



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

Appeal Number: IA/02456/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 27 May 2015**

**Decision & Reasons
Promulgated
On 9 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MRS DENISE NICHOLA HENRY-BURTON
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Eaton, Counsel instructed via Direct Access
For the Respondent: Ms A Fijiwala, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing her appeal against a decision to refuse her application for leave to remain on the grounds that removal would not place the United Kingdom in breach of its obligations under the Human Rights Act 1998, and to give directions for her removal to Jamaica under Section 10 of the Immigration and Asylum Act 1999. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the

appellant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The appellant is a national of Jamaica, whose date of birth is 10 October 1973. She entered the United Kingdom on 6 June 1999, and was granted leave to enter for one month. On 17 June 1999 she applied for leave to remain in the UK as a student, and this leave was granted until 31 October 2002. On 19 November 2002 she married her British citizen partner, and lived with him in the UK thereafter. On 22 January 2003 she applied for leave to remain as his spouse. On 29 April 2004 her application for leave to remain as a spouse was refused, and she was served with an IS151A notice informing her of a liability to removal. An IS151B notice was subsequently issued to her, giving her an in-country right of appeal. The appellant exercised this right of appeal. On 5 May 2006 her appeal came before Judge Markham David sitting at Taylor House. Both parties were legally represented. In her evidence, the appellant said she had ceased studying in October 2001. She agreed she had not informed the Home Office that she had stopped studying. She had discussed the question of her immigration status with her husband. They decided it was better for them to settle here in the UK because it was easier for her to adapt to life here than it was for her husband to adapt to life in Jamaica. She said her husband would not go with her to Jamaica to settle, but he could go for a short time. She agreed that in Jamaica she had her parents and her two sisters and her 9 year old son.
3. Her husband, Anthony John Burton, gave evidence. He said he was not ready to go with the appellant to Jamaica, and he might lose his council flat if he went even for a short period. He had had various jobs since their marriage, but his last proper job was two years ago. His rent was paid by housing benefit.
4. Judge Markham David found that the marriage was subsisting and the parties intended to live permanently with each other. He found against the appellant on the issue of proportionality. In his view, there were no circumstances in the case which could possibly be described as truly exceptional. The appellant had failed to observe the Rules:

It may be the Secretary of State was feeling particularly charitable, he might decide it was not necessary for the appellant to return to Jamaica to apply for leave to enter in accordance with the Rules. However, that is entirely a matter for the Secretary of State. It is quite clear that in this case, as in the majority of cases, the maintenance of effective policy of immigration control outweighs all over factors.
5. On 5 June 2006 the appellant sought reconsideration by way of a High Court review, and on 19 June 2006 this was refused. She became appeal rights exhausted on 29 June 2006.
6. On 3 July 2006 Greenland Lawyers LLP wrote to the FLRM Unit of UKBA in Durham on the appellant's behalf. They said they had been instructed to apply to the Secretary of State for him to look on her compassionately in consideration of her matter and to grant her further leave to remain in the

United Kingdom with her husband *for another twelve months*. This request was made exceptionally, having regard to her particular circumstances. She was a citizen of Jamaica, had been living in the United Kingdom with her husband for nearly four years. She had strong family ties in the United Kingdom in the form of his brother, aunts, mother-in-law etc. all of whom are present and settled in the United Kingdom. She had established a private life and lived as part of a family unit in the United Kingdom with her husband Mr John Burton. In the accompanying application form, the appellant said she was not working in the UK, and her husband was a jobseeker. He was receiving income support.

7. A refusal decision was prepared in respect of this application. According to internal records, the refusal decision was “outcomed” against the appellant on 26 September 2006. However, the appellant appears not to have been served with the decision, and she was induced to believe that her application was still pending in subsequent correspondence (see below).
8. The grounds of refusal were that the appellant did not meet the requirements of paragraph 284 of the Rules for an extension of stay in the United Kingdom as the spouse of a person present and settled here. As an overstayer, the appellant failed to meet at least one of the criteria. Notwithstanding that, guidelines to do with marriage applications and enforcement cases (DP3/96) might allow leave to remain to be granted outside the Rules if:
 - the marriage is genuinely subsisting;
 - it predates the service of an enforcement notice by at least two years; and
 - it is unreasonable to expect the settled spouse to accompany his/her spouse on removal.
9. The appellant did not fall within these guidelines. Consideration nonetheless had been given to whether it be right to allow her to remain exceptionally, outside the Rules, taking into account the United Kingdom’s obligations under the ECHR, with specific regard to Article 8 of the Convention. The appellant’s removal from the United Kingdom would not amount to a breach of Article 8 since there are no insurmountable obstacles to her spouse accompanying the appellant to Jamaica should this be his wish.
10. On 18 December 2008 the Deputy Chief Executive of UKBA wrote to John Austin MP with reference to the appellant’s case. He confirmed that her application was still awaiting consideration. That UKBA can only take a case out of term in very limited circumstances. This was where the case had been seriously mishandled, or where there was information which had not been previously considered, or where there were compelling and compassionate circumstances. None of these factors applied in her case, as no reason has been put forward that would justify proceeding with her case ahead of others.

11. Greenland Lawyers LLP sent a chasing letter on 5 October 2009, and a different firm of solicitors sent a chasing letter on 24 July 2012. The same firm provided an update to UKBA on 21 May 2013. They wrote to advise UKBA of a significant change in their appellant's circumstances which impacted on her case. Her husband of over ten years had sadly passed away on 12 May 2013. Their client was devastated by the loss of her husband. Their client's case had been outstanding for over six years, and numerous letters had been sent to UKBA expressing concern about the undue delay in determining her case. Although the appellant could not meet the requirements under the Rules for bereaved spouses, nonetheless the Secretary of State had wide discretionary powers to grant leave in exceptional cases. Their client had established family life with her now late husband's family and her relatives in the UK. She had remained here with a legitimate expectation that she would eventually acquire leave to remain in the United Kingdom.
12. The Immigration Advice Service made further representations on 8 October 2013. The appellant remained very close to her husband's family, and she lived with her husband's mother. She also looked after her ill brother who was a British citizen and settled in the UK, Mr Stafford Henry. He was separated from his wife and lived alone.
13. In a letter dated 2 September 2013 Mr Stafford Henry said that he wished he could do more for his sister, but he suffered from chronic cluster headaches and, she being his only relative, he tended to lean on her for emotional support. She had taken on the role of carer where his illness was concerned. She was the person who accompanied her to consultant appointments and the person that he called whenever he suffered an acute attack, which might vary from two to five days some weeks.
14. In a letter dated 12 September 2013, Ms Janet Smith said that the appellant was still very much part of their family and she loved her dearly like a daughter. The appellant had had to give up the former matrimonial home as a result of her status. She had invited the appellant to live with "us", as this was what her son Anthony would have wanted. Also, with her not being able to work, this was the best they could do for her as a family.

The Reasons for Refusal

15. On 16 December 2013 the Secretary of State gave her reasons for refusing her application which had been outstanding since 2006. Police records showed that the appellant received a warning on 11 August 2006 for sexual offences. The appellant had not complied with the conditions of her leave to remain in the UK as a student. She ceased studying in October 2001 but failed to inform the Home Office that she was no longer studying, thereby failing to observe the Rules. After her student leave ran out, she then spent a number of months overstaying before contacting the Home Office to make a new application. There had been a specific delay in the amount of time that the appellant had been waiting for a decision on her application of 3 July 2006. The Home Office did in fact make a decision on 26 September 2006 to refuse her application, but an error was

made and it did not appear to have been served on her. It was claimed that her application would have been granted had it not been for maintenance issues. This was not the case. Her application of 3 July 2006 had been refused because there was no new information to consider and there were no exceptional circumstances to prevent the relationship continuing in Jamaica. Following the dismissal of her appeal in May 2006, the appellant was fully aware of her precarious immigration status and that, because her circumstances were still the same, she was also aware that any new application she made would be very likely to be refused. Despite this, she chose to continue to remain in the UK and made no attempt to return to Jamaica. Whilst the delay in considering the application was regrettable, this was not sufficient to justify granting the appellant leave to remain in the UK.

16. It was noted that the appellant stated she provided a caring role for a British citizen brother who suffered from headaches. But her brother could obtain help from the local authorities if required. No medical evidence had been provided of his medical condition, or the level of care that the appellant provided to him. So this was not a sufficient factor to justify granting the appellant leave on that ground.
17. Her circumstances had been considered in the round, and whilst delays involved in the case had been unfortunate, she had a criminal history and had shown disregard for the Immigration Rules.

The Hearing Before, the Decision of, the First-tier Tribunal

18. The appellant's appeal came before Judge Miles sitting at Richmond Magistrates' Court on 22 July 2014. Both parties were legally represented. The judge received oral evidence from the appellant, her mother-in-law and her brother Mr Henry. In cross-examination, Mr Henry said he had been separated from his wife for between ten or twelve years. He suffered from cluster headaches for thirteen or fourteen years, and had last worked about fourteen years ago. He had last gone to Jamaica for a funeral in June 2014 for three weeks. He was taking medication for his headaches, and he used an oxygen cylinder which helped. If his sister went back, there was no-one to look after him. She was cooking him meals every two days.
19. In answer to questions from the judge, he stated he had to take oxygen with him everywhere he went, and that included taking a small oxygen cylinder when he travelled to Jamaica for his cousin's funeral. On that journey he had travelled with another cousin and his girlfriend. He suffered from about four headaches per day and most occurred at night. He was to see the consultant in 2015 and he was still on medication. He had never really enquired about support from social services.
20. In a comprehensive decision, the judge set out at some length the oral evidence. At paragraph [25] he set out the background facts to the application which were not materially disputed. At paragraph [26] he said it was conceded on behalf of the respondent that the application should

not have been considered against the new Immigration Rules, given that it was made in July 2006. The judge observed that her application on that basis was bound to fail under the Rules in any event, because by the time the application was finally decided, she was a person without leave, as indeed was the case when she made her first application for leave to remain as the spouse.

21. At paragraph [27] he said if he was wrong to find that the application should not have been assessed against Appendix FM, the appellant clearly could not succeed under Appendix FM. He went on to consider an Article 8 claim outside the Rules, in accordance with the guidance given in the Upper Tribunal in **Shahzad (Article 8 legitimate aim) Pakistan [2014] UKUT 85**.
22. At paragraph [28], he found the appellant did not have family life in the United Kingdom either with her mother-in-law or her brother. In respect to the mother-in-law, although they were very close and treated each other like mother and daughter, Mrs Smith lived not only with the appellant, but with her partner; and quite apart from the lack of a biological relationship between them there was no evidence of interdependence over and above that which might apply in the particular circumstances of a mother and daughter-in-law, who have both lost a close family member.
23. In terms of the relationship with her brother, they did not live together and Mr Henry was supported financially by the state without assistance from the appellant. Although she clearly provided a great deal of sibling support to Mr Henry, the respondent was right to point to the fact that he would be eligible for appropriate support as a British citizen in any event. He was not satisfied there was a degree of dependence between them to establish family life for the purposes of Article 8.
24. From paragraphs [29] onwards the judge addressed proportionality, with specific reference to each of the three factors commented upon by the respondent in the refusal letter, including the issue of delay. At paragraph [30] he observed that while the removal of the appellant would clearly disrupt significantly her relationship with her mother-in-law and her brother, it would mean that she would be reunited with her own parents, siblings and her son who all lived in Jamaica and with whom she was in regular contact. Mr Henry, despite his medical condition, was able to travel to Jamaica recently for the funeral of another family member, and there was thus no reason why that could not continue.
25. The judge concluded at paragraph [34] that, notwithstanding the strength of private life that the appellant had established in the United Kingdom, together with the delay in resolving her application, her removal would not be a disproportionate interference with her rights under Article 8 ECHR or with the rights of her mother-in-law and brother in that regard, and would thus not be in breach of Article 8 ECHR.

The Initial Refusal of Permission

26. The initial application for permission to appeal to the Upper Tribunal was settled by the Immigration Advice Service, and the application was refused by Judge Saffer on 3 December 2014. He was not satisfied there was any arguable material error of law. The judge was entitled to conclude the family life the appellant had with adult relatives did not go beyond those normally existing between adults. Even if he was wrong in that, the judge carefully considered the relevant factors that fell to be considered in the Article 8 proportionality balancing exercise. The grounds mainly disagree with the findings he was entitled to make.

The Eventual Grant of Permission to Appeal

27. Mr Andrew Eaton, who did not appear below, settled a renewed application for permission to appeal to the Upper Tribunal. Ground 1 was the judge had erred in failing to applying the ratio of **EB (Kosovo) v Secretary of State for Home Department [2008] UKHL 41** to the question of delay. Ground 2 was the judge had failed to consider **Edgehill and Another v Secretary of State for the Home Department [2014] EWCA Civ 402** when considering the appellant's length of residence. Ground 3 was the judge had failed to consider the respondent's own policy regarding carers. Ground 4 was that the judge had erred in applying an exceptionality requirement to the existence of further evidence of dependency under **Kugathas** in finding there was no evidence of interdependence over and above that which might apply in the particular circumstances of a mother and daughter-in-law, who have both lost a close family member.
28. On 31 March 2015 Upper Tribunal Judge Goldstein granted permission to appeal on all four grounds, although he was less persuaded as to the arguable merits of ground 4.

The Hearing in the Upper Tribunal

29. At the hearing before me, Mr Eaton developed the arguments advanced in the permission application which he had drafted, with one exception. Although he did not formally abandon ground 2, he acknowledged that it was a much weaker ground following the decision of the Court of Appeal in **Singh and Another v Secretary of State for the Home Department [2015] EWCA Civ 74**.
30. Ms Fijiwala addressed me on the remaining grounds, and submitted that no error of law was made out.

Discussion

31. Mr Eaton's main criticism of the judge's approach to the question of delay is in respect of the judge's finding at paragraph [33] that the delay did not prejudice the appellant. Mr Eaton submits that this is unsustainable, as if a decision by the respondent had been made within a reasonable time, the appellant's husband would have still been alive, and so the appellant

would have been able to continue to rely on her relationship with her husband as strengthening her family life claim.

32. I consider it was open to the judge to find the appellant was not prejudiced by the delay, for the reason which he gave. He acknowledged that the appellant had had the strain of having to wait for the decision and had suffered a sense of uncertainty as a result, but she was able to continue to live with her spouse throughout that time until his death, which was the basis of the application in the first place.
33. Indeed, the judge could have gone further, pointing out that the application made in 2006 was only for the appellant to be granted discretionary leave to remain for a further period of twelve months. So by a decision on the application not having been made until some seven years later, the appellant had obtained a de facto extension of leave seven times greater than which her then legal representatives had applied for on her behalf.
34. Mr Eaton referred me to the passage at paragraph [14] of **EB (Kosovo)** where Lord Bingham observed that the applicant may during the period of any delay develop closer personal social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of delay, the likelihood this is to be true. To the extent that it is true, the applicant's claim under Article 8 will necessarily be strengthened.
35. But as the claim under Article 8 is thereby strengthened, the delay operates to the applicant's advantage, not to the applicant's detriment. The judge fully took into account the respects in which the appellant's Article 8 claim had been strengthened by the delay, most notably by the length of her residence being extended from some eight years to some fifteen years.
36. Ground 2 was not pursued by Mr Eaton in the light of the recent decision of the Court of Appeal in **Singh** which confines the ambit of **Edgehill** to a limited class of cases decided between the introduction of the new Rules on 9 July 2012 and an amendment to the new Rules later in 2012.
37. Even if **Edgehill** had applied, no error of law would have been disclosed by the judge's approach in paragraph [30]. The judge assumed in the appellant's favour that her length of residence should be considered by reference to the old fourteen year Rule, and not by reference to the new twenty year Rule introduced in July 2012. The judge rightly observed that the appellant could not have made an application under the old Rule at any time prior to the implementation of the new Rules. This was because, the judge found, she only achieved fourteen years' continuous residence in June 2013, which was after the new Immigration Rules had come into force.
38. In fact, the appellant could not have accrued fourteen years continuous residence under the old Rule until 2018, as the clock stopped and re-started for the appellant when she was served with an IS151A notice in

2004. So there was an error in the judge's analysis which operated in the appellant's favour, rather than to her detriment.

39. In Ground 3, Mr Eaton relies on the respondent's policy regarding carers as set out in section 2 of chapter 17 of the Immigration Directorate Instructions. Of particular relevance is paragraph 17.5 which provides as follows:

If case workers are intending to refuse an application from an applicant who wishes to provide care for a relative in the UK, the Secretary of State must be able to show that s/he is satisfied there would be alternative arrangements for care should the applicant not be available ... If social services are involved the case worker should send them a letter asking whether the carer has made alternative arrangements and if not what kind of alternative arrangements could be made.

40. There is no overt consideration of this policy by the respondent in the refusal letter, and the judge did not refer to this policy in the course of his proportionality assessment.
41. The appellant did not in terms seek leave to remain as a carer. The assistance which she provided her brother was not the corner stone of her application, but a subsidiary consideration which the Secretary of State was asked to take into account.
42. Paragraph 17.3 of the IDIs requires caseworkers to be mindful of the following:

Whilst each case must be looked at on its individual merits, and considering whether a period of leave to remain should be granted, the following points are amongst those which should be borne in mind by caseworkers:

- the type of illness/condition (this should be supported by a consultant's letter); and
- the type of care required; and
- care which is available (e.g. from the social services or other relatives/friends); and
- the long term prognosis.

43. Paragraph 17.3.1 provides that initial leave will usually be granted to remain for three months on code 3 (no recourse to employment or public funds) outside the Rules. The applicant must be informed that leave has been granted on the strict understanding that during this period arrangements are made for the future care of the patient by a person who is not subject to the Immigration Rules.
44. The obligation laid on the Secretary of State in paragraph 17.5 of the IDIs needs to be viewed in the context of other aspects of the policy, as adumbrated inter alia in paragraphs 17.3 and 17.3.1 above.

45. As the appellant did not in terms apply for leave to remain as a carer, I find that the Secretary of State did not in terms refuse the appellant leave to remain as a carer, and therefore she was not under an obligation to show that she was satisfied that there would be alternative arrangements for care should the appellant not be available to continue to assist her brother.
46. Moreover, the information which the caseworker is required to take into account under paragraph 17.3 includes information which only the applicant can provide, including whether care is available from other relatives/friends. Accordingly, as submitted Ms Fijiwala, I find that an applicant has a duty to proffer information relevant to the exercise of discretion under paragraph 17.3 as a necessary precursor to triggering the obligation on the Secretary of State arising under paragraph 17.5.
47. As a result of the additional evidence provided by way of appeal, the judge had more information within the ambit of paragraph 17.3 than that which had been provided in advance of the refusal decision. But he was not asked to consider whether the appellant could thereby bring herself within the terms of the policy. If he had been directed to the policy, he would have noted that at best (and ignoring proportionality considerations) the appellant was only in line for an initial grant of leave to remain of three months, on the strict understanding that during this period arrangements would be made for the future care of the patient by a person who was not subject to the Immigration Rules.
48. While the judge accepted that the level of care provided by the appellant to her brother was substantial, he also noted that the brother had recently travelled to Jamaica with another relative and his girlfriend.
49. In conclusion, for the reasons given above, I am not persuaded that the judge's failure to consider the respondent's policy on carers, which was not in any event relied upon by the legal representative for the appellant who appeared before him, renders his decision unsafe. From the evidence available to the judge, it was open to the judge to find that Mr Henry would not have to fend for himself if the appellant was no longer in the United Kingdom. It was also open to him to find that if support was required, then the local authorities were under duty to provide it to Mr Henry, given his status as a British citizen.
50. Ground 4 was regarded by Upper Tribunal Judge Goldstein as being the weakest of the four grounds. I do not consider that the judge has misstated or misapplied the **Kugathas** criteria. There is no bright line here, and the inbuilt imprecision of the **Kugathas** criteria reflect this. The judge has given adequate reasons for finding that the relationship between the appellant and her mother-in-law falls short of a relationship of dependency sufficient to constitute family life for the purposes of Article 8. Likewise, the judge has given adequate reasons for finding the appellant does not enjoy family life with her brother for the purposes of Article 8.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson