



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/23220/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 17 November 2015 and 21 January 2016

Decision & Reasons Promulgated  
On 3 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS CATHERINE ELIZABETH NICHOLSON  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms S Whitwell (17.11.15) and Mr N. Bramble (21.01.16), Specialist Appeals Team

For the Respondent: Mr R Jesurum, Counsel instructed by Leslie and Co, Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Quinn sitting at Richmond Magistrates' Court on 18 May 2015) whereby the First-tier Tribunal allowed under the Rules and under Article 8 ECHR the claimant's appeal against the decision by the Secretary of State to remove her as an overstayer. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

## **The Reasons for Granting Permission to Appeal**

2. On 14 August 2015 First-tier Tribunal Judge Parkes granted the Secretary of State permission to appeal for the following reasons:
  2. The Appellant's application for LTR under article 8 was refused. The appeal was allowed on the basis of the Appellant's relationship and that there were insurmountable obstacles to that continuing in Jamaica.
  3. The grounds argue that the Judge erred in the assessment of article 8 by reference to Agyarko and the evidence of insurmountable obstacles was limited. The fact that the Appellant's partner was a British national and had not ties to Jamaica (the grounds erroneously state Ghana) and might find relocation difficult did not amount to insurmountable obstacles.
  4. A poor immigration history counts heavily against an Appellant and any life established whilst in the UK illegally inevitably attracts little weight and the decision of a British national to enter a relationship with such a person also lessens the complaints such a person might have about the enforcement of immigration control. One might add that there was no analysis of how long there had been a relationship akin to marriage or any analysis of the maintenance requirements.

## **The Factual Background**

3. The claimant is a national of Jamaica, whose date of birth is 5 May 1957. She arrived in the UK on 12 October 1998 and was granted leave to enter as a visitor until 12 May 1999. She remained in the UK after her leave as a visitor expired, and did not seek to regularise her status until 16 April 2011 when she applied for leave to remain on medical grounds under Article 3 ECHR, and family and private life grounds under Article 8 ECHR. In a letter dated 25 May 2011 the Secretary of State gave her reasons for refusing the application. The case had been considered in the light inter alia of the House of Lords decision in Chikwamba v SSHD [2008] UKHL 40. That case addressed the issue of the lawfulness of the Secretary of State's policy that people relying on Article 8 should leave the UK in order to make an entry clearance application. It was not accepted that the claimant's circumstances were such that it was unlawful to require her to return to Jamaica. She claimed to have been in a relationship with her partner since 2005, but had only submitted documents showing she had lived with her partner since 2011 and a letter from Barclays Bank to show she had held a joint account with her claimed partner for four years. Thus although she might have family life with her partner, it was short-lived and therefore she could return to Jamaica in order to return through the correct channels if she wished to do so. Visa processing times in Jamaica were a maximum of 120 days, during which time 99% of all applications submitted were concluded. It would be reasonable to expect the claimant to return overseas and any temporary interference with her claimed family life while she sought entry clearance was proportionate. The claimant had not been granted any further leave to enter or remain in the United Kingdom and had continued to live and work here when she did not have permission to do so. The claimant was fully aware since the expiry of her visa that she had no valid leave to remain. She claimed she did not return to Jamaica because

she was advised against travel after having a medical check up. But she could provide no explanation as to why she did not inform the UK Border agency of the change in her circumstances before the expiry of her leave to enter as a visitor. This cast serious doubt upon the credibility of her application. In the light of her poor immigration history and blatant disregard for the immigration regulations, the proposed interference with her Article 8 rights was proportionate.

