IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003671

First-tier Tribunal No: HU/54211/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22nd of February 2024

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

MR HERMAN NICOLA GOULBOURNE

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Murphy, Counsel
For the Respondent: Ms A Ahmed, Senior Home Officer Presenting Officer

Heard at Field House on 20 December 2023

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Herlihy ('the Judge') who dismissed his appeal on 27 February 2023 against the respondent's decision to refuse him leave to remain on human rights grounds.

Background

2. The appellant is a citizen of Jamaica who has been married to a British Citizen since 2 January 2016. Since marrying the couple have split their time together between Jamaica and the UK. His wife required surgery and invited him to the UK so that he could be with her and offer moral and physical health and support during and after the operation. He entered the UK on 9 November 2019 with entry clearance as a visitor valid to 17 April 2020. Her operation was fixed for 6

March 2020, however rather than getting better, her health conditions deteriorated.

3. He applied on 11 April 2020 for leave to remain outside the immigration rules on human rights grounds. This was refused on 25 September 2020 and he appealed.

4. The appeal came before the Judge on 6 February 2023. In her decision the Judge found:

11. I do not find the Appellant has established that there are any obstacles to his integration should he return to Jamaica where he has strong cultural and linguistic (sic) and where he lived and worked until the age of 51, worked and has two adult daughters. The evidence before me indicates that the Appellant's partner herself originates from Jamaica, where she spent her formative life, and has an adult daughter and grandchild and I find that she is likely to have strong cultural and familial ties to that country. The Appellant's partner is presently not working and is awaiting a second knee operation and is currently receiving Personal Independence Payment ("PIP") and state benefits.

12. The Appellant argues that it would be difficult for his wife to reside in Jamaica due to her serious health complaints and relies upon the medical evidence in the bundle. I note that the Appellant's wife had a total left knee replacement on 6/3/2020 and that the Appellant came to the United Kingdom as a visitor to help support his wife before and following her surgery. The evidence indicates that the outcome from her knee replacement was very good and this is disclosed by the letter from the orthopaedic surgeon dated 13/9/2021. His wife suffers with pain in her right knee and is due to have a similar replacement surgery that was due to take place in November 2022 but has been cancelled. The evidence indicates that tl1e Appellant's wife has long-standing low back pain with sciatica and has some degenerative lumbar discs and facet changes referred to at page 155 of the bundle. Since the decision the Appellant's wife has been awarded Personal Independence Payment due to her difficulties in undertaking activities of daily living and mobility arising from her health conditions. I note from consideration of the PIP award dated 20/9/2022 that it was determined the Appellant's wife was in need of aids rather than personal support from another individual. The evidence indicates the Appellant's wife can cook, wash and dress herself with the use of aids; the award makes no reference to need for the provision of assistance or supervision of another person. I find that there is no evidence to support the claim by the Appellant that his wife needs his care 24 hours a day as this is not supported by the medical evidence. The Appellant's wife has reduced mobility and it is likely that this will improve following future surgery on her right knee. The evidence before me is that the Appellant's wife is currently being investigated for blackouts. However there is no satisfactory evidence before me that his wife's health is such that she needs the continued care and support of the Appellant. In the event that such care was required the Appellant would undoubtedly be able to obtain help via Social Services or the National Health Service.

...

15. In assessing the public interest under Article 8(2) I have kept in mind the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002 as amended by Section 19 of the Immigration Act 2014. The Appellant developed

his family and private life in the United Kingdom at a time when he knew that the development and continuance of the same was dependent upon meeting the requirements of the Immigration Rules. The Appellant produced evidence of his wife's financial situation and it is submitted that now she is in receipt of benefits that the Appellant is able to meet the financial threshold under the Immigration Rules. The Respondent was also satisfied that the Appellant met the English language requirements. However, these aspects are neutral and do not add significant weight to the proportionality exercise.

16. However, I do not find there is anything exceptional about the Appellant's claim, he entered the United Kingdom as a visitor and developed his relationship with his partner in the full knowledge that he did not have leave to remain as a partner and I find it very likely that the time the Appellant entered the United Kingdom it was known that he could not satisfy the financial requirements of the Immigration Rules, this is indicated by the statement of the Appellant's wife as to why there had been no previous application for settlement. He lived for the entirety of his life in Jamaica before coming to the United Kingdom in 2019 and I have already found there will be no difficulties in reintegration upon return. I do not find that there is any evidence to support the claim that the Appellant's presence is required in the United Kingdom in order to care for his partner. The evidence before me shows that his partner has been suffering from chronic bi lateral knee pain before they met and had been managing these conditions on her own. I accept that she may not have been caring for himself as well as the Appellant cares for her, but there is no evidence to suggest that she was unable to manage her medical conditions or that her health was precarious. I except that the Appellant's partner may be reluctant to accompany him to Jamaica even temporarily while he makes an application for entry . clearance as she is awaiting further surgery; but I see no reason why she could not accompany him for a period until such time as she requires further medical treatment. It has not been claimed that the partner's medical conditions meet the high threshold such that the decision would amount to a breach of Article 3 of the ECHR I do not find that the Appellant has established that his partner's health conditions present any obstacle to their family life continuing outside the United Kingdom.

