Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01329/2015

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 2 May 2017	**On 7 June 2017**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

PATRICE JARRETT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O'Ryan, instructed by Walsh Solicitors
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I gave a decision as regards error of law in this appeal on 6 January 2017. My decision was as follows:

1. The appellant, Patrice Lorraine Jarrett, was born on 2 February 1988 and is a female citizen of Jamaica. She entered the United Kingdom as a visitor in 2002 and overstayed. She subsequently attempted to regularise her status. On three occasions between 2009-2013 her applications to the Secretary of State had been rejected without a right of appeal. She applied again on 13 May 2015 and her application was refused by a decision dated 12 June 2015. The appellant appealed to the First-tier Tribunal at Section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 (as amended) on the grounds that her human rights claim had been refused by the Secretary of State. The First-tier Tribunal (Judge Alis), in a decision promulgated on 4 March 2016, dismissed the appeal. The Appellant now appeals, with permission, to the Upper Tribunal.

2. A preliminary issue arose at the Upper Tribunal hearing at Liverpool on 30 November 2016. Mr O'Ryan, who appeared for the appellant, sought to amend the grounds of appeal. At first, he wished to "amplify" a point made in the existing grounds of appeal at 6.3-6.4. At [29], Judge Alis had written:

> "The appellant and her husband live off his benefits. They are therefore a burden on the state. The appellant's own evidence is that she would be required to look after her husband on a full-time basis so she would be unable to work. There was no evidence that the appellant's husband received any of the benefits set out in Section E-LTRP3.3 of Appendix FM. Section 117B(iv) makes clear that little weight shall be given to her private life or to her relationship with her husband because they were formed when she was in the United Kingdom unlawfully, in this case both the appellant and her husband knew that she was here illegally. Little weight should also be given to a private life established by a person at a time when the person's immigration status is precarious."

3. The appellant asserts that the judge misunderstood the facts. There had been evidence that the appellant's husband received PIP (Personal Independence Payment). Further, the appellant asserts that the Employment Support Allowance (ESA) which the sponsor receives is contribution-based and not income-based (see appellant's bundle at [59]). Mr O'Ryan submitted that only income-based ESA is treated as a public fund for the purposes of paragraph 6 of HC 395 (as amended). In his skeleton argument, he submits that "the judge's failure to appreciate that any reliance of the appellant on income from her husband's ESA did not amount to reliance on public funds arguably adversely affected his assessment of the proportionality of the impugned decision."

4. The proposed amendment of the grounds of appeal is, as Mr O'Ryan accurately describes it, in part an "amplification" of the existing grounds and in part relies upon material which was in the bundle of documents before the First-tier Tribunal. In the circumstances and without any strong objection from Mr McVeety for the Secretary of State, I granted permission to amend the grounds of appeal. The grounds of appeal are, therefore, as contained in the documents submitted to the Upper Tribunal with the application for permission to appeal and as stated in Mr O'Ryan's skeleton argument for the Upper Tribunal hearing (13 November 2016).

5. Mr O'Ryan submitted that the appellant is, on the basis that the new grounds of appeal, "closer to satisfying the Immigration Rules". This is because she had proved that she was financially independent (see Section 117(2) of the 2002 Act 9as amended)). The appellant would have satisfied the financial requirements of Appendix FM but, because she had overstayed for more than 28 days, she could not satisfy the provisions in total. Mr O'Ryan submitted that, having wrongly found against the appellant for her lack of financial independence and her burdening of the state's finances, the judge had found that her removal would not be disproportionate for the purposes of his Article 8 ECHR analysis; it could not be said that the same conclusion will have been reached on an accurate assessment of the evidence.

6. Judge Alis observed that the appellant could only succeed on human rights grounds (Article 8 ECHR) at [9]. However, he correctly had regard to the ability of the appellant to comply with the provisions of the Immigration Rules in commencing his Article 8 analysis. He recorded that the appellant's husband, a British citizen, suffers from arthritis, high cholesterol, and was also partially blind [10]. The couple had married in 2011. The appellant's husband has only lived in the United Kingdom and claims to be unable to live in Jamaica. At [26], the judge noted that there was no evidence that "very significant obstacles" such as would prevent the appellant from succeeding under paragraph 276ADE of the Immigration Rules had been identified. With that in mind, the judge went on to make the observations which I have recorded above in respect of the likely burden of the appellant upon the public finances.

7. Mr McVeety, for the respondent, submitted that, if it were true that the appellant was not, for the reasons given by Mr O'Ryan, not a burden on public finances then this could only operate as a neutral factor in the Article 8 assessment and could give her no positive benefit in the analysis.

8. I agree with Mr McVeety for the reasons he gave that any error on the part of the judge would not add weight to the appellant's side of the scales in the Article 8 proportionality exercise. However, the point is that, whilst he should have treated the question of financial independence as a neutral factor, Judge Alis has found incorrectly that it had negative effect in the assessment. To that extent, this faulty analysis may have contributed to an adverse outcome for the appellant when it should not have had any effect at all. In the circumstances, I find that Judge Alis's analysis is vitiated by his failure properly to assess the evidence concerning the financial circumstances of the appellant and her husband. However, since it is impossible to strip out this incorrect part of the analysis from the remainder of the assessment, I find I have no alternative but to set aside the First-tier Tribunal decision. As regards remaking the decision, whist I accept that circumstances may have moved on (I understand, for example, that the appellant's husband's sight may have deteriorated), there was no need for a new and extensive fact-finding exercise. The decision can be re-made in the Upper Tribunal before me following receipt of updated evidence from the appellant.

Notice of Decision

> The decision of the First-tier Tribunal which was promulgated on 4 March 2016 is set aside. The findings of fact shall not stand. The Upper Tribunal will remake the decision following a resumed hearing before Upper Tribunal Judge Clive Lane.
>
> No anonymity direction is made.

2. I heard evidence at the resumed hearing from the appellant and also from a witness, Ms Jowery. This is an appeal which proceeds only in respect of Article 8 ECHR. The standard of proof in an Article 8 appeal is the balance of probabilities.

3. The appellant adopted her written statements as her evidence-in-chief. Cross-examined by Mr Harrison, the appellant confirmed that she arrived in 2002 as a visitor and had overstayed. After her marriage to Mr Johns she had attempted to regularise her status but had again been refused leave. The appellant confirmed that her own health was good but that her husband's health was poor. The appellant confirmed that she had never worked in the United Kingdom and that since she had been living with her husband, he had supported her financially. Her relationship with Mr Johns had commenced in 2006 and, since 2012, his eyesight had been extremely poor. She did, however, confirm that Mr Johns can care for himself and make meals etc. if required to do so in her absence. However, Mr Johns' mental health has started to deteriorate and he has been losing his memory. The appellant confirms that her son lives in Jamaica and that she has other family members there. However, her son is unable to find work at the present time.

4. Re-examined by Mr O'Ryan, the appellant said that her family in Jamaica took the view that, since the appellant had been living in the United Kingdom, it was now her duty to look after them rather than *vice versa*.

5. Ms Jowery, the Mr John's sister, adopted her written statement as her evidence-in-chief. She works as a physiotherapist administrative assistant for the NHS. She works 30 hours per week. She said that she would not have time to look after Mr Johns. Ms Jowery said that she had her own family to look after and could not look after her brother. Cross-examined by Mr Harrison, Ms Jowery said that her own daughter is aged 34 years and lives in France. She said that she had not spoken to her daughter or her husband about any help, short term or longer term, which they might be able to provide to Mr Johns in the United Kingdom. She did, however, say that when she had "an hour here or there" she was able to help Mr Johns and relieve the appellant from his care.

6. I reserved my decision.

7. Article 8 ECHR provides as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

8. Further, Section 117 of the 2002 Act (as amended) provides as follows:

(1)This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a)breaches a person's right to respect for private and family life under Article 8, and

(b)as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2)In considering the public interest question, the court or tribunal must (in particular) have regard—

(a)in all cases, to the considerations listed in section 117B, and

(b)in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3)In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117BArticle 8: public interest considerations applicable in all cases

(1)The maintenance of effective immigration controls is in the public interest.

(2)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a)are less of a burden on taxpayers, and

(b)are better able to integrate into society.

(3)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a)are not a burden on taxpayers, and

(b)are better able to integrate into society.

(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.

(5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6)In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a)the person has a genuine and subsisting parental relationship with a qualifying child, and

(b)it would not be reasonable to expect the child to leave the United Kingdom.

…

117DInterpretation of this Part

(1)In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a)is a British citizen, or

(b)has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a)is a British citizen, or

(b)who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2)In this Part, "foreign criminal" means a person—

(a)who is not a British citizen,

(b)who has been convicted in the United Kingdom of an offence, and

(c)who—

(i)has been sentenced to a period of imprisonment of at least 12 months,

(ii)has been convicted of an offence that has caused serious harm, or

(iii)is a persistent offender.

> (3)For the purposes of subsection (2)(b), a person subject to an order under —
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> (a)section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
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> (b)section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
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> (c)Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),
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> has not been convicted of an offence.
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> (4)In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—
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> (a)do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
>
> (b)do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;
>
> (c)include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and
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> (d)include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.
>
> (5)If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it.

9. The parties agree that this is a case which turns on proportionality. The parties accept that the appellant and Mr Johns are in a marriage which is genuine and subsisting. Mr O'Ryan submitted that the appellant's case should be considered on the basis that she is capable of meeting the provisions of the Immigration Rules (Appendix FM) but does not qualify under the Rules, at least in part because she had overstayed for more than 28 days. As regards the decision of the First-tier Tribunal which has been set aside, I do accept that the appellant is not a burden on the public purse and that she is supported financially out of the benefits which Mr Johns legitimately receives in respect of his medical conditions. However, for reasons which I will set out below, I do not find that there are any obstacles of a serious nature which would make it unreasonable for this couple to return to live together in Jamaica or, indeed, for the appellant to return to Jamaica on her own and make an application out of country for entry clearance.

10. As I have noted in the error of law decision, Mr Johns has a number of medical complaints; he has arthritis, high cholesterol and is partially blind. I have no medical evidence to show that he is also suffering from

dementia as the appellant implied during her oral evidence. Whilst I am aware that Mr Johns receives ongoing medical treatment for his problems in the United Kingdom, I have not received any evidence to show that treatment could not be made available to him in Jamaica should he go to live there. I accept that Mr Johns has family living in the United Kingdom, including Ms Jowery who gave evidence. However, the relationship between Mr Johns and his United Kingdom family does not seem particularly close; I did not find that the relationship between the appellant and Ms Jowery is especially close and Mrs Jowery was at pains to say that she was unwilling or unable to offer substantive care to her brother.

11. The appellant has an extremely poor immigration history. She entered the United Kingdom as a visitor and simply overstayed. Having married Mr Johns, she now purports to remain living here because of what she claims are the problems that they would face as a couple upon return to Jamaica. I have to say that the medical conditions which Mr Johns suffers, although distressing to him, are not of a kind which would render his living in Jamaica unreasonable. He would have the care and attention of the appellant which he receives on a daily basis here in the United Kingdom. The financial position of the couple in Jamaica has not been explored in any detail but it remains the duty of the appellant to adduce evidence, if that is what she wished to do, to show that the couple's financial position would be untenable. She has chosen not to do so. The appellant has an unemployed son living in Jamaica and other family members and I see no reason why they should not be able to provide at least emotional support and possibly accommodation to the couple upon their return to Jamaica. As regards the public interest, I consider this to be particularly strong in the case of an individual such as the appellant who has chosen to flout immigration laws and procedures over a number of years. She has entered a relationship with Mr Johns at a time when she was fully aware that her immigration status was precarious.

12. Even if I am wrong and it would be unreasonable to expect Mr Johns and the appellant to return together to live permanently in Jamaica, then the secondary option of the appellant returning to make an application for entry clearance out of country remains viable. I have accepted that Mr Johns has care needs but I cannot see why these could not be met in the short term either by family members (I was not particularly impressed by Ms Jowery's claimed inability to assist) or by medical and social services in the United Kingdom. There is simply no evidence to suggest that Mr Johns' physical or mental condition would deteriorate sharply or permanently if he were to be separated from the appellant for the period of time it would need her to make her application. Mr O'Ryan relied on the case of *Chen* [2015] UKUT 00189 (IAC). In that case, the Tribunal found that there "may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK where temporary separation to enable an individual to make an application for entry clearance may be disproportionate". I fail to see how that principle may logically be applied in the case such as that before this Tribunal. The finding that the couple may return permanently to live in Jamaica together and that it would be

reasonable for them to do so is frankly, the end of the matter. Only if that proposed arrangement were considered not reasonable would the alternative option (if it may be described as such) of the appellant returning to apply for entry clearance needs to be considered. For the avoidance of any doubt, I find that both options are available to this couple. They may live together in Jamaica permanently whilst it would not be unreasonable (having regards to the principles of **Chikwamba** or otherwise) for the appellant to return and make an application.

13. In the circumstances, I dismiss the appellant's appeal on Article 8 ECHR grounds.

Notice of Decision

I have remade the decision. The appellant's appeal against the decision of the respondent dated 12 June 2015 is dismissed.

No anonymity direction is made.

Signed Date 2 June 2017

Upper Tribunal Judge Clive Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 2 June 2017

Upper Tribunal Judge Clive Lane