Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08525/2014

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 27 January 2015	**On 24 February 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MARCIA ELAINE MOFFAT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Grubb instructed by Hoole & Co, Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Jamaica who was born on 31 August 1958. On 30 January 2012, she made an application for leave to remain in the UK outside the Immigration Rules. That application was refused by the Secretary of State on 5 November 2012 and, against which, the appellant had no right of appeal.

2. On 18 September 2013, the appellant was served form IS151A notifying her of her immigration status as an overstayer and that she was liable to detention and removal

from the UK. On 10 October 2013, the appellant indicated that she would be voluntarily departing to Jamaica. However, on 28 October 2013 the appellant advised that further representations would be submitted. On 29 November 2013, further representations were received by the Secretary of State.

3. On 4 February 2014, the Secretary of State refused the appellant's application for leave based primarily upon her claimed relationship with her partner, Mr Edwards who is also a citizen of Jamaica and had limited leave to remain in the UK and also on the basis of her private life in the UK. The Secretary of State concluded that the appellant could not succeed under Appendix FM, in particular E-LTRP and under para 276ADE of the Immigration Rules (HC 395 as amended). On 4 February 2014, the Secretary of State also made a decision to remove the appellant as an overstayer by way of directions to Jamaica.

4. The appellant appealed that latter decision to the First-tier Tribunal. In a determination promulgated on 4 July 2014, Judge M J Waygood dismissed the appellant's appeal under the Immigration Rules and also under Arts 3 and 8 of the ECHR.

5. The appellant sought permission to appeal to the Upper Tribunal. On 28 August 2014, the First-tier Tribunal (Judge P J M Hollingworth) granted the appellant permission to appeal.

6. On 11 September 2014, the Secretary of State served a rule 24 notice opposing the appellant's appeal.

The Judge's Decision

7. First, the judge accepted that the appellant and Mr Edwards had a "genuine and subsisting" relationship and had lived together since 2010. However, the appellant could not succeed under Appendix FM as a "partner" because Mr Edwards only had limited leave and therefore was not a British citizen, someone settled in the UK, or someone with leave as a refugee or humanitarian protection as required by para E-LTRP.1.2.

8. Secondly, the judge found that the appellant could not meet the requirements of para 276ADE as she had not been in the UK for twenty years and it was not established that she had lost all ties with Jamaica.

9. Neither of those findings is challenged by Ms Grubb on behalf of the appellant before me.

10. Thirdly, the judge went on to consider Art 8 outside the Rules. At paras 82–92, the judge considered the medical evidence concerning the health of both the appellant and Mr Edwards and found that, on the basis of the background information, any required medication or support would be available in Jamaica. As a consequence, the judge found that the appellant could not succeed under Art 8 on the basis of her health and, it was not suggested otherwise before him, she could also not succeed under Art 3.

11. Fourthly the judge considered the appellant's private and family life including the best interests of the children who were part of the appellant's family living in the UK and Mr Edwards' grandchildren and concluded that it would be reasonable for the appellant and Mr Edwards to return to Jamaica and continue their family life there. The appellant's removal was a proportionate interference with her family and private life in the UK and no breach of Art 8 had been established.

The Submissions

12. On behalf of the appellant, Ms Grubb made two submissions.

13. First, she submitted that the judge had erred in law by considering separately the Art 8 issues in relation to the health issues and then in respect of her private and family life. She submitted that that was contrary to the approach required by the Court of Appeal in MM (Zimbabwe) v SSHD [2012] EWCA Civ 279 at [23]. She submitted that the judge failed to deal with the Art 8 issues "holistically". Ms Grubb accepted that the appellant could not succeed on health grounds alone under Art 8. Nevertheless, her (and Mr Edwards') health were relevant as to their circumstances in Jamaica and, she submitted, effectively they would be "destitute" because they would be unable to work and would be unable then to return to see their families in the UK. She submitted that there was evidence that they could not afford drugs and so their health would deteriorate.

14. Secondly, Ms Grubb submitted that the judge had erred in law by considering whether the appellant met the requirement of Appendix FM and para 276ADE which only applied to applications made on or after 9 July 2012. The appellant's application had been made prior to that. She relied upon the decision of the Court of Appeal in Edgehill and Another v SSHD [2014] EWCA Civ 402 that pre-9 July 2012 application should be decided under the Rules in force prior to 9 July 2012. She submitted that the subsequent, and contrary, decision of the Court of Appeal in Haleemudeen v SSHD [2014] EWCA Civ 558 should not be followed. Ms Grubb submitted that the judge's error, in applying the post-9 July 2012 Rules, was material. Under para 281 of the Immigration Rules, even though the appellant could not succeed as Mr Edwards was not "present and settled" in the UK, nevertheless they could satisfy the adequate maintenance requirement since their income was £16,357.80 even though it did not meet the threshold requirements in Appendix FM of £18,600.

15. On behalf of the respondent, Mr Richards submitted that the judge had not erred in law in carrying out the assessment of proportionality under Art 8. He submitted that it was clear that the judge, having considered the relevant background evidence at para 83, had found that the appellant and Mr Edwards would be able to obtain the required medication and support which was available in Jamaica (see para 92 of the determination). Mr Richards submitted that at para 99 of his determination, the judge did refer to the "medical issues" which he had already considered when considering the wider issues of the appellant's private and family life in the UK. Given the availability of treatment, Mr Richards submitted that it was inconceivable that the judge would have reached any other finding, namely that it was reasonable for the appellant and Mr Edwards to continue their family life in Jamaica and not disproportionate.

16. As regards the applicable Immigration Rules, Mr Richards submitted that the judge was entitled to follow Haleemudeen which was the most recent decision of the Court of Appeal. In any event, Mr Richards submitted that even if that was wrong his error was not material as the judge had engaged in a full assessment of proportionality and had not taken into account the issue of the financial threshold as a negative factor in assessing proportionality.

Discussion

17. It is convenient to deal with the second ground of appeal in relation to the applicable Immigration Rules to this appeal.

Ground 2

18. Ms Grubb invited me to follow the Court of Appeal's decision in Edgehill rather than the more recent decision of the Court of Appeal in Haleemudeen.

19. Since this appeal was heard the Court of Appeal has resolved the conflict between Edgehill and Haleemudeen in Singh v SSHD; Khalid v SSHD [2015] EWCA Civ 74, preferring the reasoning in Edgehill to that in Haleemudeen, namely that the old Rules applied to applications made before 9 July 2012 which were decided on or after that date. However, the Court of Appeal held that Edgehill only applied to decisions taken between 9 July 2012 and 6 September 2012. As a result of a further amendment to the Rules made by HC 565 with effect from 6 September 2012, the Secretary of State was entitled to take into account the provisions of Appendix FM and para 276ADE when deciding private or family law applications even if they were made prior to 9 July 2012 (see [56]).

20. In this appeal, the decision to refuse leave was made on 4 February 2014 and so did not fall within the 'window' recognised in Singh and Khalid to which Edeghill applied. The new Rules applied. Consequently, Judge Waygood did not err in law in considering the appellant's appeal under Appendix FM and para 276AE.

21. In any event,, even if the pre-9 July Rules had applied, any error would not, in my judgment, have been material to the decision. Ms Grubb did not suggest that the appellant could succeed under the pre-9 July Rules.

22. First, the appellant could not succeed under the predecessor to para 276ADE, namely para 276B. The appellant arrived in the UK on 5 August 2012 with leave as a visitor valid until 5 February 2003. Although the appellant made an in time application on 17 January 2003 to extend that leave, that application was rejected on 23 March 2003 as no application form was submitted. Her subsequent application on 10 April 2003 was refused on 15 May 2003 and against which she had no right of appeal as she had no extant leave. The appellant's leave, therefore, expired no later than 23 March 2003. As a consequence, the appellant could not establish under para 276B that she had ten years' continuous lawful residence or 14 years' continuous residence.

23. Secondly, in relation to her claim as a partner under Appendix FM, she failed for the very same reason that she would have failed under para 281 (as a spouse) or para 295A as an unmarried partner because Mr Edwards was not a person "present and

settled in the United Kingdom" as he only had limited leave to remain. Ms Grubb placed some reliance on the fact that the appellant would have been able to establish "adequate maintenance" on the basis of Mr Edward's income in the UK of £16,357.80 even if he could not satisfy the threshold requirement of Appendix FM of £18,600. The difficulty with that submission is, as Mr Richards pointed out in his submissions, that at para 98 of his determination the judge expressly ignored the fact that the appellant did not reach the financial threshold under Appendix FM in assessing proportionality. He said this:

> "... In this case the fact that Mr Edwards, as the appellant is not earning any money, does not reach the financial threshold I find in any event does not sway my assessment of proportionality, they do not meet the requirements of the Rules for the reasons previously stated ..."

24. In other words the aspect of non-compliance with the Immigration Rules which the judge considered important was applicable equally under the pre-9 July 2012 Rules, namely that Mr Edwards was not "settled" in the UK because he only had limited leave to remain. It would, therefore, have been irrelevant to the judge's reasoning if he had applied para 281 or para 295B that the appellant had "adequate maintenance".

25. Further, it is, in any event, difficult to see any material error of law given the judge's extensive consideration of Art 8 outside the Rule at paras 73–105 of his determination. Without succeeding on her first ground, even if the judge should have applied the pre-9 July 2012 Rules, there is no proper basis upon which it can be said that that factor in any way tainted or infected the judge's reasoning and conclusion for finding that the appellant's removal was proportionate under Art 8 of the ECHR.

26. Ms Grubb accepted as much in her submissions when she recognised that the judge's application of Gulshan (Art 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) at paras 71–72 of his determination could only be successfully criticised if she made good her first ground in relation to the judge's assessment of proportionality under Art 8.

27. Consequently, I reject Ms Grubb's submissions in relation to Ground 2 and I now turn to Ground 1.

Ground 1

28. Ms Grubb submitted that the judge was wrong to consider the "medical issues" in relation to Art 8 separately at paras 82–92 from the wider family and private life issue at paras 93–105 of his determination. She submitted that the correct approach was to consider them "holistically". She relied upon [23] of MM (Zimbabwe) where Moses LJ (with whose judgment the Master of the Rolls and McFarlane LJ agreed) stated:

> "23 The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8 , is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8 . Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8 . That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

29. In Akhalu (health claim: ECHR) Art 8 [2013] UKUT 00400 (IAC) the Upper Tribunal considered MM and, in particular, [23] of the judgment. Having noted at [41] that the decision in MM ultimately did not turn on a comparison of medical treatment available in the UK with that in Zimbabwe, the Upper Tribunal said this about the proper approach to Art 8 (at [43] – [46]):

> "43. *MM (Zimbabwe)* does not establish that a claimant is disqualified from accessing the protection of article 8 where an aspect of her claim is a difficulty or inability to access health care in her country of nationality unless, possibly, her private or family life has a bearing upon her prognosis. The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases.
>
> 44. When a judge arrives at the question of proportionality he is required to have regard to all of the circumstances relied upon by both parties. If he left out of account aspects of the claimant's private life established here because it could not be shown that they had a direct bearing on her prognosis, the balancing exercise would be fundamentally flawed and legally deficient.
>
> 45. The correct approach is for the judge to have regard to every aspect of the claimant's private life here, as well as the consequences for her health of removal, but to have in mind when striking the balance of proportionality that a comparison of levels of medical treatment available is something that will not in itself have any real impact on the outcome of the exercise. The judge must recognise, as did Judge Saffer, that it will be a rare case that succeeds where this is an important aspect of the claimant's case.
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> 46. Put another way, the consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country, are plainly relevant to the question of proportionality. But when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal."

30. That passage provides support for Ms Grubb's submission that a judge should adopt a "holistic" approach in applying Art 8 including consideration of health issues but, as the UT noted, the public interest is likely to outweigh the consequences for the health of an individual simply where there is a disparity of healthcare facilities in all but "a very few rare cases".

31. The latter point has recently been affirmed by the Court of Appeal. In GS (India) v others v SSHD [2015] EWCA Civ 40 Underhill LJ said (at [111]) this about the approach in MM and the passage from Moses LJ's judgment at [23] cited above :

> "There are possibly some ambiguities in the details of the reasoning in that passage, but I think it is clear that two essential points are being made. First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging article 8: if that is all there is, the claim must fail. Secondly, where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the "no obligation to treat" principle."

32. In this appeal, Ms Grubb accepted (as she did before Judge Waygood) that the appellant could not succeed under Art 8 simply on the basis of health or medical issues. I agree. It added little or nothing to the appellant's claim under Art 8 considered 'holistically'.

33. The judge set out the evidence concerning the health issues of the appellant and Mr Edwards at para 82 as follows:

> "... The appellant's medical evidence is contained in section 3 of the appellant's bundle. It appears that back in 2011 the appellant underwent examination in relation to her kidneys but there is no outcome indicated. Additionally within the respondent's bundle there are letters to the appellant in 2012 indicating that she requires a repeat blood pressure check and also indications that she has routine blood tests and then a further letter to the appellant from the community urology service indicating that an appointment was made her on 26 May 2011. There is no indication of any adverse outcome from any of these tests or checks. As far as Mr Edwards is concerned there is an indication in the documentation provided in particular from a letter from the Montpellier health centre in Bristol dated 23 May 2014 that he has been registered with them since 2002 and that he has degenerative cervical stenosis diagnosed in 2013, hypertension diagnosed in 2005 and diabetes diagnosed in 2009. The letter states his diabetes and hypertension are managed by medication and he has physiotherapy for his neck symptoms and continues to take analgesia. In addition of course Mr Edwards has indicated that he ha some memory problems and is helped in this by the appellant, although there is no specific medical diagnosis that has been placed before me at this point."

