Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44396/2014

THE IMMIGRATION ACTS

Heard at Field House
On 13 November 2015

Decision & Reasons Promulgated
On 25 November 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ZUCKER

Between

KJ
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Parkin, of UK Law Associates, Ilford
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Jamaica whose date of birth is recorded as 27 January 1973. He arrived illegally in the United Kingdom at sometime in 1999 and on 20 September 2002 was encountered and served with a Form IS151A notifying him of his liability to removal. Thereafter he was convicted of a number of offences including offences of dishonesty until on 5 March 2010 he was detained pending removal. On 3 June 2010 however, he was released but was soon committing further offences of dishonesty until on 9 November 2011 he was again detained for removal. On 13 December 2011 he applied for Judicial Review. On 24 January 2012 he was

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released from detention pending a decision on the application which was refused on the papers on 19 March 2012. Thereafter the Appellant was given 28 days to produce further submissions to support his request to remain in the United Kingdom but he did not do so.

2. On 5 September 2012 the Appellant married SW.

3. On 23 September 2014 the Secretary of State wrote to the Appellant requesting up-to-date information regarding his then current circumstances. The questions asked in that letter were directed towards any relationships which the Appellant might have formed, any children, any employment and/or any relevant medical conditions. On 12 October 2014 the Appellant's solicitors wrote to the Secretary of State in response to the letter of 23 September 2014 explaining the marriage and nature of the relationship. Importantly the letter makes reference to his wife getting panic attacks and as such he was involved in her life not only as her husband but as her carer. The letter was accompanied by medical evidence, a marriage certificate and certain other documents all dated in 2014. Paragraph 6 of the letter of 12 October 2014 reads as follows:-

> "The main reasons why our client wishes to remain in the United Kingdom at this stage, includes the fact that he is married to a British citizen, and there are insurmountable obstacles which prevents him from leaving her and returning to Jamaica. He is her carer as she has serious medical concerns. He says that he has to wake up at 5.00a.m. every morning to make sure that his wife takes her tablets, and ensure that she does not go into panic attacks. He has been recognised by the medical consultants as her carer and any attempt to leave her at this time can be detrimental to her health condition. He also arrived in the United Kingdom in October 1991, fifteen years ago and has his family members in the United Kingdom, with no life or no one else to go to in Jamaica. He has never been married to anyone else before and has no children anywhere else. He has continued to sign on at Beckett House since 2003 (fourteen years ago) to date, and confirms that he is the main carer for his home."

4. On 6 November 2014 the Secretary of State responded with a decision to remove the Appellant as an illegal entrant with his human rights claim being refused. The accompanying letter set out the convictions and explained that in the view of the Secretary of State the Appellant's presence in the United Kingdom, given the offending, was not conducive to the public good. Reference was made to Appendix FM, S-LTR 1.5.

> "S-LTR.1.1. The applicant will be refused limited leave on grounds of suitability in any of paragraphs S-LTR.1.2. to 1.7. apply….
>
> S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law."

It was noted that between 2003 and 2011 the Appellant had been convicted on ten separate occasions for various offences including driving offences, drug offences and

theft. I note that the Appellant received various disposals including fines, a suspended prison sentence, and community orders, one of which he breached. The Secretary of State therefore contended that the Appellant was a "persistent offender"

5. Further, the Secretary of State did not accept that the Appellant was, at the time of the decision, in a relationship or that there had been cohabitation in the previous two years or since the date of marriage; indeed the marriage itself was not accepted. The Secretary of State did not therefore accept that the eligibility requirements were met.

6. In the alternative the Secretary of State gave consideration to the exceptions to certain of the eligibility requirements for leave to remain as a partner and having regard to Appendix FM-EX.1(b) it was not accepted that there were insurmountable obstacles to family life continuing outside the United Kingdom. The Secretary of State focused on the medical conditions set out in the supporting evidence but was of the view that there was sufficient availability of the medication required by the Appellant's wife in Jamaica.

7. As to private life, regard was had to paragraph 276ADE as to which the Secretary of State again contended that the suitability requirements were not met. Though the Appellant had claimed to be in employment he had worked when he had no permission to do so but the fact that he had demonstrated an ability to work would mean, in the contention of the Secretary of State, that he could employ those skills in Jamaica. The Appellant was noted to have said that his father was ill and in the United Kingdom but there was said to be no sufficient evidence concerning that. There was therefore, in the submission of the Secretary of State, no very significant obstacles to his integration into his home country so that the requirements of 276ADE(iii)-(vi) were not met. The letter did not go on to consider the wider application of Article 8 ECHR; it was not felt necessary to do so.

8. Not content with that decision, the Appellant appealed to the First-tier Tribunal. On 23 April 2015 his appeal was heard by Judge of the First-tier Tribunal Monson. There was a preliminary issue. The Appellant at that time was represented by Mr Amgbah. Although the appeal was listed in the float list, on arriving at the hearing centre, Mr Amgbah, made written representations for the appeal to be placed first in the list because of SW's panic attacks which, it was said, would be exacerbated by any long period of waiting. The matter was not placed before Judge Monson until the middle of the morning.

9. Though SW was present in the hearing centre she was not, in Mr Amgbah's submission, mentally or physically able to give evidence that day. Judge Monson stood the matter down in order to consider the medical evidence available to him but having come to the view that there was not sufficient evidence that SW was unfit to give evidence and with Mr Amgbah not in a position to give Judge Monson any reassurance that SW would be better able to give evidence on a future occasion the adjournment request was refused. In his Statement of Reasons, Judge Monson stated:

> "If SW regarded giving evidence in support of her husband's appeal as a form of mental torture, it was better for her to get it over and done with today, rather

> than to seek to put if off. It was not going to get any easier for her, and in any event it was not shown by appropriate medical evidence that she was not unfit to give evidence."

10. The matter proceeded without SW giving evidence. In making findings Judge Monson noted various inconsistencies in the evidence, making reference in particular at paragraph 30 to the letter of Dr Braithwaite of 10 February 2015 being silent as to panic attacks or mental health problems. Judge Monson clearly gave significant weight to the failure of SW to give evidence. He expressed himself as follows:-

> "… her palpable reluctance to give evidence on his behalf, even though she was in attendance, is highly damaging to the credibility of the claim that the marriage between them is genuine and subsisting."

11. Recognising that the burden of proof was upon the Appellant to prove his case to the civil standard, Judge Monson dismissed the appeal on all grounds having regard to Appendix FM, Rule 276ADE and on the wider application of Article 8 ECHR, including consideration of those matters set out in Section 117B of the 2002 Act.

12. On or about 19 May 2015 the Appellant made application for permission to appeal to the Upper Tribunal. It was submitted that Judge Monson erred in four respects

    1) Failing to grant an adjournment.

    2) Focusing on the past relationship of the Appellant when the proper question, it was submitted, was whether the marriage was genuine and subsisting at the date of the application, decision and hearing.

    3) Misinterpreting the information given in the medical report leading to unsustainable findings.

    4) Failing to consider the insurmountable obstacles relevant to the appeal having found that the marriage was not genuine or subsisting.

13. On 20 July 2015 Judge of the First-tier Tribunal M Davis refused the application.

14. On 4 August 2015 the Appellant made a renewed application to the Upper Tribunal on the same grounds and on 4 September 2015 Upper Tribunal Judge Gill granted permission. In doing so she stated her reasons as follows:

> "I am not entirely sure that the file contains the medical evidence that was before Judge Monson on the hearing day. I have therefore relied upon what the grounds state about the medical evidence that was before him.
>
> Given that I am only considering whether to grant permission and given what the grounds state about the medical evidence, it is at least arguable that the judge should have adjourned the hearing and that his refusal to do so arguably means that the Appellant has been deprived of the opportunity of having his wife give oral evidence. Again, relying on what the grounds state about the medical evidence, it is arguable that it was unrealistic for the judge to expect to see medical evidence to the effect that she was unfit to give evidence on the particular day.

> The parties will be expected to state clearly at the hearing precisely what medical evidence was before the judge. In addition, the Appellant should note that, whilst I have considered that the threshold of arguability has (just about) been reached, it does not follow that the Upper Tribunal will conclude that the refusal of the adjournment request did lead to unfairness. In this respect, the Appellant will be well advised to ensure that he produces medical evidence confirming in clear terms the medical condition of the Appellant's wife at the date of the hearing before the judge. The medical evidence should also confirm that she did suffer from a panic attack on the hearing day (23 April 2015) and received treatment for it, how the panic attack affected her and whether the doctor is of the view that she was fit to give evidence on that day; alternatively, that she was prone to suffer from sudden panic attacks at the relevant time (on or about 23 April 2015), how such panic attacks affected her at the relevant time (on or about 23 April 2015); and in either case, whether, if there is another hearing, she would be fit to give evidence.
>
> The question whether any such evidence is admissible will be a matter for the judge who hears this appeal.
>
> The remaining grounds may also be argued."

Thus the matter comes before me.

Was there an error of law?

15. Quite properly given what Upper Tribunal Judge Gill had said in granting permission, Ms Everett did not object to Mr Parkin placing before me a letter written by Dr Farley, dated 6 November 2015. Dr Farley is a general practitioner involved in SW's care. The letter states that SW was diagnosed with post-traumatic stress disorder in 2012 consequent upon domestic violence and an attempted sexual assault in 2009. Her condition worsened after suffering a cardiac arrest due to myocardial infarction in 2014. The medical records going back to 2013 make reference to panic attacks, often precipitated by leaving the house and so she avoids going out because of these attacks. The records refer to a panic attack in April 2015 at the time of the relevant hearing and in consequence the Appellant was referred to psychology service for further support. SW is waiting for that further treatment. In the opinion of Dr Farley SW may find giving evidence difficult because of her anxiety and panic attacks and invites the reader to take all of those matters into consideration.

16. The grounds of appeal make the point that the judge erred in stating that the medical evidence had not made reference to panic attacks. Reference was made to the refusal letter at paragraph 35 which in turn made reference to the medical letter of 10 October 2014, submitted in support of the Appellant's application to remain in the United Kingdom, with reference made to depression and psychosis.

17. I have seen the letter of 10 October 2014 which simply summarises SW's medical history. There is however reference to some clearly significant events including a serious sexual assault, history of domestic violence and consequent post-traumatic stress disorder. Whilst the letter of 10 October 2014 does not expressly state that SW was suffering from panic attacks or mental health problems, post-traumatic stress disorder is clearly a mental health problem and may or may not include panic

attacks. There was at least corroborative evidence before the judge of that which was being asserted by the Appellant's representative.

18. Although the Appellant relies on grounds other than the failure to grant the adjournment, I indicated to the parties that my preliminary view was that there had been unfairness in the First-tier Tribunal by the refusal of the adjournment:

> "…the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the Appellant court, it was unfair": Terluck v Berezovsky [2010] EWCA Civ 1345.

The evidence of SW was highly relevant. The importance of it is demonstrated by the adverse inferences drawn by Judge Monson to the absence of it.

19. Fairly and wisely, though Ms Everett did not concede the error of law, she did not press, without more, for the decision to stand.

20. I agree with the Appellant's submission, made in the grounds, that the representative could not have anticipated, on that very day, at the time of the hearing, SW, would suffer from a panic attack. Still further the opinion expressed by Judge Monson that it would be better for SW "to get matters over and done with on that day rather than seek to put it off", was not a matter upon which Judge Monson might reasonably have been expected to express an opinion, absent expert evidence. He could not know whether the situation would get easier for her or not. At the very least, given that the test is one of fairness, Judge Monson should have granted the Appellant the adjournment asked for, with a direction for the type of evidence suggested by Upper Tribunal Judge Gill, in order that the First-tier Tribunal might decide on the next occasion how to treat the evidence of SW were she not able to attend or, if she were able to attend, whether, and to what extent she should be treated as a vulnerable witness.

21. As it was SW attended before me. At the outset, I asked her how she was feeling and whether she felt able to give evidence. She was clearly nervous but nevertheless said that were matters to proceed, she did feel able to give evidence. Clearly that went to the materiality of any error in not granting the adjournment.

22. Though I only gave an indication that I was of the view that the judge had erred in law, for the reasons that I have already given, I do find that the judge unintentionally acted unfairly in not granting an adjournment and that such had a material affect upon the outcome of the hearing in the First-tier Tribunal.

23. The remaining grounds go to the issue credibility and since I have found a material error of law I set aside the decision of the First-tier Tribunal, which I am able to remake.

The remaking of the decision

24. There was some discussion as to whether the Appellant needed to give evidence afresh, or at least make himself available for further cross-examination, but Ms

Everett was content to note that there was a record of the evidence given by him in the Statement of Reasons of Judge Monson so that in the circumstances it would be necessary only for SW to give evidence, though were some fresh matter to arise in the course of the questions put to her, Ms Everett would invite the Tribunal to have the Appellant recalled. Further the parties were content, notwithstanding the fact that this was KJ's appeal, for KJ to leave the hearing room whilst SW's evidence was given. Given that KJ was at all material times represented in the hearing room, I was content for that procedure to be adopted.

25. KJ's evidence is set out in his witness statement as recorded at paragraphs 17-24 of the decision of Judge Monson as set out below:

> "17. Mr Amgbah called the Appellant as a witness, and he adopted as his evidence in chief his witness statement in the Appellant's bundle. It was not true that he entered the United Kingdom illegally. On arrival at Heathrow airport, he was given a six month holiday visa. Unfortunately he lost his passport and he had reported the loss of his passport to the UK police sometime in 2000.
>
> 18. Before coming to the United Kingdom, he did not have a criminal record. He was living with a girlfriend in Jamaica, and worked for Sandals Resort as a table server. It was a good job. His reason for coming to the United Kingdom was to see his father, because he had not seen him for more than ten years. He did not go back after his visit, because after he came here his mother called him to say that his girlfriend had begun to see a corrupt police officer so if he returned, he might not be safe so he decided to stay a little bit, and to return to Jamaica only when he felt [safe] to do so.
>
> 19. He had met his future wife sometime in 2008 at a party in Brixton. They had begun a serious relationship in June 2010 and had married on 5 September 2012. He had not been involved in any criminal offences since his marriage. He had been gainfully employed with Vinchi Construction in Battersea as a fire marshall/traffic marshall. He had provided details of this employment to the Home Office, to whom he had been reporting since 2002. He had passed his exams for crane work, and he was looking forward to becoming a safety officer. Previously he worked as a construction worker, and he had started working with Vinchi Construction as a fire and traffic marshall in February 2014. It was through this employment that he was able to maintain himself and his wife.
>
> 20. His wife is a British national, who had been born on 21 October 1965. Her parents and siblings all lived in the United Kingdom. She did not have a British passport, as she had never travelled out of the United Kingdom and so she had not needed one. He could confirm that she was a British citizen by birth…
>
> 23. In cross-examination, Ms Savage asked the Appellant why there were only documents from 2014 evidencing co-habitation, when he claimed that they had started living together in 2008, and been living together for four years before they got married. He said that the Home Office had always known where he was, as he had been reporting since the year 2000. He and his spouse had always lived at the same address, namely the [-] Road address in London [-], in respect of which there is a tenancy agreement in the

name of [SW] in the Appellant's bundle. The tenancy agreement with Camden Council is dated 1 October 2007.

24. The Appellant was asked why the council tax bill rendered on 17 March 2014 to [SW] credited her with a single person's discount. The Appellant answered that there was no point telling the council about him as he had "no stay" but he said the council knew now that he was sharing the occupancy of the flat with [SW]."

26. I set out the evidence of the Appellant because in remaking the decision I remind myself that I have to have regard to the totality of the evidence recognising that it is still for the Appellant to prove his case applying the civil standard.

27. SW adopted her witness statement of 20 April 2015. Her evidence follows. She was born in the United Kingdom of British parents and produced a birth certificate. She does not have a passport because she suffers from panic attacks and cannot fly. She has never left the United Kingdom and therefore has never needed a passport. Indeed she has never applied for one. She met the Appellant at a party in Brixton in 2008. Sometime in 2010 their relationship began and they started living together in 2011. Since they have lived together, it has always been at the same address on [-] Road. They married on 5 September 2012 and she confirms that the relationship is genuine and subsisting. It would not be possible for her to go to Jamaica with her husband given her medical conditions and in addition her children, parents and siblings all live in the United Kingdom and she would not wish to be separated from them. She is concerned that she would not be able to access medical treatment in Jamaica. She does not want the Appellant to be returned to Jamaica. Without him she does not know how she would cope; he has provided for the family financially. Since meeting the Appellant her life has been more stable.

28. SW was cross-examined and taken to the letter of 12 December 2014 from the Joint, Head and Neck Clinic written to SW's general practitioner. The letter is dated 26 November 2014 (a second page was missing). That letter whilst making reference to SW's medical condition states, amongst other things:

> "She lives alone and is independent."

29. SW said that she did not know how that appeared in the letter since she had never been asked about it. She said that she and the Appellant started living together in 2010 and it was then, when the Appellant "moved in", that they started a proper relationship.

30. Asked why there were no documents prior to 2014, she said that given his status the Appellant's name wasn't on anything, including the rent book. So far as obtaining a discount for being single with respect to council tax, she said that that was the, "the last thing on my mind." She confirmed that her eldest child, 29 years of age, knew the Appellant. I was told that they had met a couple of times though the daughter was not at their wedding as SW and her daughter were not talking at that time. SW did say that it had occurred to her and the Appellant that her mother might give evidence but she had just undergone a mastectomy. At that point SW broke down in

tears but after being reassured, continued to give evidence, telling me that her mother had made a good recovery and was now out of hospital.

31. When asked if she and the Appellant had any friends in common, she said that they would hardly go out but she did say that it had not occurred to her to think of asking any friends to give evidence.

32. Turning to how life would be in Jamaica, SW said that it was the Appellant who made sure that she took her medication. She said that she was sometimes agoraphobic. She did not know his immigration status when first they met but she said she managed to work it out because he "kept going missing on a Thursday."

33. So far as the lack of documents prior to 2014 were concerned, SW explained that after she had had her heart attack, the Appellant telephoned the council and said that, "it was fair to say that prior to that he had not been open about living at the address". There was no re-examination.

34. It was common ground that the requirements for leave to remain as a partner required consideration of the suitability requirements because the Appellant had overstayed the period of more than 28 days. Mr Parkin sought to persuade me that the suitability requirement was discretionary rather than mandatory and that the record of offending was not serious. There had not been any immediate custodial sentence and the offending was not of a level that would trigger refusal on grounds of general suitability. If he were wrong on that point then, recognising that the Appellant would not then be entitled to succeed under the in immigration rules, Mr Parkin invited me to look to the wider application of Article 8 ECHR and because, in Mr Parkin's submission, the Appellant only just fell foul of the suitability requirements, that was an important factor which ought to be borne in considering the issue of proportionality. I was invited also to have regard to the age of the offences and to the fact that the Appellant was an active carer for SW, a British citizen.

35. As to credibility, Mr Parkin invited me to find that the evidence between the Appellant and SW had been consistent and to note that whereas Judge Monson had found that it had not been credibly explained why SW raised the topic of domestic violence with her general practitioner in August 2013, that was not a matter which was any longer pursued; there was no cross-examination about it. Accordingly I was invited to find that the domestic violence was at the hands of an ex-partner, as contended for by SW and not the Appellant. Ms Everett confirmed that that issue was no longer live.

36. Mr Parkin then addressed each of the remaining reasons given by Judge Monson for dismissing the appeal. He submitted that there was an error in finding that there was no history of panic attacks or mental health problems and, in any event, relying on the guidance in the case of E v Secretary of State for the Home Department: R v Secretary of State for the Home Department [2004] EWCA Civ 49, there was now evidence before the Upper Tribunal which ought to be taken into account.

37. Further or in the alternative Mr Parkin relied on Appendix FM-EX1(b) to the Immigration Rules which provides that there is an exception to certain eligibility requirements for leave to remain as a partner which would apply if:

> "The applicant has a genuine and subsisting relationship with a partner who is in the United Kingdom and is a British citizen, settled in the United Kingdom or in the United Kingdom with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the United Kingdom."

This is defined in EX.2 to mean "very significant difficulties would be faced by the applicant or their partner in continuing their family life together outside the United Kingdom and which could not be overcome or would entail very serious hardship for the applicant or their partner".

38. Mr Parkin submitted that the evidence of SW had not been challenged with respect to her ability to fly or travel or her agoraphobia and in those circumstances he submitted that the Secretary of State had no answer to the contention that there were insurmountable obstacles. Finally it was his submission that the Appellant was entitle to succeed, in the alternative, having regard to the wider application of Article 8 ECHR.

39. For the Secretary of State, Ms Everett submitted that the suitability requirements had not been met and whilst it was correct to say that the evidence of SW had not been challenged with regard to her ability to fly and the like, the medical evidence did not say that she could not do so. The burden, she submitted, was on the Appellant and the evidence was lacking. It would be open to the Appellant to make an entry clearance application. Little weight should be given to the relationship given the precarious nature of it when formed. It was further submitted that there was no suggestion that SW would not receive support in the United Kingdom during any absence of the Appellant while he sought to make regular his status by making application from abroad.

40. Mr Parkin responded simply to make the point that the guidance in the case of Bossade (SS.117-A-D- Inter Relationship with Rules) [2015] UK UT00415 that little weight should be given to the precarious nature of the relationship, when looking to the public interest, if the Appellant were entitled to succeed under the rule.

Findings

41. Whether the Appellant succeeds under Appendix FM is dependant upon my finding with respect to his presence being conducive to the public good or otherwise. If the Appellant fails to meet the suitability requirement then EX1 also falls away given the guidance in Sabir (Appendix FM –EX.1 not Freestanding) [2014] UK UT00063 (IAC).

42. No point was taken on the construction of S-LTR.1.5. The agreed question for me was whether the Appellant was a persistent offender. It is important to note that the rule is written in the present tense and so I am concerned with the situation as it now is. The matters relied upon by the Secretary of State are as follows:

22 May 2003 - driving whilst disqualified and driving whilst uninsured – 28 days imprisonment with licence endorsed.

20 June 2004 - driving whilst disqualified, driving whilst uninsured and failing to surrender to custody – sentence to community punishment order of 40 hours, disqualified from driving for six months and licence endorsed with fine £50.

25 September 2004 - driving whilst disqualified, driving whilst uninsured sentenced to tree month curfew order, disqualified from driving three months and licence endorsed.

7 September 2015 - convicted of possession of cannabis, driving otherwise in and in accordance with the licence and driving whilst uninsured – fined £150 with £55 costs, licence endorsed and 12 month conditional discharge.

11 April 2008 - caution for possession of cannabis.

5 September 2008 - conviction of possession of a controlled article – suspended prison sentence and twelve weeks supervision order with residence requirement.

15 January 2009 - conviction of breach of community order with the order revoked.

2 March 2010 - theft and failure to comply with community requirement. Imprisonment two weeks and ten weeks to run consecutively.

23 April 2011 - conviction for theft – sentenced to community order and supervision requirement with unpaid work requirement of 100 hours.

25 April 2011 - conviction of theft and failure to surrender to custody sentenced to a community order and supervision requirement with unpaid work requirement of 100 hours.

11 August 2011 - conviction of theft sentenced to supervision requirement, community order and costs of £100.

43. I am assisted in the proper approach that I should take by the guidance in Farquharson (Removal – Proof of Conduct) [2013] UK UT00146 (IAC). The guidance in that case was as follows:

> "1) Where the Respondent relies on the allegations of conduct in proceedings for removal, the same principles apply as to proof of conduct and the assessment of risk to the public, as in deportation cases: Bah [2012] UK UT196(IAC) applicable.
>
> 2) A criminal charge that has not resulted in a conviction is not a criminal record; but the act that led to the charge may be established as conduct…"

44. I would observe however that this is not a deportation case and so the first point in Farquarson is to be read together with the guidance in Clarke ("Section 117C – limited to deportation") [2015] UKUT 00628 (IAC)

45. I should add that in interpreting the suitability of requirement I am mindful of the guidance in Mahad (Ethiopia) v Entry Clearance Officer [2009] UK SC16 at

paragraph 10 of that judgment in which Lord Brown who gave the lead judgment placed reliance on Lord Hoffman's analysis in Odeola v Secretary of State for the Home Department [2009] UK SC25 that the construction of an immigration rule relies upon the language of the rule construed against the relevant background and concludes that: "The rules are not be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used."

46. In short the Appellant was someone who broke the law over a prolonged period but as I have observed the rule is framed in the present tense. There is no doubt that the Appellant *was* a persistent offender but the question that I have to resolve is whether he *is*. At the date of decision, 6 November 2014, the Appellant had not committed any offence for going on three years. It is now over four years. Using the ordinary language of the rule, the Appellant was a persistent offender but in my judgment it cannot be said any longer that he is. Given that the suitability requirement relied upon by the Secretary of State falls away the question is whether the Appellant is entitled to succeed having regard to EX1.

47. In this case it was common ground that if the Appellant were to succeed under the immigration rules he would have to demonstrate a genuine and subsisting relationship with SW *and* that there were insurmountable obstacles in family life with her continuing outside the United Kingdom.

48. Having heard the evidence of SW I am satisfied that there is a genuine and subsisting relationship. SW addressed the various concerns of the Secretary of State and indeed Judge Monson. She explained why no documentation pre-dated 2014 and I accept that explanation. The documentation is consistent with SW having suffered a major heart attack in 2014. I accept that at that point that the Appellant needed to "sort things out" and the more so since he was now married.

49. Despite the Reasons for Refusal letter, Ms Everett quite rightly did not purse the challenge to the validity of the marriage and I observe, in addition to the satisfactory explanations given by SW in the course of cross-examination to the questions put, that she attended at the Appellant's appeal notwithstanding her ill health in the First-tier Tribunal, and on the appeal hearing to the Upper Tribunal. That is as relevant a factor as it would have been had she not attended. Finally I take into account the corroborative evidence of Dr Braithwaite who in his letter of 10 February 2015, speaks of the importance of the role the Appellant plays in the life of his wife. I am satisfied therefore that on balance of probabilities the relationship is genuine and subsisting.

50. The issue then is whether there are insurmountable obstacles. That SW cannot fly and is agoraphobic was not challenged. Despite Ms Everett's submission that there was no supporting evidence, Dr Farley in her letter of 6 November 2015 makes reference to documented panic attacks going back to 2013, often precipitated by leaving the house. The letter says that SW, in these circumstances often avoids leaving the house. That is at least corroborative of the contention that SW cannot fly. Taking into account what I was told by SW and all the medical evidence, I find as a

fact that she is not someone who reasonably could be expected to make the journey to Jamaica.

51. I remind myself that I am not making this decision as a first instance judge but am remaking the decision of Judge Monson. He set out his reasons for dismissing the appeal at paragraphs 27 to 32. The Appellant has met each and every reason given by Judge Monson for dismissing the appeal.

52. I have found that the difficulties that would face this couple are established and are sufficient to meet EX.1 but I must also consider not only if there would be “serious hardship” but whether it would be “very serious hardship”.

53. I accept, given the medical conditions from which she suffers and her current state of health that it would be wholly unreasonable to expect the Appellant to leave the United Kingdom in order to make application to return. The impact upon SW is likely to be very serious. The medical evidence points to it and whilst Ms Everett invited me to accept that there would be support available during the Appellant’s uncertain period of absence she was not able to point to what support would be available, whereas the medical evidence pointed to the current strain on resources and the deleterious effect that would have on SW absent her husband who I accept has taken on the role of carer as well as husband. The effect upon SW would in my judgment be wholly disproportionate to what the Secretary of State seeks to achieve. In those circumstances it is not necessary for me to go to the wider application of Article 8 because I find that the rule satisfactorily deals with the issues which arise.

54. A word of caution to the Appellant, the commission of a further offence might be said, once again, to render him a persistent offender!

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and is set aside. The decision is remade such that the appeal is allowed under the Immigration Rules.

Signed **Date**

Deputy Upper Tribunal Judge Zucker