Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/49915/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 January 2015	**On 13 January 2015**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mrs SAMANTHA LAVETA DENTON (Née BURKE)

Respondent

Representation:
For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Ms C T Patry, Counsel
(instructed by J McCarthy Solicitors)

DETERMINATION AND REASONS

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge TRP Hollingworth on 24 November 2014 against the determination of First-tier Tribunal Judge Seifert who had allowed the Appellant's appeal against the refusal of her application for leave to remain, on Article 8 ECHR

family life grounds only, as the spouse of a British Citizen in a determination promulgated on 6 October 2014.

2. The Respondent is a national of Jamaica, born on 24 June 1984, who had entered the United Kingdom as a visitor in December 2003 and had remained since then once her initial leave to enter had expired. She had known her husband Mr James Burke since 2006. They had married on 20 August 2011. He exceeded the income requirements under Appendix FM. The Respondent had applied for leave to remain in 2013, which was refused, initially without right of appeal. The Removal Directions subsequently made on 12 November 2013 restricted the Respondent's right of appeal to an out of country appeal only, however a duty judge took the view that a human rights claim had been made prior to the issue of Removal Directions and so the Respondent was permitted to continue her appeal in country. That decision, although perhaps erroneous, was not appealed by the Secretary of State and cannot now be reopened.

3. Judge Seifert found that the Respondent met all of the requirements of Appendix FM save for prior entry clearance. She considered that it would not be reasonable for the Respondent's husband to travel to Jamaica to support an entry clearance application, nor that the couple could relocate to Jamaica. The judge found that EX.1(b) applied. The judge accepted the couple's reasons for not applying to regularise the Respondent's status sooner. The judge found that the Respondent retained some ties with Jamaica, including her elderly grandmother. The judge also found that there were exceptional, compassionate and compelling circumstances which warranted consideration of Article 8 ECHR outside the Immigration Rules. The judge allowed the appeal under the Immigration Rules. Had it been necessary, the judge indicated that she would have allowed the appeal on Article 8 ECHR grounds.

4. Judge Hollingworth considered it arguable that Judge Seifert's decision was flawed, in that the Respondent's partner had connived at her illegality, and where the Respondent's position had been precarious in terms of her immigration status. The couple had known of the position since 2006. The Article 8 ECHR decision was also arguably wrong in that insufficient weight had been given to the public interest.

5. Standard directions were made by the tribunal, including that the decision would be remade immediately in the event that a material error of law were found. A rule 24 notice opposing the Secretary of State's appeal was filed on the Respondent's behalf.

6. Mr Tarlow for the Appellant relied on the onwards grounds and the grant of permission to appeal. The judge's decision was wrong in all material particulars.

EX1 was not engaged. There had been inadequate consideration of relocation and of the other possibilities which existed for the couple. The determination should be set aside, with the appeal remade and dismissed.

7. Ms Patry for the Respondent relied on her skeleton argument. The judge's decision had been open to her. The judge had found that there were genuine reasons why no application had been made sooner. The judge had been right to find that there were insurmountable obstacles to the continuation of family life in Jamaica. The relationship was genuine. The judge was bound to apply EX.1 in the light of her findings that there were insurmountable obstacles. VW (Uganda) [2009] EWCA Civ 5 showed that reasonableness was the correct test. Chikwamba [2008] UKHL 40 was relevant.

8. At the conclusion of submissions the tribunal indicated that it found that the judge had fallen into material error of law, for the reasons identified in the grant of permission to appeal, and as further developed in Mr Tarlow's submissions. The judge's reasons for finding that there were insurmountable obstacles to the continuation of family life in Jamaica were deficient. The judge had failed to provide adequate reasons for finding that it was not reasonably open to the Respondent to return to her country of nationality and to submit an entry clearance application, sponsored by her husband, to join him in the United Kingdom. It was obvious that the husband would not have to give up his employment in the United Kingdom as he could take leave for some or all of the waiting time and join her in Jamaica if he wished. Alternatively, the period of absence of the Respondent was likely to be between 6 weeks and 3 months, a separation which could not be considered excessive given that (a) the Respondent was a long term overstayer and (b) her husband had been well aware of her lack of lawful status when they married. The realistic and practical alternative of an entry clearance application, likely to be successful, meant that the issue of insurmountable obstacles did not arise, because any separation would be a temporary one. That was the process laid down by parliament. Patel v SSHD [2012] EWCA Civ 741 shows that there is no general dispensing power vested in the tribunal for Article 8 ECHR appeals. Moreover, the Immigration Rules prescribe that fees are payable for spouse settlement and that the specified documents set out in Appendix FM-SE must be checked. There was no reason why the Respondent should have been excused or exempted such requirements. EX.1 was inapplicable. The Secretary of State's appeal was allowed.

9. The determination must be and was accordingly set aside. The determination had to be remade. The parties' names now revert to their original titles for clarity and convenience in the remainder of this determination.

10. Ms Patry for the Appellant made further submissions. There was evidence in the form of a death certificate that the Appellant's grandmother in Jamaica had died. That meant that there were now no remaining ties and so the appeal should succeed under paragraph 276ADE of the Immigration Rules. In any event, there were compassionate and compelling circumstances. That meant that the appeal under Article 8 ECHR (family life) should succeed on proportionality grounds. It was pointless requiring the Appellant to leave the United Kingdom just to make an entry clearance application which would succeed. The appeal should be allowed.

11. There was nothing further which Mr Tarlow wished to add.

12. The tribunal indicated at the conclusion of further submissions that the appeal would have to be dismissed, with its determination reserved.

13. It was accepted that the Appellant could not meet Appendix FM for want of entry clearance. The judge had found that the Appellant's grandmother was among her remaining ties to Jamaica. That particular tie has recently gone but the Appellant retains her Jamaican nationality. She was last in Jamaica as a child of 8, but of course English is spoken there and it is a Commonwealth country with a vibrant culture which is well known in London. The tribunal is not satisfied that the Appellant has lost all of her social, cultural or family ties to Jamaica. She remains unable to satisfy paragraph 276ADE of the Immigration Rules.

14. There may be scope for differences of view as to whether the Appellant is able to show exceptional, compassionate or compelling circumstances such as to require the Secretary of State to consider the exercise of discretion outside the Immigration Rules under Article 8 ECHR, but the tribunal will accept Judge Seifert's view that such circumstances existed. The live issue for Razgar [2004] UKHL 27 purposes is proportionality.

15. The answer is clear. The Appellant is in a position to satisfy the relevant Immigration Rules under Appendix FM, which prescribe entry clearance procedures and the payment of the prescribed fee. There was no evidence that the Appellant would be unable to return to Jamaica safely and to stay there for so long as is necessary, with or without her husband, to make an entry clearance application, have her documents checked and return to the United Kingdom once her visa was granted. The likely period of separation will not produce unduly harsh consequences and the parties will be able to maintain contact in the event of such temporary separation. Obtaining entry clearance will in any event be a far preferable and faster course to settlement for the Appellant than via Article 8 ECHR. Chikwamba [2008] UKHL 40 and MA (Pakistan) [2009] EWCA Civ 953 are not comparable or relevant to the facts of the present appeal, where the Appellant

is a long term overstayer whose spouse was complicit in her overstay. Her return for entry clearance cannot be regarded as an empty, bureaucratic exercise.

16. It follows that the Appellant's appeal must be dismissed.

DECISION

The making of the previous decision involved the making of an error on a point of law. The appeal of the Secretary of State is allowed.

The determination is set aside and remade as follows:

The original Appellant's appeal is DISMISSED

There can be no fee award as the appeal was dismissed

Signed **Dated**

Deputy Upper Tribunal Judge Manuell