Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/23737/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 November 2019	**On 2 December 2019**

Before

THE HON. LORD MATTHEWS
UPPER TRIBUNAL JUDGE BLUNDELL

Between

DONNA MARIE JOANIE DYER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Martin, instructed by Londonium Solicitors
For the Respondent: Mr Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Jamaican national who was born on 24 November 1961. She appeals against a decision which was issued by First-tier Tribunal Judge Head on 3 July 2019, dismissing her appeal against the respondent's refusal of her human rights claim.

Background

2. The appellant entered the UK as a visitor on 2 January 2002. Her leave to enter expired six months later and she overstayed. A little over nine years later, she applied for leave to remain outside the Immigration Rules. That application was refused without a right of appeal in October 2011. The appellant remained in the UK. In February 2015, she was served with a notice that she was present in the UK unlawfully. That prompted her to make a further application for leave to remain on Article 8 ECHR grounds, which she did on 11 March 2015. The application was refused on 26 May 2015 and the appellant appealed to the First-tier Tribunal. The appeal was heard the following year by Judge Bennett. In his decision, which was issued on 1 September 2016, Judge Bennett accepted that the applicant was in a relationship with a British gentleman named Mr Brown but he found that it would be proportionate to remove her from the United Kingdom. He dismissed the appeal accordingly. The appellant sought permission to appeal against that decision but did not secure leave. Her appeal rights were exhausted on 24 March 2017.

3. The appellant did not leave the United Kingdom. On 12 April 2017, she made a further application for leave to remain as Mr Brown's partner. The respondent considered whether the further representations amounted to a fresh human rights claim, under paragraph 353 of the Immigration Rules. She concluded that it did not. This adverse decision carried no right of appeal and the appellant's solicitors issued a Letter Before Action, threatening judicial review proceedings. This caused the respondent to issue an amended decision on 12 November 2018, accepting that the further representations amounted to a fresh claim but refusing that claim on the merits. This is the decision under appeal.

4. In her decision, the respondent concluded that the appellant was not Mr Brown's partner, as defined by Gen 1.2 of Appendix FM of the Immigration Rules. She did not accept that there were insurmountable obstacles to the continuation of family life in Jamaica. She did not accept that paragraph 276ADE(1)(vi) of the Immigration Rules applied. Nor did she consider that there were exceptional circumstances outside the Immigration Rules which rendered the appellant's removal from the United Kingdom contrary to Article 8 ECHR.

The Appeal Before the First-tier Tribunal

5. Before Judge Head, the appellant was represented by counsel, the respondent by a Presenting Officer. Judge Head refused an adjournment application and then considered the issues with the advocates. Counsel (not Mr Martin) noted that it was accepted by the respondent that the Financial Requirements of Appendix FM were satisfied. The Presenting Officer indicated that he would be relying on Judge Bennett's decision and

on Devaseelan [2003] Imm AR 1: [5]. It was agreed that the appellant and the sponsor were still unable to meet the requirements of the Immigration Rules: [6].

6. Judge Head took Judge Bennett's decision as her starting point in accordance with Devaseelan, although she noted that the Court of Appeal had subsequently emphasised the inherent flexibility in the guidelines: [20]. At [21]-[25], the judge set out various sections of the earlier decision. She then turned to the more recent evidence. She noted that there was some expert evidence before her but that neither advocate had relied upon it in submissions: [27]-[32]. At [34], she stated that there was nothing before her which caused her to depart from the findings reached in the previous decision and she then set out her reasons for that conclusion. She did not accept that the appellant could meet the Immigration Rules for the reasons she gave at [35]-[38]. In respect of the appellant's relationship with Mr Brown, it remained the case that the appellant was unable to meet the definition of a partner despite the fact that she and he were engaged because paragraph E-LTRP 1.12 of Appendix FM provided that the applicant's partner could not be a fiancée unless the applicant was granted entry clearance in that capacity. In respect of the appellant's private life under paragraph 276ADE(1)(i), the judge concluded that the appellant would not face any real adversity on return to Jamaica: [37].

7. The judge then turned to consider Article 8 ECHR outside the Immigration Rules. She directed herself in accordance with Razgar [2004] UKHL 27; [2004] 2 AC 368. She accepted that the appellant had established a substantial private and family life in the United Kingdom: [41]. She was satisfied that the respondent's decision was in accordance with the law: [43]. She reminded herself of what had been said by the Supreme Court in Agyarko [2017] UKSC 11; [2017] 1 WLR 823 and that she was required, in considering the proportionality of the decision under appeal, to consider the human rights of not only the appellant: [44]-[45]. She accepted that the appellant was not a burden on the public purse but she considered that to be a neutral matter in the assessment of proportionality: [47]. She noted that the appellant's private and family life in the UK had accrued whilst she was unlawfully present: [48]. At [49]-[50], the judge concluded her decision as follows:

> "[49] Taking into account all the evidence, I do not find that the appellant's departure from the UK will result in unjustifiably harsh consequences. It is of course understandable that the sponsor would prefer the appellant to stay and that the appellant wishes to stay in the UK with the sponsor. However, this preference does not demonstrate exceptional or compelling circumstances. Both the appellant and the sponsor have links with Jamaica. I find that the appellant could return to Jamaica either to live, or to make a suitable application for entry clearance to join Mr Brown as his fiancé (sic) or his spouse, if they chose to do so.

> [50] I am satisfied that there are no exceptional and/or compelling circumstances which warrant a grant of leave to the appellant under Article 8 outside the Immigration Rules. I conclude that the consequences of the respondent's decision are not unjustifiably harsh, when considered in conjunction with all relevant factors. Consequently, the appellant's Article 8 appeal falls for dismissal.

The Appeal to the Upper Tribunal

8. The grounds of appeal were not settled by trial counsel or by Mr Martin and are rather diffuse. Permission to appeal was granted by a judge in the First-tier Tribunal with regrettably little focus on the points which were considered to be particularly arguable.

9. Mr Martin made focussed submissions in which he developed two principal points. He submitted, firstly, that there had been no adequate resolution of the submissions which had been made in relation to Chikwamba [2008] UKHL 40; [2008] 1 WLR 1420. Judge Bennett had found that Chikwamba did not apply because the Financial Requirements of the Appendix FM were not met. The position before Judge Head was demonstrably different and she erred, he submitted, in failing to consider whether the appellant would inevitably be successful in an application for entry clearance. Secondly, he submitted that there had been no adequate consideration of Mr Brown's circumstances. He had set out in his statement the reasons why he could not relocate to Jamaica with the appellant and the judge had failed to engage with that evidence at all, despite her self-direction at [45]. The appellant and Mr Brown had been unable to get married because the respondent had her passport and it was disproportionate to hold against her the fact that she remained unmarried and unable to meet the Immigration Rules in those circumstances.

10. Mr Melvin submitted that there had been no successful appeal against Judge Bennett's decision and nothing had really changed since then. The only material change was that the appellant had decided not to leave the United Kingdom and to accrue yet more unlawful residence. The judge had been entitled to rely upon s117B of the Nationality, Immigration and Asylum Act 2002 and to conclude that the appellant should return to Jamaica to apply for entry clearance.

11. In response, Mr Martin noted that it had been accepted by the respondent that the appeal had a realistic prospect of success, since that was the reason that a further right of appeal had been permitted. The material change in circumstances since Judge Bennett's decision was the clarification of the Chikwamba principle in Agyarko and the fact remained that Judge Head had failed to address the application of that principle to the facts of the appellant's case.

12. We reserved our decision.

Discussion

13. It is not abundantly clear to us that the Chikwamba argument, which was front and centre in Mr Martin's submissions, was advanced before Judge Head. The point was certainly raised in writing, in additional submissions which featured in a supplementary bundle and in a document which was emailed to the FtT(IAC) on 17 June 2019. We see in those documents reference to the point which was certainly recorded in the early paragraphs of the judge's decision; the sponsor was demonstrably earning more than £18,600 and the reason given by Judge Bennett for finding that Chikwamba did not apply had arguably fallen away. In the judge's note of counsel's submissions, however, it seems to have been submitted that the appellant would be likely to be *refused* entry clearance because of her immigration history.

14. Despite those concerns, we think it safer to adopt the course urged upon us by Mr Martin. It is clear that submissions on Chikwamba were made in writing and we have no clear indication, whether in the judge's decision or in her Record of Proceedings, that the point was positively abandoned. In those circumstances, we are satisfied that the judge erred in law in failing to resolve those submissions. She concluded her decision with reference to the possibility of the appellant seeking entry clearance as Mr Brown's partner but she failed to consider whether she was certain to be granted entry clearance or whether the public interest nevertheless required her to return to make that application: Agyarko and Kaur [2018] EWCA Civ 1423 refer.

15. We do not consider that error to be a material one, however. Had the judge turned her mind to the question posed at [51] of Agyarko (whether the appellant was *certain* to be granted entry clearance as a partner if she applied for the same), the only rational conclusion she could have reached was adverse to the appellant. It is correct to observe, as did counsel before us and before the FtT, that the Financial Requirements which were not met before Judge Bennett had been addressed before Judge Head. As an applicant for leave to remain, paragraph E-LTRP 1.12 prevents her from being Mr Brown's "partner", as defined, but that difficulty would not apply in an application for entry clearance.

16. The difficulty for the applicant is not with the substantive requirements of Appendix FM but with her immigration history, and the effect this might have on a future application for entry clearance. As counsel before the FtT seemingly recognised, her immigration history is sufficiently bad that she is not certain to be granted entry clearance. An Entry Clearance Officer might, instead, take the view that she fell to be refused entry clearance with reference to paragraph 320(11). The extent of her overstaying, her repeat applications and her failure to return to Jamaica after the dismissal of her appeal arguably amount to a significant frustration of the Immigration Rules with aggravating features. Given her failure to return after Judge

Bennett's decision, her circumstances are obviously very different from those considered by the Upper Tribunal in PS (India) [2010] UKUT 440 (IAC). It cannot, in these circumstances, be a certainty that a future application for entry clearance would succeed.

17. Even if the appellant were certain to be granted entry clearance, we consider this to be a case in which what was said by the Court of Appeal in Kaur [2018] EWCA Civ 1423 must be recalled. Having set out what was said by Lord Brown in Chikwamba and by Lord Reed in Agyarko, Holyroyde LJ (with whom Richards and Asplin LJJ agreed) stated at [45]:

> "It is relevant to note that [Lord Reed] there spoke of an applicant who was "certain to be granted leave to enter" if an application were made from outside the UK, and said that in such a case there *might* be no public interest in removing the applicant. That, in my view, is a clear indication that the *Chikwamba* principle will require a fact-specific assessment in each case, will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain."

18. In this case, had the judge turned her mind squarely to the issue of whether of whether there was a public interest in the appellant returning to Jamaica to make an entry clearance application (which, for these purposes, would be bound to succeed), she could only have reached one rational answer. The appellant's immigration history is terrible. She overstayed by a significant margin and failed to make an application to regularise her position for nine years. When that application was refused, she did not leave. When her subsequent appeal was properly and lawfully dismissed by the FtT, she did not leave. She has continued to develop her private and family life with Mr Brown in the United Kingdom despite the conclusions reached by Judge Bennett. There is a clear and obvious public interest in such an individual being required to seek entry clearance even if that application would be certain to succeed. That is particularly so when the both of the parties to the relationship are adults who would have been fully aware of that risk from the outset of their relationship.

19. For the reasons above, we come to the clear conclusion that the principle in Chikwamba, as examined in the subsequent authorities to which we have referred, would not have improved the appellant's Article 8 ECHR case even if it had been considered by Judge Head. Mr Martin does not establish a material error of law in her decision on the basis of this submission, therefore.

20. Mr Martin also submitted that the judge had failed to consider the circumstances of Mr Brown. She had failed to consider the evidence that there were insurmountable obstacles to his relocation to Jamaica and had failed to consider the impact on him of his separation from the appellant. As with the first submission, we consider it to be established that the judge

erred in law in this respect. She should have considered whether there were insurmountable obstacles to the appellant and Mr Brown relocating to Jamaica. The importance of that consideration in the assessment of proportionality is clear from Agyarko, amongst other domestic and ECtHR authorities.

21. As with the first submission, however, we do not consider this error on the part of the judge to be material. We are conscious of the fact that the threshold for materiality is a low one (IA (Somalia) [2007] EWCA Civ 323; [2007] Imm AR 685 refers, at [15]). Nevertheless, on the evidence before the FtT, the judge could have reached only one rational conclusion on this point. The obstacles to Mr Brown relocating to Jamaica were set out in his statement. He is employed in this country. He has only been to Jamaica twice. He has children and grandchildren in this country. His three children are independent adults who (according to the Record of Proceedings) live in Clapham and Brixton. When asked before the judge whether he could relocate, he said merely that it would be difficult to start all over again. That is almost certainly the case but the appellant has children in Jamaica and there is nothing in the evidence which even begins to suggest that the stringent test imposed by the ECtHR in Jeunesse v The Netherlands (2015) 60 EHRR 17 was arguably met. Mr Martin's related criticism that the judge failed to give separate consideration to Mr Brown's position falls away when it is understood that there are no insurmountable obstacles to family life between him and the appellant continuing in Jamaica.

22. Mr Martin also sought to develop a submission in relation to the decision of Upper Tribunal Judge Jarvis in Aswatte [2010] UKUT 476 (IAC). The judicial headnote to the decision is as follows:

> (1) The Immigration Rules make no provision for the admission of fiancé(e)s of refugees who are in the United Kingdom with limited leave. In FH (Post-flight spouses) Iran [2010] UKUT 275 (IAC), the Upper Tribunal found that the spouse of a refugee with limited leave was in an unjustifiably worse position than the spouses of students, businessmen etc, where the immigration rules make provision for a spouse to enter with limited leave. Unlike such persons, the refugee could not return home to enjoy married life there.
>
> (2) By the same token, a refugee cannot return home in order to marry the fiancé(e) and it may be unreasonable to expect the couple to marry in a third country. Where that is the case, and where all the requirements of paragraph 290 of the rules are met, save that relating to settlement, it is unlikely that it will be proportionate to refuse the admission of the fiancé(e).

23. Mr Martin's submission in relation to this decision was not advanced before the First-tier Tribunal. As we understood him, the point was that it was disproportionate for the Immigration Rules to draw a distinction (in E-

LTRP 1.12) between those who entered as fiancées and those who became engaged in the United Kingdom. We do not agree. There is a clear basis in public policy for requiring those who become engaged in the United Kingdom to return to their countries of origin in order to make the proper application for entry clearance. In any event, the point cannot take the appellant any distance because she would be bound to fail under the in-country Rules even if she was treated as Mr Brown's partner. That is because she cannot meet the Immigration Status Requirement under the 5 year route and she cannot, as we have explained above, meet the insurmountable obstacles exception in EX1 under the Ten Year Route.

24. In summary, we accept that the First-tier Tribunal erred in the respects we have set out above but we consider that it undoubtedly reached the correct conclusion in the appellant's case. She has a lengthy history of failing to show any regard for immigration control. There are no insurmountable obstacles to her relationship with the sponsor continuing in Jamaica. There is a cogent public interest in expecting her to return to make an application for entry clearance. This was a case of precarious family life from the outset and, as in TZ (Pakistan) [2018] EWCA Civ 1109; [2018] Imm AR 1301 there was nothing which began to amount to the very strong or compelling claim which was required to outweigh the public interest in immigration control. The judge did not err materially in her decision to dismiss the appeal on Article 8 ECHR grounds and that decision shall stand.

Notice of Decision

The First-tier Tribunal did not err materially in law and the appeal is dismissed.

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

19 February 2020