Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22146/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th May 2017	**On 10th May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MS ROSE MARIE MCLEOD
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E. Oremuyiwa, Solicitor
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Jamaica born on 29th of August 1966. She appeals against a decision of Judge of the First-tier Tribunal Oliver sitting at Hatton Cross on 8th of August 2016 in which he dismissed her appeal against a decision of the Respondent dated 27th of May 2015. That decision was to refuse to grant her leave to remain in the United Kingdom outside the Immigration Rules under Article 8.

2. The Appellant entered the United Kingdom on 20th of June 2002 as a visitor. She was granted a student visa valid from 21st of February 2003 until 30th of September 2003. She made two further applications for a student visa on 30th of June 2006 and 19th of July 2006 both of which were rejected and refused. On 23rd of July 2008 she was served with form IAS 151 as an overstayer.

3. On 27th of March 2014 she claimed asylum on the grounds that she had given evidence against a man at a trial in the United Kingdom when he was indicted for rape against his daughter (he was subsequently acquitted). The man returned to Jamaica after serving a nine-month sentence for assault and told the Appellant to remember that they would all meet up in Jamaica which she took as a threat. She did not complain to the police at the time because of her immigration problems.

4. The Respondent considered the asylum claim to be without any merit and it was certified as such. It appears that the Upper Tribunal rejected a judicial review challenge to the certification on the basis that the Appellant's protection claim had no prospects of success on appeal. On 16th of January 2015 the Appellant applied to remain outside the rules on the basis of her family and private life arguing under paragraph 276ADE of the Immigration Rules there would be very significant obstacles to the Appellant's reintegration back to Jamaica.

5. The Appellant was said to have a particular close relationship with her cousin whom she treated like a daughter. The man against whom she had given evidence would kill her if he found her in Jamaica. He belonged to a gang which was strongly feared in Jamaica. The Respondent refused the application on the basis that the Appellant had spent the first 36 years of her life in Jamaica and had not lost all social, cultural and family ties. Her evidence in the Crown Court was not an exceptional circumstance warranting consideration outside the Rules. There was no medical condition warranting her stay in this country.

The Decision at First Instance

6. At the hearing at first instance the Appellant gave evidence of her friendships in the United Kingdom and that she had become an integral part of the local community. She explained the very close relationship she had with her cousin and that they could not bear to be separated from each other. She had been receiving counselling to help her through her stress, fear and depression. Her own children were both now in America although her daughter was only there as a 6 month visitor. In Jamaica, the Appellant had worked in a hotel and in a factory. She had worked in a hotel in the United Kingdom too but stopped just after her visa expired in 2003 and had not worked since. She had been supported since then by family and friends. She did not know if anyone she knew had contacted the man she feared. The people in his neighbourhood had

severed ties with him because she had cousins living in that area and so knew that. She did not know if the man had any influence locally but she knew he had a gun. The police in Jamaica would not provide protection for her.

7. Paragraph 10 of his determination the Judge wrote:

> "The Appellant's fear of the man against whom she gave evidence was fully considered at the time of her asylum appeal. Nothing material has changed since then and she has not explained any of the circumstances which led her to claim that he will kill her. The Appellant's claim is based on her private life, to which I give little weight because it has developed while she has been in the United Kingdom in breach of immigration law without leave. In the circumstances, I do not accept that there would be very significant obstacles to her integration into Jamaica. This being the only potentially exceptional circumstance, since it has been considered already under the Rules it cannot be a reason for considering the claim outside the Rules. In any event the public interest in the maintenance of a firm but fair immigration system far outweighs her own interests".

The Judge dismissed the appeal under both the Immigration Rules and on Human Rights grounds.

The Onward Appeal

8. The Appellant appealed against that decision arguing that the determination was biased. The Judge had relied on the principle established in the case of **Devaseelan** which only supported findings on the same appeal. The Judge needed to make his own assessment on the basis of evidence adduced before him in this case. He pre-judged the Appellant's case. The Judge had not attempted to assess the Appellant's claim independently following the amount of witness evidence made available at the hearing. The Judge had erred by comparing the Appellant's asylum claim to her current immigration application and not accorded any weight to the amount of time that had passed and the level of threats received by the Appellant following her participation in a severe criminal matter. The grounds also argued that the Judge had asked irrelevant questions but gave no examples of any such. The grounds cited various authorities on Article 8 arguing that the Judge had refused or declined to examine the material evidence before him.

9. The application for permission to appeal came on the papers before First-tier Tribunal Judge Parkes on 8th of February 2017. He noted that the grounds of onward appeal had consisted of a series of quotes and assertions without engaging with the decision. At paragraph 4 he wrote: "the asylum claim would have been considered to the lower standard and would have had to consider the issues of protection and internal

relocation, **Devaseelan** applied. The Judge was obliged to take that as a starting point, he was entitled to find that there was no evidence to justify departing from the earlier decision. As the Appellant had been in the United Kingdom illegally for some considerable time her private life would attract little weight. The grounds are a lengthy disagreement with findings properly made and open to the Judge for the reasons given."

10. The Appellant renewed her application for permission to appeal to the Upper Tribunal following this rejection in grounds largely disagreeing with the assessment of the Article 8 claim. The First-tier Tribunal it was said had erred in law by not applying the appropriate standard of proof to the Appellant's case. She had a well-founded fear on return to her home country she had been a vital witness in a criminal prosecution matter. The Judge could not hold that the Appellant's asylum claim would have been unsuccessful that would be to pre-judge the Appellant's case without careful consideration.

11. The renewed application for permission came before Upper Tribunal Judge Smith on 24th of March 2017. In granting permission to appeal she wrote: "the first ground takes issue with the standard of proof applied to what is said to be a protection claim. The Respondent's decision under appeal did not relate to that protection claim. That claim was determined in an earlier decision and certified as clearly unfounded. The Upper Tribunal rejected a judicial review challenge to certification. The Appellant did not appeal that decision. Although the basis of the Upper Tribunal's decision (UTJ Southern) is that the protection claim has no prospect of success on appeal, it is arguable that the Judge has erred by assuming at paragraph 10 of the decision that this is the same consideration of the substance of the claim as would be made on appeal, that findings had already been made on that claim and that those were therefore the starting point to his determination. The remaining grounds are less persuasive. However, I do not limit the grant of permission."

12. The Respondent replied to the grant of permission under rule 24 of the Procedural Rules. She relied on the House of Lords decision of **South Bucks District Council v Porter [2004] UK HL 33**. The reasons for decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was. The First-tier Judge's reasons according to the Respondent enabled the reader to understand why the matter was decided as it was at paragraph 10. The First-tier Judge was correct to say there had been no material change since the Appellant's last determination. It could not be established that a different decision could have been reached. The Judge of the First-tier Tribunal directed himself appropriately.

The Hearing Before Me

13. In consequence of the grant of permission the matter was set down for hearing on whether there had been a material error of law such that the

decision of the First-tier Tribunal should be set aside. I heard submissions from both representatives. For the Appellant, her solicitor relied on a skeleton argument which now conceded that the standard of proof in the case was the balance of probabilities (as opposed to the so-called lower standard). However once the Appellant could show that the decision maker had violated her rights under Article 8 the onus then rested on the decision maker to justify the breach. The Judge's reasons for his decision were not reasonable or adequate and he had not undertaken a careful assessment of the Appellant's case. The skeleton argument again conceded that for leave to remain to be granted outside the Immigration Rules that should only be in an exceptional case. As this was not a case involving criminality or deportation the Appellant should have been granted leave outside the rules. The Judge had failed to undertake a proportionality assessment in his decision.

14. In oral submissions it was argued that the First-tier Tribunal had not considered the actual facts of the case or the risks upon return to Jamaica. The case had not been looked at outside the rules. **Devaseelan** was applied but this claim was different. There were significant obstacles to the Appellant's relocation in Jamaica. The Appellant had been in the United Kingdom for 15 years following overstaying but during that time she had put down roots in the United Kingdom.

15. In reply, the Presenting Officer indicated that this was a perversity challenge but the decision was not perverse. The very significant obstacles test contained in paragraph 276 ADE (vi) was not to be used for a 2nd bite at the cherry. The test was whether the Appellant could have a private life in Jamaica. The Appellant had made an asylum claim on the same facts that she was arguing now but the certificate had not been overturned. The Appellant could not use the guise of private life. The question was whether the Appellant would be such an outsider that she would not be able to form a private life within a reasonable time. She was not at risk as had already been decided. The presence of the individual concerned (who was said to have made the threats) in Jamaica was irrelevant for the purposes of 276 ADE. It was a much narrower issue. Finally, in reply the Appellant's solicitor said that this was a private life application the Tribunal had to make its own findings and there were obstacles to relocation.

Findings

16. The Appellant makes two challenges in this case. The first is the Judge's treatment of her claim that she would be at risk upon return to Jamaica because she feared a man against whom she had given evidence at a criminal trial in the United Kingdom. She made a claim for asylum on that basis which was refused by the Respondent and certified as being without merit. There appears to have been no new evidence of threats since the Respondent's certification and it is difficult to see how such a vague claim could indeed amount to a valid claim for international

protection. The Respondent's certificate is wholly understandable as is the rejection of the judicial review challenge by the Upper Tribunal.

17. The grant of permission in this case appears to be concerned with whether by indicating there were significant obstacles to the Appellant's re-integration back into Jamaica the First-tier Tribunal should have re-examined the Appellant's claim that she feared threats from the individual against whom she had given evidence. The criticism made of the first-tier Tribunal in this case is that the Judge has applied the ratio in the case of **Devaseelan** [although I note that at no point does the Judge himself refer to that case] whereas he should have looked at the facts of the case himself. There are however a number of problems with that submission. The first is that the test applied by Upper Tribunal Judge Southern would have been that the decision of the Respondent to certify the Appellant's asylum claim is being without merit was not Wednesbury unreasonable. As the grounds of onward appeal now acknowledge the standard of proof in this case was not the lower standard applicable to asylum claims but the balance of probabilities as this was an Article 8 claim outside the Immigration Rules not an Article 3 claim.

18. On that basis there was ample material before the Judge for him to find that the Appellant could not show on the balance of probabilities that it was more likely than not that there were very significant obstacles to her relocation to Jamaica. The Respondent's decision to certify the asylum claim as being without merit was a reasonable decision, that was the effect of Upper Tribunal Judge Southern's decision. As the Respondent's decision was a reasonable one the Appellant could not show it was more likely than not that the Respondent had got it wrong and that she was at risk upon return. If the Respondent had been wrong to say that the Appellant's claim for asylum was without merit the picture might have been very different but that was not the reality the First-tier Judge was dealing with.

19. The Appellant had not appealed further Upper Tribunal Judge Southern's rejection of her judicial review claim. The issue had therefore been decided, the Appellant did not have a valid claim for asylum and there was no new evidence put before the Judge to cause him to re-examine the matter. The Judge specifically stated as much at paragraph 10 when he said "nothing material has changed since [the Appellant's asylum appeal was considered]". Brief as the Judge's decision was, he was quite entitled to dismiss the claim under paragraph 276 ADE and find that there were no very significant obstacles to the Appellant's return to Jamaica.

20. The remainder of the grounds are as Upper Tribunal Judge Smith pointed out less persuasive. The Appellant had a bad immigration record. She had overstayed by several years and little if any weight could be attached to a private life that she had acquired during the time she was here. That she had made a number of meritless applications in the

meantime did not strengthen her claim to a private life but did go some way perhaps toward explaining any delay by the Respondent in dealing with her. The Judge was quite entitled to conclude that so little weight could be given to the Appellant's claim to a private life that it was easily outweighed by the weight to be given to the fact that this was a claim outside the Immigration Rules. There appears to be no family life claim of any significance, the relationship between the Appellant and her cousin being that of adults displaying no more than normal emotional ties. The Judge's findings were open to him on the evidence and the grounds of onward appeal were indeed no more than a disagreement with the result. The decision of the First-tier Tribunal did not involve the making of an error of law and I dismiss the Appellant's onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 8th day of May 2017

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 8th day of May 2017

.....
Judge Woodcraft
Deputy Upper Tribunal Judge