



IAC-AH-CJ/DN-V2

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/29884/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 10th October 2014**

**Determination Promulgated
On 21st November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MISS EVETTE ANOLA SIMMS
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Corban, Solicitor

For the Respondent: Mr M Shilliday, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Jamaica born on 5th September 1976. The Appellant entered the United Kingdom on 24th October 1999. Her immigration history is recited in great detail in the first main paragraph of the Notice of Refusal dated 9th July 2013. On 25th June 2013 the Appellant's case was reconsidered under the European Convention of Human Rights it having been contended that her removal would be a breach of her human rights because of her relationship to Calvin Scott. In considering her claim regard was given to Appendix FM of the Immigration Rules

specifically in relation to the partner route. By a Notice of Refusal dated 9th July 2013 the Secretary of State concluded that the Appellant had failed to show any evidence that she had children in the United Kingdom and consequently did not benefit from EX.1(a). Further it was accepted that although the Appellant might face a degree of hardship if returning to Jamaica there would be no insurmountable obstacles preventing her relationship with Mr Scott continuing outside the United Kingdom and consequently she did not meet EX.1(b).

2. Further her application was assessed against the parent route of Appendix FM. The Secretary of State concluded that the Appellant has lived in Jamaica for 23 years before coming to the United Kingdom and it was accepted that she still had cultural and social ties to Jamaica. It was noted that she spoke a language which is recognised within Jamaica and that she had a 16 year old daughter in Jamaica who is currently cared for by her father and as such the Secretary of State was satisfied that the Appellant had family ties and therefore did not meet part VI of paragraph 276ADE. In addition consideration was given to the factors listed in paragraph 353B of the Immigration Rules, as were her family and private life which were considered in the round.
3. The Appellant appealed and the appeal came before First-tier Tribunal Judge Archer sitting at Hatton Cross on 21st February 2013. Thereafter a further application was accepted and the appeal came before First-tier Tribunal Judge Oliver sitting at Richmond on 20th January 2014. In a determination promulgated on 14th February 2014 the Appellant's appeal was dismissed, both under the immigration grounds and on human rights grounds.
4. On 18th February 2014 Grounds of Appeal to the Upper Tribunal were lodged. On 13th March 2014 First-tier Tribunal Judge Chohan granted permission to appeal. The judge noted that in essence the grounds submitted that the judge had failed to undertake the balancing exercise in respect of Article 8 of the ECHR and further argued that the judge had given inadequate reasons in respect of his findings that there were no insurmountable difficulties to family life outside the United Kingdom. It was noted that the judge's findings set out at paragraphs 14 to 16 were relatively short although within those paragraphs the judge had dealt with the issue of insurmountable obstacles and Article 8. Whilst the judge made reference to the relevant case law regarding insurmountable obstacles it was not clear from his determination on what basis that he found there were no insurmountable obstacles and in respect of Article 8 a proportionality exercise did not appear to have been undertaken as set out in the test in *Razgar [2004] UKHL 27*. Finally Judge Chohan found that if anything the determination lacked adequate reasoning and considered that there were arguable errors of law and that all grounds could be argued.
5. By letter dated 31st March 2014 the Secretary of State responded to the Grounds of Appeal under Rule 24 and submitted that having considered recent jurisprudence the Judge of the First-tier Tribunal had made findings on insurmountable obstacles which were open to him on the evidence before him at the hearing and at the time of

hearing and that the Grounds of Appeal were merely an attempt to reargue the appeal.

6. On 14th April 2014 this matter came before me to determine whether or not there had been a material error of law. I acknowledged in finding that there was an error of law that the First-tier Tribunal Judge had not addressed paragraph 276ADE of the Immigration Rules nor had he addressed the situation of the Appellant's personal and private life only that of her partnership with Mr Scott. I had noted that it was the contention of the Appellant that she did not have ties now with Jamaica and that whether she did or did not was an issue that needed to be addressed in the determination. I acknowledged that the case had to be looked at on its own facts and in its entirety and that approach had not been adopted by the Immigration Judge nor had the judge given full and proper consideration to the position in which Mr Scott found himself and as to whether or not there were insurmountable obstacles that would prevent the Appellant and Mr Scott relocating to Jamaica.
7. I found that there was a material error of law then gave directions. Those directions recorded that the factual history in this matter was agreed. It is on that basis that the appeal comes back before me to be dealt with by way of submissions. Mr Corban continues to appear on behalf of the Appellant. The Secretary of State appears by her Home Office Presenting Officer Mr Shilliday.
8. The Sponsor is unwell and unable to attend. However it is agreed that the matter proceed by way of submissions and consequently the appeal can proceed in his absence. Mr Corban advises that there are no additional documents to be lodged.

Submissions/Discussions

9. Mr Corban starts by taking me to Appendix FM of the Immigration Rules Section EX1(b) namely that this paragraph applies if:

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 ..., and there are insurmountable obstacles to family life with that partner continuing outside the UK.
10. Mr Corban submits that that applies in this instant case and that the Secretary of State has conceded that the Appellant and Mr Scott have lived together for some two years and that the Sponsor is currently aged 59, a UK citizen who will be 60 in December and that he would be likely to face the difficulty of establishing himself if he had to move with the Appellant to Jamaica. He points out that Mr Scott is a self-employed panel beater with his own property which is subject to mortgage and that if he moved he would have to sever his family ties with relatives in the UK.
11. Mr Corban submits that the Appellant meets the requirements to be met by an applicant for leave to remain on the grounds of private life referring me to the established statutory authority to be found in paragraph 276ADE of the Immigration Rules. He points out that the Appellant has been in the UK for fifteen years contending that that is only five years less than the period of continuous residence

required to satisfy paragraph 276ADE. He states that the presence of having relatives in the country to where an Appellant would be returned is not fatal to an application and submits that the Appellant has no longer ties with her home country submitting that this was a finding of fact that the First-tier Tribunal Judge made.

12. Mr Corban submits that the parties' circumstances are exceptional relying on the fact that they have resided together/cohabited for two years, the Appellant's age when she arrived in the UK (which I calculate to be 23) and the nature of her family ties to the UK. He reminds me of the test to be found under *Razgar* and submits that it would be proportionate, and not adverse to the interests of immigration control, to allow this appeal.
13. He further seeks to rely on the authority of *Edgehill [2014] EWCA Civ 402*. And that the principles to be adopted under *Razgar* should be looked at independently of those to be found in paragraph 276ADE of the Immigration Rules. He submits that the Appellant applied prior to the new Rules coming into force and that to use Mr Corban's words the Appellant has "clocked up" fourteen years' continuous residence. He acknowledges the public interest factor and that the Appellant was an overstayer but points out that the Appellant has no criminal record and that the public interest factor is outweighed. He submits that the appeal should be allowed.
14. Mr Shilliday submits that *Edgehill* is of no applicability in this case and that whilst the Appellant's application was before the new Rules application was thereafter made to judicially review the decision. He submits that the judicial review (which is not in the file before me) materially changed the factual matrix in this case and therefore the case is totally distinguishable from the findings in the Court of Appeal in *Edgehill* and he refers me to the new Immigration Rules.
15. He further submits that Mr Corban is wrong to seek to rely on the Appellant having had fourteen years' continuous residence under the old Rules. He takes me to paragraph 1 of the determination of Judge Oliver pointing out that in November 2011 the Appellant was served with notice IS151A and therefore "the clock stopped" in November 2011 and that the Appellant could never accrue fourteen years' continuous residence under the old Rules.
16. He takes me to the authorities under Article 8 starting with *MF (Article 8 - new Rules) Nigeria [2012] UKUT 00393* as then expanded and applied in *Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)*. He correctly states the law that the term "insurmountable obstacles" in provisions such as Section EX1 are not obstacles which are impossible to surmount but concern the practical possibility of relocation and that in the absence of such insurmountable obstacles it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh. He refers me to the factual detail of the authority of *R (On the Application of) Kussin [2009] EWHC 358 (Admin)* where Mr Justice Blake made findings on very similar facts and that the authority of *Chikwamba v the Secretary of State for the Home Department [2008] UKHL 40* was quite specific and would not apply in this instant case. He emphasises that Mr Scott would not have to leave everything

behind and that whilst Mr Corban had already indicated that “for Mr Scott to leave would cause some difficulties” the Secretary of State admits that it would cause a degree of hardship but points out that that degree of hardship shown as long ago as 2009 in *Kussin* would be insufficient to interfere with the Secretary of State’s right to maintain immigration control and that the degree of hardship cannot possibly be such as to show that the case would succeed in this instant case. The law is, as Mr Shilliday reminds me, set out albeit that it has subsequently been expanded by further case law, at paragraph 24(b) of *Gulshan* namely:

“After applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: Nagre;”

17. Mr Shilliday points out that this is an Appellant who contends that she has long resided in the UK and had a lengthy relationship with her Sponsor but that both these aspects are aspects that are considered under the Rules and that if the Appellant fails to satisfy the test under the Rules there is nothing else left upon which she can appeal. He points out further that even if he is wrong there are no compelling circumstances in this instant case and that there is no suggestion of any health problem either for the Appellant or the Sponsor. As far as private life is concerned the Court of Appeal has made it abundantly clear that there is no concept of a “near miss” and he also refers me to paragraph 117B of the 2014 Immigration Act pointing out that that is binding upon me and that parliament has decided unless there are exceptional circumstances outside the Rules, (which he submits there are not in this instant case,) that the appeal cannot succeed. He asked me to dismiss the appeal.
18. Mr Corban asked me to note the difference between ISA151A and B pointing out that A is only a warning and that it is the service of ISA151B that requires a party to leave. Further he contends that it is open for me to find that there are grounds for granting leave to remain outside the Rules and that therefore it would be appropriate to go on to consider whether there are compelling circumstances not sufficiently recognised under them.
19. Mr Shilliday points out when looking at ISA151 that Part 1 is not appealable, that Part 2 is appealable out-of-country and that ISA151B is appealable in-country and nobody is certain exactly what Mrs Edgehill received and therefore effectively to look at that argument under *Edgehill* is not relevant. He reminds me that the point is that the Appellant can never satisfy the fourteen year Rule and that a 151 notice stops the clock anyway and as he has submitted previously the Appellant cannot meet that part of the Rules.

Findings

20. There have been very detailed arguments and submissions in this matter. Whilst I will hereinafter address the position under *Edgehill* it is further appropriate to note that it is only at this hearing that issues relating to that authority have been raised. It

was not raised before me when the issue relating to an error of law was raised albeit that the authority had been published prior to that date.

21. It is important to give this determination structure. Prior to July 2012 the Immigration Rules contained provisions relating to human rights applications. In December 2012 the Rules were changed by the introduction of paragraph A277C. In *Edgehill* the Tribunal had applied the provisions of the post-July 2012 Rules in ignorance of the Transitional Provisions in a case in which the pre-July 2012 Rules contained a specific provision under which the applicant may have been able to succeed. I am satisfied that the submission made by Mr Shilliday in this matter is the correct one and that the factual matrix of this case substantially distinguishes it from *Edgehill* and that the provisions in *Edgehill* do not apply. Consequently as set out clearly in Judge Oliver's determination from the service of the notice IS151A the Appellant remained in this country unlawfully, that time had stopped and that she could never have acquired under the old Rules the fourteen years' continuous residence that was necessary to succeed under the Rules and that she certainly does not succeed under the new Rules.
22. The factual history of the First-tier Tribunal has been maintained and by that I mean that the findings set out at paragraphs 19 to 25 of Judge Oliver's determination are agreed and accepted. It is the claim pursuant to Article 8 that I am looking at afresh and reconsidering. The Appellant as set out at paragraph 26 of the First-tier Tribunal Judge's determination seeks to rely on paragraph EX1(b) of the Immigration Rules. It is true that the Appellant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen settled in the UK. The question therefore arises to whether or not there are insurmountable obstacles to family life with that partner continuing outside the UK. That issue was initially addressed at paragraph 26 of the First-tier Tribunal's determination. The First-tier Tribunal Judge considered *VW and MO (Article 8 – insurmountable obstacles) Uganda [2008] UKAIT 00021*, a decision of the then president of the Tribunal Mr Justice Hodge. That case confirmed that there was a need to a structured approach to Article 8 and subject to the need to avoid applying too high a threshold to the issue of interference and not applying a legal test of "truly exceptional" the five stage approach set out in *Razgar* remained correct. The test or criterion of "insurmountable obstacles" remained part of UK and Strasbourg jurisprudence on Article 8 and the fact that both the UK and Strasbourg's decisions sometimes formulated this test in terms of "reasonableness" or "seriousness" showed that it was not a test subject to strict definition. Mr Justice Hodge found that whichever of these formulations was used an applicant must show more than a degree of hardship. Mr Corban submits these degrees of hardship in this instant case includes the fact that the Sponsor is almost 60, a self-employed panel beater and has his own property. I find as a finding of fact that none of these factors justify insurmountable obstacles which would come within the definition. Indeed the fact that the Appellant is self-employed would, it seems to me, place him on a slightly better footing than if he were in employment in that he can set up his own business wherever he likes. I do emphasise however for the purpose of this determination that even if he had been in employment I would not have found that that created an insurmountable obstacle. The fact that he has a property subject to

mortgage and that he would have to sell that property again cannot in any way be shown to be an insurmountable obstacle. The Sponsor knows exactly where he stands with the Appellant and that she has no status to be in the UK and that if he wishes to live with her there is nothing whatsoever of a practical nature to stop him moving with her back to her country of origin. It is a free choice that he has to make.

23. Consequently if there are no insurmountable obstacles or serious difficulties in the way of family members accompanying an applicant abroad, and in this case I find that there are not, and that the Sponsor can be treated as a family member, then special reasons need to be shown for why an adverse decision is not to be considered proportionate. The submission Mr Corban makes that the Sponsor has family ties in the UK which he would have to leave does not even begin to approach the necessary threshold. Consequently I am satisfied this is an Appellant who cannot avail herself of the benefits of paragraph EX1 of the Immigration Rules.
24. The approach to private and family life addressed by Mr Shilliday in particular with regard to his reference to *MF Nigeria* is correct in law. Insurmountable obstacles provisions such as Section EX1 are not obstacles which were impossible to surmount. They concern the practical possibility of relocation. There is no practical reason other than a lack of a desire to do so which would prevent the Appellant and Sponsor relocating back to Jamaica.
25. In any consideration of an Article 8 claim the starting point is the law itself. Article 8 states:
 - (i) everyone has the right to respect for his private and family life, his home and his correspondence;
 - (ii) there should be no interference by a public body with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.
26. The general approach to Article 8 cases is that in *Nhundhu and Chiwera (01/T/H/0613)*. In those cases the Tribunal said that, in deciding claims under Article 8, there is a five stage test which must be applied in order to determine whether a breach has occurred:
 - (i) does family life, private life, home or correspondence exist within the meaning of Article 8;
 - (ii) if so, has the right to respect for this been interfered with;
 - (iii) if so, was the interference in accordance with the law;
 - (iv) if so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

(v) if so, is the interference proportionate to the pursuit of the legitimate aim?

Those were essentially the five questions endorsed by the House of Lords in *Razgar [2004] UKHL 27*.

27. It is, of course, well-established that, where the Appellant is in the UK and removal will interfere with the family life/private life he (and since *Beoku-Betts v SSHD [2008] UKHL 39* his family) already enjoy in the UK, then Article 8 can be engaged. In *Ullah and Do [2004] UKHL 26* the House of Lords accepted that Article 8 could, in principle, be relied upon if the effect was that the infringement of the Appellant's rights would occur in the country to which he was to be removed.
28. The Secretary of State has addressed Article 8 family aspects of the Respondent's position through the Rules, in particular EX1, and the private life aspect through paragraph 276ADE. I am satisfied that there are no insurmountable obstacles preventing the continuation of the family life outside the UK for all the reasons set out above. Only if there are arguably good grounds for granting leave to remain outside the Rules is it necessary for me to consider for Article 8 purposes whether there are compelling circumstances not sufficiently recognised under the Rules. That was the approach adopted by the First-tier Tribunal Judge at paragraph 15 of his determination. He found that all the Appellant's Article 8 rights had developed whilst her residence had either been temporary or unlawful and whilst return will interfere with that life she has developed with her partner it would be in accordance with the law. I endorse that approach.
29. The Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* at paragraph (31):

"Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."

30. The Court of Appeal in *MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985* at paragraph 128 went on to state:

"Nagre does not add anything to the debate save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further intermediary test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker."

31. It is necessary for the Appellant to show exceptional circumstances in order to succeed on Article 8 outside the Immigration Rules. Exceptional does not mean unusual or unique. Whilst all cases are to some extent unique those unique factors do not generally render them exceptional. Having considered all the relevant factors raised by the Appellant and weighed them against the public interest I have determined that in this instant case there are no exceptional circumstances upon which the Appellant can rely.
32. Further it is now appropriate for me to give due consideration to paragraph 117B of the Immigration Act 2014. The Appellant remained unlawfully in the UK from 14th August 2003 until served with her notice IS151A on 17th November 2011. She claims to have met Mr Scott and to have cohabited with him since 2007. Under paragraph 117B of the 2014 Act 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 UK unlawfully and under 117B(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. Both of these factors affect the current Appellant.
33. In conclusion therefore what I am faced with is that an Appellant who cannot meet the Immigration Rules, has shown no reason for all the above reasons that she should come within EX1 of the Immigration Rules and has shown no reason whatsoever to establish exceptional circumstances that would enable me to consider this case outside the Immigration Rules. For all the above reasons the appeal fails and the decision of the First-tier Tribunal is reinstated.

Decision

34. The Appellant's appeal is dismissed and the decision of the First-tier Tribunal is reinstated.
35. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed

Date **21st November 2014**

Deputy Upper Tribunal Judge D N Harris