife ... has an ongoing health condition that requires monitoring and treatment for which she can access healthcare and support from the NHS. Any family she has in the UK could be relied upon for support and your client can offer some emotional support from abroad through modern communications. As such her current state of health does not present as a very compelling circumstance sufficient to outweigh the public interest in maintaining deportation.'

### **First-tier Tribunal Decision**

16. The matter came before the Judge as a CVP remote hearing held at Hatton Cross on 14 September 2022. Mrs. Tomlinson attended. Mr. Tomlinson resides in France and was unable to attend the hearing remotely to give evidence: *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 00286 (IAC). He was represented before the Judge by Mr Balroop, as he was before this Tribunal.

17. The Judge found, *inter alia*:

- Mrs. Tomlinson is a British citizen, at [36].
- There was no dispute that the couple are in a genuine and subsisting relationship, at [37].

- Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 – Exception 2 – was engaged, at [37].
- Mrs. Tomlinson is currently suffering from thyroid cancer, at [38].
- Mrs. Tomlinson gave detailed and compelling evidence as to her reasons for delaying her cancer treatment: she was initially in denial about the diagnosis, she had wished to obtain a second opinion, and she did not feel that she would have the necessary support needed to go through treatment in the absence of her husband.
- Mrs. Tomlinson has experienced serious mental health concerns over time, at [40], [41] and [45].

18. The Judge further found at [43]:

‘43. The respondent argued that the appellant and Mrs Tomlinson’s move to France was a not a genuine attempt to start marital life afresh, but rather an attempt to evade the Immigration Rules. I have assessed this submission in the context of their credibility. I find that Mrs Tomlinson has provided evidence that she was working from March 2019. I find that she gave credible evidence that she intended to settle in France and was only returning to the UK for her medical appointments at first. I also accept that there is evidence that the appellant was also seeking work. I find that the evidence that she returned for medical appointments and then for good, is consistent with the health scare she suffered in August and September 2020. I am satisfied that Mrs Tomlinson did intend to settle at the time she started living in France, and that it does not undermine her credibility that it transpired to be for a limited period, or that they sought entry clearance under the EEA Regulations as well as under the Immigration Rules.’

19. The Judge further found, *inter alia*, that Mrs. Tomlinson had given truthful evidence as to why her mother was unable to provide support to her, as her mother was caring for her husband who suffers from the same adverse genetic condition as his daughter, but at a more advanced stage, at [46].
20. It was found that Mrs. Tomlinson’s needs are extensive and unpredictable during her treatment, at [46].
21. The Judge found that there was compelling evidence that Mr. Tomlinson has been supportive throughout his wife’s hospital and therapy appointments, attending remotely where possible and actively engaging with her treatment options, at [47].
22. As to Mrs. Tomlinson’s engagement with healthcare:

‘48. I am satisfied that the reason that Mrs Tomlinson has not had any treatment for her cancer in spite of medical advice, is because she does not feel that she can cope with having that treatment at the present time in the absence of her husband. It has now been

a period of 9 months following diagnosis and being offered treatment. I am satisfied that she is genuinely reluctant to have treatment without her partner being present in the UK, and this has arisen because of her complex medical history and mental health issues. I do not find that this is any way designed simply to bolster his appeal, because it is so clearly contrary to the advice she has been given by medical practitioners. I find that evidence of notable delay which has ensued is evidence that it is very likely that she will continue to resist treatment in absence of her husband being present in the UK.

49. I have considered whether Mrs Tomlinson could relocate to France and pursue treatments there. Her medical history is long, and her genetic condition is rare. I find Mrs Tomlinson had to return to the UK in order to pursue treatment, due to the language barriers and lack of medical history in France. I find it likely that changing treatment providers to France would entail further delays and would disproportionately disrupt with her current treatment plans in the UK. I also find that even though she indicated that her close family members are unable to provide direct support, that her mother has been an important factor in managing her mental health issues and that depriving her of that emotional support in order to be with the appellant is likely to have a negative impact on her health and well-being. I therefore find that it would be unduly harsh to expect her to relocate to France in order to be with the appellant and continue her treatment there.'
23. The Judge concluded that she could properly depart from the 2014 decision of Judge Chamberlain because she was considering a new relationship which had commenced after that time and also the personal issues faced by Mrs. Tomlinson are recent. The Judge therefore found that there were cogent reasons to depart from the decision of Judge Chamberlain in respect of whether there are very compelling circumstances over and above those described in Exception 2 of Section 117C of the 2002 Act.
24. Having reminded herself that there is a strong public interest in Mr Tomlinson's continued deportation and that in the case of a conviction for which the person was sentenced to a period of imprisonment of at least four years the continuation of a deportation order would be the proper course, the Judge concluded:
- '52. I have considered the respondents submission, that the appellant and Mrs Tomlinson recommenced their relationship knowing that the appellant was subject to a deportation order. However, I accept that there has been a significant deterioration in Mrs Tomlinson's health as she did not have a cancer diagnosis at that time. I also find that her suicide attempt indicates that there was a further decline in her mental health which was impacted by the separation and recurrent miscarriages. I find the situation that they are in now compared to the time that they got married is markedly different. I also accept that Mrs Tomlinson genuinely tried to move to France to be with the appellant, however, was

ultimately unsuccessful due to her complex medical needs. Therefore, the public interest in maintaining effective immigration control whereby the sponsor has married someone knowing they were subject to a deportation order, is slightly reduced in this case.

...

54. I find that Mrs Tomlinson has delayed her surgery because the appellant is not currently in the UK to support her through this. I find that the evidence relating to her mental physical health, has consistently indicated that she requires his support during this difficult period of her life. I find that her decision not to have treatment for her cancer despite medical advice is strong indication of the interference that the respondent's decision to refuse entry to the appellant is having.

55. Overall, I am satisfied that the combination of Mrs Tomlinson's conditions, and the impact that this is having on her choice on whether to have ongoing treatments that she needs in order to assist health, amount to very compelling circumstances which outweigh the public interest in maintaining the appellant's deportation. I am satisfied both that the absence of the appellant is disproportionately affecting Mrs Tomlinson's mental and physical health, and further that his return to assist her during a challenging period is likely to be critical to her getting cancer treatment. I find that these are exceptional circumstances which outweigh the public interest in deportation.'

### **Grounds of Appeal**

25. The Secretary of State identified two grounds of appeal by means of her notice of appeal dated 22 September 2022. However, before this Tribunal, both parties agreed that three grounds are identifiable within the document as being advanced:

- i) Inadequate reasons were given as to why Mrs. Tomlinson could not access healthcare in France.
- ii) In finding that Mrs. Tomlinson had chosen to delay her cancer treatment without the presence of her husband in this country, the Judge failed to have regard to the possibility that the refusal of treatment was in order to promote Mr. Tomlinson's immigration case.
- iii) The Judge erred in having regard to the fact that Mr. Tomlinson's criminal behaviour took place nearly ten years ago. The Judge erred as to rehabilitation in respect of the time that has passed since Mr. Tomlinson last offended.

26. Mr. Lindsay confirmed that ground 1 was concerned with the 'go' consideration relevant to deportation and family life matters. The second ground, he observed, was concerned with the 'stay' consideration. The third ground was primarily focused upon the application of the Court of

Appeal decision in *EYF (Turkey) v. Secretary of State for the Home Department* [2019] EWCA Civ 592.

27. On 9 December 2022, Upper Tribunal Judge Macleman granted permission to appeal on all grounds.
28. Mr. Tomlinson filed a Rule 24 response, drafted by Mr Balroop, on 17 February 2023.

### **Discussion**

29. Ultimately, whilst not withdrawing any of the three grounds, because he had no instruction to do so, Mr. Lindsay pursued the Secretary of State's appeal primarily on one issue, said to fall within the scope of ground 2. I observe that it was advanced with considerable skill but as confirmed at the conclusion of the hearing, the purported challenge was properly to be considered as being outside ground 2 as drafted and so permission to appeal had not been granted in respect of it.

#### *Ground 1*

30. Paragraph 2 of the grounds of appeal:

'2. Inadequate reasons are given as to why the appellant (sic) cannot access healthcare in France. The reasons given by the appellant (sic) are language difficulties and a lack of understanding by French medical professionals. There is no evidence that there is no treatment available to the appellant (sic) in France, with the assistance of an interpreter if necessary. Seemingly the appellant's (sic) relocation to the UK in order to access NHS medical care is a matter of choice. It is submitted that the FTTJ has erred in taking this choice into account when balancing the appellant's and his partner's Article 8 rights against the very strong public interest [in] maintaining the deportation order. Article 8 is a qualified right and does not extend to a choice as to where family life is to be enjoyed. It is submitted that the FTTJ has erred in failing to give adequate reasons for finding that the very strong public interest in maintaining the appellant's deportation order is outweighed.'

31. Mr. Lindsay acknowledged that the reference to 'appellant' in this paragraph of the grounds is meant to be a reference to Mrs. Tomlinson.
32. The foundation of the challenge is related to the 'go' element of the unduly harsh exception established by section 117C(5) of the 2002 Act. At the hearing, Mr. Lindsay confirmed that the second limb of this ground, the contention as to Mrs. Tomlinson's engagement, or otherwise, with health care services in this country was to be considered with ground 2, concerned as it is with the 'stay' element of section 117C(5).
33. This ground was not pursued with vigour by Mr. Lindsay, and he was correct to adopt such approach. The issue as to whether Mrs. Tomlinson

could seek and secure appropriate medical treatment in France was not relied upon by the Secretary of State in her decision letter of 7 June 2021. Rather, the focus was upon Mrs. Tomlinson securing medical treatment in Jamaica. Mrs. Tomlinson addressed the reasons why she returned to the United Kingdom for medical treatment before the Judge. She confirmed that she did try to access medical care in France, but there were difficulties with language, and there was a lack of understanding as to her health condition.

34. The focus of the respondent's submission before the Judge was that Mrs. Tomlinson had not genuinely moved to France and had simply relocated to attempt to circumvent the Immigration Rules. It was not submitted that Mrs. Tomlinson could return to France post-Brexit and secure medical treatment.
35. The Judge gave cogent, lawful reasons for concluding that Mrs. Tomlinson genuinely relocated to France and returned to this country consequent to the deterioration in her health during the summer of 2020. Cogent reasons were given for finding that Mrs. Tomlinson required surgery for life-threatening physical illness in 2020, and that she has ongoing, significant, mental health concerns. On the evidence presented, it was reasonably open to the Judge to conclude at [49] of her decision that Mrs. Tomlinson had to return to this country for treatment consequent to a language barrier, that her medical condition was 'rare', and that her lack of a medical history with the French health authorities would result in a change of treatment provider from the United Kingdom to France entailing 'further delay' and 'disproportionately' disrupting treatment at a time when surgery was required. The respondent's ground of challenge fails to engage with the Judge's finding, again at [49], that it would be unduly harsh for Mrs. Tomlinson to relocate to France to continue her treatment because her mother has been an important element in managing her mental health issues, and 'depriving her of that emotional support in order to be with the appellant is likely to have a negative impact on her health and well-being'. Such conclusion was reasonably open to the Judge, and in all of the circumstances this ground of challenge is properly to be dismissed.

## *Ground 2*

36. It is upon this ground that the Secretary of State placed greatest reliance at the hearing:

' **Failing to give adequate reasons for findings on a material matter**

...

3. The FTTJ notes the appellant's partner choosing to delay her cancer treatment without the presence of the appellant. The FTTJ finds this is evidence of very compelling circumstances, however it is submitted that the FTTJ has failed to have regard to the



possibility that the appellant's partner is refusing treatment in order to promote the appellant's immigration case.'

37. It is appropriate to observe that Mr. Lindsay relied upon the heading of this ground as well as its substance.
38. On its face this challenge appears to be directed towards an assertion that Mrs. Tomlinson has manipulated her medical health concerns to ensure that her husband is permitted to re-join her in this country. An allegation as to actively harming oneself, to the extent of causing considerable physical detriment, to manipulate the entry of a husband into this country, is a very serious one. The allegation was not relied upon by the Secretary of State in her decision letter of 7 June 2021, at which time she was aware that Mrs. Tomlinson had been diagnosed with cancer. Additionally, it was not her position before the First-tier Tribunal. At no point during her cross-examination was Mrs. Tomlinson asked to address this issue. I observe the well-established common law rule of evidence identified by the House of Lords in *Browne v. Dunn* (1893) 6 R. 67, that a witness be given a fair opportunity to deal with the allegation if they are disbelieved. The allegation was not raised by the respondent during closing submissions.
39. In any event, the Judge considered the situation at [48] and gave lawful reasons for concluding that the approach adopted by Mrs. Tomlinson was not designed simply to bolster her husband's appeal. Contrary to the ground advanced, the Judge did have regard to the possibility that the refusal of treatment was to promote her husband's case and rejected the notion. There is no merit to this ground.
40. Before this Tribunal, Mr. Lindsay, with his usual skill, sought to read an additional ground into paragraph 3. At its core, the challenge advanced was that that in concluding at [48] of her decision that it was 'very likely' that Mrs. Tomlinson would continue to resist treatment in the absence of her husband being present in this country, the Judge's extrapolation went beyond the evidence presented in her witness statement and orally before the First-tier Tribunal.
41. Mr. Lindsay observed [12] and [14] of the decision:
  - '12. Mrs Tomlinson said that she has not had any treatment for her cancer diagnosis as yet. She said that she is still waiting for a referral and is in talks with the medical team. She said that she was advised to take treatment at the time she was diagnosed in January 2022, but she was unable to deal with everything and therefore had not taken any treatment. She had also saw a second opinion which advised that she gets treatment as soon as possible. She said she found it difficult to believe that she was diagnosed with cancer.

...

14. Mrs Tomlinson said that she has not decided when her treatment is going to start as she wants to finish this court case before she can make a decision on that. She could not answer whether treatment would go ahead regardless of the outcome of this case. She said that the medical team had advised her to get treatment as soon as possible. Mrs Tomlinson said that she was having an anxiety attack during her evidence, so a short break was taken in the proceedings.'
42. To permissibly read this challenge into paragraph 3 of the grounds the Upper Tribunal was asked to consider the first sentence of the paragraph in conjunction with the title to the ground. It was contended that paragraph 3 was properly to be read as 'there being a failure by the Judge to give an adequate reason for finding that Mrs Tomlinson had chosen to delay her cancer treatment without the appellant's presence in the country'. Having carefully considered both the title of the ground and the paragraph, I am satisfied that such reading cannot properly be made when considering the normal meaning of the words used. The first sentence of paragraph 3 clearly adopts "notes", which can properly be considered in context as introductory in substance. Thus, the first sentence of the paragraph can only be read as being introductory, noting the factual observation made by the Judge, which is consistent with the evidence presented: Mrs Tomlinson had chosen to delay her cancer treatment as of the date of the hearing before the First-tier Tribunal. The criticism of how the Judge approached this evidence is clearly identified in the second sentence of the paragraph:

'The FTTJ finds this is evidence of very compelling circumstances, however it is submitted that the FTTJ has failed to have regard to possibility that the appellant's partner is refusing treatment in order to promote the appellant's immigration case.'

43. I am satisfied that the linking word of 'however', coupled with 'submitted', establishes that an identified challenge follows, such challenge being the one addressed above, namely Mrs. Tomlinson acting in a manipulative manner. That challenge has been dismissed. In the circumstances, the only proper course is to conclude that the additional challenge raised at the hearing was one which the Secretary of State had not advanced in writing and upon which permission to appeal had not been granted. Mr Lindsay accepted that if this was found this to be the case, and with the Secretary of State having not made an application to amend the grounds of appeal, it could not be pursued.

### *Ground 3*

44. Ground 3:

'4. It is submitted that the FTTJ has regard to the fact that the appellant's criminal behaviour took place nearly 10 years ago, however the passing of 10 years does not lead to a presumption that the deportation order should be revoked.

5. In *EYF (Turkey) v SSHD* [2019] EWCA Civ 592 the Court of Appeal agreed with the Secretary of State's position that the expiry of the 10-year period simply meant that the presumption for continuation of the order no longer applied, not that a new presumption pointing the other way was in favour of revocation then arose. The correct approach is to undertake a balancing exercise including the factors set out in rule 390.
  6. Furthermore, at *EYF*, para 30, it is not apparent from the authorities that, once a person has spent the prescribed period of 10 years outside of the UK, the provisions of S.117C of the NIA Act 2002 have any application to the question of whether the order should be revoked, albeit the public interest in the deportation of foreign criminals remains a relevant factor. The appellant was deported in March 2016, so in any event 10 years have not passed, it is submitted that the FTT errs in failing to consider the length of time since the deportation order was imposed, as opposed to the length of time since the offending behaviour took place.'
45. Mr. Lindsay requested that the first sentence of paragraph 6 be excised from 'Furthermore' to 'revoked' as the Judge has correctly self-directed herself as to the guidance in *Binaku (s.11 TCEA; s.117C NIAA; para. 399D)* [2021] UKUT 00034 (IAC), [2021] Imm. A.R. 653.
  46. It is clear upon reading [51] of her decision that the Judge was aware that the presumption remained in favour of the deportation order being kept in place. Such reading was accepted by Mr. Lindsay at the hearing.
  47. The submission advanced was that the Judge noted the consideration of rehabilitation by the Supreme Court in *HA (Iraq) v. Secretary of State for the Home Department* [2022] UKSC 22, [2022] 1 WLR 3784, at [58], where it was held that 'in a case where the only evidence of rehabilitation is the fact that no further offences have been committed then, in general, that is likely to be of little or no material weight in the proportionality balance'. However, it was submitted that the Judge erroneously applied a 'limited' assessment at [51] of her decision: 'It has been nearly 10 years since the index offence that there is no evidence that the appellant has engaged in any further offences or been convicted since that date, although I note that that is to be given limited weight as to evidence of rehabilitation in and of itself' [emphasis added].
  48. As Mr. Lindsay's submission progressed, he candidly acknowledged that in the context of the decision itself, the reference to 'limited' may ultimately be of the same substance as 'little'.
  49. Reading the structured assessment in the round, I conclude that whilst referencing 'limited', the Judge placed little weight on Mr. Tomlinson's rehabilitation. The observation made at [51] does not re-appear with any greater weight as the structured assessment continues. In the circumstances, ground 3 does not identify a material error of law.

50. In the circumstances the Secretary of State's appeal is dismissed.

**Notice of Decision**

51. The decision of the First-tier Tribunal sent to the parties on 16 September 2022 is not subject to material error of law. The respondent's appeal is dismissed, and the decision of the First-tier Tribunal stands.

52. No anonymity direction is made.

*D O'Callaghan*  
**Judge of the Upper Tribunal**  
Immigration and Asylum Chamber

**2 May 2023**