**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/00454/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **on 19 September 2017** | **on 05 October 2017** |

**Before**

**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**SANDRA EVADNEY TAYLOR-COOKSON**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms K Reid, Counsel, instructed by Haq Hamilton Solicitors
For the Respondent: Mr P Armstrong, Home Office Presenting Officer

**DECISION AND REASONS**

**Appeal history**

1. This is a remade appeal against the Respondent's decision of 26 May 2015 refusing the Appellant's human rights claim which was based on her family life relationship with her husband, Mr Cookson. In an error of law decision promulgated on 25 July 2017 I concluded that the First-tier Tribunal's judge's (FtJ) decision, promulgated on 15 November 2016 and dismissing the appeal, contained a material error of law. Although the FtJ had been entitled to conclude

that there were no insurmountable obstacles to the Appellant's relationship with her husband continuing in Jamaica, his conclusion that the claim did not merit consideration outside of the immigration rules was one he was not legally entitled to reach. The FtJ failed to consider whether any temporary return by the Appellant to enable her to make an entry clearance application could constitute a disproportionate interference with the article 8 relationship even if there were no insurmountable obstacles to family life being enjoyed in Jamaica (*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), headnote (i)). Despite this submission having been prominently made in the skeleton argument the FtJ failed to consider whether the Appellant fell within the terms of the *Chikwamba [2008] UKHL 40* principle (i.e., whether, but for her immigration status, she would be certain to be granted leave to enter if an entry clearance application was made, a factor which, if holistically considered, 'might' mean there was no public interest in requiring her to leave the UK – see *Agyarko* [2017] UKSC 11, at [51]). There was no consideration by the FtJ as to whether the financial and evidential requirements of Appendix FM and Appendix FM-SE were met (the large bundle of documents before the FtJ contained evidence relating to Mr Cookson's employment as an English teacher with an annual salary of £36,906), or of the Respondent's acceptance that the Appellant met the Suitability requirements, or that, as a national of Jamaica, she was exempt from requiring any English-language certificate.

2. There were, in addition, a number of other factors, not included in the FtJ's assessment under the immigration rules, which, if cumulatively considered, may have had some bearing on an assessment outside of the immigration rules. These included the nature of the Appellant's relationship with her son as well as her grandson, the fact that the Appellant resided in the UK for 15 years, and the substantial number of letters in support indicating the extent to which she had integrated. Nor was there any clear consideration of the factors contained in s.117B of the Nationality, Immigration and Asylum Act 2002. Having holistic regard to these factors I could not be satisfied that, but for the FtJ's failure to engage in an assessment outside of the immigration rules, the appeal would inevitably have fallen for dismissal.

3. Having uncovered a material error of law I was invited to adjourn the matter to enable further evidence to be adduced relating to the nature and quality of the Appellant's relationships in the UK, her relationship with her son, and to consider the provision of further financial evidence. The FtJ's finding that there were no insurmountable obstacles to the Appellant and her husband relocating to Jamaica was not vitiated by any legal error. This finding would stand. The matter was adjourned to consider the narrow issue of whether it would be disproportionate to expect the Appellant to return to Jamaica to make an entry clearance application, and whether she could otherwise succeed in an assessment outside the immigration rules.

**Factual Background**

4. The Appellant is a national of Jamaica, date of birth 26 June 1971. There is some confusion as to her early immigration history. The Respondent notes that the Appellant was issued with a visitor entry clearance on 10 June 2000, valid until December 2000. Although not referenced in the Reasons For Refusal Letter the Appellant maintains that she returned to Jamaica on 6 July 2000 and re-entered the United Kingdom on 10 March 2001 with leave valid until September 2001. The Appellant was, in any event, granted leave to remain as a student on 18 June 2002, and thereafter received subsequent grants of leave to remain. On 24 April 2007, the Appellant applied for further leave to remain as a student. This was refused on 16 May 2007. She was accorded a right of appeal but her appeal was struck out on 14 September 2007. Thereafter the Appellant remained in the country without lawful leave. She made several applications for leave to remain including one made on 29 August 2013 as the spouse of a person settled in the UK. These applications were all refused. On 20 May 2015, the Appellant made a human rights claim based on her marital relationship with Mr Anthony Cookson and her medical condition. They met online in 2008 and their relationship commenced in 2009. They were married on 6 July 2013 and have lived together from that date.

5. In her decision dated 26 May 2015 the Respondent accepted that the Appellant met the Suitability requirements of Appendix FM and that she met the Eligibility requirements of Appendix FM (R-LTRP.1.1.(d)(ii) with the exception of EX.1. The Respondent was not satisfied that there were 'insurmountable obstacles' to family life with her partner continuing outside the UK. The Respondent noted that Mr Cookson had Jamaican heritage as he was born in Jamaica and lived there until the age of 35. The Respondent was not satisfied that he would have lost all social and cultural ties to Jamaica or that there would be any language barrier preventing his return. The Respondent went on to consider whether the Appellant met the requirements of paragraph 276ADE of the immigration rules but concluded that there would be no 'very significant obstacles' to her re-integration given the length of time she lived in Jamaica (28 years) and in the absence of any evidence that she had lost all social and cultural ties with her country of nationality.

**Further evidence**

6. In addition to the bundle of documents that was before the First-tier Tribunal, the Appellant relies on a further bundle of documents prepared for the error of law hearing on 13 July 2017. This includes a number of character references relating to both her and her husband, and some further medical documents dating back to 2015, 2016 and 2017 relating to the gastroenterology and gynaecological problems,

7. The Appellant produced a supplementary bundle (Bundle B) containing, *inter alia*, a further statement from her dated 21 August 2017, statements from her son (Jevone Robinson) and daughter-in-law (Tamara Robinson) dated 22 August 2017, a letter from the Penrhyn Surgery dated 11 August 2017, wage slips relating to her husband's (Anthony Cookson) employment as a teacher covering the period from January 2017 to July 2017 and Mr Cookson's corresponding bank account statements reflecting the monthly wage. There was also background evidence relating to health provision in Jamaica taken from, amongst others, a Home Office COI report dated January 2013, Foreign Office advice on travel to Jamaica, some details of hospitals in Jamaica, information relating to the National Health Fund (NHF) card, and advice from the US Jamaican embassy in respect of medical assistance.

8. In her additional statement the Appellant reiterated that she had lived in the UK for over 16 years and had embraced the British way of life. She described the course of the previous studies. Her son had entered the UK at the age of 12 in December 2002 and the Appellant couldn't see her life without him. The Appellant now had a grandson who would be turning 3 in October and with whom she had a good relationship. She was expecting the birth of a granddaughter early in the same month. Her son also had 2 stepchildren who adored the Appellant. The Appellant's son and wife were dependent on the Appellant to help with babysitting. Although the Appellant and her son's mother-in-law took it in turns to act as babysitter, due to the mother-in-law's husband's long-term illness the Appellant spent more time with the grandchildren. Witness statements from the Appellant's son and daughter-in-law confirmed that they all enjoyed a good relationship, that their son adored the Appellant, that it was good to have the Appellant around to help bring up their son and that the Appellant could always be depended upon to babysit even at short notice.

9. Oral evidence was taken only from the Appellant. There was no examination-in-chief. In cross-examination, the Appellant confirmed that her husband was aware of her precarious immigration status when their relationship began. When asked why the Appellant could not return to Jamaica to make an entry clearance application, which was likely to take between 1 and 3 months, the Appellant said it was as a result of her medical issues. She didn't know what could happen to her and needed to be close to the gastroenterology team. She had a severe issue with her bowels and attended A&E in April 2017 because her stomach was blocked. As a result of this incident an appointment was brought forward from 2018 to November 2017. The Appellant described the challenging time she experienced in 2012 as a result of her gastroenterological problems. The Appellant had not made any enquiries in relation to the treatment for her gastroenterological problems in Jamaica. The Appellant and her husband rented a one-bedroom flat. He was an English teacher. When asked whether she had investigated any precautions against the possibility of developing Deep Vein Thrombosis (DVT) the Appellant said she had not. The Appellant confirmed she

developed a blood clot in her lungs in 2012. The Appellant had not made any enquiries as to whether treatment for this was available in Jamaica.

10. When asked in re-examination why she could not return to Jamaica for a brief period of time in order to make an application to re-enter the UK the Appellant said her daughter-in-law was due to give birth in early October 2017. Her daughter-in-law had gestational diabetes and the daughter-in-law's father was in a nursing home with dementia and Parkinson's disease. The Appellant had to help as much as possible. The Appellant acted as a babysitter for her grandson as her son was a bus driver. The Appellant did not know how her son's family would cope if she had to leave the UK for short period of time. She had investigated how long entry clearance applications usually took and believed a spousal entry clearance application would take about 90 days.

11. I heard submissions from both representatives which are recorded in my record of proceedings. Having considered the letter from Mr Cookson's employer and the requirements of Appendix FM-SE in respect of such a letter I permitted the Appellant to provide a new letter of employment within 10 days of the hearing (expiring on 29 September 2017). In the event I received no further evidence from the Appellant.

**Discussion**

12. (*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) states that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to their home country to make an entry clearance application. In *Chen* the Upper Tribunal found that there may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate under article 8. It was submitted on behalf of the Appellant that it would be disproportionate to expect her to return to Jamaica for a temporary period to make an entry clearance application in circumstances where she met all the requirements of the immigration rules.

13. At the resumed hearing, I considered the financial documentation provided in relation to Mr Cookson's employment at the Lee Valley high school. Mr Armstrong indicated there was no reason to doubt the reliability of the wage slips or the Halifax bank account statements showing the salary deposits. The Appellant provided wage slips relating to her husband dating from January 2017 to July 2017 inclusive. The Halifax bank statements relating to Mr Cookson, covering the same period, showed regular deposits into his account matching those contained on the salary slips.

14. To fulfil the requirements of Appendix FM – SE the Appellant's partner must additionally provide a letter from his employer containing certain prescribed information. The only letter from the Appellant's husband's employer (Lee Valley high school) is dated 8 September 2016. This confirms that Mr Anthony Cookson has been employed by the school since 1 April 2016 as a teacher of English and that his salary is £36,906. The letter does not give the period over which Mr Cookson has been paid this level of salary, or the type of employment (e.g. permanent, fixed-term contract or agency). This information is required by Appendix FM-SE. In the absence of this information I gave the Appellant 10 days in which to provide a new employment letter from Mr Cookson's school containing all the relevant information required by Appendix FM – SE. By 4pm on Friday the 29 September 2017 I had received no further evidence. After making enquiries on Monday 2 October 2017 I was informed by Ms Reid that Haq Hamilton solicitors had ceased acting for the Appellant and a notice to that effect had been sent to the Tribunal on the morning of 2 October 2017. Ms Reid stated that it was the understanding of the solicitors that no further evidence would be forthcoming. Ms Reid reminded me that the Appellant was aware of the deadline for further evidence having been in the hearing room and having been reminded of it by Haq Hamilton solicitors who also provided her with the Tribunal's email address. A letter from Haq Hamilton solicitors was received by the Upper Tribunal on 2 October 2017 confirming that they were no longer instructed by the Appellant.

15. Appendix FM–SE requires a letter from the sponsor's employer confirming, *inter alia*, the period over which the sponsor has been paid his stated level of salary, and the type of employment (e.g. permanent, fixed-term contract or agency). This specified information has not been provided, despite the Appellant being given a sufficient opportunity to produce a new employer's letter. No explanation has been provided for the failure to provide the new employer's letter. The requirements of Appendix FM-SE have not been met. In a national entry clearance application under the immigration rules the Appellant would not be granted entry clearance because the required information in Mr Cookson's employer's letter has not been provided. In the circumstances, it cannot be said that, but for her immigration status, the Appellant would be certain to be granted entry clearance. The principal enunciated in *Chikwamba* [2008] UKHL 40 only has application if a notional entry clearance application would be certain to be granted (see *Agyarko* [2017] UKSC 11). She does not therefore fall within the parameters of the *Chikwamba* principle.

16. Even if the Appellant was certain to meet all the requirements in a notional entry clearance application, there is nothing in my judgment to render it disproportionate to expect her to return to Jamaica for a brief period while she makes an application to re-enter the United Kingdom. In *Chen,* Upper Tribunal Judge Gill stated (at [39]), "In my judgement, if it is shown by an individual (the burden being upon 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."

17. The Appellant claimed that her son and daughter-in-law and grandson could not do without her because she provided invaluable assistance babysitting their young child. This was in large part because the mother of the Appellant's daughter-in-law was not in a good state of health herself and had to care for her husband who suffered from dementia and Parkinson's disease. I note however from the evidence that the daughter-in-law's father resides in a care home. Moreover, other than statements from the Appellant's son and daughter-in-law there is no independent evidence confirming the nature or severity of the daughter-in-law's father's condition, or indeed any evidence relating to the health of the daughter-in-law's mother. Even accepting these assertions at face value, there is insufficient evidence to support the Appellant's claim that she is the only one who can provide the necessary childcare. Neither the Appellant's son nor her daughter-in-law gave oral evidence at the hearing and there was therefore no opportunity to test their written evidence. I find it hard to believe that there is absolutely no other support available from any other source to babysit the Appellant's grandchild. The Appellant has not persuaded me, on the balance of probabilities, that alternative childcare arrangements cannot be made for a temporary period while she returns to Jamaica and makes an entry clearance application. There was no independent evidence that the relationship between the Appellant and her son and daughter-in-law and grandchild contained any elements over and above those normally to be expected in such relationships. Nor is there any reason why the Appellant could not stay either with her family or friends or relatives, or rent property for a short time while she makes the entry clearance application.

18. Although there is no evidence of the Appellant's visit to A&E in April 2017 the GP's letter dated 11 August 2017 does refer to her ongoing treatment in hospital relating to her bowel condition and that her next appointment, which was scheduled for the 21 February 2018, was expedited to 29 November 2017 due to complications. There is however no further medical evidence describing the seriousness of the Appellant's gastroenterological condition and whether this renders her unfit to travel. Nor is there any evidence that the Appellant's condition cannot be treated in Jamaica. Whilst the background documents provided by the Appellant identifies many hospitals in Jamaica there is nothing produced specifically stating that she would be unable to receive any treatment in respect of her gastroenterology problems.