4. The claimant was not given a right of appeal, as she did not have extant leave when she made her application. On 11 July 2011 her solicitors asked for her application to be reconsidered. On 8 April 2014 the Home Office asked her to provide further information, and issued her with a One-Stop Warning under Section 120 of the Nationality, Immigration and Asylum Act 2002.
5. Her solicitors responded on 29 April 2014, enclosing a number of documents. They included a death certificate for the claimant's former partner, Mr Jaldo, who had died on 4 October 2011. In the Statement of Additional Grounds, the solicitors said the claimant was now in a relationship with Mr Paul Fraser, whose date of birth was 9 February 1958, and who was a British citizen by birth. They had attended the same church for a long time but did not have much contact with each other. Following the claimant's bereavement, Mr Fraser provided much needed comfort and moral support. They had become close and started living together. They lived at the claimant's address in Tulse Hill. He worked as a bus driver, and he contributed towards the bills and council tax relating to the property. The property in Tulse Hill had been transferred to the claimant as the successor-in-title of the late Mr Jaldo.
6. On 12 May 2014 the Secretary of State gave her reasons for being satisfied that the claimant's removal would not breach her human rights. She met the suitability requirements of Appendix FM, but it was noted that she had not provided proof of payment for the extensive treatments she had received from the NHS despite having no right to remain in the UK or to access non-emergency NHS treatment.
7. She did not meet the eligibility requirements to remain in the UK as a partner. Under GEN.1.2 a partner meant the applicant's spouse; or the applicant's civil partner; or the applicant's fiancé or proposed civil partner; or a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application.
8. The claimant did not fulfil the requirement for leave to remain in the United Kingdom in line with GEN.1.2 in view of the fact that she had not shown she had lived with her claimed partner for at least two years. She admitted that they had only been cohabiting for seventeen months.
9. In regard to EX.1, as the claimant had failed to meet the eligibility criteria under Appendix FM of the Immigration Rules as a partner or parent it was not accepted that she could meet the requirements of EX.1(b). But even if she had demonstrated that she met the partner route, it was not demonstrated that there were insurmountable obstacles to family life with Mr Fraser continuing outside the UK.

10. With regard to private life, she did not satisfy the requirement of Rule 276ADE(1)(vi), which was that she had lived continuously in the UK for less than twenty years but had no ties (including social, cultural or family) with the country to which she would have to go if required to leave the UK. Subparagraph (1)(vi) did not apply, and might not be relied upon, in circumstances in which it was proposed to return a person to a third country pursuant to Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Furthermore, the claimant had provided no evidence to show that she had no ties to her home country. While she claimed to have no contact with her son who continued to live in Jamaica, the duration of her absence from Jamaica was not of sufficient length that this relationship, along with other relationships with friends and extended family in Jamaica, could not be re-established upon her return.

### **The Hearing Before, and the Decision of, the First-tier Tribunal**

11. Both parties were legally represented before the First-tier Tribunal, and the judge received oral evidence from the claimant and Mr Fraser.
12. The judge's findings of credibility and fact are set out at paragraph [29] onwards, and I reproduce them below.
  29. The Appellant had been in the UK since October 1998. However I note that little weight should be given to any private life when a person's immigration status is precarious. The Appellant only had leave to remain as a visitor for six months and thereafter she was in the UK illegally.
  30. She had left matters for thirteen years before contacting the authorities and had gone under the radar. Therefore little weight should be given to any private life established by her in any event.
  31. I noted that during the time that she had been in the UK she had been a partner of Altroy Jaldo and had an outstanding application for leave to remain as his partner made in April 2011. Unfortunately he died in October 2011.
  32. No decision had been made by the Respondent as to whether the Appellant could qualify as the partner of Mr Jaldo but it seemed to me given that she had been living with him since 2005 and it was not in dispute that he was a British citizen then it seemed to me that the Rules were satisfied. That however was not the issue in dispute in this appeal.
  33. Mrs Nicholson began a relationship with Mr Fraser in December 2012 but as I have indicated that relationship was entered into by both parties in the knowledge that Mrs Nicholson was not legally in the UK.
  34. The Appellant said that she had no ties to her native country of Jamaica. She did however have a son there although she said she had lost contact with him.
  35. I did accept that if she returned to Jamaica she would have no job and nowhere to live.

36. Whilst health care in Jamaica might not be as good as in the UK, there was no persuasive evidence before me to persuade me that Mrs Nicholson's health would deteriorate if she were returned to Jamaica.
37. Further she had relatives in the USA and she would be nearer them if she were in Jamaica and it was possible they might assist her financially.
38. Another factor weighing against the Appellant was that she had been a substantial drain on the NHS without contributing to it.
39. I accepted that Mrs Nicholson was in a genuine and subsisting relationship with Mr Fraser and that the parties would have married if they had access to their passports (which were retained by the Respondent).
40. Had they married the Respondent might have taken a different view of the Appellant's application.
41. I had to take account of Section 117B and that the maintenance of an effective immigration control was in the public interest. This was a significant hurdle to the Appellant's Article 8 claim.
42. If the Appellant were to return to Jamaica her relationship with Mr Fraser could continue. They could speak to each other on the phone and on Skype and he could visit her.
43. Looking at all the evidence in the round I did not think that the Appellant had a strong Article 8 claim.
44. However, I had to look at the Article 8 rights of other people and I therefore had to consider Mr Fraser's Article 8 rights. He was a British citizen who had been in the UK all his life and had no family in Jamaica.
45. In the UK he had an uncle, several cousins and four children. He had brothers here and an elderly mother to whom he provided care.
46. Mr Fraser had a right to family life. The case of **Beoku-Betts** established this. If Mrs Nicholson were to return to Jamaica that would disrupt family life between her and Mr Fraser.
47. Mr Fraser was a UK citizen and has a right to remain in the UK and it is not unreasonable for him to expect to remain in the UK.
48. If he were to relocate to Jamaica and follow Mrs Nicholson, he would have no job and nowhere to live. Contact with his children would be rendered difficult and contact with his mother would be reduced to telephone contact and occasional visits to the UK by him.
49. He had a home and a job in the UK and a meaningful relationship with Mrs Nicholson involved more than telephone and contact on Skype. Case law supported the finding that social and sexual contact formed an integral part of an ongoing relationship.

50. I took account of the fact that Mr Fraser is over the age of 55. He did not appear to be a wealthy man and it was difficult to see how he would be able to provide himself with accommodation in Jamaica and maintain that accommodation.
51. In considering his Article 8 rights I came to the conclusion that the Respondent's decision was disproportionate. I considered the five questions in the case of **Razgar** and came to the conclusion that the removal of Mr Fraser's partner was not proportionate to the legitimate public end sought to be achieved.
52. I went on to consider the Appellant's claim under the Immigration Rules.
53. She had made her application in April 2011 and I had to consider whether the new Rules applied to applications made before 9<sup>th</sup> July 2012.
54. I considered the cases of **Edgehill v Secretary of State for the Home Department [2014] EWCA Civ 402** and **Singh and Khalid v Secretary of State for the Home Department [2015] EWCA Civ 74**.
55. **Odelola v SSHD [2009] UKHL 25** established that changes in the Immigration Rules apply not only to applications for leave to enter or remain made on or after the date that they take effect but also to applications pending at that date unless the Statement of Changes in question contains an express indication to the contrary.
56. The implementation provision in HC 194 reads "however, if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9<sup>th</sup> July 2012 and the application has not been decided, it will be decided in accordance with the Rules in force on 8<sup>th</sup> July 2012".
57. I noted what Jackson LJ said in **Edgehill**, namely

"The Immigration Rules need to be understood not only by specialist immigration Counsel, but also by ordinary people who read the Rules and try to abide by them. I do not think that (Counsel's) interpretation of the transitional provision accords with the interpretation with which any ordinary reader would place upon them".
58. I also noted the case of **Haleemudeen v SSHD [2014] EWCA Civ 558** which was heard two weeks after the judgment was given in **Edgehill** but that the decision in **Haleemudeen** was later held to be per incuriam. I therefore thought that I could look at Mrs Nicholson's claim under the old Rules.
59. The Appellant qualified for leave under the old Rules on the basis with Mr Fraser. She had been in an existing relationship and he was a British citizen.
60. Under the new provisions (Section EX.1.(a)) the Appellant could qualify for leave if she had 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 and there are insurmountable obstacles to family life with that partner continuing outside the UK.

61. EX.2 stated that

“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”.

62. I accepted that the Appellant and Mr Fraser were in a relationship akin to marriage and that the only reason they had not gone through a marriage ceremony was because the Home Office had Mrs Nicholson’s passport. Mrs Nicholson had no real ties to Jamaica having been in the UK for over sixteen years. It was difficult to see how she would be able to restart her life if she had to go back to Jamaica. If her partner were to join her he would have no visible means of support and nowhere to live.
63. Given these factors and the ages of the parties, I thought that there were insurmountable obstacles to family life continuing with that partner outside of the UK. I therefore find that Section EX of Appendix FM is satisfied on the particular facts of this case.
64. Given the above findings and conclusions I find that the Appellant has failed to discharge the burden of proof to show that her removal would be disproportionate in respect of her Article 8 rights but it would be disproportionate in respect of Mr Fraser’s Article 8 rights and would therefore cause the UK to be in breach of its obligations under the 1950 Convention as regards to Article 8 thereof and therefore I allow the appeal.

### **The Application for Permission to Appeal**

13. The Specialist Appeals Team settled an application for permission to appeal on behalf of the Secretary of State. They submitted the judge had erred in his assessment of Article 8 and this was further supported by the findings in the case of **Agyarko and Others, R (on the application of) v Secretary of State for the Home Department** [2015] EWCA Civ 440 at paragraphs [24] and [25] in which the court said inter alia:

The mere facts that Mr Benett is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to relocate to Ghana to continue their family life there – could not constitute insurmountable obstacles to his doing so.

### **The Error of Law Hearing**

14. At the hearing to determine whether an error of law was made out, Mr Jesurum relied on the Rule 24 response prepared by his instructing solicitors. The judge had given adequate reasons for finding that there were insurmountable obstacles. **Agyarko** was distinguishable, as in this appeal there was the additional factor that the claimant’s partner would not be able to provide care for his mother from

overseas. Reliance was placed on Mukarkar v SSHD [2006] EWCA Civ 1045 where the Tribunal said at paragraph [40]:

Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is in the nature of such judgments that different Tribunals, without illegality or irrationality, may reach different conclusions on the same case ... the mere fact that one Tribunal has reached what may seem an unusually generous view of the facts in a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new.

15. In oral argument, Mr Jesurum submitted that, on a proper construction of Appendix FM, Mr Fraser was rightly treated by the judge as the claimant's partner, although they had not been cohabiting for a period of two years at the date of application. Alternatively, it was open to the judge for the reasons he gave, and on the facts as found, to hold that there were insurmountable obstacles to family life being enjoyed in Jamaica, and thus to allow the appeal outside the Rules.
16. I raised the question of Chikwamba. Mr Jesurum submitted that the claimant could not reasonably be expected to go back to Jamaica to seek entry clearance as Mr Fraser did not meet the income requirements. The evidence before the First-tier Tribunal showed that he was earning £15,000 a year, and the claimant was thus £3,600 short of the minimum income threshold requirement.
17. On behalf of the Secretary of State, Mr Whitwell relied on the Appendix FM guidance on family and private life dated November 2014:

The assessment of whether there are insurmountable obstacles is a different and more stringent assessment than whether it would be reasonable to expect the applicant's partner to join them overseas. For example, a British citizen partner who has lived in the UK all their life, has friends and family here, works here and speaks only English may not wish to uproot and relocate halfway across the world, and it may be very difficult for them to do so, but a significant degree of hardship or inconvenience does not amount to an insurmountable obstacle. ECHR Article 8 does not oblige the UK to accept the choice of a couple as to which country they would prefer to reside in.

Being separated from extended family members - such as might happen where the partner's partners and/or siblings live here - would not usually amount to an insurmountable obstacle, unless there were particular exceptional factors in the case.

A material change in quality of life for the applicant and their partner in the country of return, such as the type of accommodation they would live in, or a reduction in their income, would not usually amount to an insurmountable obstacle.

The factors which might be relevant to the consideration of whether an insurmountable obstacle exists include but are not limited to: (a) ability to lawfully enter and stay in another country; (b) cultural barriers; (c) the impact of a mental or physical disability; (d) the security situation in the country of return.



### Reasons for finding an Error of Law

18. The judge has fallen into material error as the result of failing to follow the correct methodology. As adumbrated in the Nagre line of jurisprudence, and as affirmed relatively recently by the Court of Appeal in **SS (Congo)**, the judge ought to have begun with an analysis of whether the claimant could bring herself within the Rules (correct answer, no); and, having answered the first question in the negative, asked himself whether there were compelling circumstances which meant that the claimant and her partner should nonetheless be granted Article 8 relief outside the Rules. Such an analysis would have to take into account the factors listed in Section 117B and also whether there was a reasonable alternative option available to the couple which was the claimant returning to Jamaica to seek entry clearance as the fiancée or spouse of Mr Fraser.

#### *Appendix FM*

19. Dealing with the issues in the correct order, the judge materially erred in failing to acknowledge that the claimant did not meet the eligibility requirements of Appendix FM, and therefore she could not qualify for leave to remain under Appendix FM on the ground that there were insurmountable obstacles to her carrying on family life with Mr Fraser in Jamaica. The Rules are very clear. Mr Fraser was not the claimant's partner for the purposes of Appendix FM as they had not lived together in a relationship akin to marriage for two years.
20. There was evidence that they had recently become engaged, and it was open to the judge to find that they would have got married by the date of the hearing if the claimant had been in possession of her passport. But under the Rules, a fiancé cannot make an in-country application for leave to remain. A fiancé has to apply from abroad for entry clearance to join his/her partner in the UK. Hence, when considering her Article 8 claim outside the rules, the judge needed to address the question of whether it was reasonable to expect the claimant to apply for entry clearance from Jamaica. She would be given back her passport when being removed to Jamaica, or when returning there voluntarily, and so the previous impediment to her getting married would evaporate. Alternatively, in an entry clearance application she could rely on her engagement to Mr Fraser as enabling her to meet the eligibility requirements of Appendix FM.

#### *Insurmountable obstacles outside the Rules*

21. If there were insurmountable obstacles to the claimant carrying on family life with Mr Fraser in Jamaica, this would be a powerful consideration in favour of the claimant being granted Article 8 relief outside the Rules. But it would not necessarily be determinative of the outcome. Even if there were insurmountable obstacles to family life being continued in Jamaica, the Article 8 claim might still fail if countervailing considerations of immigration control prevailed or because the couple had a reasonable alternative option of the claimant going back to Jamaica to seek entry clearance as a partner.

22. In paragraph [24] of **Agyarko** the Court affirmed that in, a wider Article 8 assessment outside the Rules, “insurmountable obstacles” was a factor to be taken into account, not an absolute requirement which had to be satisfied.
23. Mr Jesurum relies on this passage in **Agyarko** as strengthening his argument that the judge made no material error in allowing the appeal on the grounds of insurmountable obstacles. As it is not an absolute requirement which has to be satisfied outside the rules, he submits that, if it is in fact satisfied outside the rules, then *a fortiori* this should be decisive of the outcome, or at least it was reasonably open to the judge to find that it was decisive.
24. I reject this submission as it flies in the face of the parallel observation in paragraph [24] of **Agyarko**, which is that the presence of insurmountable obstacles is simply one factor to be taken into account in the wider proportionality assessment.
25. In addition, the judge’s finding of insurmountable obstacles is inadequately reasoned. As stated in the IDIs, the assessment of whether there are insurmountable obstacles is a different and more stringent assessment than whether it would be reasonable to expect the applicant’s partner to join them overseas. The judge’s earlier reasons for finding that it would not be reasonable to expect Mr Fraser to join the appellant overseas are essentially the same reasons which he later gives for finding that there are insurmountable obstacles – although his inability to care for his mother is not one of them, contrary to what is stated in the Rule 24 Response. This discloses an error of law, as the judge has failed to acknowledge that the concept of insurmountable obstacles requires a different and more stringent assessment than that which he has performed.

*Other errors in the wider proportionality assessment*

26. In a wider proportionality assessment outside the Rules, it is not necessary for the claimant to show that there are insurmountable obstacles to family life continuing in the country of return. The correct test is whether it is reasonable to expect the claimant’s partner to join them overseas. But the corollary of this question in a case such as this is whether in the alternative it is reasonable to expect the claimant to go back on her own and to make an application to return as a partner. The judge wholly failed to address this question, and so the Article 8 assessment is fatally flawed.
27. The wider proportionality assessment was also fatally flawed for two other reasons. Firstly, in finding that it was not reasonable to expect Mr Fraser to relocate to Jamaica, the judge failed to remind himself that the relationship between the claimant and Mr Fraser had been developed in the full knowledge that the claimant’s status here was unlawful, and thus Mr Fraser had no legitimate expectation of the claimant being allowed to settle here as his partner. Secondly, the judge needed to weigh in the balance considerations of immigration control before reaching the conclusion that it was not reasonable to expect Mr Fraser to relocate to Jamaica. The judge did this when looking at the matter from the claimant’s perspective, but failed to perform the required balancing exercise when addressing Mr Fraser’s right to respect for his family and private life.

28. In conclusion, the decision of the First-tier Tribunal is vitiated by a material error of law, such that it must be set aside and remade.
29. This is an appropriate case for retention by the Upper Tribunal, even though some further fact-finding may be necessary. So there will be a further hearing before me to remake the decision, with a time estimate of 1.5 hours.
30. The judge's findings of fact relating to the genesis and development of the relationship between the claimant and Mr Fraser will be preserved.
31. On the remaining issues, the claimant has permission to adduce further evidence, provided that such evidence is served in a paginated and indexed bundle on the Specialist Appeals Team and the Upper Tribunal not less than 7 days before the resumed hearing.

### **The Resumed Hearing**

32. Mr Fraser was called as a witness, and he adopted as his evidence-in-chief his witness statement dated 13 January 2016. He was now working full-time for "Integration" an employment agency based in Enfield that provided drivers to "Abellio" a bus company which engaged in rail replacement work. He was submitting documentary evidence in the form of Barclays Bank statements, available pay slips and available P60s, to show that he was now earning in excess of £18,600 a year.
33. He would face a number of obstacles if he moved to Jamaica to live with Catherine. He did not have any connection with Jamaica. Catherine would not have a job and she would not have any income. She also was not going to have any accommodation available for them. He was not going to reach pensionable age until he was 67. As unemployment was very high in Jamaica, it would be difficult for him to get a job as a foreigner. There were many younger people who could do a driving job in Jamaica. Having no income or the means of generating income was the greatest obstacle he would face if he had to go and live in Jamaica. He did not have any special working skills, including technical and IT skills. He had become a bus driver fourteen years ago and that was the only skill that he had now.
34. The Home Office might say that Catherine could return to Jamaica and they could get married there, and she could return here as his wife. But she did not have any accommodation or family there and she would be vulnerable to crime. She got blackouts in stressful circumstances or in close surroundings. She did not travel by underground tube train, because she feared that if she got a blackout the tube train could not stop between stations. For this reason she would always travel by bus however long the journey was. If she had to return to Jamaica, he would have to accompany her and stay with her. This would create problems with his financial ability to maintain her for a spousal visa.
35. In cross-examination, Mr Fraser said that Catherine had a son in Jamaica, but they were not in contact. She did not know where he was in Jamaica. The part of Jamaica

that she came from was St Catherine. He was not sure if she kept in touch with friends in Jamaica.

36. Mr Bramble asked him why she could not make an application to return here as his partner. He said she would not be able to obtain in Jamaica the medication that she was on here. Mr Bramble asked if there was any other reason. He answered they were engaged to be married.
37. In answer to questions for clarification purposes from me, Mr Fraser said that his partner was on blood thinning medication. She took two or three different drugs for this. There was no re-examination.
38. In his closing submissions on behalf of the Secretary of State, Mr Bramble submitted the appeal should be dismissed. The couple not show very significant obstacles to carrying on family life in Jamaica. She had a son there, with whom she could make contact. It was reasonable for the appellant to apply for entry clearance. Mr Fraser could accompany her to Jamaica on a holiday, and then come back here if he did not wish to stay out longer while the decision on the entry clearance application was awaited. Applying Chikwamba, there was a good reason to require the appellant to go back to seek entry clearance, due to her adverse immigration history. The factors in Section 117B required due consideration. She had been an overstayer since 1999, and she had established family life with Mr Fraser when present here unlawfully. He reminded me that the First-tier Tribunal Judge found at paragraph [38] that the claimant had been a substantial drain on the NHS without contributing to it through the payment of taxes.
39. In reply, Mr Jesurum conceded that the case for the appellant was weaker than it had been previously, as Mr Fraser's mother had recently died, and therefore the need for Mr Fraser to act as a carer for her no longer existed. Compelling circumstances were required for the Article 8 claim to succeed outside the Rules, but such circumstances must be considered cumulatively. What made the circumstances here compelling were the length of the appellant's residence (eighteen years), the fact that they were an aged couple, the appellant's medical difficulties, and the absence of family in the country of return. The fact that the Rules were not met was only the starting point, following Huang.
40. Mr Jesurum submitted that the formulation of the compelling circumstances principle in SS (Congo) at paragraph [32] was per incuriam, as it was inconsistent with the statement of the law by the House of Lords in Huang at paragraphs [16] to [18]. He accepted that this was an argument for a higher court, and that I was bound by what the Court of Appeal had said in SS (Congo).

### **Discussion and Findings on Remaking**

41. As submitted by Mr Jesurum, the Rules are "hard edged". Mr Fraser is not a partner for the purposes of Appendix FM, and so the appellant cannot avail herself of the exemption criteria contained in EX.1. But even if she could, there are not insurmountable obstacles to family life being carried on in Jamaica. I accept that the test is not whether there are literally insurmountable obstacles, but whether the

hardship which the couple would encounter would be so severe as to meet the criteria set out in EX.2. The evidence relied on does not disclose insurmountable obstacles as defined by EX.2.

42. There can be no doubt that questions 1 and 2 of the **Razgar** test should be answered in the appellant's favour with regard to the establishment of family and private life in the United Kingdom. Questions 3 and 4 of the **Razgar** test must be answered in favour of the Secretary of State, and so the crucial issue is whether the proposed interference is proportionate.
43. I find that the couple face a reasonable choice, and that it is obvious which one they should take. Option one is for them to settle as a couple in Jamaica. They will have each other for mutual support, but there will be a difficult period of adjustment for Mr Fraser, who may well struggle to find gainful employment at his age. The appellant can revive her relationship with her son, and Mr Fraser can reasonably be expected to look to his family here for financial assistance to cover their maintenance and accommodation needs until at least one of them finds some employment. Option two is far more attractive and palatable. This is the appellant going back to Jamaica to seek entry clearance. Mr Fraser can accompany her, or join her for a holiday, while the entry clearance application is pending. So his ability to show that he is earning at least £18,600 per annum will not be compromised. There is good reason to require the appellant to go back to Jamaica to regularise her status, despite the inconvenience and temporary interference of family life that this will entail. For there is strong public interest in requiring immigration offenders to regularise their status by returning to their country of origin to make the appropriate application for entry clearance. I am not persuaded that are compelling circumstances which tip the balance the other way. While the appellant is well integrated into UK society, due to her long residence here and to her fluency in English, little weight can be attached to family life which is established whilst a person's status here is unlawful.
44. In conclusion, the proposed interference strikes a fair balance between, on the one hand, the rights and interests of the appellant and Mr Fraser, and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson