IAC-TH-WYL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40170/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th January 2016	**On 29th January 2016**
Prepared 8th January 2016	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MISS CAROL MARIAN MCINTOSH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Kanu, Representative
For the Respondent: Mr. Duffy, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Jamaica born on 29th May 1969. She appeals against a decision of Judge of the First-tier Tribunal Howard sitting at Richmond on 14th April 2015 in which he dismissed an appeal against a decision of the Respondent dated 22nd September 2014. That decision was to remove the Appellant from the United Kingdom by way of directions pursuant to Section 10 of the Immigration and Asylum Act 1999

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and to refuse to grant leave to remain. The Appellant argued that the decisions put this country in breach of its obligations under Article 8 (right to respect for private and family life) of the European Convention on Human Rights and were in breach of the provisions of the Immigration Rules which relate to private and family life contained in Appendix FM and paragraph 276ADE. The burden of proof of establishing this rested upon the Appellant and the standard of proof was the usual civil standard of balance of probabilities.

2. The Appellant arrived in the United Kingdom as a visitor on 21st March 2002. She subsequently applied for leave to remain as a student which was granted and thereafter extended until 31st October 2006. The Appellant submitted a further application for leave to remain as a student in time but this was refused by the Respondent and an appeal lodged against that refusal was dismissed. The Appellant became appeal rights exhausted without any further leave to remain in this country on 6th November 2007. The Appellant sent an unsolicited legacy questionnaire to the Respondent on 16th September 2009 and submitted an application for further leave to remain on 31st March 2011 which was refused a month later. The Respondent requested further information from the Appellant and after considering this further information the decision of 22nd September 2014 was issued which forms the subject of this appeal.

The Application

3. In a letter dated 16th May 2011 requesting that the Appellant's application on Form FLR(O) be reconsidered the Appellant's legal representatives referred to the care which the Appellant was providing for the Sponsor. The Appellant lived in the same house as that of her partner, the Sponsor which took care of her accommodation needs. The Appellant also received help from another Sponsor. The Appellant had met the Sponsor in 2005 and the couple had thus been living together for a sufficient period which would have been recognised by Home Office Policy DP3/96 before it was withdrawn in 2008. (The Respondent's reply to this was that such a policy was irrelevant in any event since it had been withdrawn). The Appellant had lived with lawful leave to remain in this country for at least five years before her leave expired.

Explanation for Refusal

4. On 22nd September 2014 the Respondent wrote an eleven page letter refusing the Appellant's claim and noting the documentation received in support of the application. No information had been provided to demonstrate how and when the Appellant and the Sponsor met or how their relationship began. The Appellant had failed to demonstrate that her relationship with the Sponsor was one that went beyond that of a friend or carer. The Appellant did not meet the eligibility requirements contained within Appendix FM E-LTRP.1.7. This requires the relationship between the Appellant and the partner to be genuine and subsisting. Even if there was a genuine relationship the Appellant could not bring herself within EX.1 of

Appendix FM as she could not show that there were insurmountable obstacles to family life with the Sponsor continuing outside the United Kingdom.

5. No information had been provided which demonstrated that the Sponsor was currently receiving any form of medical treatment for his spinal condition. He had been discharged from the Community Therapeutic Team Facilitated Exercise Programme. If the Sponsor decided to accompany the Appellant to Jamaica he would have access to any necessary medical treatment there. The Sponsor had been born in Jamaica in the same parish in which the Appellant was born. He had applied for naturalisation as a British citizen on 26th September 1996 and was naturalised as such on 12th March 1998. If the Sponsor wished to relocate to Jamaica with the Appellant he could renounce his British citizenship but retain his Jamaican nationality. As a Jamaican citizen he would have access to medical care, disability support, etc. The letter quoted from the Country of Origin Information Report on health services in Jamaica. The Sponsor had last visited Jamaica in 2001 and the country would be familiar to him. He would not face any barriers in adapting to life there. The Appellant herself had worked in the United Kingdom and could do so in Jamaica. Whilst in the United Kingdom she had received financial support from friends and her church. She had failed to demonstrate that she had met and formed her relationship with the Sponsor at a time when she the Appellant had valid leave to remain in the United Kingdom. The claim was refused under paragraph E-LTRP.1.3. with reference to R-LTRP.1.1.(d) of Appendix FM.

6. The Respondent considered whether the Appellant had established a private life in this country and whether she could bring herself within the provisions of paragraph 276ADE. The Appellant did not fall for refusal under any of the suitability grounds in Section S but due to her age and length of residence she failed to meet sub-sections (iii); (iv); (v) and (vi) of paragraph 276ADE. The Appellant's length of residence amounted to twelve years but such a period would not result in the development of obstacles significant enough to make the Appellant unable to reintegrate herself back into Jamaica. The Appellant had spent the majority of her life including her youth, formative years and most of her adulthood in Jamaica and would have developed ties and attachments to that country which would facilitate reintegration. The Sponsor shared a cultural background with the Appellant which would facilitate the Appellant's reintegration. The Appellant had failed to demonstrate that she would face significant obstacles to being assimilated back into Jamaican society. The Appellant had resided illegally within the United Kingdom for the last six years and her removal was proportionate to the legitimate aim pursued. There was insufficient evidence of any exceptional circumstances that would make it appropriate to allow the Appellant to remain outside of the Immigration Rules.

7. The Appellant appealed that decision arguing that sufficient evidence had been provided to establish that the Appellant and Sponsor were in a

genuine and subsisting relationship. It was unreasonable and impractical to expect the Sponsor to relocate to Jamaica if the Appellant should be removed there and that would be a disproportionate interference with the Appellant's Article 8 rights. The Appellant and Sponsor had become intimate friends in 2005 three years after the Appellant arrived. They had been living together since then.

The Appeal at First Instance

8. The Judge heard oral evidence from the Appellant and Mr Owen Gordon who she said was her partner. In a relatively brief determination the Judge dismissed the appeal stating that the Appellant had not satisfied him that she was in a relationship akin to marriage with Mr Gordon "they share the same accommodation, but no more". There were more distant family members who spoke of their association with the Appellant but that had not satisfied the Judge that the Appellant had a family life with any of those persons either. The Appellant's removal would not constitute an interference with any right to a family life. Noticeably, the Judge did not deal with whether the Appellant had a claim for private life. Nor did the Judge consider whether the Appellant could meet the provisions of Appendix FM in relation to family life or paragraph 276ADE in relation to private life stating that as the application that was made to the Respondent was on 31st March 2011 it was to be considered under what the Judge referred to as "the old Rules".

9. I take that last remark to mean that the Judge held that the Rule changes introduced in July 2012 by way of Appendix FM and paragraph 276ADE did not apply in this case because the application had been made before those Rules were introduced. The Respondent had in fact considered this application under the 2012 Rules but had nevertheless refused the application. In deciding not to deal with this appeal under the post-July 2012 regime the Judge appeared to be basing his view on the authority of **Edgehill** (although not cited by him in his determination). The correct position was explained in a subsequent Court of Appeal decision of **Singh [2015] EWCA Civ 74** delivered before the Judge heard the instant appeal which makes clear that apart from decisions taken in a narrow window between July and September 2012 the Respondent's decision under the Immigration Rules should take into account the Rules as at the date of the decision not the date of application.

The Onward Appeal

10. The Appellant appealed the dismissal of her appeal arguing that the Judge was wrong in law in confining himself to jurisprudence under Article 8 without considering the post-July 2012 Immigration Rules. The Judge had failed to clarify which standard of proof he employed in his assessment of the evidence and whether or not it was the balance of probabilities. Although the Judge had directed himself in accordance with **Razgar** he had only considered the first step and in finding that there was not a family life in this case had not gone on to consider proportionality.

Evidence of the genuineness of the relationship between the Appellant and the Sponsor was for example that the Sponsor had included the Appellant in his household bills. The Judge had not weighed the evidence contained in the Appellant's bundle.

11. A letter from the Sponsor's doctor, Dr Ali, had spoken of the Sponsor's need for assistance with activities of daily living. The Judge had queried why Dr Ali had not made mention of the care provided by the Appellant if indeed the Appellant was providing such care. The Judge had misinterpreted and then come to the wrong conclusion about Dr Ali's letter as it was written for the Sponsor to obtain adequate accommodation. It was thus not relevant to the Appellant's case that she required leave to remain in this country and was caring for the Sponsor.

12. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Frankish on 7th October 2015. In granting permission to appeal he wrote that:

> "The application for permission to appeal asserts that the case was considered under the old Rules but the timing of its submission meant that it had to be considered under transitional arrangements by which both old and new Rules were to be considered (**MM (Lebanon) [2014] EWCA Civ 985**) and the Respondent's correspondence there referred to in the application (ground 1); failed to specify whether or not the balance of probability was being applied; despite referring to the five stages of **Razgar** failed to consider proportionality; insufficient account taken of the duration of the relationship relied upon; focussed excessively on the evidence not in the bundles. While the application asserts that correspondence supporting ground 1 is enclosed in fact it is not. It is arguable nevertheless that there is merit in ground 1. However the Appellant must come fully prepared with documentary evidence to support his assertion in ground 1."

13. I note here that the reference to correspondence arises from paragraph 3 of the Appellant's application for permission to appeal the First Tier Tribunal's decision. Although the paragraph is not particularly clear the objection taken was that the Judge had restricted himself to considering certain correspondence listed as:

> "The enclosed [Appellant's representatives'] covering letter of 28th March 2011 and the case review letter of 16th May 2011 to the Chief Immigration Officer. Our CIO letter of 16th May 2011 was responded to by the UKBA's Reconsideration Team in an undated UKBA's letter received on 15th June 2011 (copy enclosed)."

14. As was indicated by Judge Frankish those documents were not enclosed with the application for permission but the correspondence was in the Appellant's bundle. The letter written by the Appellant's representatives on 28th March 2011 was a covering letter which accompanied the Appellant's FLR(O) application form. It detailed the history of the

Appellant's relationship with the Sponsor and said that the Appellant had extended her visa as a student for most part of her stay until she encountered "personal problems". The "case review letter" of 16th May 2011 was a further letter written by the Appellant's representatives taking issue with what at that stage was the Respondent's rejection of the Appellant's claim. It emphasised that the Appellant was living in the same house as the Sponsor and that the Sponsor had provided evidence of his financial status. The undated Respondent's letter was a pro forma one acknowledging the Appellant's request for a reconsideration of the decision at that stage to refuse the application and indicating that no removal action would be pursued until the request for reconsideration had been dealt with. It was correct that this documentation had not been specifically referred to in the Judge's decision at first instance but the correspondence in question was brief and said nothing which was different to the matters which the Judge did consider.

15. The Respondent replied to the grant of permission pursuant to Rule 24 of the Upper Tribunal Procedure Rules on 19th October 2015 noting that the Judge had found that Article 8 was not engaged. In those circumstances the Judge would not have found for the Appellant even if he had had been otherwise properly directed.

The Hearing Before Me

16. As a consequence of the grant the matter came before me to determine in the first place whether there was a material error of law such that the determination of the First-tier fell to be set aside. If not, then the decision of the First-tier would stand. At the outset of the hearing I observed to the parties that there was a clear error in the Judge's determination in his misunderstanding of the transitional provisions following the decision in **Edgehill** but overlooking the subsequent decision of **Singh** (see above paragraph 9). The question was whether that error was material such that it led to the decision being set aside in its entirety or in part.

17. For the Appellant it was argued that the Appellant could bring herself within Appendix FM as the Sponsor came within the definition of a partner contained in Section Gen.1.2. of Appendix FM, that is a person who had been living together with the Appellant in a relationship "akin to marriage for at least two years prior to the date of application". The Appellant in this case had cohabited with the Sponsor for seven years. She had made her application in 2011 but it had taken the Respondent three years to make a final appealable decision which if anything served to increase the number of years of cohabitation. The Appellant had also established a private life and any removal decision would have to be proportionate to the interference with private and family life. The Appellant had been living in the United Kingdom now for over thirteen years and had no living relatives in Jamaica. She would find it intolerable to reintegrate back into Jamaica. The Sponsor suffered from a number of ailments and he too could not go and live in Jamaica.

18. For the Respondent it was acknowledged that the Judge should have looked at the July 2012 Rules as amended. However Appendix FM in this case was not material as the Judge had found that there was no family life (see paragraph 8 above). There were letters from doctors telling the Tribunal about the health of the Sponsor but there was no mention in them that the Appellant and Sponsor were in a relationship. One would only get as far as the proportionality stage if one could clear the hurdle of establishing that family life existed. It was conceded by the Respondent that the Judge had not considered whether the Appellant had established a private life under paragraph 276ADE that was something which was absent from the determination. The finding as to family life was adequately reasoned and the appeal was a mere disagreement in that regard.

19. For the Appellant the Appellant's representative reiterated the Appellant's argument as to both private and family life. There was no evidence to contradict the claim that the Appellant and Sponsor were living as husband and wife.

