Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10392/2014

THE IMMIGRATION ACTS

Heard at : IAC Birmingham	**Determination Promulgated**
On : 24 June 2015	**On 29 June 2015**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

JACQUELINE VENICIA JACKSON

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Lane, instructed by Maurice Andrews Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica, born on 24 January 1976. She has been given permission to appeal against the determination of First-tier Tribunal Judge Osborne, dismissing her appeal against the respondent's decision to remove her from the United Kingdom.

2. The appellant entered the United Kingdom on 17 May 2003 with leave to enter as a visitor until 17 November 2003. She did not leave the United Kingdom at the end of her visa but subsequently made various unsuccessful

applications for leave to remain, in April 2004 as a student, in May 2004 to care for the child of Mr Don Brown, in January 2010 as the unmarried partner of Mr Leroy Duquesnay and in December 2010 on the basis of marriage. In February 2011 the appellant came to the attention of the Home Office after using a forged or counterfeit British passport in an attempt to gain employment and she was served with papers as an overstayer. On 7 February 2011 she submitted a second marriage application and on 18 February 2011 she submitted a third marriage application, both of which were rejected as invalid.

3. On 24 October 2013 the appellant applied for indefinite leave to remain outside the rules on human rights grounds, on the basis of her marriage to, and family life with, Alton Derrick Powell and on the basis of the best interests of her husband's son Tyrese Bedward-Powell from a previous relationship.

4. The appellant's application was refused on 29 January 2014. The respondent found that her medical problems did not give rise to any Article 3 rights. As regards Article 8, consideration was given to her family and private life under Appendix FM and paragraph 276ADE but it was concluded that she could not meet the criteria in either. It was considered that the numerous unsuccessful applications she had made, and the fact that she had attempted to gain employment when not entitled to work, cast doubt on her credibility and it was not accepted that she had a genuine and subsisting relationship with her spouse. It was considered that even if her relationship was genuine, there were no insurmountable obstacles to family life continuing in Jamaica. There was no evidence that she had sole responsibility for her husband's child or that she was taking an active role in his upbringing. The respondent did not consider that there were any compelling circumstances justifying a grant of leave outside the rules.

5. On 5 February 2014 the respondent made a decision to remove the appellant.

6. The appellant appealed against that decision.

7. The appellant's appeal was heard on 16 May 2014 by First-tier Tribunal Judge Osborne. The judge heard oral evidence from the appellant, her husband and her brother. On the basis of the oral evidence and the letters of support from other family members, the judge accepted that the appellant's relationship with her husband was genuine and subsisting. She went on to consider whether the appellant could meet the requirements of paragraph EX.1 of the Immigration Rules. She found that the respondent was wrong to have found that there were no insurmountable obstacles to the appellant's family life with her partner *and his child* continuing in Jamaica, given that his son lived with his mother on a full-time basis, that he was a British citizen and was well settled at school and that his mother would not consent for him to go to live in Jamaica. She accepted that the appellant's husband would have a difficult choice to make and accepted that he had a genuine and ongoing relationship with his son, but she considered that it was open to him to maintain contact with his son through visits and that there were no insurmountable obstacles to family life continuing between the appellant and her husband in Jamaica. She

therefore found that the requirements of the immigration rules could not be met and that there was nothing further to consider outside the rules and that no further assessment was required under Article 8. She accordingly dismissed the appeal.

8. Permission to appeal that decision was sought on the grounds that the judge had failed to give proper consideration to the best interests of the appellant's husband's child and the impact upon him of his father's departure to Jamaica.

9. Permission to appeal was initially refused, but was subsequently granted by myself on 30 October 2014 on the basis that the grounds were arguable.

Appeal hearing and submissions

10. The parties made submissions before me on the error of law.

11. Mr Lane submitted that the judge had erred by failing to consider the questions of insurmountable obstacles under EX.1 and exceptional circumstances outside the rules from the perspective of the appellant's husband's son. The effect of the decision was that the child would be separated from his father and that had only been considered from the perspective of the father and not the child. There had been no assessment of the best interests of the child and that was inconsistent with the guidance in LD (Article 8 best interests of child) Zimbabwe [2010] UKUT 278 and Azimi-Moayed and others (decisions affecting children; onward appeals)[2013] UKUT 00197. The respondent's view, as expressed in section 117B of the Nationality, Immigration and Asylum Act 2002, was that a person's removal was not in the public interest when they had a genuine and subsisting relationship with a British child. Mr Lane submitted that the judge had accordingly made a material error of law and her decision ought to be set aside and re-made.

12. Mr Mills submitted that the judge had considered the best interests of the child in substance if not in form, and that even if it was in his best interests for his father to remain in the United Kingdom that would not amount to insurmountable obstacles, such as to meet the high test identified in Agyarko & Ors, R (on the application of) v The Secretary of State for the Home Department [2015] EWCA Civ 440. With regard to the judge's consideration of Article 8 outside the rules, she was correct to consider that all relevant matters had been addressed under the rules, and in any event Agyarko made it clear that if there was any gap between EX.1 and the requirements of Article 8, it would be very small in precarious family life cases.

13. Mr Lane, in response, reiterated the submissions previously made.

Consideration and findings

14. Having now, since the grant of permission, had the benefit of detailed submissions from both parties and an opportunity thoroughly to consider the evidence before the judge in the First-tier Tribunal, it seems to me that there was no error of law in her decision.

15. I find myself in agreement with Mr Mills that, whilst there is no explicit reference to section 55 of the Borders, Citizenship and Immigration Act 2009 in the judge's decision, it is clear from her findings that she gave careful consideration to the circumstances and interests of the appellant's husband's son. There was no suggestion that it would not be in the best interests of Tyrese for his father to remain in the United Kingdom and the relevant consideration before the judge was, therefore, whether those best interests amounted to an insurmountable obstacle to the appellant being able to maintain her family life with her husband in Jamaica. Plainly she concluded that they did not. She noted at paragraphs 30 and 34 that Tyrese was well settled in the United Kingdom with his mother and would not leave the United Kingdom if his father did and that his father was therefore faced with a difficult choice, but she concluded at paragraph 35 that their relationship could continue by way of visits by the father to his son and vice versa.

16. Mr Lane relied on section 117B as expressing the respondent's view of the public interest not requiring removal where a person has a genuine and subsisting relationship with a child and where it was not reasonable for that child to leave the United Kingdom. He submitted that that provision applied equally to the partner of the person being removed and that it was relevant to the question of insurmountable obstacles. However I do not agree. The appellant's husband is not being required to leave the United Kingdom and has an element of choice, albeit a difficult one, as the judge accepted at paragraph 34. If he chooses to remain with his wife and accompany her back to Jamaica he has the choice to return to the United Kingdom whenever he wants and for as long as he wishes to see his son, a matter also considered by the judge, at paragraph 35. Further, it is not the case that the child lives with his father on a full-time basis and the evidence before the judge as to the nature of the contact was not entirely consistent, although she accepted at paragraph 30 that it was frequent. Clearly, those were all matters taken into consideration by the judge.

17. What is also of particular significance in considering the judge's assessment of the impact on the question of "insurmountable obstacles" of Tyrese's best interests, is the evidence that had actually been produced before her in order for her to conduct such an assessment. That evidence was conspicuously limited, a matter not acknowledged by Mr Lane. There was no statement from Tyrese as to how he would be affected by his father's departure. His mother's very brief statement did not give any indication of the affect of separation. Other than the appellant's husband's statement, that his son would be devastated by the loss of his father from his life, there was no evidence to suggest that that would be the case or that he would be adversely affected to any material extent. Indeed, although the judge found that there was a genuine and ongoing relationship between father and son and that there was frequent contact between them, the evidence before her from Tyrese's mother was that he only occasionally spent weekends and time during school breaks with his father and step-mother and the appellant's evidence in her statement was that Tyrese stayed only on occasional weekends and during school holidays. That conflicted somewhat with his father's statement that he came to stay almost every weekend, suggesting his account of the level of

contact was not entirely reliable. There was no mention of Tyrese in any of the supporting letters from the appellant's family members and the letters from Tyrese's school made only a vague reference to his involvement in his schooling.

18. Accordingly there was nothing in the way of supporting evidence to suggest that Tyrese's best interests constituted insurmountable obstacles to the appellant being able to maintain her family life with her husband in Jamaica.

19. For all of those reasons I find that the judge's assessment of the question of insurmountable obstacles under EX.1.(b) was one that took account of all relevant factors and that her conclusion in that respect was entirely open to her on the evidence before her.

20. Turning to the second ground relied upon by Mr Lane, namely the judge's approach to Article 8 outside the rules, I would again agree with the submissions made by Mr Mills. As Mr Mills acknowledged, the judge's observation that the immigration rules were a complete code and that there was a "gateway test" as established in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 was not a correct statement of the law. However that was not a material error given that she was entitled to conclude, on the evidence before her, that there were no compelling circumstances justifying a grant of leave outside the rules on wider Article 8 principles.

21. The Court of Appeal found, in Agyarko, (paragraph 30) that:

> "In relation to precarious family life cases, as I observed in *Nagre* at para. [43], the gap between section EX.1 and the requirements of Article 8 is likely to be small"

22. The appellant's case was clearly a precarious family life case, given that she had been in the United Kingdom unlawfully and had entered into her relationship whilst she had no basis of stay here. Her husband had entered into the relationship in the knowledge that she could be removed to Jamaica at any time. She had a terrible immigration history, having overstayed for many years and used a forged British passport to find employment when she was not entitled to work. Whilst it is asserted that the judge failed to consider the best interests of Tyrese as part of a wider Article 8 assessment, I would repeat my earlier observations that she had considered his interests and circumstances and that, furthermore, the evidence in that respect was particularly lacking. As the judge said at paragraph 41, there was no need for her to conduct a further Article 8 assessment since all matters had been full considered, but in any event and taking account of Tyrese's interests in a proportionality balancing exercise, it is clear that the appellant's interests were far outweighed by the public interest, particularly in light of the above factors and considering section 117B of the 2002 Act. There was clearly no basis upon which the appellant could hope to succeed outside the rules and the judge was entitled to conclude as she did.

23. Accordingly, I find no errors of law in the judge's findings on Article 8, either within or outside the immigration rules, and I uphold her decision.

DECISION

24. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed

Upper Tribunal Judge Kebede Dated: