IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01006/2020**

THE IMMIGRATION ACTS

Heard at Field House By Skype
On 18 March 2021

Decision & Reasons Promulgated
On 28 May 2021

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

TAMARA KENISHA CHIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss K Moffatt, counsel by Direct Access
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of the Secretary of State to refuse her human rights claim on 27 December 2019. Her appeal against that decision was dismissed by First-tier Tribunal Judge Steer for the reasons given in her decision of 7 April 2020. For the reasons set out in my decision of 29 September 2020, that decision was set aside on the basis it involved the making of an error of law. A copy of that decision is attached to this decision.

2. This decision must be read in connection with the decision of the First-tier Tribunal which found that:

   (i) The appellant and Mr Allen were in a genuine and subsisting relationship and that they intend to marry [58];

   (ii) The appellant did not, however, meet the definition of "partner" within GEN 1.2 of Appendix FM owing to the lack of cohabitation, and so the appellant could not rely on paragraph EX.1 [44] to [48];

   (iii) The appellant did not meet the requirements of paragraph 276ADE, given her age and as she had not spent 20 years in the UK, nor had she shown there would be very significant obstacles to her integration into Jamaica [51];

   (iv) Family life exists between the appellant, her adult brother and his children [60];

   (v) The appellant would not face insurmountable obstacles to continuing family life with Mr Allen in Jamaica [69];

3. The hearing on 18 March 2021 was unusual in that it commenced on the basis of submissions only, it becoming apparent only during those submissions that it would be necessary to hear evidence both from the appellant and her brother, Mr Chin, in respect of the health of her nephew.

4. The appellant adopted her witness statement explaining that she had initially lived with her brother when she came to the United Kingdom in 2006 and had then moved to Essex as it was easier for her studies. Although she had moved back in with the family, she had continued flat sharing for some period moving in with her brother permanently in October 2018. Mr Chin explained that his oldest son suffers from a serious illness, BSEP deficiency. This is a genetic disorder which he has had since birth and requires regular stays in hospital, as well as extensive medication. The illness has now progressed to the extent that he will now have to undergo a liver transplant and is under the care of the specialist unit at King's College Hospital, London. This is, on any view, a serious illness, which in a child inevitably places stress on the family as a whole.

5. It also emerged in evidence that the appellant has been a major part of his life since he was very young, approximately 2 years of age, and that she has during his recent stays in hospital stayed there with him in the position of a parent as it has not been possible for both parents to do so and they have other duties given that they have small children. They also work full-time.

6. I found the appellant to be a credible and compelling witness. I am satisfied by her explanation as to the apparent discrepancies, when she was living with her brother or not. He appeared at the time to be somewhat confused but I bear in mind he had not been expecting to give evidence and was doing so over a video link.

7. I am satisfied by the evidence that the appellant has formed a very close bond with her nephew. This is I accept due in part to the nature of his illness and that she has been a carer for him, assisting with sorting out medication and being with him in

hospital. I bear in mind also the strain that would be placed on the family such as this where the older child has a life limiting condition which has progressively worsened since he was a child. In the circumstances, I am satisfied, looking at the evidence as a whole that the bond is unusually close given the support offered as is the bond between the appellant and her brother and sister-in-law, as well as the other nephews and nieces.

8. I note the appellant's argument that there is no public interest in her removal and that this would be dispositive of the proportionality assessment, relying on Parveen [2018] EWCA Civ 932.

9. I do not accept that the overstaying in this case is of the nature entirely like that in Parveen. I accept the appellant had been here for a significant number of years, legitimately, and that her overstaying resulted from her not being able to continue her studies as she no longer met the requirements of the Immigration Rules for leave to remain as a student. I do not consider that she was without fault as she knew she could not meet the requirements of the Immigration Rules but equally, there was no element of dishonesty here.

10. I accept that the nature of the relationship between the appellant and her nephew is such that it cannot be sustained by video and telephone calls. It is a relationship based on close contact which has developed over a number of years, most of his life, and which could not be maintained in such a way. I take note in particular the stress that he is undergoing at present given that he faces a serious operation in the form of a liver transplant.

11. Looking at the evidence as a whole, I am not satisfied that it is entirely certain that the appellant would be granted entry clearance to join her fiancé. That said, that is because I do not have full copies of all the relevant documents relating to their finances. These are a requirement of Appendix FM-SE. In addition, and this is not meant as a criticism, it would be necessary for there to be documents showing the plans for the wedding to take place. Given it is accepted that the relationship is genuine it is almost certain that these documents could be provided.

12. I find that there is not, in this case, any indication that the appellant falls within the terms of paragraph 320 (11) of the Immigration Rules or its successor, paragraph 9.8.2, there being no evidence that she has contrived in a significant way to frustrate the intention of the rules, or there are other aggravating circumstances.

13. That said, for these reasons, the appellant does not meet the requirements of the Immigration Rules.

14. I turn next to whether, nonetheless, and applying section 117B of the 2002 Act, it would nonetheless be disproportionate to require her to leave the United Kingdom.

15. In assessing this issue, I bear in mind that there is a strong public interest in the maintenance of immigration control.

16. In terms of the length of time that would be required for the appellant to spend outside the United Kingdom, I do not accept the submission from Miss Moffatt that this would be at least four months. It is not possible to read over from the findings in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC) that this would apply in applications from Jamaica and equally given current circumstances and the difficulties of flying from the United Kingdom to Jamaica and back I accept it would be difficult to quantify how long any gap would be. I do, however, accept that it would be a matter of months, rather than weeks and I do not accept that time need necessarily be spent outside the United Kingdom preparing the application. All the relevant documents relating to finances are present in the United Kingdom and this is where any wedding would take place. The application could be prepared ready to submit on her return to Jamaica.

17. That said, I agree that there is some diminution in the public interest in this case given that it is close to inevitable that she would be granted entry clearance. I find no basis on which it could be said that she fails to meet the suitability requirements.

18. I accept that the appellant is able to speak English and would be financially independent and equally I find that little weight could be attached to the relationship with her partner given that she was here at all times unlawfully. Equally her private life would be of little weight given that it was established when her presence here was precarious. I consider, however, that Section 117B(4) of the 2002 Act has limited applicability to the relationship she has with her other family.

19. Having heard the evidence of the appellant and her brother, I am satisfied that there would be a significant impact on their relationship and more particularly the relationship she has with her nephew who she has been supporting throughout his illness for many years. The relationship is a very close one, and I accept on the basis of the evidence I heard that there is significant emotional dependency on both sides. I accept also that this support has recently included staying with the nephew in hospital during the restrictions imposed by the current pandemic; that has assisted him and his parents who have two other younger children to care for.

20. I consider that the effects on the nephew of separation would be all the greater given that he faces a liver transplant and given that, that it would be unclear how long she would have to spend outside the United Kingdom given current conditions. I accept also that she has a subjective fear of having to return to Jamaica but I find that a little wait that would be caused to her by having to remain in her family home in Jamaica pending the consideration of an application to return.

21. The effect of removal on the family life she has with her nephew who is particularly vulnerable would be severe. He would no longer have the regular, day to day help and support she provides, nor could she provide the care and support to him while he is in hospital. That could not, without a significant and serious effect on their other children, be provided by the parents. There would inevitably be distress to him.

22. Taking all these factors into account I consider that whilst no single one of them is determinative, bearing in mind the effect on the family life she has with her nephew who is particularly vulnerable, I am satisfied on the particular and compelling emotional circumstances of this case sufficient to outweigh the public interest in maintaining immigration control and for these reasons I am satisfied that the removal of the appellant would be in breach of Article 8. I therefore allow the appeal on that basis.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the appeal by allowing it on human rights grounds.

Signed Date: 17 May 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW

IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01006/2020T

THE IMMIGRATION ACTS

Decided under Rule 34 Without a Hearing **Decision & Reasons Promulgated**
At Field House
On 29 September 2020

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

TAMARA CHIN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS[1]

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Steer promulgated on 7 April 2020.

2. The appellant is a citizen of Jamaica who appealed against the decision made on 6 November 2029 to refuse her application for leave to remain on a human rights basis. That in turn was based on her relationship with Mr J Allen, a British Citizen, and with her brother and his children.

[1] Amended pursuant to rule 40, Tribunal Procedure (Upper Tribunal) Rules 2008

3. The appellant arrived in the United Kingdom with leave as a Tier 4 Student on 30 September 2006. Her leave to remain in that capacity was later extended. Her leave became exhausted on 17 may 2014, but she remained. Further submissions for leave to remain were made and refused. An asylum claim made in 2017 was refused and the appeal against that decision was dismissed, all appeal rights being exhausted by 8 June 2018. Further unsuccessful applications followed, the last being on 14 October 2019, the refusal of which gives rise to this appeal.

4. The respondent did not accept that the appellant met the requirement of the Immigration Rules and concluded that in all the circumstances, removal was proportionate.

5. The appellant and Mr Allen gave evidence before the First-tier Tribunal. The judge found that:

   (i) The appellant and Mr Allen were in a genuine and subsisting relationship and that they intend to marry [58];

   (ii) The appellant did not, however, meet the definition of "partner" within GEN 1.2 of Appendix FM owing to the lack of cohabitation, and so the appellant could not rely on paragraph EX.1 [44] to [48];

   (iii) The appellant did not meet the requirements of paragraph 276ADE, given her age and as she had not spent 20 years in the UK, nor had she shown therE would be very significant obstacles to her integration into Jamaica [51];

   (iv) Family life exists between the appellant, her adult brother and his children [60];

   (v) The appellant would not face insurmountable obstacles to continuing family life with Mr Allen in Jamaica [69];

   (vi) Little weight was to be attached to the appellant's family or private life [78] given that her position here had been precarious;

   (vii) The appellant had not provided the specified or any evidence that she met the financial requirements of the Immigration Rules for leave to enter as a fiancée or partner [78]; and, as this was not a very clear case, she could not be certain that the appellant would be granted Entry Clearance and so, could not, applying Agyarko [2017] UKSC 10 and R (ota Kaur v SSHD [2018] EWCA Civ 1423 could not be satisfied that there was no public interest in her removal as had been the case in Chikwamba [2008] UKHL 40

6. The appellant sought permission to appeal on the grounds that the judge had erred in her analysis of proportionality because she had failed:

   (i) to note that the respondent had in the refusal letter accepted that the financial requirements had been met and so her conclusion that they had not been met was flawed and so her rejecting the application of Chikwamba in assessed the public interest in removal was flawed;

   (ii) to take into account the family life that existed between the appellant, her brother and his children, in particular failing to consider the children's best interests; and,

(iii) to take into account the appellant's immigration history; and, failed properly to follow Younas (section 117b(60(b); Chikwamba; Zambrano) [2020] UKUT 00129 in considering the degree of culpability and deception involved

7. On 21 July 2020 Upper Tribunal Judge Stephen Smith granted permission on all grounds stating:-

> "…. It is arguable that the judge founded her application of the [Chikwamba] doctrine on an erroneous view of the facts. At [78] the judged held that the appellant did not provide the specified, or any evidence, concerning her ability to meet the financial requirements of the rules. Arguably that was in error because, at page 4 of the respondent's refusal lettered…the respondent accepted that the appellant met the financial requirements of E-LTRP 3.1 to 3.4. Arguably the appellant's ability to meet the financial requirements was not in issue between the parties. While it is well established that the mere likely ability to meet entry clearance requirements is not, in isolation, determinative of the abs3ence of the public interest in event temporary removal…(see Younas…), it is unarguably necessary for a "Chikwamba" assessment to be founded on a correct understanding of the factual matrix of the case.

8. Judge Stephen Smith also made directions in this case stating:

> 1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules[2], I have reached the provisional view, that it would in this case be appropriate to determine the following questions without a hearing:
>
> (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so
>
> (b) whether that decision should be set aside.
>
> 2. I therefore make the following DIRECTIONS:
>
> (i) The appellant may submit further submissions in support of the assertion of an error of law, and on the question whether the First-tier Tribunal's decision should be set aside if error of law is found, to be filed and served on all other parties no later than **14 days after this notice is sent out** (the date of sending is on the covering letter or covering email);
>
> (ii) Any other party may file and serve submissions in response, no later than **21 days after this notice is sent out**;
>
> (iii) If submissions are made in accordance with paragraph (ii) above the party who sought permission to appeal may file and serve a reply no later than **28 days after this notice is sent out**.
>
> (iv) All submissions that rely on any document not previously provided to all other parties in electronic form must be accompanied by electronic copies of any such document.
>
> 3. Any party **who considers that despite the foregoing directions a hearing is necessary** to consider the questions set out in paragraph 1 (or either of them)

[2] The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4).

above must submit reasons for that view no later than **21 days after this notice is sent out** and they will be taken into account by the Tribunal. The directions in paragraph 2 above must be complied with in every case.

4. If this Tribunal decides to set aside the decision of the First-tier Tribunal for error of law, further directions will accompany the notice of that decision.

5. Documents and submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents. Service on the Secretary of State may be to [email] and to the original appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

9. The appellant sent an email to the Upper Tribunal on 12 August stating that she would not be making further submissions at this point but reserving the option to reply to any submissions from the respondent.

10. The respondent has made no submission, and thus neither she nor the appellant has made any objection to this matter being dealt with without a hearing.

11. The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. Given that no objection to this course of action has been raised, and bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly, I am satisfied that in the particular circumstances of this case where no objection to a decision being made in the absence of a hearing that it would be right to do so. I find ~~no~~[3] merit in the grounds of appeal.

12. The challenge in the grounds is limited to the assessment of proportionality, it being accepted that the appellant does not meet the requirements of the immigration rules as, although engaged to marry Mr Allen, cannot be his fiancée for the purpose of the rules as she was not granted entry clearance in that capacity.

13. As Judge Stephen Smith noted when granting permission, it is accepted that the applicant met the financial requirements of the rules; she also met the English language requirement and the suitability requirements. Given the finding that the relationship with Mr Allen is genuine and subsisting, and as paragraph 320 (7B) would not apply to the appellant by operation of A320, the only apparent basis on which there could be a refusal of entry clearance is paragraph 320 (11). There is, however, little in the material indicating that this could properly be invoked.

14. That does now, however, mean that the appeal should have succeeded. The Upper Tribunal addressed Chikwamba in Younas at [78] ff, setting out the steps that ought to be taken. Some of those were undertaken, albeit not in the same order, and the judge did not have the benefit of Younas when preparing her decision; it was not published until 17 April, well after she had signed her decision.

[3] Amended pursuant to rule 40, Tribunal Procedure (Upper Tribunal) Rules 2008

15. Unlike in Younas there is no assessment of the appellant's immigration history, in terms of whether it was poor or not; there are no findings on the circumstances of her overstaying and while there is, properly an assessment pursuant to section 117B, this does not include any analysis of the effect on the appellant's brother's children, despite the judge having made findings that a family life with them exists.

16. In the light of that failure and the error of fact made, the decision did involve the making of an error of law. I consider that in all the circumstances, and in the absence of submissions to the contrary from the respondent, that it is material.

17. Accordingly, for these reasons, I conclude that the decision of the First-tier Tribunal involved the making of an error of law as claimed. I therefore set it aside to be remade in the Upper Tribunal on the basis that the findings of fact, with the exception of the error relating to the meeting of the financial requirements, are preserved. That includes the findings as to family life and the relationship being genuine and subsisting. There does not appear to be any need for the Upper Tribunal to hear further oral evidence.

Notice of Decision

1 The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

2 I direct that the decision be remade in the Upper Tribunal on a date to be fixed.

3 Any party wishing to adduce further evidence must make an application pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 at least 10 working days before the hearing.

Signed Date 29 September 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul