Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10039/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 17 March 2016	**On 27 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

D A J
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Gaisford, Counsel, instructed by Nandy and Co
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Pooler (the judge), promulgated on 22 January 2015, in which he dismissed the Appellant's appeal on all grounds. That appeal was against the Respondent's decision of 15 October 2014 to remove the Appellant from the United Kingdom by way of directions under section 10 of the immigration and Asylum Act 1999.

2. The Appellant is a citizen of Jamaica. He arrived in this country in 2000. He married his British wife, Ms [J] in 2011. The Respondent's decision arose from an asylum claim made by the Appellant on 14 May 2014. On appeal to the First-tier Tribunal, the Appellant initially relied on protection grounds as well as Article 8.

The judge's decision

3. It is noted at paragraph 7 of the decision that Mr Gaisford (who appeared below as well) formally withdrew the protection claim, on instructions from the Appellant. Therefore, only the Article 8 claim was pursued.

4. The judge accepted that the Appellant's relationship with his wife was genuine and subsisting (paragraph 11). He goes on to consider whether EX.1 was satisfied. In respect to the Appellant's daughter (with whom he did not have contact at the time), the judge concluded that EX.1(a) was not met (paragraphs 13 and 14). In terms of EX.1(b), the judge went through various matters in paragraphs 15 to 22. Then, in paragraph 23 the judge concludes that the difficulties facing Ms [J] in moving to Jamaica were not such that they could not be overcome. He also observes that it appeared as though the Appellant could meet the requirements of the Rules in respect of obtaining entry clearance into the United Kingdom. Ultimately, he concludes that the Rules were not met in this appeal (paragraph 24).

5. Looking at the Article 8 claim outside of the Rules, the judge finds that the best interests of any relevant children were not adversely affected by removal (paragraph 25). Section 117B of the 2002 Act is cited in paragraph 26. Finally, in paragraph 27 the judge considers that the Appellant could and should be expected to return to Jamaica in order to seek entry clearance to re-join his wife here (on the alternative basis that she did not go with him): Chikwamba [2008] UKHL 40 is cited. The appeal is dismissed on this ground as well.

The grounds of appeal and grant of permission

6. I will deal with the seven grounds of appeal when setting out my decision on error of law, below.

7. Permission to appeal was granted by Upper Tribunal Judge Perkins on 28 May 2015.

The hearing before me

8. The Appellant and his wife attended the hearing. I heard helpful submissions from both representatives, a full note of which is contained in the Record of Proceedings.

Decision on error of law

9. I emphasise here that in deciding whether the judge made material errors of law I am not applying a test of whether I would have come to the same conclusions as he did. It may well be that I would have reached a different decision at first instance.

10. Having considered the arguments put forward, oral and in writing, I conclude that there are no material errors of law in the judge's decision. I will take each of the Appellant's grounds of appeal in turn.

Ground 1

11. It is right that in paragraph 27 the judge appears to have thought that the Appellant's leave to remain expired in April 2001 (see also paragraph 2). Having heard Mr Gaisford's uncontested submission on this point, I accept that the leave in fact expired on 2 August 2003. The judge therefore erred. However, taking the decision as a whole, I do not see that this made a material difference to the judge's overall conclusion on the Chikwamba issue or any other matter. The leave may have continued for a touch over two years after the judge apprehended it did, but it remained the case that he had had no leave for something approaching twelve years up to the date of the hearing. On any view, the judge would have been fully entitled to conclude that this was "significant".

Ground 2

12. This is linked to the first ground in some respects. It is said that the judge failed to take account of the Appellant's attempts to chase the Respondent after he had submitted further representations. In turn, it is suggested that the Appellant's immigration history was not as poor as the judge thought.

13. I reject this point. At paragraph 4 of his decision (cited and relied on in the grounds) the judge expressly recognises the volume of correspondence in the Appellant's bundle relating to the representations. He records that the Respondent believed there had been no response to requests for further information. In my view, the judge did not overlook any relevant materials. Given the express reference to the Appellant's bundle in paragraph 4 it is highly likely that the judge had this information in mind when considering the Article 8 claim outside the Rules. Even if he had left it out of account in error, I do not see that it could have made a material difference, whether in isolation or combination with the point discussed under ground 1, above. The fact was that the Appellant had had no leave since 2003.

Ground 3

14. This is the Chikwamba point. The Appellant's challenge faces an initial and insuperable obstacle: the judge's conclusion in paragraph 23 that there were no insurmountable obstacles to Ms [J] moving to Jamaica with the Appellant. This conclusion has not been expressly challenged in the grounds. Therefore, any error in approach on the Chikwamba issue is immaterial.

15. Even if that primary conclusion had not been made or was wrong, there is no material error here. The judge did have in mind the fact (or the assumed fact) that the Appellant could meet the requirements of entry under Appendix FM (paragraph 23). He had in mind the short visa processing times in Jamaica. He correctly directed himself to the case of Jeunesse [2014] ECHR 1036. As has been discussed previously, he was entitled to take account of the Appellant's immigration history. The focus

in the grounds is somewhat limited and does not reflect the fact that Chikwamba does not lay down a rule of law precluding return to the country of origin as being a relevant consideration in Article 8 cases. In addition, given the judge's other findings in this appeal, it is clear enough that the judge had concluded (at least by implication) that a temporary separation would not be disproportionate. In other words, the Appellant had not proved this element of his claim (see, for example, paragraph 39 of R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM – *Chikwamba* – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)).

Ground 4

16. This ground was not specifically referred to in oral argument. It is said that the judge should have factored into account the nature of Ms [J]'s excellent work for the NHS.

17. There is no specific reference to this fact in the judge's decision. However, in respect of the question of whether Ms [J] could move to Jamaica, it would not in my view have had a material bearing on the outcome. In addition, when considering the Chikwamba point the judge was not expecting her to leave this country in any event.

18. I would just add that there is no doubt that Ms [J]'s work is in my opinion an extremely valuable contribution to society.

Ground 5

19. Although the Appellant had withdrawn his protection claim, the judge accepted that he retained a subjective fear of going to Jamaica because of the murder of his brother in 2005. The judge placed "very little weight" on the subjective fear (paragraph 16). Weight is essentially a matter for the judge. In this case, whilst another tribunal may have attributed more weight to the subjective fear, it was open to the judge to conclude as he did. The Appellant could have pursued his protection claim on the basis of a subjective fear (after all, each case is fact-sensitive).

Ground 6

20. In paragraph 19 the judge found that there was no family life as between the Appellant and his wife and other relatives in the United Kingdom. The grounds assert that this conclusion was irrational. It is debatable whether the elevated threshold created by an irrationality challenge is met here. This is in reality by-the-by because the judge correctly directed himself that the relationships in question formed "important aspects" of private live in any event. Thus, the substance of the relationships were taken into account.

21. Paragraph 27.3 of the grounds is a simple disagreement with the judge's conclusion at paragraph 20.

Ground 7

22. This ground relates to children. There is no error in respect of the Appellant's own daughter. This issue is adequately dealt with in paragraphs 14 and 25. The judge was entitled to take account of the absence of contact and any family proceedings.

23. In respect of Ms [J]'s grandchildren, having looked at the evidence in the bundle before the judge, I note that it was rather thin in substance and could not properly be said to show (on any rational view) that the Appellant's temporary departure from the United Kingdom would have a significant impact on them. The same would apply to the issue of Ms [J] herself moving to Jamaica. I can see no evidence of matters which would have the effect of permitting the judge to find that her departure would have had such an impact on the grandchildren as to create an insurmountable obstacle for her under EX.1(b) and EX.2.

Other matters

24. For the sake of completeness, I would add that there are no errors in terms of the judge's consideration of Ms [J]'s health situation (paragraph 18) and the care of her parents (paragraph 20). Whilst these were clearly difficult issues, the judge was entitled to find as he did.

Summary

25. I appreciate that my decision will come as a big disappointment to the Appellant and his wife. I have sympathy for their situation. However, as I have stated previously, my role has been to decide whether or not the conclusions reached by the judge were open to him, and to not whether I would have made the same decision on the case.

Anonymity

26. Given the withdrawal of the protection claim there is no need for a direction, and I do not make one.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

Signed Date: 25 April 2016

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 25 April 2016

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal