Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12779/2018

THE IMMIGRATION ACTS

Heard at Field House
On 13 July 2021

Decision & Reasons Promulgated
On 18 August 2021

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Mukherjee, Counsel instructed by Immigration Advice Service Ltd
For the Respondent: Mr S Kotas, Home Office Presenting Officer

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

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DECISION AND REASONS

1. The Appellant is a citizen of Trinidad and Tobago. Her date of birth is 21 April 1993.

2. I set aside the decision of the First-tier Tribunal (Judge Moffatt) promulgated on 30 September 2019 allowing the Appellant's appeal. My error of law decision reads as follows:

> "20. Ms Panagiotopoulo submitted that the finding of the judge at [54] is a finding that there are no insurmountable obstacles to family life. However, I do not agree. A proper reading of [53] and [54], discloses that the judge was concerned with the Appellant's private life on return. There was no consideration of insurmountable obstacles because the judge accepted that A would not accompany the Appellant.
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> 21. Ms Panagiotopoulu submitted that it is clear the judge accepted the Secretary of State's submissions that there were no insurmountable obstacles because he went onto consider Article 8 outside of the Rules. I must consider whether the absence of a reasoned decision concerning insurmountable obstacles to family life continuing in Trinidad and Tobago is an error of form or substance.
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> 22. The judge first turned his attention to the possibility of family life in Trinidad and Tobago, when assessing Article 8 outside of the Rules. He attached significant weight to whether A would as matter of fact return with the Appellant. At [57] the judge made some findings about the difficulties faced by A should he accompany the Appellant. However, these findings are far from sufficient to satisfy the insurmountable obstacles test, properly applying Agyarko. However, they are findings that informed the judge's decision under Article 8. The failure to determine the insurmountable obstacles test in this case affected the evaluation outside of the Rules. While the judge said that there is a strong public interest in the maintenance of effective immigration control, it is unclear what, if any, weight he attached to the policy of the Secretary of State as expressed in the Rules when assessing proportionality in this case.
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> 23. It may have been open to the judge to conclude that the Secretary of State's decision disproportionately interfered with the Appellant's rights under Article 8; however, the judge in this case did not make a reasoned finding under EX1.1 and this infects the overall proportionality assessment. Ground 1 is made out.
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> 24. In respect of the second ground of appeal, I also find that this has been made out. The Appellant's status here has been unlawful since she became an overstayer. The judge did not make it clear how he factored this into the proportionality assessment and applied s.117B(4)(b). The Appellant's case was advanced on the basis that it was not her fault that she had not regularised her status. This is a relevant factor that the judge was entitled to consider and attach weight to, but he does not properly engage with the issue. The findings at [56] are insufficient and do not disclose a properly reasoned application of s.117B(4)(b). The judge does not make it clear what he accepted from Mr Richardson's skeleton argument and why. Having seen this document, the submissions refer to precarious family life.

However, the Applicant's relationship with A was established when she was in the United Kingdom unlawfully. The only period of leave the Appellant has ever been granted was 6 months when she initially came to the United Kingdom in 2009.

25. The error of law is material. I set aside the decision of the First-tier Tribunal.

26. There was no further evidence submitted on behalf of the Appellant.

27. There is no reason to go behind the findings of fact made by the First-tier Tribunal in respect of credibility. There was no cross-appeal. The judge accepted that the relationship was genuine and subsisting. The issue is proportionality.

28. Ms Panagiotopoulou applied for an adjournment. She said that there was up to date medical evidence on which the Appellant seeks to rely. The Appellant had recently instructed IAS to represent her. There had been a delay in seeking paperwork from the previously instructed solicitors, the documents having been received the day before the hearing.

29. I granted the adjournment.

I make the following directions;-

1. **The Appellant is to serve and file all evidence on which she relies not later than 21 days before the hearing. (If the Appellant seeks to rely on the Chikwamba point (Chikwamba v Secretary of State for the Home Department v SSHD [2008] UKHL 40, her solicitors are reminded that the relevant date for consideration of Article 8 is the date of hearing and their attention is drawn to Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129).**

2. **If the Appellant proposes to call live evidence, up to date witness statements must be served and filed not later than 21 days before the hearing.**

3. **The Appellant is to serve and file a consolidated bundle not later than 7 days before the hearing.**

Notice of Decision

The Secretary of State's application is allowed.

The matter is adjourned for a face to face resumed hearing."

3. The matter came before me on 13 July 2021 in order to remake the appeal.

The Law

The Statutory Regime

4. The Secretary of State's case is that the Appellant does not meet the eligibility requirements with reference to Appendix FM. The Secretary of State therefore considered whether EX.1. applies in the Appellant's case.

"EX.1. This paragraph applies if:

(a) …

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave, or humanitarian protection, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

5. Part 5A of the 2002 Act has been in force since 25 July 2014 and establishes the present regime under the rubric "Article 8 of the ECHR: public interest considerations". Section 117A of the 2002 Act addresses the application of the public interest regime; Section 117B details the public interest considerations applicable in all cases. It reads as follows:

"117B **Article 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."

Case Law

6. There have been a number of cases concerning Article 8 and the relevant issues in this appeal. I have attempted to summarise the primary findings in those cases which have a bearing on this case.

Agyarko v Secretary of State for the Home Department [2017] UKSC

(i) The expression 'insurmountable obstacles' is now defined by paragraph EX.2 as meaning

> 'very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.'

(ii) Interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship.

(iii) Where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in 'exceptional circumstances', (in circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate).

TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109

(i) The Tribunal should consider the insurmountable obstacles test within the Rules before considering the exceptional circumstances test outside the Rules.

(ii) The Tribunal should undertake an evaluation of the insurmountable obstacles test within the Rules in order to inform an evaluation outside the Rules because that formulates the strength of the public policy in immigration control. The policy of the Secretary of State as expressed in the Rules is not to be ignored when a decision about Article 8 is to be made outside the Rules.

GM (Sri Lanka) [2019] EWCA Civ 1630,

(i) The legislation and rules must be construed in a way that is consistent with Article 8. The policy of the rules must be accorded "*significant weight*", but there must be a "*limited degree of flexibility*".

(ii) The test to be applied outside the rules is whether a "*fair balance*" is struck between competing public and private interests (and not one of exceptionality).

(iii) The test is to be applied on the circumstances of the individual case evaluated "*in the real world*".

(iv) There is a need for "*real evidence*" and the list of relevant factors is "*not closed*" but is in practice "*relatively well trodden*" and includes personal conduct, social and economic ties and delay.

(v) There is no requirement to give "*little weight*" to family life formed while immigration status was "*precarious*".

CL (India) [2019] EWCA Civ 1925

(i) An "*insurmountable obstacle*" to return does not mean an *inability* to return.

(ii) In, the Court suggested a three-stage approach to the insurmountable obstacles test under the Immigration Rules: (i) whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty, (ii) if so, whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK and, (iii) if not, whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both) – [35] to [36].

7. In the case of Kaur, R (on the application of) v Secretary of State for the Home Department [2018] EWCA Civ 1423 the Court of Appeal considered insurmountable obstacles to family life in the context of paragraph EX.1. of the Immigration Rules (IRs).

8. The court stated as follows:-

> "23. Since the decision of the Deputy Judge in this case, the meaning of 'insurmountable obstacles' has been definitively stated by the Supreme Court in *Agyarko*. Lord Reed, with whom the other Justices of the Supreme Court agreed, referred to *Jeunesse v The Netherlands* (2015) 60 EHRR 17, GC, saying:
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> > '42. In *Jeunesse*, the Grand Chamber identified, consistently with earlier judgments of the court, a number of factors to be taken into account in assessing the proportionality under article 8 of the removal of non-settled migrants from a contracting state in which they have family members. Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were 'insurmountable obstacles' in the way of the family living in the country of origin of the non-national concerned, and whether there were factors of immigration control (for

> example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion: para 107.
>
> 43. It appears that the European court intends the words 'insurmountable obstacles' to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer … 'Insurmountable obstacles' is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119.'

24. Lord Reed went on to refer, at paragraph 44, to the fact that the July 2012 version of the Rules (which was applicable in that case, and is applicable in this) did not define the expression 'insurmountable obstacles'. With effect from July 2014, however, Appendix FM was amended by the addition of paragraph EX.2, which states –

> 'For the purposes of paragraph EX.1(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.'

25. Lord Reed concluded that that definition was consistent with the meaning given to the phrase by the decisions of the European Court of Human Rights. He therefore concluded that the meaning of the phrase under the 2012 version of the Rules was the same as it is now under paragraph EX.2. He continued:

> '45. By virtue of paragraph EX.1(b), 'insurmountable obstacles' are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case in which such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in 'exceptional circumstances', in accordance with the Instructions: that is to say, 'in circumstances in which refusal

would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate'.'

26. Having considered the nature of the Rules and the Instructions given by the SSHD as to their application, Lord Reed concluded that they are compatible with Article 8, though of course a specific application of the Rules and instructions to the facts of a particular case may be open to challenge as incompatible with Article 8. He then went on to consider the case of an applicant whose immigration status is precarious:

> '49. In *Jeunesse*, the Grand Chamber said, consistently with earlier judgments of the court, that an important consideration when assessing the proportionality under article 8 of the removal of non-settled migrants from a contracting state in which they have family members, is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be 'precarious'. Where this is the case, the court said, 'it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8': para 108.
>
> 50. Domestically, officials who are determining whether there are exceptional circumstances as defined in the Instructions, and whether leave to remain should be granted outside the Rules, are directed by the Instructions to consider all relevant factors, including whether the applicant '[formed] their relationship with their partner at a time when they had no immigration status or this was precarious'. They are instructed, at para 3.2.7d: 'Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK.' That instruction is consistent with the case law of the European court, such as its judgment in *Jeunesse*. As the instruction makes clear, 'precariousness' is not a preliminary hurdle to be overcome. Rather, the fact that the family life has been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affects the weight to be attached to it in the balancing exercise.
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> 51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an

application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*.'

52. It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control. …'

…

45. I have quoted in paragraph 26 above the passage in which Lord Reed (at paragraph 51 of his judgment in *Agyarko*) referred to *Chikwamba*. It is relevant to note that he 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."

9. In the case of Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 the court considered the Appellant's Chikwamba argument and set out the approach taken to it which is summarised in the headnote as follows:-

"*(1) An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') including section 117B(1), which stipulates that 'the maintenance of effective immigration controls is in the public interest'. Reliance on Chikwamba v SSHD [2008] UKHL 40 does not obviate the need to do this.*"

The Hearing

10. At the resumed hearing it was a matter of concern that a bundle comprising 389 pages was served on the Tribunal one day before the hearing and on the Secretary of State on the morning of the hearing. Therefore, the matter had to be put back in order to allow Mr Kotas time to consider the new bundle. On consideration of the bundle it was clear that there was no further evidence from the witnesses. I stated to Mr Mukherjee that I presumed that it was not intended to call live evidence, bearing in mind my directions. However, Mr Mukherjee explained that the solicitors were only put in funds shortly before the hearing. He intended to call the Appellant to give evidence concerning her mental health and A and H in order to provide evidence of support given to the Appellant. I permitted the Appellant and witnesses to give evidence relating to the Appellant's mental health since the hearing before the First-tier Tribunal and support given to her by A and H and A's financial situation to address a Chikwamba point.

11. The Appellant's immigration history is that she arrived in the UK on 17 June 2009, having been granted a six month visit visa. She overstayed. She made an application for leave to remain on 18 July 2013. On 5 September 2013 the application was refused by the Secretary of State. The Appellant made further representations which were refused by the Secretary of State on 29 May 2018. It is that decision which the Appellant appeals.

The Appellant's Evidence

12. The Appellant adopted her witness statements of 24 December 2018 and 6 August 2019. She gave oral evidence at the hearing. This can be summarised. The Appellant had been treated by Central Wandsworth and West Battersea Community Health Team since 2016. She first attempted suicide that year. She then received home treatment from the Mental Health Team from 2016 to 2017. She received help from the Psychosis Team and saw a nurse called Zoe for three years once a week. The purpose of this was to assess her psychosis (seeing things and hearing voices). She was still feeling suicidal and depressed. She remained with the Psychosis Team from 2017 to 2020. After 2020 she received treatment from Shalini. She is a recovery coach. She started seeing her in February 2020. They had face-to-face meetings before the pandemic. She helps the Appellant with alternative thinking, low self-esteem issues and helps her to feel better about herself. She helps with anxiety. She informed the Appellant about the STEPS Programme because she thought that she needed extra help. This programme is for people diagnosed with emotionally unstable personality disorder (EUPD). She explained that the condition causes what she described as "emotional tornadoes". She breaks down and is unable to speak. She feels suicidal and has negative thoughts. She started a sixteen week course with STEPS. She has now completed week 8. She hopes to continue with Shalini after she completes the course and have a follow-up with her GP.

13. She has a good support network here. Her husband and family are supportive. They love her. Losing this support will affect her negatively. She cannot really express how it would negatively affect her. On days when she cannot get out of bed A talks to her. He tells her that he loves her and they pray together. She feels very supported by him.

14. She looks after her grandmother in the UK. She helps her take medication. She shops for her and attends appointments with her. If the Appellant is having a bad day she withdraws from people and in these circumstances she will telephone her grandmother.

15. She does not have a relationship with her mother. She does not know her real father.

16. In cross-examination, the Appellant said that when she mentioned her mother to Dr Gupta she meant her grandmother. She calls her grandmother mother because she raised her.

17. She does not know whether she had permission to receive treatment on the NHS. However, she mentioned at the Courtyard Clinic for HIV patients that she had problems with immigration and they said that they do not deny anyone treatment.

A's Evidence

18. A adopted his two witness statements of 21 December 2018 and 6 August 2019 as his evidence-in-chief. He gave oral evidence. He confirmed that he lives with his mother, sister and the Appellant. He pays 60% of the household expenditure. His sister pays 40% of the family expenditure. If he was to go to Trinidad with the Appellant the family in the UK would experience financial difficulties because he is the main breadwinner. He earns approximately £1,847 before tax. In addition, he receives commission bringing his average monthly earnings to £2,000 before tax.

19. He gave an example in evidence of an incident in February 2021 when he left work in order to support the Appellant. His mother had called him to say that she had cut herself. He returned home and he comforted her and re-assured her that everything would be alright.

H's Evidence

20. H attended the hearing and gave evidence. He adopted his witness statement as his evidence-in-chief. He confirmed that he is like a *de facto* brother. He supports both the Appellant and A. A cannot always help the Appellant because he is employed whereas H is self-employed and is more flexible. He is able to leave work more easily and help the Appellant, ensuring that she is eating sufficiently, taking medication and getting out of bed. He is aware that the Appellant supports her grandmother here.

Submissions

21. Mr Kotas addressed me on the issue of insurmountable obstacles. He referred to Kaur and Younas.

22. He referred me to A's witness statement of 21 December 2018, specifically paragraphs 6 and 7.

> "6. I confirm that it is not possible for me to follow my wife to Trinidad and Tobago as I have a settled life in the UK. I have never been to Trinidad and Tobago and it will not be possible for me to move there leaving my settled life, job and especially my mother in the UK. I cannot leave my mother, my family and my job and just migrate to a country where I have never been. If I am forced to leave the UK with my wife then it will breach of my (sic) human right (sic) too.
>
> 7. I confirm that I along with my wife, my mother and family members have developed a very strong and private and family life in the UK. All of them have written supportive letters."

23. These reasons, Mr Kotas submitted, are not sufficient to establish insurmountable obstacles. The Appellant and her husband would have a home and a support network in Trinidad. Insofar as Chikwamba is concerned, this is not a case that is bound to succeed. Whilst the Sponsor has given oral evidence concerning the level of his earnings, there is no contemporaneous evidence. It cannot be said with certainty that entry clearance will be granted.

24. In any event, Chikwamba does not obviate the need to consider Part 5A factors. The Appellant is an overstayer, albeit she came here as a child. She has worked full-time in breach of immigration laws. Her relationship with A was formed in precarious circumstances.

25. He referred me to the preserved findings of the First-tier Tribunal.

26. Mr Mukherjee made submissions. He relied on EB (Kosovo) at paragraph 12:-

> "12. Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

The test applies in this case.

27. There are insurmountable obstacles to A returning to Trinidad with the Appellant. It is a different factual matrix to that in Kaur. In this case, A and the Appellant live in a joint family home with A's mother and sister. There is a strong family unit. A provides the basic income for the family. In these circumstances, severe financial difficulties would ensue for that household which amount to insurmountable obstacles to A being able to relocate for any extended period or indeed for any short time because he does not have a lot of excess income.

28. The Appellant is a vulnerable person with a life-threatening disease. She has been under the supervision of the Mental Health Team since 2016. She has given detailed oral evidence about treatment since 2016. She has had periods of self-harming and suicidal ideation. There is no reason to disbelieve her evidence that there is no emotional connection between the Appellant and her mother.

Findings and reasons

29. The only further evidence upon which the Appellant relied other than the oral evidence at the hearing was a letter from Central Wandsworth and West Battersea Community Health Team to the Appellant's GP, Dr P Gosney, of 18 March 2021 and in that letter it sets out the diagnosis of the Appellant's condition as depression and emotionally unstable personality disorder. It sets out her medication, mirtazapine 30mg ON and Symtuza. The author of the letter, Dr Gosney, states that he reviewed the Appellant over the phone on 15 March and that she was recently accepted onto the STEPS Programme. It states that the Appellant is compliant with her medication. Her next appointment with the Courtyard Clinic is in July. At her last appointment in January the clinic were happy with her CD4 count and viral load. In relation to her depression, Dr Gosney states that the Appellant thinks that COVID-19 lockdown has had a big effect on her mental health. She has stopped finding enjoyment in activities. She has had contact with her grandmother, who is in a retirement home, and she has regular contact with her friends but has been advised to limit social contact due to her HIV diagnosis. She is going out on her own to get some exercise. Her sleep is okay with medication although in the last few weeks this has worsened. Her appetite is described as normal. In relation to EUPD, the Appellant describes "random outbursts of emotions" and she last self-harmed about three weeks ago by cutting her wrists. Usually this would make her feel better but in this case it made her feel worse.

30. There are preserved findings made by the First-tier Tribunal. The judge accepted that the Appellant's husband (A) would not go to Trinidad with the Appellant. The judge found that there was no evidence that has been produced to suggest that the Appellant's medical condition could not be treated in Trinidad. He found that the Appellant would have support from her mother and stepfather, who are aware of her diagnosis and have been offering support to her via electronic means. The judge found that there would be no language barrier because the Appellant had resided in Trinidad for sixteen years as a child and is familiar with the culture there. The judge concluded that there would not be "insurmountable difficulties" for the Appellant were she to be returned to Trinidad.

31. The judge found that the removal of the Appellant would amount to an interference in the family life of both the Appellant and A. The judge found that should the Appellant be returned A would be forced to choose between his wife and between his family here in the UK. The judge said as follows:-

> "He has created a family life with the Appellant. If he chose to go with her, he would have to forgo these things. He would be moving to a country with different religious and cultural roots to those he has grown up with. He would have no guarantee that he could secure work. He has never been to Trinidad. Should he stay here he would have to rely upon electronic means to continue his relationship with his wife. For short periods, that may be satisfactory, it is not suitable for sustaining marriage on a permanent basis."

32. In relation to the evidence, the judge found that the Appellant was not credible. He noted that in the documentary evidence there were several references to the Appellant's mother. Similarly, there was reference to the Appellant having a full-time job. Both matters were in contradiction to the Appellant's evidence. However, the judge went on to find that the Appellant and A are in a genuine and subsisting relationship. While he found the Appellant not credible, he found A (and H, a friend who was called to give evidence on the Appellant's behalf) credible. The judge found that it was more likely that should the Appellant be returned to Trinidad and Tobago, A would not accompany her.

33. The Appellant cannot meet the requirements of the immigration rules. As found by the First-tier Tribunal, she has family in Trinidad and Tobago. She has not been honest about this aspect of her claim. However, I accept that she was raised by her grandmother and so may have a closer relationship with her than her own mother. However, there is family support for her in Trinidad and Tobago. There are no properly identified very significant obstacles to integration, properly applying SSHD v Kamara [2016] EWCA Civ 813

34. Similarly there are no insurmountable obstacles ("very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner") to family life continuing in Trinidad and Tobago. While it is accepted that A will not accompany her to Trinidad and Tobago because of his family commitments here, that is a matter of choice for him. If he did accompany her, there is insufficient evidence that there would be very insurmountable obstacles to family life continuing there.

35. The test is not whether it is reasonable to expect A to return to Trinidad and Tobago with the Appellant. This does not reflect the statutory regime and case law post EB (Kosovo). I have to consider where a fair balance lies. There are a number of factors which are capable of supporting that removal of the Appellant is not proportionate to the breach of her rights under Art 8. The Appellant has health problems. I accept that she has a support network here, including support from A's family with whom she resides and from a close family friend, H. While the Appellant has not been honest about her own family in Trinidad, A and H have been found to be credible witnesses in respect of the support that the Appellant needs and receives from them and A's wider family. Their evidence is consistent with that of the Appellant on this issue. The Appellant is unwell. She receives support from the Mental Health Services. I accept the medical evidence, which includes evidence of self-harm. She has a recognised disorder (EUPD) for which she is prescribed medication. She was half way through a 16 weeks course at the time of the hearing before me and hopes when the course has concluded to resume meetings with the recovery coach. I accept that she has a support network here outside the family. She is provided with care from the mental health team. She is also receiving treatment for HIV.

36. I accept that the Appellant's removal will rupture family life. I accept that A does not want to accompany her because his family here depends on him for some financial

support. The Appellant and A live with his mother and sister. I accept that he is the main breadwinner for the whole family. I accept that the Appellant helps her grandmother here. (The evidence does not establish Kugathas dependency (Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, which was not argued on behalf of the Appellant, in any event.)

37. The Appellant cannot meet the requirement of the immigration rules. Furthermore in respect of medical treatment, there is no evidence before me that there is no available treatment which the Appellant can access in Trinidad and Tobago. The burden of proof rests on the Appellant. The maintenance of immigration control is in the public interest. The Appellant's stay has been precarious and since 2009 unlawful. She has remained here unlawfully during which time she has formed a relationship with A. She married A in 2012 when she had no leave. She made an application in 2013 as a spouse. The application was refused in the same year 2013 with no right of appeal. The Appellant remained here and the Respondent agreed to reconsider her case.

38. The little weight provision under s.117B (4) applies to her relationship with A. I accept that she does not bear all of the responsibility for overstaying because she came here as a child. I accept that family members were remiss in failing to regularise her status. However, the Appellant, on reaching adulthood two years after she came here, should have taken responsibility for this herself. She has made efforts to do this, but only after she married.

39. The Appellant has been in the United Kingdom since 2009, but she has spent most of her life in Trinidad and Tobago. She has family and support there, as found by the First-tier Tribunal. A could if he wanted return with her. I accept that this would entail a level of hardship for his family here. However, his sister is also responsible for some of the outgoings. There will be a family of 2 rather than 4 to maintain. I reasonably infer that household costs would reduce accordingly. He does not have children here. There is no evidence that he would not be able to find work in Trinidad and Tobago.

40. Taking into account all matters and conducting an evaluative assessment of the evidence, I conclude that a fair balance lies in favour of the SSHD in this case.

41. There is no mileage in the Chikwamba point because the appeal falls to be dismissed on Article 8 substantive grounds. A was found by the First-tier Tribunal to be a witness of truth. He gave evidence before me, about the level of his earnings. There is no requirement to produce corroborative evidence. There is no good reason for me not to accept his evidence on this issue. Therefore I accept that this earnings would be sufficient to support an application for entry clearance, providing he was able to produce all the necessary paperwork, which was not before me.

Notice of Decision

The Appellant's appeal is dismissed

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Joanna McWilliam* Date 3 August 2021

Upper Tribunal Judge McWilliam