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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05619/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 March 2016	**On 13 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M M J
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Duffy, Home Office Presenting Officer
For the Respondent: Mr Youssefian, legal representative

DECISION AND REASONS

1. Although it is the Secretary of State who pursues this appeal, I refer to the parties as they were in the First-tier Tribunal. Thus I refer to the Secretary of State as the respondent.

2. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Geraint Jones QC ("the FTTJ") promulgated on 28 August 2015, in which he allowed the appellant's appeal, on human rights grounds, against the refusal of leave to remain as the spouse of a British citizen under the Immigration Rules, Appendix FM.

3. No anonymity direction was made in the First-tier Tribunal but, given my references to the appellant's depression and suicidal thoughts, she is entitled to anonymity in these proceedings.

Background

4. The appellant is a citizen of Jamaica. She claims to have entered the UK on 9 December 2001 on a visit visa valid for six months. Her leave to remain was extended but on 7 March 2003 her immigration exemption was curtailed. She remained in the UK nonetheless. On 5 July 2012 the appellant applied for leave to remain on the basis of her marriage to a person settled in the UK. That application was refused with no right of appeal on 9 February 2013. The decision was reconsidered and maintained on 22 January 2015. The application was refused under Appendix FM because, although the appellant met the suitability criteria, she did not fulfil the requirements for family life as a partner. The respondent also refused the application because the appellant did not meet the criteria in paragraph 276ADE.

5. The appellant appealed that decision. She relied on the provisions of EX.1 to the effect that there "would be insurmountable obstacles or a substantial degree of harshness if the appellant's spouse, a British citizen, had to continue family life with his wife in Jamaica" (paragraph 3 of the FTTJ's decision).

6. The FTTJ concluded that the factors identified by the appellant "did not present insurmountable obstacles or that it would be harsh to expect the appellant's husband to reside with the appellant in Jamaica to further their family life in that country" (paragraph 4). The appellant has not appealed those findings. The FTTJ concluded however that it was highly likely that an application for entry clearance as a spouse would be successful; he did not consider "there to be any public interest or any other sensible reason to require the appellant to leave and embark upon the expense and disruption to her family life that such a process would involve". He allowed the appeal on human rights grounds.

7. The respondent was granted permission to appeal by First-tier Tribunal Judge Brunnen who decided that it was arguable the FTTJ had erred in law by failing to have regard to s117B of the Nationality, Immigration and Asylum Act 2002 and failing to have regard to **Chen IJR [2015] UKUT 189 (IAC).**

Error of Law Submissions

8. I noted to both parties that there was no cross-appeal by the appellant with regard to the findings under the Immigration Rules. Mr Youssefian confirmed that was the case.

9. The respondent's grounds of appeal to this Tribunal are limited to a

submission that the FTTJ erred in his approach to the **Chikwamba** principle in two ways

a. Since the introduction of s117B, the rationale behind the requirements for entry clearance applications to be made is no longer simply a public policy requirement but is instead part of the public interest in ensuring immigration control as set out in 117B(1). The "good reason" for this requirement is written into primary legislation. As such, the public interest factors written into 117B and as expressed in the Immigration Rules are to be accorded significant weight.

b. There is no consideration as to why any significant separation would interfere disproportionately with protected rights. Chen at paras 39 – 42 states that it remains for the appellant to establish that there would be significant interference with her family life by her temporary removal. This interference is to be assessed against the public interest factors before it can be said to be disproportionate. That assessment has not been done.

10. Mr Duffy, for the respondent, expanded upon those grounds and I summarise as follows. There was no analysis or explanation of why returning to seek entry clearance was a disproportionate interference with the appellant's and her husband's rights to a family life. He submitted that the guidance in **Chikwamba** and **Hayat** had not been followed. The appellant did not fulfil the criteria in the Immigration Rules; there was no longer a requirement for an applicant to have entry clearance in order to meet the provisions in the Rules for the grant of leave to remain as a spouse (contrary to the situation in **Chikwamba**). The appellant could, in theory, qualify under section EX.1. She did not do so.

11. Furthermore, the FTTJ had not given due regard to the maintenance of effective immigration control, as required by s117B.

