Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03863/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 May 2017	**On 5 June 2017**

Before:
UPPER TRIBUNAL JUDGE GILL

Between

Dahlia Laurance Sherewood Appellant
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department Respondent

Representation:

For the Appellant: Ms K Reid, of Counsel, instructed by Obadiah Rose Solicitors.
For the Respondent: Mr S Staunton, Senior Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Jamaica born on 10 January 1970. She has been granted permission to appeal to the Upper Tribunal against a decision of Judge of the First-tier Tribunal ("FtT") Sangha who, following a hearing on 6 October 2016, dismissed her appeal under the Immigration Rules and on human rights grounds against a decision of the respondent of 28 January 2016 to refuse her application for leave to remain in the United Kingdom as the spouse of a Mr Paul Gordon David Colman and to give directions under section 10 of the Immigration and Asylum Act 1999 (the "1999 Act") for her removal from the United Kingdom.

2. The appellant arrived in the United Kingdom on 29 November 1999 with six months' leave as a visitor. Her in-time application for leave as a student and subsequent out-of-time applications for leave on the basis of Article 8 and as a spouse were refused. She has therefore remained in the United Kingdom without leave since May/June 2000. The decision of 28 January 2016 that was the subject of the appeal to the FtT was the third decision refusing to grant leave to remain as a spouse. The appellant met her husband-to-be in 2012.

He is a British citizen. They were married on 9 August 2013. Her husband has two adult children who live separately. His father requires care which the appellant provides.

3. The issues before the judge were as follows:

   i) In relation to Appendix FM of the Immigration Rules, whether there were insurmountable obstacles to the appellant and her husband relocating to Jamaica to enjoy their family life together.

   ii) In relation to para 276ADE(1)(vi) of the Immigration Rules, whether there were very significant obstacles to the appellant's reintegration in Jamaica.

   iii) In relation to the Article 8 claim outside the Rules, whether the appellant's removal would be in breach of Article 8.

The judge's decision

4. The judge considered the evidence before him at para 18 onwards of his decision. His findings, and reasons for his findings, may be summarised as follows:

   i) There were no insurmountable obstacles to the appellant and her husband relocating to Jamaica to enjoy family life (paras 20-22). In reaching this decision, the judge took into account the following:

      a) The appellant's evidence that she was caring for her father-in-law and a friend in the United Kingdom. He noted that the appellant's father-in-law was entitled to assistance from social services in respect of his care but he did not want such assistance because he did not like paying for it. The judge found that such assistance was clearly available to the father-in-law whether as a matter of personal choice he wanted it or not. The appellant was providing the care out of preference and not necessity (para 20).

      b) The appellant's evidence that she had been supported by her aunt when she lived in Jamaica, that none of her family live in Jamaica any longer and that she had never worked whilst in Jamaica. The judge found her evidence in this respect to be lacking in credibility (para 20).

      c) The judge also noted the evidence of the appellant's husband that he was aware of the appellant's immigration status before they were married (para 21).

      d) The evidence of the appellant's husband who said he was self-employed in the construction industry and that he would not be able to relocate to Jamaica because he would have to leave all of his family behind in the United Kingdom, including his two grown up children and his elderly father who was in need of care (para 21). At para 26, the judge said that her husband's evidence that he would not be able to relocate to Jamaica was an expression of preference.

      e) At para 22, the judge considered the appellant's evidence that her British citizen husband is in full time employment / self-employment, that they have their home in the United Kingdom, that they are living together and that it would cause disruption to their lives if she were required to return to Jamaica in order to apply for entry clearance or if her husband were to relocate to Jamaica with her.

   ii) The judge said that, from the evidence before him, he was satisfied that there were no very significant obstacles to the appellant's reintegration into Jamaica (para 21). He had earlier stated, at para 20, that he found the appellant's evidence that she had never worked in Jamaica, that she had lived in Jamaica with her aunt and that she no longer has family in Jamaica lacking in credibility.

iii) The judge said, at paras 21, 22, 25, 26 and 29, that, in the alternative, the appellant had the option of returning to Jamaica temporarily in order to make an application for entry clearance, that it was more than likely that they would be separated for a short while only and that during the period of their separation she could continue to communicate with her husband by modern means of communication. At para 26, he said that the appellant would be able to re-establish herself in Jamaica for a short period of time in order to apply for entry clearance. In reaching this finding, he took into account the appellant's evidence that she did not have family in Jamaica. He noted that she was 29 years old when she came to the United Kingdom and had therefore spent the major part of her life in Jamaica including her formative years and that she speaks English. He noted that the appellant's husband had said that he would support the appellant's application for entry clearance, at paragraph 26. At para 29. He noted that appellant's husband was earning £22,000 per annum, and therefore the appellant would satisfy the financial requirements for entry clearance in order to rejoin her spouse.

5. The above summary is drawn from paras 18-30 of the judge's decision which read:

"My Findings of Fact and Conclusions

18. On examination of the evidence I find that the Appellant was born on 10 January 1970 and is a citizen of Jamaica.

19. The Appellant entered the UK on 29 November 1999 with a 6 month visitor's visa. On 23 May 2000 the Appellant applied for leave to remain as a student but that application was refused on 4 August 2000. The Appellant thus became an overstayer. Although the Appellant subsequently made various applications in order to regularise her stay in the UK, all those applications were unsuccessful. The evidence before me is that the Appellant met Paul Gordon David Colman, a British citizen, in 2012 and they established a relationship and they got married on 9 August 2013 and this is evidenced by a copy of the Marriage Certificate which appears before me at page 9 of the Appellant's bundle. The Appellant's husband has admitted in his evidence that he was aware of the Appellant's immigration status before they got married. It would appear that on 25 February 2014 the Appellant applied for leave to remain under the Family and Private Life Rules but that application was refused on 16 April 2014. On 7 April 2015 the Appellant applied for leave to remain as a spouse but that application was rejected on 18 June 2015. On 27 August 2015 the Appellant applied for leave to remain as a spouse but that application was rejected on 3 November 2015. On 19 December 2015 the Appellant applied for leave to remain in the UK on Form FLR(M) on the basis of her relationship with her husband Paul Gordon David Colman and the fact that she had been residing in the UK for 16 years and that she cared for her father in law and a family friend. Her application for leave to remain was on the basis of her family and private life in the UK. That application was refused by the Home Office by their letter dated 28 January 2016.

20. The issue in this case is whether there are insurmountable obstacles for the Appellant and Sponsor relocating to Jamaica. The burden of proof is on the Appellant. The Appellant was 29 years of age when she entered the UK and her evidence was that she had been living with an aunt. She says that none of her family now reside in Jamaica and that they are either in the USA or Canada. The Appellant also said that she had never worked whilst in Jamaica and that she had been supported by her aunt. However I find her evidence in that respect to be lacking in credibility. The Appellant also claims that she is caring for her husband's elderly father and also for a friend Miss Latchman although the Appellant's husband has two grown up children. There was also evidence given before me that although the Appellant's father in law is entitled to assistance from Social Services in respect of his care, that he does not want it because he does not like paying for it. However, I find that Social Services assistance is clearly available to the Appellant's father in law whether he, as a matter of choice, wants it or not. The fact that the Appellant is providing that care is out of preference and not, it seems to me, out of necessity.

21. I heard evidence from the Appellant's husband, who admitted that he knew his wife's immigration status before they got married. The Appellant's husband is self- employed in the construction industry and claims that he would not be able to relocate to Jamaica because he would have to leave all his family behind including his two grown up children and his elderly father who is in need of care. The Respondent's case is that all these factors do not prevent the

Appellant and her husband from relocating to Jamaica to enjoy their family life together or alternatively for the Appellant to return to Jamaica in order to apply for entry clearance to rejoin her husband in the UK. The Respondent's case is that although relocating to Jamaica may cause a degree of hardship for the Appellant, her husband and other family members that there was no evidence to show that there was any insurmountable obstacles preventing them from continuing their relationship in Jamaica. The Respondent's case is that the Appellant did not satisfy the requirements of paragraph EX.1(b) of the Rules and nor did the Respondent consider that the Appellant met the requirements of paragraph 276 ADE of the Rules and that it is clear that she has not been resident in the UK for more than 20 years and, from the evidence before me, I am satisfied that there is little evidence to show that there would be very significant obstacles to the Appellant's integration into Jamaica if she were required to leave the UK. On the evidence before me I agree with the Respondent's assessment in this respect.

22. The basis of the Appellant's Application is that her British husband is in full time employment/self-employment and that they have their home and that they are living together. Her case is that it would cause disruption to their lives if she were required to return to Jamaica in order to apply for entry clearance or indeed for her and her husband to relocate to Jamaica. In my assessment of the evidence, the Appellant has not demonstrated that there are very significant obstacles preventing the Appellant or her British partner from relocating to Jamaica to enjoy their family life or indeed alternatively for her to return to Jamaica temporarily in order to apply for entry clearance in the proper manner to join her husband in the UK. Whilst the Appellant and her husband have established a family life here, it was their own choice to marry and live in the circumstances they have chosen to do. The Appellant and her husband both knew the Appellant's immigration status was precarious when they chose to enter into their marriage. They will have known that they would have had to comply with the requirements of the Immigration Rules for the purpose of entry clearance to the UK. The Appellant's immigration status in the UK has always been precarious since she overstayed because it depended on her being granting further leave to remain which is evidenced by the various applications that the Appellant has made since she has been living here. Whilst I can understand that the Appellant and her husband's desire for her to remain in the UK, I am required to assess the Appellant's case in accordance with the UK's Immigration Laws. On the evidence before me I cannot accept that the Respondent's decision is in any way disproportionate in the circumstances of this particular case. Whilst I note that Miss Reid argued that there were significant obstacles for the Appellant and her husband to be able to enjoy their family life outside the UK, I find that there is nothing to stop the Appellant from returning to Jamaica in order to make an application for entry clearance in the proper manner and during that time she could continue to communicate with her husband by modern means of communication and they are more than likely to be separated for only a short while.

23. In the assessment of this case I have taken into account the Upper Tribunal's decision in R (on the Application of Chen) v. SSHD (Appendix FM Chikwamba - Temporary Separation - Proportionality) IJR [2015] UKUT 189 (IAC).

24. In the Chen case it was held:

> "(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 rejoin family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where a 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 protective rights. It will not be enough to rely solely upon the case law concerning Chikwamba v. SSHD [2008] UKHR 40.
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> (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring the claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children (Burnett j as he then was, in R (Kotecha & Das) v. SSHD [2011] EWHC 2070 (Admin)).
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> (iii) In an application for leave on the basis of an Article 8 claim, the Secretary of State is not obliged to consider whether an application for entry clearance (if one were to be made)

would be successful. Accordingly, her silence on this issue does not mean that it is accepted the requirements for entry clearance to be granted are satisfied.

(iv) In cases where the Immigration Rules (the "IRs") do not fully address an Article 8 claim so that it is necessary (pursuant to R (Nagre)) to consider the claim outside the IRs, a failure by the Decision Maker to consider Article 8 outside the IRs will only render the decision unlawful if the Claimant in fact shows that there has been or, in a permission application (arguably has been) a substantive breach of his or her rights under Article 8".

25. In my assessment this Appellant has not placed any cogent evidence before me that a temporary separation from her UK Sponsor by returning to Jamaica to make an application for entry clearance in the proper manner would interfere disproportionately with her protected Article 8 rights. I do not accept that the Appellant and her husband cannot maintain their family life if she returns temporarily to Jamaica to make an application for entry clearance in the proper manner. I am satisfied that the Appellant and her husband could continue to maintain contact with one another by modern means of communication whilst she temporarily returns to Jamaica to make an application for entry clearance in the proper manner. Consequently I do not accept that there will be any disproportionate interference with the Appellant and the UK sponsor's private and family life by their temporary separation. The circumstances placed before me are not, in my assessment, so exceptional to warrant a grant of leave to remain for this Appellant outside the Rules.

26. In assessing this case I have also taken into account the public interest provisions of Section 117 A - B of the 2002 Act. The public interest in the maintenance of effective immigration control is engaged. There is no infringement of the "English speaking" public interest as the Appellant speaks English. The Appellant's husband is economically self-sufficient as he is self-employed. The Appellant is, as I have found, an overstayer and any private life established since then or a relationship formed with a qualifying partner established whilst the Appellant has been in the UK unlawfully, is to be given little weight. Little weight is to be given to private life established by a person at a time when the person's immigration state is precarious. The fact that although the Appellant claimed that she does not have any family in Jamaica does not, in my assessment mean that that there would be very significant obstacles to the Applicant's integration into Jamaica if required to leave the UK. The Appellant was 29 years of age when she came to the UK and spent the major part of her life there including her formative years. She speaks English. Just as she was able to establish herself in the UK I find that she would be able to re-establish herself in Jamaica for a short period of time in order to apply for entry clearance to return to the UK in the normal way. Whilst I note the Appellant's husband gave evidence that he would not be able to relocate to Jamaica with his wife because he would be leaving his family here, I find that that is an expression of preference and does not, in my assessment, amount to "very significant obstacles" to the Appellant's integration into the country to which she would have to go if required to leave the UK. There has been no evidence put before me to demonstrate why the Appellant would not be able to return to Jamaica for a temporary period of time and to apply for entry clearance to return to the UK to rejoin her husband. Her husband has said that he would support such an application. In my assessment the Appellant and her husband's circumstances here do not outweigh the public interest provisions.

27. In the assessment of this appeal I have taken into account the cases of AM (S.117B [2015] UKUT 260 (IAC) and Forman (SS117A - C Considerations) [2015] UKUT 412 (IAC) where it was stated:-

"(i) The public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

(ii) The list of considerations contained in Section 117B and Section 117C... is not exhaustive. Tribunal entitled to take into account other considerations provided they are relevant in bearing the public interest.

(iii) In cases where the provisions of Sections 117B - 117C... arise, the decision of the Tribunal must demonstrate that they have been given full effect".

28. I have also considered the case of SSHD v. SS (Congo & Others) [2015] EWCA in which it was stated at paragraph 51:

> "... the approach to Article 8 in the light of the Rules in Appendix FM - SE should be the same as in respect of the substantive leave to enter and leave to remain rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of leave to enter or leave to remain where the evidence rules are not complied with".

29. I note that the Appellant's husband is earning £22,000 per annum and therefore the Appellant would satisfy the financial requirements of the Immigration Rules when she applies for entry clearance to rejoin her husband in the UK.

30. In all the circumstances therefore I find that the Appellant fails to meet the requirements of Appendix EX.1(b) or paragraph 276 ADE (1) (vi) of the Rules. I also find in all the circumstances that the Respondent's decision is not a disproportionate measure and therefore does not, in my assessment, contravene Article 8 of the ECHR."

The grounds

6. The judge erred in finding that there was nothing to prevent the appellant from returning to Jamaica to apply for entry clearance because the Upper Tribunal had confirmed in Chen that temporary separation may be disproportionate even if there were no insurmountable obstacles to family life continue permanently outside the United Kingdom.

7. In reaching his decision that there were no insurmountable obstacles to the appellant and her husband returning to Jamaica whilst the appellant makes an entry clearance application, the judge failed to consider the following:

   i) The cost of travelling to Jamaica.

   ii) The cost of renting accommodation in Jamaica.

   iii) They would have no means of income.

   iv) It was uncertain how long the appellant would have to wait for a visa.

   v) The appellant has been resident in the United Kingdom for 17 years.

   vi) The appellant had no family members in Jamaica.

8. The judge erred in stating that, during the period of their separation, the appellant and her husband would be able to communicate with each other through modern means of communication. The judge failed to take into account a decision said in the grounds to be that of the Immigration Appeal Tribunal in "*Nigeria [2011] UKUT 247 (IAT)*" in which it is said that the Tribunal made the point that *""modern means of communication cannot equate to ongoing physical and emotional relationship available to people who reside together or nearby one another.*"

9. The judge failed to consider the public interest considerations in s.117B of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"), i.e. that the appellant speaks English and that she is financially independent.

10. Finally, it is said that the judge failed to take into account the decision of the Upper Tribunal in Hayat (nature of Chikwamba principle) [2011] UKUT 00444 (IAC). The head-note of this case reads:

> "The significance of Chikwamba v SSHD [2008] UKHL 40 is to make it plain that, in appeals where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the immigration rules from abroad,

> that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance. 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."

Submissions

11. Ms Reid accepted that the judge had considered s.117B at para 26 of the decision, i.e. that the appellant speaks English and that her husband is self-sufficient. However, she submitted that the only proper consideration by the judge of the impact of temporary separation on the fact that the appellant cares for her father-in-law was at para 25. However, whilst the judge found that, if the appellant and her husband were to relocate permanently to Jamaica, her father-in-law could obtain care from social services, the judge failed to consider the position if the appellant were to return to Jamaica temporarily in order to apply for entry clearance. This was important given that the appellant's father-in-law receives a significant level of care. Temporary separation can amount to a disproportionate breach.

12. I asked Ms Reid whether any evidence was placed before the judge to show that temporary separation would have such consequences in relation to the care that the appellant's father-in-law receives from her that removal would be disproportionate even if permanent separation did not. Ms Reid informed me that she could not point to any specific documentary evidence.

13. Ms Reid submitted that it would be disproportionate to expect the appellant to return to Jamaica to apply for entry clearance, given the factors listed in the grounds of appeal.

14. Mr Staunton replied briefly. In relation to s.117B(2) and (3), he relied upon the Court of Appeal's judgment in Rhuppiah v SSHD [2016] EWCA Civ 803.

Assessment

15. Dealing first with the judge's treatment of s.117B(2) and s.117B(3) of the 2002 Act, the judge was not referred to Rhuppiah. Nevertheless, it is clear from para 26 of his decision that he (correctly) regarded the fact that the appellant speaks English as a neutral factor. He appears to have treated the fact that the appellant's husband is self-sufficient as equivalent to the appellant being financially independent. Leaving aside whether this was the correct approach in view of Rhuppiah, the fact is that, even if the appellant was financially independent for the purpose of s.117B(3), the judge correctly treated it as a neutral factor. To the extent that the grounds take issue with the judge's consideration of s.117B(2) and s.117B(3), they amount to no more than an attempt to re-argue the evidence.

16. The main point raised on the appellant's behalf concerns the impact of temporary separation, both on the appellant in view of the factors listed in the grounds and described at my para 7 above and the impact on her father-in-law.

17. In relation to the impact on the appellant's father-in-law, it is clear that the judge considered, in terms, the impact of permanent relocation to Jamaica by the appellant and her husband. He considered that the care that the appellant's father-in-law required was available to him but that he did not want such assistance because he did not like paying for it. Although the judge did not specifically make a finding that it would not be disproportionate for the appellant's father-in-law to receive care from social services if the appellant were to return to Jamaica temporarily to make an application for entry clearance, the fact is that he did consider the possibility of temporary return to Jamaica and he did quote from the headnote in Chen, in particular, para (i) of the headnote which specifically refers to this issue. In my judgment, it is a reasonable inference to be drawn from the judge's assessment that, in reaching his decision that removal would not be disproportionate, he had in mind not only the impact of the appellant being separated temporarily from her husband but also her father-in-law when he considered the possibility of the appellant returning to Jamaica to make an entry clearance application.

18. In any event, even if I am wrong about this, Ms Reid confirmed that there was no evidence before the judge to show that the impact of temporary separation on the appellant's father-in-law might be in breach of Article 8 even if permanent relocation by the appellant to Jamaica did not. In the absence of such evidence, it is inevitable that the judge's decision would have been the same.

19. The grounds refer to "*Nigeria [2011] UKUT 247 (IAT)".* I assume this is a reference to the decision of the Upper Tribunal (not the Immigration Appeal Tribunal) in Omotunde (best interests – Zambrano applied – Razgar) Nigeria [2011] UKUT 00247 (IAC). However, Omotunde concerned family life between a parent and a child. The children of the appellant's husband are adults. There are no minor children who would be affected by the appellant returning either temporarily or permanently to Jamaica.

20. In relation to the factors relied upon in the grounds and listed at my para 6 above, the judge considered the appellant's evidence that she would have no accommodation in Jamaica and that she had no family members in Jamaica. He was plainly aware that the appellant had lived in the United Kingdom for 17 years. It is not clear whether the remaining factors were in fact relied upon before the judge or whether there was any evidence before the judge to establish them. In any event, it was not necessary for the judge to have dealt specifically with each of the remaining factors. The suggestion that the appellant would have no means of income ignores the fact that her husband is self-employed and the evidence was that she was currently being supported by him. There was no evidence before the judge that her husband would be unable to give her financial support, to include the cost of travel and accommodation in Jamaica, if she returned temporarily.

21. Overall, I have to say that there is simply no substance in the grounds.

22. Given that there are no minor children involved in this case, the judge's finding that the appellant's father-in-law had the option of obtaining care from social services and that the only reason he did not wish to do so was because he did not want to pay for it and given further the public interest considerations in s.117B having regard to the appellant's immigration history and that, as the judge noted, the appellant and her husband entered into the marriage in full knowledge of her immigration status, it was entirely open to the judge to find that it would not be disproportionate for the appellant to return to Jamaica either permanently with her husband or temporarily in order to make an entry clearance application.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The appellant's appeal to the Upper Tribunal is therefore dismissed.

Signed Date: 2 June 2017
Upper Tribunal Judge Gill