Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24826/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 15th September 2015	**On 29th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

CHANTILLE PATRICE BLAKEGROVE
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Nicholson instructed by One Immigration (Leicester)
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant had applied for leave to remain as the spouse of a British citizen. Her application was refused by the Respondent and a decision made to remove her to Jamaica. An appeal against that decision was heard before Judge of the First-tier Tribunal Pickup at Bennett House, Stoke-on-Trent on 4th September 2014. In his decision, promulgated on

17th September 2014, the judge dismissed the appeal. Amongst his findings he stated (at paragraph 24 of his decision) that the Appellant could not succeed under Appendix FM to the Immigration Rules as she was in the UK in breach of immigration laws and did not have any valid leave. He considered that the refusal decision by the Secretary of State was flawed in that it appeared to consider paragraph EX1 when that paragraph could not be reached because of a failure to meet paragraph E-LTRP2.1–2.2. He also found that the Appellant could not meet the requirements of paragraph 276ADE of the Rules and that her removal would be proportionate under Article 8 ECHR.

2. In the grounds of application it was stated that the judge had erred in his approach to paragraph FM. The Respondent accepted that the Appellant met the suitability requirements of the Rules. The judge had been incorrect in considering that the Appellant could not meet the requirements of paragraph E-LTRP2.2, which at the time stated "the applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less) unless paragraph EX1 applies". It was said that the Rules were framed precisely to allow a spouse to remain in the UK despite a breach of the Rules if EX1 applied. With regard to his decision under Article 8 the judge had noted at paragraph 19 of his decision that the insurmountable obstacles test did not mean obstacles that were impossible to surmount but implied a reasonableness test. However it appeared that in fact he had applied a test of obstacles and his approach to "reasonableness" was unlawful. It was also said that the judge had failed to address the evidence of the Appellant's spouse as to the reasons why he could not relocate to Jamaica. The spouse was a 39 year old man who had lived in the UK all of his life, had no ties to Jamaica and would encounter risks if he went there. Permission to appeal was granted on all grounds.

3. At the commencement of the hearing Mr Smart on behalf of the Secretary of State accepted that there was an error in the decision as the judge had incorrectly regarded paragraph EX1 as not being in issue when it was. However he argued that the accepted error was not material to the outcome as the judge had gone on to consider the matter of reasonableness in the context of Article 8 ECHR. As to whether there were findings upon the evidence of the spouse, Mr Smart said that the judge had considered that evidence at paragraph 31 of his decision. For his part, Mr Nicholson said that there were fundamental problems with the decision. There had been a misunderstanding of where paragraph EX1 fitted into the scheme of Appendix FM. The reasoning at paragraph 24 of the decision was simply wrong. If EX1 applied, the Appellant could succeed. With regard to the suggestion that the decision could be sustained because of the judge's assessment under Article 8 ECHR. In that assessment the judge had not had regard to the experience of the spouse on his one visit to Jamaica nor to the Foreign and Commonwealth Office advice to British citizens going to that country. It could not be said that the judge had taken that evidence on board but in any event he should have considered matters in the context of EX1. It was also the case that the judge had at one point referred to the test under Article 8 being one of reasonableness but had then applied a test of obstacles. There were good

reasons why the spouse could not go to Jamaica, including the dependency of his father. After some discussion the two advocates accepted that the version of the Rules in play as at the date of decision under appeal did not include the words now appearing as EX2.

4. Having considered the grounds and those submissions I came to the view that there was a material error of law in the judge's decision. The correct construction of the position of paragraph EX1 in Appendix FM is helpfully set out in the reported decision of **Sabir (Appendix FM – EX1 not freestanding) [2014] UKUT 00063 (IAC)**. In the current case the Respondent accepted that the Appellant met the suitability requirements of the Rules. Section R-LTRP1.1 sets out the requirements to be met for limited leave to remain as a partner and by virtue of sub-paragraph (d) EX1 was relevant if the Appellant could come within (ii) of that sub-Section which requires an applicant to come within E-LTRP1.2–1.12 and (as at the time of decision) E-LTRP2.1 and 2.2. The Appellant did not fall foul of E-LTRP2.1. 2.2 reads "the applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less) unless paragraph EX1 applies". It will be seen that the Appellant does come within this sub-paragraph. The judge therefore erred in considering that paragraph EX1 was not in issue, as Mr Smart quite readily accepted.

5. The issue is therefore whether the decision made may be sustained in the light of the other findings made, not in relation to the Rules but under Article 8 outside of the Rules. I find that it cannot. At paragraph 23 the judge said that the Appellant's application and appeal fell to be considered first and foremost under the Immigration Rules. The fact that in his assessment she failed under the Rules would therefore appear to have coloured his approach to Article 8. His starting point in that respect was that she failed to meet the requirements of the Rules, a potentially relevant factor in considering proportionality.

6. It is correct that at paragraph 21 the judge referred to the evidence of the Appellant's spouse but he made no express findings on either the difficulties which leaving his elderly UK family would involve or his fears of what could befall him as a British citizen resident in Jamaica. In the circumstances I set aside the decision in its entirety.

7. I then canvassed with the representatives whether it would be possible to go on to make fresh findings on the same occasion. Mr Nicholson for the Appellant said that the statements produced were now out of date and there was further evidence that the spouse suffered from a medical condition which was relevant to Article 8. There were new facts and it was not his client's fault that an error of law had been made at the initial hearing. In the circumstances, and bearing in mind the layers of appeal to which the Appellant is entitled, I considered that this was an appropriate case to remit to the First-tier Tribunal under the provisions of Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and in accordance with Practice Statement 7.2(b).

Notice of Decision

There was a material error of law in the decision of the First-tier Tribunal. That decision is set aside and the appeal is remitted to the First-tier Tribunal for a fresh hearing in accordance with the directions below.

No anonymity order was sought and I could see no basis upon which one was required. None is made.

Signed Date: 28 September 2015

Deputy Upper Tribunal Judge French

DIRECTIONS FOR HEARING IN THE FIRST-TIER TRIBUNAL PURSUANT TO SECTIONS 12(3)(a) and 12(3)(b) OF THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

(1) The findings of the First-tier Tribunal are set aside in whole and fresh findings are required to be made on all issues.

(2) The members of the First-tier Tribunal to sit on the remitted appeal should not include First-tier Tribunal Judge Pickup.

(3) The appeal is to be reheard in the First-tier Tribunal at the Stoke Hearing Centre or such other hearing centre as may be directed. The time estimate is two hours.

(4) Each party shall serve upon the Tribunal and upon the other party all witness statements and other documentary evidence upon which they seek to rely at least seven days before the resumed hearing.

Signed Date: 28 September 2015

Deputy Upper Tribunal Judge French