12. The respondent averred that the findings between [5] and [7] should be set aside.

13. Mr Youssefian, for the appellant, submitted, in summary, that it was clear the FTTJ had had in mind the public interest factors in s117A-D. The appellant was able to satisfy the relevant criteria, including the English language requirement, and financial independence.

14. Mr Youssefian made lengthy submissions to the effect that **Chen** had been wrongly decided. He noted that paragraph 39 appeared to provide guidance in **Chikwamba** cases but said that this was at odds with the Court of Appeal judgments in **MA (Pakistan)**, **Hayat** and **Agyarko**. He accepted that **Hayat** had been considered by the Court of Appeal in **Chen** but submitted that **MA (Pakistan)** had not been considered; he accepted that **Agyarko** post-dated Chen. He explained at length his reasoning for such an approach. In essence, he submitted that the Upper Tribunal in

Chen had departed from the principle that a "sensible reason" was required for an individual to be required make an application for entry clearance from abroad (per para 30 (c) and (d) of **Hayat**). In summary, Mr Youssefian's submission was that there was no error of law in failing to refer to **Chen** because it was wrongly decided; the FTTJ had rightly been guided by **Chikwamba** and **Hayat**, in circumstances where the appellant met all the criteria in the Immigration Rules for the grant of entry clearance as a spouse. He submitted this guidance was still valid, despite the introduction of s117A-D.

15. Mr Youssefian accepted that if I decided that **Chen** was not wrong in law, the appellant was in some difficulty because the FTTJ had not provided detail about the significant interference to her family life resulting from the need for her to apply for entry clearance. He noted that the evidence before the FTTJ was of the appellant's unstable mental health, including suicidal thoughts and the benefit to her of being with her husband.

16. Mr Duffy, in reply, accepted that the respondent had not made a reasons challenge to this tribunal. He noted that **Chikwamba** was a case involving insurmountable obstacles and children. **Hayat** refined the principles in **Chikwamba**. The "sensible reason" for requiring the appellant to return to Jamaica to make an entry clearance application was the public interest in maintaining immigration control, as enshrined in statute. There should have been consideration of the appellant's circumstances: why was the interference disproportionate? How long would the appellant have to wait for an entry clearance decison? How long was the potential separation? None of these issues had been addressed in the decision. Even if **Chen** were not at issue, under **Hayat** principles the FTTJ had not addressed the appellant's case.

Findings – Error of Law

17. There is no challenge by either party to the FTTJ's findings that the appellant did not fulfil the criteria in the Immigration Rules. Nor is there any challenge to the FTTJ's finding as follows:

> "3. … During the appeal it became very apparent that Mr. Youssefin [sic] was not challenging the findings [sic] that the appellant could not come within Appendix FM and/or paragraph 276ADE, save to the extent that he argued that the appellant could rely upon EX1 of Appendix FM because there would be insurmountable obstacles or a substantial degree of harshness if the appellant's spouse, a British citizen, had to continue family life with his wife in Jamaica. That was put on the basis that he had lived all his life in United Kingdom; never visited Jamaica; would face cultural changes; is now 56 years of age; had secure employment as a driver on the London underground; and has a house in the United Kingdom.
>
> 4. I considered those factors and came to the conclusion that

> they did not present insurmountable obstacles or that it would be harsh to expect the appellant's husband to reside with the appellant in Jamaica to further their family life in that country."

18. The FTTJ finds that the entry clearance application is highly likely to be successful [5]. He then goes on to say:

> "6. Accordingly, reliance is placed upon the futility of requiring the appellant to return to Jamaica to make what is highly likely to be a successful spouse application. It is on that sole basis that the appellant's reliance upon article 8 has any merit, bearing in mind the decision of the higher courts in Chikwamba.
>
> 7. The only public interest in requiring the appellant to depart is to mark the fact that those who choose to flout the immigration laws of this country should not gain an advantage over others who abide by them. I have come to the conclusion that this does not apply in the instant case because if the appellant departs for Jamaica and makes a spouse application it is so highly likely to succeed that I do not consider there to be any public interest or any other sensible reason to require the appellant to leave and embark upon the expense and disruption to her family life that such a process would involve.
>
> 8. Hi [sic] record that both the appellant and her husband gave evidence in accordance with their respective witness statements which are hereby incorporated by reference. There was no cross-examination.
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> 9. Accordingly I allowed the appeal based upon article 8 ECHR."

19. The respondent does not challenge the decision of the FTTJ to consider the appeal outside the Immigration Rules. The challenge is to the assessment of proportionality.

20. I am satisfied that the FTTJ erred in law in failing to take into account the guidance in **Chen**. It was recognised in **Chen** that Appendix FM did not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the UK. There may be no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable to make an application for entry clearance may be disproportionate. However, in all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. The guidance is that it will not be enough solely to rely on the **Chikwamba** case law.

21. I have considered the submission of Mr Youssefian that **Chen** was wrongly decided. However, the Upper Tribunal in **Chen** specifically rejected the

submission that the use of the phrase "sensible reason" in **Hayat** amounted to a test for applying the guidance in **Chikwamba**; the burden remained on the applicant to place before the Secretary of State all material that he or she relied upon to suggest that removal pursuant to the refusal of leave would breach Article 8 (paragraph 36 of **Chen**). I do not accept, therefore, the proposition that the findings in **Chen** are not in line with earlier judgments on the application of **Chikwamba**. The Upper Tribunal in **Chen** has taken those earlier judgments into account and the judgment is not at odds with them. The FTTJ should have taken into account the guidance in **Chen** which was directly relevant to this appellant's personal situation and circumstances. I refer to paragraph 39 of Chen:

> "39. In my judgement, if it is shown by an individual (the burden being on him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was "precarious". In other words, in the former cases, it would be easier to show that the individual's circumstances fall within the minority envisaged by the House of Lords in Huang or the exceptions referred to in judgments of the ECtHR than in the latter case. However, it all depends on the facts."

22. In **Chen**, as here, the appellant and her husband had begun their relationship well after the appellant's leave had expired; they were married in the full knowledge that the appellant was in the UK unlawfully. In neither **Chen**'s case nor this case did the appellant produce evidence of the length of disruption to family life if the appellant were remove and had to apply for entry clearance. In the present case the appellant's evidence in her witness statement is that "any forced separation would make [her] depressed again" but there is no medical evidence to support this and, in any event, the FTTJ found that there were no insurmountable obstacles to family life being continued in Jamaica. There is indeed, very little evidence to support the appellant's contention that a temporary separation would give rise to significant disruption and interference with the couple's protected rights. The FTTJ has failed to refer to the paucity of the evidence on the issue.

23. Notwithstanding his finding that the appellant does not fulfil the criteria in the Immigration Rules for leave to remain on the basis of her family life, the FTTJ has failed to consider the public interest in the maintenance of

effective immigration control, contrary to s117B(1), instead making only passing reference to "the only public interest in requiring the appellant to depart is to mark the fact that those who choose to flout the immigration laws of this country should not gain an advantage over others who abide by them." That is not the only public interest: the FTTJ has failed to take into account the provisions of s117B(4) to the effect that little weight is to be given to a private life or a relationship formed with a qualifying partner that is established by a person at a time when that person is in the UK unlawfully. Nowhere in the decision is there reference to this important sub-section of s117B. On the contrary, the FTTJ states he does "not consider there to be any public interest or any other sensible reason to require the appellant to leave and embark upon the expense and disruption to her family life that such a process would involve". Such a finding is unsustainable given s117B(1) and (4) and the lack of evidence as regards the claimed "disruption to her family life" and the failure of the appellant to demonstrate "insurmountable obstacles or that it would be harsh to expect the appellant's husband to reside with the appellant in Jamaica to further their family life in that country." [4].

24. The failure of the FTTJ to apply the guidance in **Chen**, a case which has similarities to this one, and his failure to give consideration to the public interest factors in s117B(1) and (4), amount to errors of law which could have impacted on the outcome of the appeal. The assessment of proportionality is unsafe and unsustainable on the evidence. Paragraphs 6 and 7 must be set aside. I do not set aside paragraph 5 because there is no specific challenge in the respondent's grounds to the findings in that paragraph.