19. The letter from the Appellant's GP at Penrhyn surgery, dated 11 August 2017, confirmed that the Appellant had an episode of pulmonary embolism (blood clot) in 2012 which required warfarin and anticoagulation treatment. The letter stated that the Appellant remains at risk for a subsequent episode of DVT and that flying long distance at high altitude is a known high-risk factor for developing DVT, which can lead to a potentially fatal lung clot. The letter did

not actually say that the Appellant was unfit to fly. There was no assessment of the nature of the risk for a subsequent episode of DVT. Nor did the letter identify any precautions that could be taken by the Appellant to minimise the threat of DVT. When asked why she could not return to Jamaica to make an entry clearance application the Appellant referred to her gastroenterological problems but made no reference to the possibility of DVT occurring. There does not appear to have been any issue of pulmonary embolism since 2012. In the absence of any enquiries by the Appellant as to whether she can minimise the risks of DVT on a plane flight to Jamaica, and in the absence of any reference in the GP's letter to the Appellant being unfit to travel because of her previous pulmonary embolism and the current risk of any such embolism occurring, I am not satisfied that she cannot reasonably be expected to travel by plane to Jamaica.

20. The first-tier Tribunal judge's assessment in respect of the absence of insurmountable obstacles to family life relocating to Jamaica has not been challenged. For the reasons given above I do not regard it as disproportionate to expect the Appellant to relocate to Jamaica if she wishes to make an entry clearance application to join her husband in the UK. I will now consider whether there are any other compelling circumstances outside of the immigration rules that could render her return to Jamaica disproportionate.

21. I have considered the factors identified in s.117B of the Nationality, Immigration and Asylum Act 2002. I note that the maintenance of effective immigration controls is in the public interest. I accept that the Appellant is a person who can speak English and I am prepared to accept that she is a person who is capable of being financially independent. These however are neutral factors in the overall proportionality assessment (*Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803, at [59] to [62]). I must give little weight to a relationship formed with a qualifying partner that is established at a time when the person was in the UK unlawfully. It is not disputed that the Appellant's relationship with Mr Cookson commenced when she no longer had any lawful right to reside. Although the Appellant clearly gets on well with her son and daughter-in-law nothing in the evidence presented to me, including the statements, indicates there is any relationship between them sufficient to trigger the protection of article 8 (*Singh and Khalid* [2015] EWCA Civ 74). I am not satisfied there is anything more than the normal emotional bonds between adult children and their parents. Whilst the Appellant provides some childcare to her grandson there is insufficient evidence to persuade me that alternative babysitting cannot be arranged. While the definition of "family life" in Article 8 is broad enough to include the ties between grandparents and grandchildren (*Marckx v. Belgium* [1979] ECHR 2) the relationship between grandparents and grandchildren, by its very nature, generally calls for a lesser degree of protection than that between natural parents and their children (*G.H.B. v UK* Application no. 42455/98). There is nothing in the evidence to indicate that the relationship between the Appellant and her grandson is sufficient to trigger the protection of article 8.

Although it may be in the grandson's best interests, as considered pursuant to s.55 of the Borders, Citizenship and Immigration Act 2009, for the Appellant to remain in the UK, he nevertheless lives with his parents who provide for his care and welfare. Having regard to the public interest in immigration control, coupled with the Appellants unlawful residence in the UK since 2007 and the absence of any insurmountable obstacles preventing the relationship from continuing in Jamaica, I am not satisfied that it would be disproportionate to expect the Appellant to relocate to Jamaica. If the Appellant is not granted entry clearance there is nothing to indicate that contact between her and her son and grandchild would be severed. This could continue through remote forms as well as periodic visits. Although Mr Cookson has a job in the UK it was not suggested that he would be unable to look for employment in Jamaica or that he or the Appellant would be unable to find rental accommodation in the country. As has already been found by the first-tier judge the Appellant has a number of qualifications and has previously worked in Jamaica. I take into account the fact that the Appellant has lived in the UK for 16 years, and that she has established a private life in this country (as evidenced by the various letters of support), but she has not had permission to reside here since 2007and there is no reason why she could not continue to maintain her friendships, albeit by remote forms of communication.

22. Having considered all these factors 'in the round', and having weighed up the public interest factors against the Appellant's particular circumstances and the relationships she has established in the UK, I am satisfied that the decision to refuse the Appellant's human rights claim does constitute a proportionate interference with article 8.

**Notice of Decision**

**The appeal is dismissed on human rights grounds**

4 October 2017

Signed
Upper Tribunal Judge Blum

Date