The Error of Law Decision

20. The Judge did not consider whether the Appellant had established a private life which would be disproportionately interfered with. That was an error and was an issue that would need to be re-heard. The question of whether there was an error in the conclusion that the Appellant had not established a family life with the Sponsor was more complex. The Judge had considered that aspect of the matter but had rejected the Appellant's claim to have a family life. The evidence of the Appellant and the Sponsor had conflicted as to when cohabitation had started. The Sponsor had said it was in 2008 when he acquired a council property whereas the Appellant's claim was that the relationship had commenced in 2005. The Respondent had pointed out in the refusal letter there was no mention made of this relationship when the Appellant applied for leave in 2006. It was reasonable to have expected the Appellant to have mentioned the relationship in her application if the relationship had begun by then.

21. The Judge placed weight on what he referred to as "the two missing years" for which there was no or insufficient evidence. The Judge was satisfied that the Appellant and Sponsor occupied the same address and was well aware that Dr Ali's letter was written in support of a housing application. The grounds for permission to appeal were wrong to suggest that the Judge had misunderstood the purpose of the letter. What troubled the Judge was that the medical documentation did not recognise the fact that the Sponsor was said to be in a long term relationship let alone naming who that was with. The Judge took the view that it was reasonable to have expected Dr Ali to have referred to who was currently providing the Sponsor with assistance if the Sponsor required that assistance. That the doctor did not do that undermined the claim that the relationship between the Appellant and Sponsor went beyond sharing the same accommodation.

22. The issue was whether the Judge had given adequate reasons for his finding that the Appellant and Sponsor were not in a relationship akin to marriage so as to bring the Appellant within the provisions of Appendix FM. It was an error for the Judge not to apply the Appendix FM test. The question was whether it would have made any difference (in the light of the Judge's findings) if he had referred to Appendix FM. In my view the use by the Judge of the phrase "a relationship akin to marriage" is evidence that the Judge was in fact aware of the test under Appendix FM. He fell into error in coming to the conclusion that this test arose from the pre-July 2012 Rules and jurisprudence rather than the post-July 2012 Rules. That was an error of law but it was not a material one since if the Judge had directed himself to the July 2012 Rules he would have found that his understanding of what the pre-July 2012 position was was in fact what the post-July 2012 position was. The result in short would inevitably have been the same.

23. Judge Frankish when granting permission did not state that the Judge had arguably erred in law in finding that there was no family life between the Appellant and Sponsor. What Judge Frankish was concerned about was the allegation that the Judge had not considered the 2011 correspondence. As I have indicated that was not an error because the Judge had considered that correspondence. Judge Frankish was also concerned that the Judge had erred in not applying the July 2012 Rules. As I have indicated that is correct, the Judge appeared to indicate that the July 2012 Rules did not apply but nevertheless went on to apply the test ("a relationship akin to marriage") which arises under the July 2012 Rules. This was an error of law but not a material one since he would have arrived at the same conclusion in any event.

24. I indicated to the parties that there was no material error of law in the Judge's conclusion that there was no family life between the Appellant and the Sponsor. There was an error in that the Judge did not consider the Appellant's private life which would be interfered with by her removal to Jamaica. I indicated that I would proceed to re-hear the matter allowing the Appellant to give further oral testimony in relation to that issue.

The Appellant's Oral Testimony

25. The Appellant stated that she did have a loving relationship with the Sponsor notwithstanding the decision at first instance. However due to her status she could not marry the Sponsor. In order to marry him she would have to prove identification and her passport was currently being held by the Respondent. She had no family members "back home" (as her representative put it) because both her mother and father were deceased.

26. In cross-examination she stated that before she came to the United Kingdom she had worked in a haberdashery store. She had been away so long now that it would be a struggle for her to pick up the pieces. She had worked in the United Kingdom in a care home. She had not returned to Jamaica when her studies finished and her leave had expired because she

had not known what to do or how to appeal. Her mother had died in 2005 so it was not possible for her to return to Jamaica. At the time she came to the United Kingdom as a student she did have the intention of returning to Jamaica at the conclusion of her studies.

Closing Submissions

27. In closing for the Respondent reliance was placed on the 2014 refusal letter. There were no serious obstacles to reintegration of the Appellant upon return to Jamaica and nothing to meet the test set out in paragraph 276ADE(vi). The Appellant had grown up in Jamaica and spoke the language. She had worked previously there and there was no reason why she could not return there. It was very unlikely that it would be proportionate to allow her appeal outside the Rules.

28. In closing for the Appellant the argument was repeated that the Appellant could meet the requirement of the Rules as a partner due to the length of time she had cohabited with the Sponsor. The Appellant had established both a private and family life. She was a student until some problems happened. The Appellant and Sponsor started cohabiting in 2007 and her partner was supporting her. She lost her mother and had never known her father and could not return to Jamaica. It would be unduly harsh for her to be on her own there. Her appeal should be allowed.

Findings

29. As I have indicated although the Appellant continues to assert that she has an established family life with the Sponsor, that was not the finding of the Judge at first instance and I see no reason to go behind that decision in the light of the concerns of the Judge at first instance. The Respondent did not accept that the Appellant and Sponsor were in a relationship but did consider the matter on an even if basis that even if the Appellant and Sponsor were in a relationship, it was reasonable to expect the Sponsor to return to Jamaica with the Appellant as he held dual nationality and had not lost his ties to Jamaica either. I have considered the evidence of the Appellant and Sponsor including their written statements made for the proceedings at first instance and the lengthy and somewhat repetitive representations made on behalf of the Appellant but I have to say that I have seen nothing which would cause me to come to a different view to the Judge at first instance. For the reasons I have given above (see paragraphs 22) I do not consider that the Judge's error of law in not specifically directing himself to apply Appendix FM would have resulted in a different decision nor do I consider that it infected his findings in relation to whether there was a genuine and subsisting relationship. I therefore confine myself to considering the issue of whether the Appellant has an established private life in this country and if so whether it would be disproportionately interfered with by requiring her to return to Jamaica.

30. The Appellant cannot bring herself within paragraph 276ADE of the Immigration Rules. It is clear that she has not so severed her ties with

Jamaica that there are very significant obstacles to her reintegration into Jamaica. She has not lived continuously in the United Kingdom for twenty years. She would have to demonstrate the existence of very significant obstacles to her reintegration to succeed under the paragraph. This she cannot do. She has resided in this country for almost fourteen years but nevertheless spent the majority of her life (until she was 32) in Jamaica. Her evidence is that she has no living relatives in Jamaica but she is an adult with a history of work in Jamaica and I see no reason why she could not re-establish herself there. Indeed even if I had accepted that there was a family life between the Appellant and Sponsor I would have considered it reasonable to expect the Sponsor to relocate with the Appellant to Jamaica given that he remains a Jamaican citizen as well as holding British nationality and was born in the same parish in Jamaica as the Appellant. The Respondent makes a sound point at paragraph 42 of the refusal letter when she notes that the Appellant had entered into a relationship with someone who had shared a cultural background with her which would result in the Appellant maintaining ties to Jamaica which would in turn facilitate reintegration. Even if the Sponsor requires medical treatment the Respondent submitted cogent evidence at first instance which was not seriously disputed. It indicated that such medical treatment as was necessary would be available to the Sponsor in Jamaica and which he would be able to access as a Jamaican citizen.

31. The Appellant's claim to remain in this country under Article 8 falls to be decided outside the Immigration Rules. The Appellant must show that she has established a private life in this country. Given her residence of almost fourteen years and her studies I accept that she has established a private life. Her return to Jamaica would interfere with that private life but the interference would be pursuant to the legitimate aim of immigration control since she has lived here unlawfully for the last eight years. To demonstrate that the interference would be disproportionate the Appellant must show some compelling reason why that would be so (see **SS (Congo [2015] EWCA Civ 387**). I do not find that there are any compelling reasons in this case. In effect the only reason the Appellant relies upon is the length of time she has been here and her friendship/relationship which she claims with the Sponsor.

32. In assessing proportionality the Tribunal must have regard to the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002. The Appellant's evidence as to when her relationship with the Sponsor began has changed in that she now contends that the relationship began after her leave expired when she was here unlawfully. Even if I were to accept that the relationship between the Appellant and Sponsor were genuine (which I do not for the reasons given above) the relationship was established at a time when the Appellant's status here was unlawful and therefore little weight would be attached to it in any event. Similarly the Appellant's private life has been established either during the period when she has been here unlawfully or when her status was precarious with no legitimate expectation it would be extended. Little or no weight can be attached to her private life in the proportionality exercise. In those

circumstances given that little weight it is difficult to see how the Appellant's appeal could succeed under Article 8 outside the Rules given the weight to be attributed to the legitimate aim pursued. I therefore dismiss the appeal on Article 8 grounds.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law in relation to the Appellant's claim under Article 8 (private life). I have therefore set that decision aside. I re-make the decision by dismissing the Appellant's appeal under Article 8.

Appellant's appeal dismissed under both the Immigration Rules and Article 8.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 28th day of January 2016

……………………………………………….
Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed this 28th day of January 2016

……………………………………………….
Deputy Upper Tribunal Judge Woodcraft