**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/08822/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 23rd May 2014** | **On 11th June 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

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

Appellant

**and**

**GABRIEL BERNETTA ELAINE DOBBS (NEE CAMPBELL)**
**(NO ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr A Osadebe of Zuriel Solicitors

**DETERMINATION AND REASONS**

**Introduction and Background**

1. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal. I will refer to her as the Claimant.

2. The Claimant is a Jamaican citizen, born 8th June 1983 who arrived in the United Kingdom as a visitor on 9th August 2011. Her leave was subsequently extended until

1st September 2012, and on 26th August 2012 she married a British citizen, Sam Dobbs, who I will refer to as the Sponsor.

3. On 29th August 2012 the Claimant applied for further leave to remain in the United Kingdom as the spouse of a British citizen.

4. The application was refused on 5th March 2013, the Respondent making a combined decision to refuse to vary leave to remain, and to remove the Appellant from the United Kingdom. It would seem that the removal decision is unlawful as it was made simultaneously with the decision to refuse to vary leave and was made before 8th May 2013 when section 51 of the Crime and Courts Act 2013 made it lawful to take the two decisions at the same time and serve them in the same document. This however was not a point taken on appeal by the Claimant.

5. The reasons for refusal are set out in a Home Office letter dated 5th March 2013. In summary the application was refused for two reasons in relation to Appendix FM of the Immigration Rules which relates to family life. Firstly the Claimant could not succeed because she was in the United Kingdom as a visitor, and secondly because the specified evidence required had not been provided, to prove that the Sponsor had an annual income of at least £18,600.

6. The application was also considered with reference to paragraph 276ADE of the Immigration Rules, in relation to the Claimant's private life, and the Secretary of State decided that the Claimant could not satisfy the requirements of paragraph 276ADE, and therefore the application was refused both in relation to family and private life.

7. The Claimant's appeal was heard by Judge of the First-tier Tribunal Rowlands (the judge) on 7th January 2014. The judge found that the appeal could not succeed under the Immigration Rules, but allowed the appeal under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

8. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had materially erred, and had failed to give reasons for findings on a material matter. The grounds contained in the application for permission to appeal may be summarised as follows;

   (1) The Claimant failed to meet the requirements of the Immigration Rules and the judge had erred in finding that the financial requirements were met, and had not sufficiently analysed the evidence.

   (2) The judge had given inadequate regard to the income threshold requirements of the Immigration Rules and disregarded those requirements in conducting a proportionality assessment under Article 8.

   (3) Findings made in relation to Article 8 are unsustainable and the judge had not followed the guidance given in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC).

9. Permission to appeal was given by Designated Judge of the First-tier Tribunal McClure who found it arguable that the judge had erred in his approach to the issues under Article 8, and granted permission on all grounds.

10. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

**Error of Law**

11. The appeal came before me on 28th March 2014 and I heard submissions on behalf of both parties before concluding that the judge had erred and the decision needed to be re-made.

12. The judge had dismissed the appeal under the Immigration Rules, and there was no challenge to that decision, which I decided should be preserved. In my view the judge erred in law in considering Article 8 for the following reasons.

13. It was unclear how the judge concluded in paragraph 23 of the determination that the financial requirements of the Immigration Rules were satisfied. The judge described the evidence submitted in relation to the Sponsor's income as "rather patchy", and it is not clear that the judge considered the requirements of Appendix FM-SE, which sets out the specified evidence that must be provided if the financial requirements are to be satisfied. For example, there was no P60 submitted on behalf of the Sponsor, no employer's letter, and no wage slips covering a period of at least six months prior to the application.

14. The judge did not refer to Gulshan, and although not referring to a decision of the Upper Tribunal is not an error of law, it is an error to fail to consider and apply the principles. The proper approach to considering Article 8 is set out in paragraph 24(b) of Gulshan which is set out below;

> (b) after applying the requirements of the rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: Nagre;

15. In paragraph 26 of Gulshan the Upper Tribunal stated that even if it was accepted that an application could not qualify under the Immigration Rules, those rules could not be passed over without analysis, and the rules must be the starting point.

16. In paragraph 27 the Upper Tribunal commented that embarking upon "a freewheeling Article 8 analysis, unencumbered by the rules", is not the correct approach.

17. In this case the judge did not apply the principles set out in Gulshan. This failure, taken together with the error in considering the financial requirements, means that the determination must be set aside and re-made.

18. It was suggested by Mr Osadebe that the decision should be remitted to the First-tier Tribunal. Having considered the Senior President's Practice Statement 7.2 I found no reason to remit the appeal to the First-tier Tribunal. The Claimant had not been

deprived of a fair hearing before the First-tier Tribunal or an opportunity to put her case, and it was not necessary to remit to the First-tier Tribunal for reasons of judicial fact-finding.

19. I indicated that the decision would be re-made by the Upper Tribunal, and Mr Osadebe applied for an adjournment to obtain further evidence. The application was not opposed.

20. Although directions had been given that the parties should be in a position to proceed to re-make the decision if an error of law was found, I granted the adjournment in the interest of justice.

21. I indicated that in addition to preserving the judge's decision that the appeal could not succeed under the Immigration Rules, there had been no challenge to the finding made by the judge that the parties had entered into a genuine marriage, and that finding was also preserved.

**The Upper Tribunal Hearing – 23rd May 2014**

**Preliminary Issues**

22. Mr Osadebe confirmed that no further documentary evidence had been submitted following the hearing on 28th March 2014, although he produced at this hearing, without objection, a P60 tax certificate for the year ending 5th April 2012 for the Sponsor.

23. I ascertained that I had received all documentation upon which the parties intended to rely, and each party had served the other with any documentation upon which reliance was to be placed. I had before me the Respondent's bundle with Annexes A-C, the Appellant's bundle comprising 40 pages, and various bank statements belonging to the Sponsor which were not indexed or paginated. I have marked one bundle of the bank statements "A". The other bank statements relate to periods 18th September 2013 to 17th October 2013, and 10th October 2013 to 9th November 2013.

24. Mr Osadebe accepted that the appeal could not succeed under Appendix FM, nor under paragraph 276ADE(vi) as it could not be contended that the Claimant had no ties to Jamaica. I was therefore asked to consider the appeal in relation to Article 8 outside the Immigration Rules.

25. The Claimant and Sponsor had attended the hearing, but Mr Osadebe indicated that he did not intend to call them to give evidence and wished to proceed by way of submissions only.

**The Claimant's Submissions**

26. Mr Osadebe stated that the Claimant and Sponsor adopted their witness statements. I was asked to note that the Sponsor had been born in the United Kingdom and lived all his life here, and had never been to Jamaica. It would therefore be difficult for him to settle in Jamaica with the Claimant.

27. The Sponsor's family members are in the United Kingdom and he has no friends or family in Jamaica. The Sponsor is in employment and could financially support the Claimant, and the appeal should be allowed in reliance upon Article 8 because the Claimant would be unable to return to Jamaica with the Sponsor, and this amounted to exceptional circumstances which meant that the Secretary of State's decision was disproportionate.

**The Secretary of State's Submissions**

28. Mr Duffy relied upon Gulshan, and referred me to paragraph 24(b) which gave guidance on the correct approach. Mr Duffy described this as an ordinary case with no exceptional or compelling features and submitted that there was no reason why the Claimant could not return to Jamaica and apply for entry clearance.

29. Mr Duffy submitted that this appeal should not be considered outside the Immigration Rules, but even if I considered Article 8 outside the Immigration Rules, the decision made by the Secretary of State was not disproportionate.

30. Mr Duffy submitted that this was not a case where the principles in Chikwamba [2008] UKHL 40 assisted the Claimant because the application had not been refused simply because the Claimant was in the United Kingdom as a visitor, but because the financial requirements of Appendix FM were not satisfied.

**The Claimant's Response**

31. Mr Osadebe asked that I draw a distinction between this appeal and Gulshan, in that the Sponsor in Gulshan was not born a British citizen whereas the Sponsor in this case is British born and has spent all his life here.

32. Mr Osadebe submitted that Chikwamba was of assistance to the Appellant, in that the Secretary of State proposed to remove her simply to follow policy and for no other reason.

33. At the conclusion of oral submissions I reserved my decision.

**My Assessment and Conclusions**

34. I have considered all the evidence and submissions presented to me. I find as a fact that the Appellant arrived in the United Kingdom as a visitor in August 2011, and her leave was subsequently extended. I am satisfied that the Claimant and Sponsor married in this country on 26th August 2012 and they have a genuine and subsisting marriage.

35. I am satisfied that the Appellant and Sponsor first met in October 2011, started seeing each other regularly by November 2011 and the Sponsor proposed in July 2012. I am satisfied that they have been living together since their marriage.

36. I am satisfied that the Sponsor is currently in employment, and that he was born in the United Kingdom and has always lived in this country. I accept that his close family members and friends are in this country, and he has no links to Jamaica, other than being married to a Jamaican citizen.

37. It was accepted on behalf of the Appellant that she could not satisfy either Appendix FM in relation to family life, or paragraph 276ADE in relation to private life.

38. The Claimant could not satisfy Appendix FM, because she was in the United Kingdom as a visitor and this fact prohibited her from succeeding under FM. In addition the specified financial evidence required by Appendix FM-SE, was not submitted either to the Respondent or to the First-tier Tribunal.

39. As it was accepted that the Claimant still had ties to Jamaica, because she has only been in the United Kingdom since August 2011, she cannot succeed under paragraph 276ADE in relation to her private life.

40. The issue before me related only to Article 8, and I was asked to consider Article 8 outside the Immigration Rules. The correct approach is set out in paragraph 24(b) of Gulshan and I have to consider whether there are arguably good grounds for granting leave to remain outside the rules, and only if there are such grounds, is it necessary for Article 8 purposes to go on and consider whether there are compelling circumstances not recognised under the rules.

41. Further guidance was given in paragraph 21 of Gulshan as follows;

> On a thorough review of the Strasbourg guidance, Sales J concluded that in a precarious family life case only in exceptional circumstances would removal of the non-national family member constitute a violation of Article 8. To show that, despite the absence of insurmountable obstacles to removal, it would nonetheless be disproportionate, it would be necessary to show other non-standard and particular features of the case of a compelling nature demonstrating that removal would be unjustifiably harsh.

42. I have to take into account that the decision in Miah v Secretary of State for the Home Department [2013] QB 35, which was approved in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72, confirms there is no near miss principle when considering Article 8.

43. As was stated in paragraph 57 of Patel and Others by Lord Carnwath;

> 57 It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right.

44. The approach to be taken with regard to Article 8 has been further confirmed by the Court of Appeal in Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558 in paragraph 40 in which it is stated that the FtT Judge in that case erred in his approach to Article 8 because he did not consider the basis for remaining in the United Kingdom in relation to the Appellant's private and family life against the Secretary of State's policy as contained in Appendix FM and paragraph 276ADE of the Immigration Rules. The court specifically stated that the

new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new rules than it had previously been. The new rules require stronger bonds with the United Kingdom before leave will be given under them.

45. In my view there are no arguably good grounds for granting leave to remain outside the Immigration Rules, but if I am wrong about that, I will consider whether there are any compelling circumstances not recognised under the rules.

46. I therefore consider the five stage approach advocated in Razgar [2004] UKHL 27. I conclude that the Claimant and Sponsor have established family life with each other, and they have established private lives. A decision to remove the Claimant would interfere with that family and private life. I have taken into account the decision in Beoku-Betts [2008] UKHL 39, which means that I have to consider the rights of other family members affected by the decision, not only the Claimant.

47. The proposed interference with the parties' family and private lives is in accordance with the law, as the Claimant cannot satisfy the Immigration Rules. The fourth and fifth questions posed in Razgar, are whether the interference is necessary in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others, and if the interference is necessary, whether it is proportionate to the legitimate public end sought to be achieved.

48. In my view, the decision of the Secretary of State in this case is necessary in the interests of maintaining firm, fair and effective immigration control, which is needed to maintain the economic well-being of the country. I take into account that the Claimant and Sponsor wish to remain in the United Kingdom, but that Article 8 does not bestow upon the Claimant the automatic right to choose in which country she wishes to live.

49. In my view I have to attach considerable weight to the fact that the Immigration Rules cannot be met, and that there is a need to maintain effective immigration control. I place considerable weight upon the fact that the Sponsor is British born, and has lived in this country all his life, and his family and friends are here, as is his employment.

50. I also have to take into account that the parties married in the full knowledge that the Claimant was in the United Kingdom as a visitor and that her leave to remain expired on 1st September 2012, and they married on 26th August 2012. They therefore married in the knowledge that the Claimant only had limited leave to remain, and they could have no legitimate expectation that the Claimant would be allowed to remain if the Immigration Rules were not satisfied.

51. I do not find that this case can be equated with that of Chikwamba. This is not a case where the Secretary of State takes the view that the Claimant should return to Jamaica to make an application for entry clearance simply as a matter of policy. In my view, the fact that the Claimant was a visitor when she married, is only one reason why she cannot meet the requirements of the Immigration Rules, the other reason being that the necessary financial evidence was not submitted.

52. The Claimant could return to Jamaica where she has family, friends and accommodation, and make an application for entry clearance to enter the United Kingdom as the spouse of a British citizen. This I accept would mean a separation from the Sponsor, if the Sponsor did not wish to return to Jamaica with her. However in my view, more weight has to be given to the fact that the Immigration Rules cannot be satisfied, than to the wishes of the parties to remain and live in the United Kingdom, despite the fact that the rules cannot be satisfied. I do not find that there are compelling circumstances which demonstrate that the Claimant's removal from the United Kingdom would be unjustifiably harsh, and therefore I find the Secretary of State's decision to be proportionate. Having said that, although the decision to refuse to vary leave is lawful, it would seem that there would need to be a fresh decision to remove, because the removal decision dated 5th March 2013 was made simultaneously with the refusal to vary leave.

**Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows.

The Claimant's appeal is dismissed.

**Anonymity**

No anonymity direction was made in the First-tier Tribunal. There has been no request for anonymity and no anonymity order is made by the Upper Tribunal.

Signed Dated 5th June 2014

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT**
**FEE AWARD**

The Claimant's appeal is dismissed. There is no fee award.

Signed Dated 5th June 2014

Deputy Upper Tribunal Judge M A Hall