25. Mr Duffy submitted that, if I found there to be a material error of law, the appropriate course was for the decision to be remade on the preserved facts. Mr Youssefian sought to persuade me that the appeal should be remitted to the First-tier Tribunal for a fresh hearing or, alternatively, that it should remain in the Upper Tribunal with fresh evidence being taken from the appellant. I reject both these proposals because there is no challenge to the facts in this case and I have before me the witness statements of the appellant and her husband. Their evidence was not tested by cross-examination in the First-tier Tribunal and I see no need for it to be updated, particularly as the findings of fact of the FTTJ are unchallenged by the appellant. Remittal to the First-tier Tribunal is an option to be used sparingly and is inappropriate in this case. Given the findings of fact of the FTTJ have been preserved, I remake his decision in reliance on those facts, in accordance with the law.

26. I therefore proceed to remake the decision under Article 8. Both parties' representatives agreed that, in the event of my remaking the decision, it was appropriate for me to refer to the witness statements of the appellant and her husband, given that the FTTJ made specific reference to incorporating them at [8]. I have also considered the remaining documents in the appellant's bundle.

27. I adjourned the hearing to enable Mr Youssefian to make detailed submissions, which he did.

Submissions - Proportionality

28. Mr Youssefian's detailed submissions can be summarised as follows. He relied on the "**Chikwamba**" principle. He submitted that the public interest in removal was diminished where the applicant met all the requirements for the grant of entry clearance as a spouse, notwithstanding the maintenance of effective immigration control was in the public interest. The question was, he said, whether the appellant's removal would "serve any good purpose".

29. He submitted that the appellant spoke English, was financially independent (on her husband), she was not a burden on the state; she had lived in the UK for 15 years albeit the majority of her stay was unlawful or precarious. He confirmed that the respondent's account of her immigration history, as given in the reasons for refusal letter, was accurate. There was no good reason for her to be required to return and make an application; it was a mere procedural formality. The separation would be for an unknown period, albeit temporary, and would involve significant disruption to the couple's family life. The appellant would have difficulty coping on her own, due to her history of depression and the couple's need for "physical proximity and affection". The appellant had no ties to Jamaica. The respondent had to show a good or sensible reason for requiring her to be removed (**MA (Pakistan)** and **Hayat**). **Chen** should not be followed for the reasons submitted earlier.

30. Mr Duffy referred to the line of cases pre-dating **Chikwamba**. The respondent's position was not that the appellant should be expected to return to Jamaica to make an entry clearance application but that she and her husband could continue their family life in Jamaica. The FTTJ had accepted that proposition by finding that there were no insurmountable obstacles to their doing so. He referred to paragraph 27 of **Chen** which in turn referred to paragraph 30(a) of **Hayat**. This was not, he said, a case where there was some procedural deficiency requiring the applicant to apply from abroad. There were no obstacles to the appellant and her husband living in Jamaica; but if they wanted to live in the UK, they must apply from abroad to do so. In **Chikwamba** and **Hayat** there were technical hurdles for the claimants; but for those technical hurdles, the applications would have succeeded. That was not the case here. He submitted that **Chikwamba** would have succeeded under the Rules had the application been made after the 2012 changes to the Rules to incorporate Article 8 issues: there were insurmountable obstacles to return. If this appeal were successful, almost every application would be successful, obviating the Rules in their entirety. He submitted that the Rules were now a statement of the respondent's policy on Article 8. Weight should be attached to the fact the appellant did not meet them.

31. If it was not accepted that family life could continue in Jamaica, the degree

of disruption caused by a temporary separation was not sufficient to outweigh the public interest in maintaining effective immigration control which must carry significant weight. There was no basis for deciding that a temporary separation would be disproportionate. **Chen** did not depart from earlier case law. The earlier cases gave guidance on the approach under the previous Immigration Rules whereas **Chen** gave guidance as to the current approach post-2012 and the introduction of s117A-D. The existence of a statutory requirement for consideration of the public interest factors was analogous to a good reason for requiring the appellant to return to make her application.

32. In reply, Mr Youssefian reiterated that this was a **Chikwamba** case: the fact the appellant had to return to Jamaica to make an entry clearance application was a procedural one. It was the only barrier to her remaining in this country. He submitted that, whilst a person's immigration status was, according to **AM (Malawi)** precarious if their continued presence was dependent on further leave to remain, this was out of step with s117B. The case law and statute should, he said, be "in harmony". He submitted that, "to require the appellant to establish exceptional circumstances when there is precarious family life, would be in every circumstance'. It was his position that the meaning of precarious in the Strasbourg jurisprudence and in s117B should be "married", relying on Underhill LJ's comments at paragraph 22 of **R (on the application of Tetteh) v SSHD [2015] EWCA Civ 1046.**

Findings – Article 8

33. It is not in dispute that Article 8 is engaged in this case or that the decision under the Immigration Rules was lawful. I turn to the fifth question in **Razgar [2004] UKHL 27**, that of proportionality.

34. I take into account the findings of the FTTJ and the appellant's evidence (as agreed by the parties) and find as follows.

35. The appellant and her husband, who is British, have a close relationship; the appellant's husband has a permanent job as a tube driver, he owns their home and is able to support the appellant; the couple are financially independent, the appellant speaks English, she is not a burden on the state, they have a settled life in the UK. The appellant's husband is of an age that he would find it difficult to adjust to life in Jamaica. He has had some exposure to Jamaican culture as a result of their cohabitation.

36. The FTTJ found that the appellant's application for entry clearance is "highly likely" to be successful because she had demonstrated she fulfilled the criteria in the Rules apart from the provisions of EX.1.

37. The appellant entered the UK on a visit visa in December 2001. She was granted further leave to remain until March 2003 when her Immigration Exemption was curtailed. She made no attempts to rectify her immigration status until she applied for leave to remain as a spouse in July

2012. Thus her residence in the UK since March 2003 has been unlawful.

38. The appellant and her husband met in 2010 and married in 2012. Throughout their relationship the appellant's husband has known the appellant has no immigration status. The appellant has no children and there is no evidence to suggest the appellant's husband has children either.

39. The appellant has suffered from depression in the past. The appellant's own evidence is as follows:

> "I have previously been very depressed and have had suicidal thoughts several times. I took herbal tablets, such as St John Wort [sic] which can be bought from health shops or local chemists without prescription. [The appellant's husband] has been the one to show me the light and lead me back to sanity. I honestly am worried that any forced separation would make me depressed again. I do not have family in Jamaica and I am terrified that I would become lonely. I need [him] and he needs me."

Her husband states as follows:

> "When [the appellant's] immigration application was refused, she went into deep depression and pushed her into serious suicidal thoughts that nearly sprang into action. [She] is a fragile woman."

This is the very limited extent of the appellant's own evidence about the impact on the appellant's health of a separation. There is no medical evidence. Nonetheless, this evidence is not challenged and I adopt it as my findings with regard to the impact of separation on the appellant's health.

40. I turn to the issue of the public interest. The public interest factors which I must consider are set out in s117B. Of particular relevance here are s117B(1) (the maintenance of effective immigration control) and s117B(4) which provides as follows:

> "(4) Little weight should be given to –
> (a) a private life, or
> (b) a relationship formed with a qualifying partner,
> that is established by a person at a time when the person is in the United Kingdom unlawfully."

41. The appellant's husband is British. He is therefore a qualifying partner (s117D(1)).

42. Also of relevance is sub-paragraph (5) which deals with private life: "Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."

43. Throughout her stay in the UK, the appellant's immigration status has been either precarious (2001-3) or unlawful (2003 to date). She met and married her husband in the full knowledge that she had no immigration status in this country and could be removed at any time. Her husband was also fully aware of her lack of immigration status. He says that he "thought, perhaps naively, that as a British citizen [he had] the right to live in [his] home country with [his wife] without being asked to leave or be separated." Whilst that is his evidence, there is no indication that he or the appellant had sought to confirm this with the Home Office before embarking on their relationship or their marriage.

44. Since it is not challenged by the respondent before me, I adopt the finding of the FTTJ that the appellant's application for entry clearance is highly likely to succeed. That said, I note the primary submission of the respondent is that it family life can be continued in Jamaica without significant interference with the appellant's and her husband's protected rights.