34. Then, at para 83 the judge set out the relevant background evidence concerning the availability of drugs and treatments in Jamaica as follows:

> "83. The respondent referred in the refusal letter to the National Health Fund in Jamaica provided by the Jamaica information service on the Ministry of health from September 2009. The information that was obtained was from the Country of Origin Information Report on Jamaica. This section is set out as follows:
>
> > *The Jamaica Information Service, Ministry of Health, accessed 11 September 2009, noted that the state health sector provides most of the island' health care provision, Services are provided through the government' network of 23 hospitals and over 350 health centres and specialised institutions. [24d]*
> >
> > *The National Health Fund (NHF)*

25.05 It was stated on the website of the National Health Fund of Jamaica, accessed in November 2012:

The National Health Fund [was] established to provide financial support to the national healthcare system to improve its effeciveness and the health of the Jamaican population through two categories of benefits.

The NHF] provides assistance to persons, initially, to purchase specific prescription drugs used in the treatment and management of designated chronic illnesses. Persons seeking assistance from NHF Individual Benefits must be certified, by a registered private or public doctor, with one or more of the specific medial conditions and register with the NHF. Once approved, the beneficiary is issued with a NHF card and will be able to get assistance with the purchase of drugs from approved participating pharmacies. The NHF makes a fixed payment towards the price set by the pharmacy for drugs approved by the NHF. The beneficiary is required to pay the difference – the co-payment. The NHF also takes an active role in educating the population and its beneficiaries on the importance of properly managing and treating their chronic condition. "[46b]

25.06 Under the JADEP programme, the NHF provides a specific list of drugs, free of cost, to beneficiaries who are over 60 years of age fro the treatment of ten (10) chronic illnesses: Hypertension, cardiac conditions, arthritis, benign prostatic hyperplasia, high cholesterol, vascular disease, diabetes, glaucoma, psychiatric conditions and asthma."

35. At para 84, the judge noted that: "none of the above was contradicted by the appellant or Mr Edwards in their evidence." At para 92, having referred to the case law including Akhalu, at para 92 the judge said this:

> "There is no evidence that the appellant or Mr Edwards if removed from the UK would die for example within a few weeks, days or months of return. In fact the Country of Origin Information Report indicates that drugs and support are available. I therefore conclude that she cannot succeed in any Art 3 or Art 8 claim as regards to health. I consider that these conclusions equally apply to Mr Edwards should he decide to return to Jamaica with the Appellant."

36. Ms Grubb submitted that the evidence from the sponsor was that he took medication, although she accepted that there was no specific medical evidence as to what that medication was. She submitted that his oral evidence was that he could not afford that medication. However, at para 104 of his determination, the judge did not accept that the Appellant or Mr Edwards would be unable to work on return to Jamaica. He said this:

> "The Appellant has undertaken some qualifications in care in the UK which I find will assist her should she wish to gain employment in the UK (sic). In addition, Mr Edwards works in the UK and therefore again if you wish to could work in Jamaica. He has said that there is no work in Jamaica but no evidence was provided to support that contention."

37. Clearly there is a slip in the judge's reasoning: the sense is that the Appellant would be able to gain employment "in Jamaica".

38. Neither of these findings is, nor could properly be, challenged in this appeal. The evidence such that it was, and the judge's findings, were that the Appellant and Mr

Edwards would be able to work in Jamaica. There is no evidence, apart from his assertion, that he would not be able to do so and he would not be able to afford any medicine which he required, presumably for his diabetes and hypertension. It is not suggested that those medications are not available in Jamaica on the basis of the background evidence to which I have referred. The consequence is that, on the judge's findings, both the appellant and Mr Edwards would be in substantially the same position in Jamaica as regards their health as they are currently in the UK.

39. Consequently, the medial issues effectively added nothing to the appellant's claim that her removal would be disproportionate. Even if it can be said, therefore, that in considering the family and private life of the appellant, Mr Edwards and their families at paras 92 – 105, the judge did not take into account the "medical issues" simply by referring to them at para 99 (a conclusion which is not without some difficulty given a fair reading of the judge's determination as a whole), those medical issues could not conceivably have added any weight to the appellant's claim such that the judge might have reached a different conclusion on proportionality. I am in no doubt that he would still have concluded that it was reasonable for the appellant and Mr Edwards to relocate to Jamaica and any interference with their private and family life was proportionate.

40. For these reasons, I also reject Ground 1. The judge did not materially err in law in dismissing the appellant's appeal under Art 8.

Decision

41. The First-tier Tribunal's decision to dismiss the appellant's appeal on all grounds did not involve the making of a material error of law. Its decision stands.

42. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

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

Signed

A Grubb
Judge of the Upper Tribunal