17. I do not find the Appellant has established that if he were to return to Jamaica, with or without his partner, that this would give rise to any unjustifiably harsh consequences. I do not find that the Appellant has established that his presence in the United Kingdom in required in order to provide care for his partner.

18. The Appellant submits that but for the immigration status he would otherwise satisfy the requirements of the Immigration Rules and that it is not proportionate for him to return to make an entry clearance application. The Respondent in the Respondent's review referred to the decision of the Upper Tribunal in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC) and submitted that there was nothing in the evidence which would create an impediment for the Appellant to make an application for entry clearance from abroad. I find that there are no exceptional circumstances in respect of the Appellant or his wife or that the refusal would result in unjustifiably harsh circumstances if he returned to Jamaica. I find that the decision under appeal is in accordance with the law, necessary and proportionate and does not give rise to a breach of Article 8.

5. The appeal was dismissed.

6. The appellant appealed. Initially permission was refused by First-tier Tribunal Judge Alridge on 14 August 2023. An application for permission to appeal was renewed on 30 August 2023, which was outside the time limits prescribed for bringing an appeal. Upper Tribunal Judge Reeds considered the application, she granted permission and extended time.

Error of law hearing

7. The appellant was represented by Mr Murphy who appeared below before the Judge. He adopted his grounds of appeal and developed them. His principle argument was that the Judge failed to properly resolve the question as to whether the appellant's wife could return to Jamaica with him, and as a consequence the assessment as to whether her being left on her own whilst he made an entry clearance application was incomplete.

8. He relied in particular on the decision of this tribunal in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC) and submitted that the Tribunal erred by failing to consider whether a prospective application for entry clearance would succeed or not.

9. Ms Ahmed submitted that there was nothing wrong with the Judge's decision and that the grounds of appeal amounted to little more than a disagreement with the Judge's decision. She in particular highlighted that the Judge did take into account Younas and undertook a lawful assessment. The decision has to be read as a whole, and the Judge has undertaken a careful and full balancing exercise which the appellant may well disagree but which does not identify an error of law.

Decision and reasons

10. We have carefully considered the submissions advanced by the two advocates, and have carefully considered the documents in the bundle, some of which we were taken to. We are satisfied that the Judge materially erred for the following reasons.

11. The case advanced on behalf of the appellant was that his wife is not able to return to Jamaica with him due to her health condition. Such a proposition would be very challenging, so much so it amounts to insurmountable obstacles. That is a weighty consideration in any balancing exercise.

12. In addition, were the appellant be required to make an entry clearance application it would be granted because he satisfies all of the provisions. Younus requires a Judge to assess that as to whether in fact, on the evidence, an appellant would satisfy the provisions, and then factor that into the balancing exercise.

13. Insofar as the above two propositions are concerned the Judge failed in both regards. At paragraph 12 of her decision, which we set out above, the Judge commenced with her consideration of whether his wife could go to Jamaica. However the Judge does not come to a conclusion on this at all. The paragraph takes a turn about half way through to consider whether his wife relies on the appellant for her daily care.

14. We have taken time to consider, read and re-read the decision, but are at a loss to find any consideration as to whether, in the face of the medical evidence relied upon, there are insurmountable obstacles to the appellant's wife leaving the UK. In particular we note that the evidence and submission was that she engages with the NHS approximately 8 times a month, there is no consideration as to whether that could continue in Jamaica. The Judge appears to have become sidetracked as to the impact of separation, before answering whether there needs to be separation at all. As a consequence she has failed to make a finding on a material matter.

15. Insofar as it is said paragraph 16 answers this point, we disagree. The Judge's failure to make a clear finding on the question of insurmountable obstacles plainly infects her consideration in paragraph 16. The Judge here is considering only whether she could go to Jamaica for a short time whilst the appellant applies for entry clearance, however this does not answer the question whether there are insurmountable obstacles as to family life continuing outside the UK.

16. Indeed the paragraph could be read as almost accepting that she could not return and live in Jamaica permanently due to the appointments she needs. The Judge's consideration of this fails to take into account the regularity and volume of the monthly appointments, which in our view renders these findings to be tainted by legal error, because she did not take into account the evidence before her as to the number and regularity of the appointments.

17. The second error is in so far as the consideration of the prospects of the entry clearance application. The Judge fails to make any finding as to the prospects of success of such an application. The Judge records the submission and the point at paragraph 18 but again fails to resolve it. The Judge further arguably misstates the expectation and requirement on her to assess such an application as set out in Younas , instead focussing only that he could make such an application.

18. For the above reasons we are satisfied that the decision of the Judge is infected by legal error and we set it aside. The case will need to start afresh, there are no findings of fact that we can preserve. The appropriate forum for such a *de novo* consideration would be the First-tier Tribunal and we remit the matter there to be heard by any Judge other than Judge Herlihy.

Notice of Decision

The decision of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal.

Judge T.S. Wilding

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 24th January 2024