Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23263/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Thursday 8 June 2017	**On Wednesday 14 June 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MISS JOYCILDA VERONICA WALKER

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Palmer, Counsel instructed by Stuart & Co solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. There is no good reason to make an anonymity direction in this case.

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Ruth promulgated on 26 September 2016 ("the Decision"). By the Decision the Judge dismissed

the Appellant's appeal against the Respondent's decision dated 3 June 2015 refusing her application for leave to remain on the basis of her family and private life.

2. The facts of the Appellant's case are not in dispute. She is a national of Jamaica born on 15 January 1954. She entered the UK on 22 December 1999 with leave extended until 22 June 2000 (as a visitor). Thereafter she overstayed. She made no further attempt to regularise her status until 21 December 2009 when she sought leave to remain on human rights grounds. In response to a request for further information, the Appellant's representatives sent further documents on 11 November 2010. The application was refused on 17 November 2010 without a right of appeal.

3. The Appellant's representatives sought reconsideration of the refusal on 29 December 2010 and mentioned for the first time that the Appellant was in a relationship with Mr William Graham now aged eighty-one years who is a British citizen but was originally born in Jamaica. He came to the UK in 1959 and has not been back to Jamaica, I was told, for about sixteen years. He owns a parcel of land there. Mr Graham owns his own property in the UK. The couple have been in a relationship it appears since 2006. They apparently moved in together in 2008.

4. Mr Graham is now retired and in receipt of a pension. It appears from a document in the Appellant's bundle that in 2013-14, Mr Graham's income before tax was £17,002.62 but there is limited information as to his means and it is not clear whether the Appellant could meet the income threshold under the Immigration Rules ("the Rules"). The Appellant does not contend that she could meet that requirement.

5. There is some very limited information in the Appellant's bundle as to the Appellant's health. Although there is some information in the bundle which suggests that Mr Graham suffers from age-related ill heath, there is no evidence from a medical professional.

6. The Appellant has other family in the UK including adult children and their children. She has one daughter who remains in Jamaica. Mr Graham also has an adult daughter in the UK.

7. The Judge found at [25] of the Decision that the Appellant could not meet the requirements of the Rules in relation to her family life and that the Rules were not met in relation to her private life. He went on to consider the Appellant's case outside the Rules from [34] to [51] of the Decision before concluding that removal of the Appellant would not be a disproportionate interference with her private and family life.

8. The Appellant's application for permission to appeal to the First-tier Tribunal was made over three months out of time. First-tier Tribunal Judge Page refused permission on the basis that the application was out of time. He indicated however that, even if he had extended time, he would have refused permission on the merits.

9. Permission to appeal was granted by Upper Tribunal Judge Kopieczek on 20 April 2017 in the following terms:-

> "The lateness of the application for permission to appeal to the First-tier Tribunal ("FtT") is not an issue that this permission decision needs to address, given that the First-tier Tribunal Judge ("the FtJ") refused the application for permission rather than 'not admitting' it in conformity with the 'new' FtT procedure Rules.
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> Although it does not appear either that the FtJ was addressed on the issue or that the appellant's skeleton argument raised the matter, and the initial grounds seeking permission do not raise it, I consider it arguable that the FtJ erred in law in deciding that he was not required to consider the applicability of Ex.1.(b) of Appendix FM because the appellant could not meet the financial requirements of the Rules [22]. The later, wider consideration of Article 8 arguably does no address the issue of insurmountable obstacles sufficiently fully such as to mean that any error of law is not material."

10. The appeal comes before me to determine whether there is a material error of law in the Decision and if so to either re-make the decision or remit to the First-tier Tribunal to do so.

Discussion and conclusions

11. At the outset of the hearing, Mr Jarvis raised a preliminary issue about the first paragraph of the grant of permission to appeal. He submitted that there was an issue on timeliness of the permission to appeal application to the First-tier Tribunal which the Upper Tribunal Judge was wrong to refuse to deal with as he did. This raises an interesting issue of law and procedure with which it may well be appropriate for the Upper Tribunal to grapple in an appropriate case with the benefit of full argument on both sides. This was though raised late in the day and clearly took Mr Palmer for the Appellant by surprise. Further, having heard Mr Palmer's submissions regarding the reasons why the application for permission to appeal was made late, Mr Jarvis accepted that in this case there did appear to be good reason why the application was out of time. He therefore abandoned any reliance on this point. For that reason also, I do not need to deal with ground one of the Appellant's grounds which concerns FTTJ Page's refusal to permit the application out of time.

12. The Appellant therefore raises one ground of appeal which concerns the Judge's finding that the Appellant could not succeed under the Rules in relation to her family life.

13. The Judge dealt with this part of the Appellant's case in the following way:-

> "[21] Turning first to the provisions contained within the immigration rules in relation to private and family life, I have regard first to Appendix FM.
>
> [22] Although the appellant does satisfy the relationship requirements in section E-LTRP1.1, she cannot satisfy the financial requirements in section E-LTRP3.1 as she has provided very little evidence, in the specified format, to show she could satisfy these requirements. She has provided some bank statements and other financial documents but these neither come in the specified format, nor demonstrate her ability to comply with the mandatory financial thresholds.
>
> [23] For example, the bank statements from Natwest relate to a credit card as do the Barclaycard statements. The letters from the Halifax do not provide any financial

> information and there appears to be no other documentation relating to the financial requirements.
>
> [24] I note the partner said in evidence that he receives a pension but no information about this has been provided and I cannot, therefore, assess whether this would take the appellant over the relevant financial threshold.
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> [25] In these circumstances the appellant cannot satisfy the requirements of Appendix FM and it is not necessary for me to go on to consider whether or not the requirements of EX1, the immigration status requirements of E-LTRP2.2 not being satisfied are met."

14. Mr Jarvis for the Respondent accepts (as does the Respondent's Rule 24 statement) that the Judge fell into error in this passage but submits that the error is not material. I agree that this passage of the Decision does disclose an error of law. The Judge appears to have thought that, because the Appellant was unable to meet the income threshold requirement under the Rules, EX.1 of the Rules was not relevant. It is clear from the Rules, however, that EX.1 falls to be considered provided the Appellant could meet the suitability requirements and the eligibility requirements in E-LTRP.1.1-1.12. and E-LTRP.2.1. As the Judge observes, the income threshold requirements are to be found at E-LTRP.3.1. The Appellant did not therefore need to satisfy that requirement if EX.1.1 applies.

15. The Appellant's skeleton argument for the hearing before the First-tier Tribunal Judge does not make any reference to this point. Nor does it appear from the Decision that the Appellant's Counsel argued the case in this way. However, the Respondent had dealt with the application also applying EX.1 (even though she did not accept that the relationship was genuine and subsisting). The Judge should therefore have been alert to the application of this provision. The Judge did therefore err in failing to consider the Appellant's case under paragraph EX.1.1.

16. That though is not the end of the matter. Section 12 Tribunal, Courts and Enforcement Act 2007 makes clear that, where the Upper Tribunal finds that the making of a decision by the First-tier Tribunal involved the making of an error on a point of law, the Upper Tribunal "may (but need not) set aside the decision". There is therefore an issue whether the error is material. If it is not, there would be no point in setting aside the Decision.

17. The parties' submissions in this regard can be summarised as follows. Mr Palmer says that the Judge could, on the facts and evidence put forward, have found there to be insurmountable obstacles. Although he accepted that the Judge had dealt with the Appellant's family life outside the Rules which might in some cases lead to the same result, he submitted that this was not the position here. He pointed also to a number of errors which he said were made by the Judge when considering Article 8 outside the Rules, particularly in relation to the weight to be given to the Appellant's family life and the relevance of the Respondent's delay in making a decision on the Appellant's application.

18. Mr Palmer accepted that "insurmountable obstacles" is a stringent test but he submitted that it has to be given a practical and realistic interpretation. The factors which he said may lead to a conclusion that there are "insurmountable obstacles" to family life continuing in Jamaica are the Appellant's and her partner's age, the fact that he has lived in the UK since 1959, is completely settled in the UK and in receipt of a pension in the UK. The Appellant also has most of her family in the UK.

19. In response, although Mr Jarvis accepted that the Judge erred in not applying EX.1, he submitted that this error and any minor errors in approach outside the Rules were not material because all the errors were to the Appellant's benefit. The Judge had in fact applied a less stringent test than that under the Rules and indeed that advocated by the case-law outside the Rules. The Judge found that the Appellant was not a burden on the UK taxpayer. However, that is not the test applying section 117B Nationality, Immigration and Asylum Act 2002 ("section 117B"). The test is whether the Appellant is financially independent and on the face of the material produced, she is not. The Respondent's delay was considered. This was not a case where the Appellant had entered into her relationship with Mr Graham at a time when she believed, due to the delay, that her presence would be tolerated. The Appellant entered into that relationship prior to the delay when she and her partner knew that she had no right to be in the UK.

20. I start by setting out EX.1 which reads as follows (so far as relevant):-

> EX.1. This paragraph applies if
> (a)…
> or
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen……..and there are insurmountable obstacles to family life with that partner continuing outside the UK.
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> EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

21. As Mr Jarvis pointed out, this test is one which derives from the ECtHR's decision in Jeunesse v Netherlands. Although Mr Jarvis accepted that the application of that test to each case is fact sensitive, it is nonetheless clearly intended to be a high threshold. The Supreme Court summarised the test, in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 ("Agyarko") as follows:-

> "[45]…interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably

> harsh consequences for the individual such that refusal of the application would not be proportionate"…."

The Supreme Court went on to consider whether that approach was consistent with Article 8 ECHR and concluded that it was ([48]).

22. I turn next to consider the way in which the Judge dealt with the Appellant's family life outside the Rules, having failed to look at this through the lens of the Rules. There was no issue whether the Appellant's Article 8 rights were engaged or that removal would interfere with those rights. As in many such cases, the only issue is one of proportionality. The Judge dealt with that issue at [44] onwards as follows:-

> "[44] As to whether the decision is a proportionate response to the appellant's established family and private life, I have in the forefront of my mind the requirements contained in section 117B of the 2002 Act. There is no issue in relation to subsections 2 or 3 since the appellant speaks fluent English and is not a burden on the State.
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> [45] There is, however, a serious difficulty for the appellant in relation to section 117B(4). I am required to give little weight to a private life or a relationship formed with a British citizen, established by a person at a time when that person has been in the United Kingdom unlawfully.
>
> [46] That is certainly the case for this appellant since her leave to remain, she does not dispute, came to an end in 2000 and she has been unlawfully here since then. The appellant has therefore been living illegally in this country for at least the last fourteen years and she and her partner knew this to be the case.
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> [47] There is also the matter of the unexplained delay by the respondent between 2010 and 2015. It is clear that during periods of such delay private and family life ties may strengthened [sic] and deepened [sic] *(EB (Kosovo))* and I have no doubt this is what has happened in this case. Had the respondent dealt with the matter earlier the weight to be given to the appellant's private and family life would have been reduced.
>
> [48] I therefore do give greater weight to the private and family life of the appellant, but this cannot overcome the instructions of Parliament. I am required by section 117B(4) to give "little" weight to the appellant's private and family life because she has remained in the UK unlawfully. The appellant's interests cannot, therefore, weigh heavily against those of the respondent.
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> [49] In the final analysis the appellant and the sponsor ought to have known that remaining illegally for so many years was unlikely to end well. The appellant is healthy and of working age. No minor children are involved. She has access to family members, land and financial support from her family in the UK. In those circumstances I do not consider it unreasonable to expect her to return to Jamaica.
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> [50] The question then becomes how she and the partner will carry on their genuine family life. This is a matter for them but there are various options. One would be for the appellant to make an application for entry clearance as a partner. Mr Unigwe urged me not to reach such a conclusion on the basis of *Chikwamba*, but that case is not authority for a general departure from the requirements of the rules and I note this is not a case where the

> only issue in the balance from the perspective of the respondent is the general requirement that such applications are made overseas. In this case there is the more pressing issue that the appellant chose to remain illegally for considerably more than a decade.
>
> [51] Another option would be for the partner to travel to Jamaica, either temporarily or permanently. Given the fact Mr Graham knew the appellant's situation from the start of their relationship and given he owns land in that country, that does not seem to me to be an unreasonable option in all the circumstances.
>
> [52] The removal of the appellant would therefore not be a disproportionate interference with her Article 8 rights."

23. Although the Appellant's grounds did not include a challenge to the Decision in relation to the assessment outside the Rules, Mr Palmer made a number of submissions about the way in which the Judge approached this assessment and I did not prevent him from doing so. He pointed out that at [45] of the Decision, the Judge's analysis begins with the Judge giving the Appellant's family life "little weight" but then at [48] giving it greater weight as a result of the Respondent's delay in responding to the application. He said that it was therefore unclear what weight had been given to the Appellant's family life. He also relied on the Court of Appeal's judgment in Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803 ("Rhuppiah") in support of the proposition that "little weight" does not mean that no weight should be given.

24. I do not accept that the Judge erred in law in relation to the weight to be given to the Appellant's family life. It is clear that the Judge's starting point was that "little weight" should be given because the relationship was formed when the Appellant's status was unlawful. Although the Judge accepted that more weight should be given to that family life because of the Respondent's delay (or perhaps more accurately that the delay might diminish the public interest in removal), it remained the position that the Appellant's family life should be given only little weight because that is what section 117B provides in circumstances where the Appellant's stay in the UK has been for the most part unlawful. That is not inconsistent with the approach advocated in Agyarko (referring to EB (Kosovo); see [52] of that judgment). That is an assessment which the Judge was entitled to reach on the evidence. Indeed, the suggestion that greater weight should be given due to the delay may be generous given that the application had itself been refused timeously and what was outstanding was a request for reconsideration. However, that is not what the Judge found and I do not therefore need to deal with the point.

25. Mr Palmer also suggested that the Judge had failed to provide adequate reasons why it would not be "unduly harsh" for the Appellant and Mr Graham to return to Jamaica. He submitted that the Judge had begun the assessment but had not carried it through to any lawful extent. He said that this is relevant to whether another Judge might reach a different view whether there are insurmountable obstacles to family life continuing in Jamaica. Mr Palmer directed my attention to [51] of the Decision which were, he said, the only reasons given why the couple could be expected to relocate. Those reasons were, he submitted, limited to the fact that Mr Graham owns land in Jamaica.

26. The difficulty with Mr Palmer's argument is that it approaches the issue from the wrong starting position. As the Judge recognised, section 117B provides that the Appellant's family life is to be given little weight because she is here unlawfully (because of course section 117B provides that the maintenance of immigration control is in the public interest). That therefore is the Respondent's position as to what the public interest requires. It is not for the Respondent or the Judge to make the Appellant's case as to what her family and private life involves and the degree of interference which removal would entail. It is for the Appellant to demonstrate the strength of her Article 8 rights which are then to be weighed in the balance against the public interest. The Judge carried out the balancing exercise at [49] to [51] of the Decision. If the evidence which the Judge had was insufficient to demonstrate the strength of the family life which the Appellant and her partner enjoy in the UK and the interference which will result from removal, that is the fault of the Appellant or those who represent her.

27. In response, Mr Jarvis pointed out that the assessment which the Judge conducted outside the Rules is based on a test of whether removal would be unreasonable, weighing the Appellant's and her partner's Article 8 rights against the public interest. That is a lower threshold than whether there would be "insurmountable obstacles". It follows, Mr Jarvis says, that if the Judge found that removal would not be disproportionate on the basis that it was reasonable to remove the Appellant, she could not succeed applying the higher threshold. That is clearly correct.

28. Mr Jarvis also submitted that, by assessing the position outside the Rules, the Judge made it easier for the Appellant to succeed. That is because he could (and did) take account of other factors which might be to the Appellant's benefit such as delay. However, even taking account of those additional factors, the finding at [49], [51] and [52] is that it would not be unreasonable and would be proportionate to remove the Appellant. Mr Jarvis also drew my attention to what is said in Agyarko about the test to be applied outside the Rules. That is considered by the Supreme Court under the heading "Exceptional Circumstances". As the Supreme Court there makes clear that does not mean that a case has to contain some "unique or unusual feature". The Court goes on to say however that:-

> "… the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling…is required to outweigh the public interest."

As Mr Jarvis submits and I accept, in this case the Judge approached the issue against a test of whether it would be reasonable to expect family and private life to be enjoyed in Jamaica. That is a lower test than the case law requires. Nonetheless the Judge reached the view that even that lower test is not met.

29. Mr Jarvis also pointed out that at [44] of the Decision, the Judge erred in giving the Appellant credit by finding that sections 117B(2) and (3) are met in this case. As held by the Court of Appeal in Rhuppiah, the factors in sections 117B(2) and (3) are neutral if those factors are established and are only relevant if adverse to an applicant ([58] to [65] of that judgment). Mr Jarvis also rightly pointed out that the issue in section 117B(3) is not whether the Appellant is a burden on taxpayers but whether she is "financially

independent of others". In this case, the evidence is that she is not. Those errors though can only be to the Appellant's benefit. They do not serve to undermine the Judge's finding that removal would not be disproportionate.

30. In conclusion, I accept that the test which the Judge applied at [44] to [51] of the Decision is, if anything, one which is overly generous to the Appellant. The Judge found – and was entitled to find – that the Appellant's family and private life were outweighed by the public interest and it was therefore reasonable for her to be removed. That is a lower test than whether there is "something very compelling" to outweigh the public interest (assessing the case outside the Rules) and considerably lower than the stringent test of whether there are "insurmountable obstacles" (under the Rules). Since the Appellant could not meet the lower test applied by the Judge, it is inconceivable on the evidence which was before the First-tier Tribunal Judge that those higher tests could be met.

31. Mr Palmer did indicate in his submissions that, if the Decision were set aside the Appellant would wish to adduce additional evidence. He noted that there is for example no medical evidence in relation to Mr Graham's health. However, no application was made prior to the hearing before me to adduce further evidence. The Appellant and her witnesses were in court during the hearing and all speak English. I indicated to Mr Palmer that I would be willing to hear evidence from those witnesses even in the absence of any further witness statement but Mr Palmer declined that invitation and indicated that he would prefer to deal with the re-making at a second stage hearing if I found the error of law to be material. Since I have found that the error of law is not material, this stage does not arise. The Appellant's representatives will have been aware though from the Directions sent with the grant of permission that, if they wished to adduce further evidence, an application should have been made prior to the hearing before me and that they should have been prepared to deal with the re-making on the same day as the error of law hearing. As it is, if the Appellant wishes to put forward further evidence in support of her claim to remain, she will have to make a further application to the Respondent.

32. For the foregoing reasons, I am satisfied that, although the Decision contains an error of law, that error is not material. I therefore decline to set aside the Decision. I therefore uphold the Decision with the outcome that the Appellant's appeal remains dismissed.

DECISION

The First-tier Tribunal Decision did not involve the making of a material error on a point of law. I therefore uphold the First-tier Tribunal Decision of Judge Ruth promulgated on 26 September 2016 with the consequence that the Appellant's appeal is dismissed.

Signed Dated: 14 June 2017

Upper Tribunal Judge Smith