45. With the above factual matrix in mind, I weigh in the balance the degree of interference with the appellant's and her husband's protected rights as against the public interest. In doing so I bear in mind the guidance in the following cases which I summarise.

46. In **MA (Pakistan) v SSHD [2009] EWCA Civ 953** Sullivan LJ said the view in **Chikwamba** that "return should be insisted upon simply in order to secure formal compliance with entry clearance rules 'only comparatively rarely' is not confined to cases where children are involved. Whilst the suggested approach in **Chikwamba** certainly applies in such cases, it also applies in family cases more generally." In **Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC)** the Tribunal confirmed that the Chikwamba principle is not confined to cases where children are involved or where the person with whom the appellant is seeking to remain has settled status in the United Kingdom.

47. In **Chikwamba (FC) v SSHD [2008] UKHL 40** the House of Lords said that "In an Article 8 case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant". In **R (on the application of Ajoh) [2006] EWHC 1489 (Admin)** Collins J noted that removal would only be temporary as the Appellant's application to re-enter from Jamaica with her children could not reasonably be refused and appeared to suggest that this was a relevant factor. In **SA (Article 8 –burden of proof) Algeria [2008] UKAIT 00054** the Tribunal held that the European Court of Human Rights has not seen a period of delay of limited duration (before an applicant can be considered for re-admission to the country where he had established family ties) as in itself giving rise to disproportionality: see e.g. **Kaya v Germany Appn. No. 31753/02 28 June 2007), [2007] Imm AR 802, para 68**.

48. In **Sheik Saeed Hussain [2004] EWCA Civ 1190** the appellant came to

the UK as an illegal entrant and had been here for four years when he married a British citizen in 1999. His wife had four children by a previous marriage. The appellant was said to have become a father to those children. The Tribunal accepted that the wife and children could not live in Pakistan but found that the processing time for applications as a spouse of 6 months would not cause an unreasonable delay. The Court of Appeal agreed.

49. I have also had regard to **Chen** where it was held that:

> "(i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning *Chikwamba v SSHD [2008] UKHL 40*.
>
> (ii) Lord Brown was not laying down a legal test when he suggested in *Chikwamba* that requiring a claimant to make an application for entry clearance would only 'comparatively rarely' be proportionate in a case involving children (per Burnett J, as he then was, in *R (Kotecha and Das v SSHD [2011] EWHC 2070 (Admin)*)."

50. The appellant has overstayed her leave to remain for some 12 years. She has done so knowingly and in contravention of the Immigration Rules. She has known, throughout her relationship with her husband, that she could be removed at any time. She has taken an informed risk in failing to rectify her immigration status and could have had no expectation of being granted leave to remain in circumstances where she does not qualify under the Immigration Rules. Those Rules reflect the public interest in immigration control. Thus it follows that the decision to refuse was taken in pursuit of immigration control.

51. I do not accept that the appellant's failure to qualify under the Rules is a mere procedural issue. The FTTJ found that there were no insurmountable obstacles to the appellant's return to Jamaica to continue her family life there with her husband. In making that finding, the FTTJ took into account the impact on the appellant's husband. The failure to meet the requirements of EX.1 does not amount to a failure to meet a mere requirement that she seek entry clearance from abroad. It is more than that: it is a failure to meet a substantive criterion in the Rules which would have enabled her to remain in the UK without returning to Jamaica if they could not continue their family life abroad. There is no challenge to the criteria taken into account by the FTTJ in making this finding and the FTTJ

found that the couple could continue their family life in Jamaica. The fact that they wish to remain in the UK as a couple is their choice and, having made that choice, they should, as others are, be required to comply with the Immigration Rules.

52. I find it particularly relevant that there is no evidence to support the claim that the appellant's removal would entail a forced separation whilst she applied for entry clearance. Whilst I accept that the appellant's husband is working, I find it likely he has annual leave which he could utilise to visit Jamaica with his wife whilst she makes her application. Furthermore, there is no evidence to suggest that he could not afford to stay with his wife in Jamaica on a temporary basis while she makes her application. Even if he had to return to his work in the UK after a period in Jamaica with her, there is no evidence he could not afford to pay for her temporary accommodation and maintenance in Jamaica. The FTTJ had before him the evidence on the appellant's health; he did not find that this amounted to an insurmountable obstacle to their continuing family life in Jamaica together. I am unable to find that the appellant's health is a barrier to return or even temporary separation for the following reasons. She could take with her a supply of herbal treatment and medical treatment is available in Jamaica. If necessary, her husband could afford to pay for such medical treatment.

53. On the appellant's evidence, she would be returning on a temporary basis. I am satisfied that her husband could travel with her and arrange her accommodation and maintenance for the duration of their stay and any subsequent temporary separation. The appellant merely states that such a temporary separation would not be "a proportionate course of action" or a "reasonable course of action". She considers that "any forced separation would make [her] depressed again". There is thus only very limited evidence to support the claim that such a temporary separation would amount to a significant interference with the couple's right to a family life. There is no documentary or independent evidence in support.

54. I bear in mind that in **Huang & Kashmiri v SSHD [2007] UKHL 11** the House of Lords said that in reaching a decision under Article 8(2) the decision maker will need to consider and weigh all that told in favour of the refusal of leave which was challenged. The decision maker should bear in mind several factors, including: the general administrative desirability of applying known rules if a system of immigration control was to be workable, predictable, consistent and fair as between one claimant and another; the damage to good administration and effective control if a system was perceived by claimants internationally to be unduly porous, unpredictable or perfunctory; and the need to discourage fraud, deception and deliberate breaches of the law. In the present case, the appellant has breached immigration law for a prolonged period by remaining here for over ten years after her leave to remain was curtailed. The respondent is entitled to seek to discourage such conduct by enforcing the Immigration Rules. Those rules have been drafted to reflect the public interest in immigration control.

55. I take into account that little weight is to be given to the appellant's relationship with her husband because it was established at a time when the appellant was in the UK unlawfully (s117B(4)). Furthermore, her husband was aware she had no immigration status throughout their relationship. It is also relevant that the appellant has an appalling immigration history. She does not fulfil the Immigration Rules in a substantial way and has provided very little evidence to support her claim that a temporary separation would give rise to significant interference with her and her husband's protected rights. I am satisfied that the public interest in the appellant's removal outweighs the limited degree of disruption to the appellant's and her husband's family and private lives resulting from their travelling together to Jamaica to make an application for entry clearance and from the appellant's remaining temporarily in Jamaica for a further temporary period until she receives entry clearance as a spouse. I see no reason why the appellant should be given preferential treatment when she has flouted the immigration rules in the past and there is little evidence to support her claim of significant interference with the couple's protected rights.

56. Even if the appellant were not granted entry clearance, I do not consider that the degree of interference with the appellant's and her husband's right to a family life is such as to outweigh the public interest in maintaining effective immigration control, particularly given that little weight should be given to her family life (s117B(4)). Her husband is capable of finding employment in Jamaica (albeit not as a tube driver), for example in the tourist industry. He has had some exposure to the Jamaican diaspora in the UK and would receive the support and assistance of his wife in adapting to Jamaican culture. English is the national language of Jamaica. The appellant has not lost her cultural links to her country of origin where she was educated and brought up. The couple have sufficient funds to cover their initial costs of moving to Jamaica whilst the appellant and his wife find employment. There is no evidence to suggest that the appellant would be unable to work there.

57. I dismiss the appeal on human rights grounds

Decision

58. The making of the decision of the First-tier Tribunal did involve a material error of law, as set out above.

59. I do not set aside the decision of the First-tier Tribunal to dismiss the appeal under the Immigration Rules. That decision stands.

60. I set aside the decision of the First-tier Tribunal to allow the appeal on human rights grounds and remake it, dismissing the appeal.

Signed ***A M Black*** Date 1 April 2016

Deputy Upper Tribunal Judge A M Black

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

The FTTJ did not make a fee award and, the appeal having been dismissed there can be no fee award now.

Signed ***A M Black*** Date 1 April 2016

Deputy Upper Tribunal Judge A M Black