Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24491/2015

THE IMMIGRATION ACTS

Heard at : (UT)IAC Birmingham	**Decision & Reasons Promulgated**
On : 19 June 2017	**On : 27 June 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAXINE KARLENE DONALDSON

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Ms A Bhachu, instructed by Bassi Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mrs Donaldson's appeal against the respondent's decision to refuse her human rights claim.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mrs Donaldson as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Jamaica born on 2 April 1970. She entered the United Kingdom with entry clearance as a visitor on 21 May 1998 and subsequently overstayed until she was granted leave to remain outside the immigration rules on 28 February 2014 (or 30 October 2014, as stated in her application) until 2 March 2015 in order to care for her niece and nephews. In the interim she made various unsuccessful applications for leave to remain as the spouse of a British citizen, whom she married on 22 May 2000. She was convicted, in 2006, of possessing with intent to supply Class A drugs (heroin) and received a 24 month suspended sentence. Her conviction was spent in June 2013.

4. On 27 February 2015 the appellant applied for leave to remain as a spouse, on Form FLR(M), claiming that there were insurmountable obstacles to family life with her husband continuing in Jamaica and also that it would be unreasonable for her step-son Tyrone, her husband's son, who lived between her home and that of his own mother, to leave the UK as he was a British citizen. Reference was made in the letter accompanying the Form FLR(M) to the fact that she had been entrusted with the care of three vulnerable children, her niece and nephews, and to her parental relationship with Tyrone, the youngest of her husband's five children.

5. In a letter dated 12 May 2015 responding to the respondent's request for further information it was confirmed that the appellant's nephews and niece had returned to live with their parents, albeit under supervision, and further that Tyrone resided with the appellant and his father.

6. The respondent refused the appellant's application on 16 June 2015. The respondent found that the appellant fell within the suitability provisions in S-LTR.1.6 as her presence in the UK was not conducive to the public good because of her conduct, namely her past conviction. The respondent considered further that she could not meet the eligibility requirements on the basis of finance and maintenance. It was noted that there was no evidence to support the appellant's claim that she looked after Tyrone and she could not, therefore, meet the criteria in EX.1(a). The respondent considered that there were no insurmountable obstacles to family life between the appellant and her husband continuing in Jamaica and that she could not, therefore, meet the requirements of EX.1(b). The respondent considered that the criteria in Appendix FM and paragraph 276ADE(1) could not be met and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

7. The appellant appealed against that decision. Her appeal was heard by First-tier Tribunal Judge Watson on 25 April 2016. Judge Watson found that the suitability requirements should not have been applied against the appellant as the respondent had failed to follow her own guidance in that regard and, furthermore, the appellant had been approved as a foster carer by social services subsequent to her conviction which would have required an assessment of her character and conduct. The judge was satisfied that the appellant and her partner earned above the required amount of income at the

time of the hearing but agreed that the evidence produced to the respondent did not satisfy the requirements of Appendix FM-SE. The judge did not accept the appellant's evidence in relation to Tyrone living with her and her husband but found that he had been living with his mother and that the recent move to her house was one of convenience. The appellant's presence was not necessary for his welfare. The judge did not accept that the appellant had a genuine and subsisting parental relationship with Tyrone. The judge did not accept that there were insurmountable obstacles to the appellant and her husband maintaining their family life in Jamaica and considered that the appellant was no longer needed to care for her nephews and niece. The judge did not find there to be any significant obstacles to the appellant's integration into Jamaica and concluded that the appellant could not meet the requirements of the immigration rules on family and private life grounds. However the judge considered that it would be disproportionate to refuse the appellant's application and that the public interest was outweighed by her personal circumstances. She accordingly allowed the appeal on human rights grounds outside the immigration rules.

8. Permission to appeal to the Upper Tribunal was sought by the appellant as well as the respondent. The appellant sought to challenge the judge's findings under Appendix FM. Permission was refused and the application was not renewed in the Upper Tribunal.

9. However permission to appeal was granted to the respondent on 18 January 2017 on the basis that the judge had failed to identify the compelling circumstances justifying a consideration of Article 8 outside the immigration rules and had failed to consider section 117 of the Nationality, Immigration and Asylum Act 2002.

Appeal Hearing

10. At the hearing the parties agreed that this was solely an appeal by the Secretary of State. Mr Wilding submitted that the respondent's challenge was to the judge's approach and reasoning. He submitted that the judge had erred by allowing the appeal on the same matters which she had found not to meet the requirements of the immigration rules; by considering as positive factors under section 117B matters which were supposed to be regarded as neutral; by failing to identify particularly weighty factors taking the case into the realms of very compelling circumstances; and by failing to give any weight to the appellant's inability to meet the requirements of the rules. Ms Bhachu submitted that the immigration rules were not determinative of the appeal, as made clear in Hesham Ali [2016] UKSC 60 and that the judge had considered various cumulative factors outside the rules other than those considered in the context of insurmountable obstacles. She had found there to be sufficient compelling circumstances outweighing the public interest and had not erred in law in so doing.

11. I advised the parties that in my view the judge had made errors of law such that her decision had to be set aside. I agreed with Mr Wilding's view that

the judge had simply used the same factors that she had considered not to meet the requirements of the immigration rules as insurmountable obstacles under paragraph EX.1(b) to then justify a grant of leave outside the immigration rules, thus apparently giving little or no weight to the appellant's inability to meet the requirements of the rules. She had given positive weight to neutral factors such as the appellant's ability to speak English and her financial independence, contrary to the approach in AM (S 117B) Malawi [2015] UKUT 0260 and she had failed to identify the compelling circumstances justifying a grant of leave outside the immigration rules. As such her findings on Article 8 outside the rules simply could not stand and had to be set aside and re-made.

12. I did not agree with Ms Bhachu's suggestion that the matter be remitted to the First-tier Tribunal since there appeared to be no reason why the decision could not be re-made by myself in the Upper Tribunal. The parties had been warned in advance of the hearing by directions issued with the grant of permission that the decision may be re-made at the hearing and indeed the appellant had provided further evidence with a Notice under Rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008. Whilst I was told that the appellant's husband was not available at the hearing to give evidence there was no suggestion, further to my enquiry, that he would be adding anything material to the evidence already available. The appellant's aunt, whose statement was to be found at Annex H of the appeal bundle before the First-tier Tribunal, was present at the hearing and was standing by her statement. I was also content for the appellant to give further oral evidence.

13. The appellant, in her evidence before me, said that since the last hearing she had opened her own business catering for vulnerable citizens. She had undergone training to be a trainer. She had developed her skills in care work and had a relationship with Birmingham City Council in caring for vulnerable people. The appellant relied upon a letter from her employer at Honor Care Limited confirming her promotion to care coordinator, which involved liaising with social services and being responsible for the day to day running of the business and the needs of vulnerable people. She visited an elderly lady on dialysis three times a day, seven days a week. It would be heartbreaking for her clients and for the staff of the business if she had to leave. Her niece and nephews would be devastated if she had to go. They lived on the same road and she was central to their care and dropped them to school as her sister, their mother, suffered from sickle cell and had to stay in bed. Although there were many other family members living Birmingham they could not help her sister and did not live as close as she did in any event.

14. Both parties then made submissions. Mr Wilding submitted that the appellant's removal was proportionate, whilst Ms Bhachu submitted that this was a compelling and compassionate case justifying a grant of leave outside the immigration rules. She referred to the various factors that had to be considered cumulatively, including the appellant's work, her benefit to society in dealing with vulnerable people, the fact that she was previously granted leave to care for her niece and nephews, her length of residence in the UK of

almost two decades and her attempts throughout that time to regularise her stay.

Consideration and Findings

15. I have given my reasons for finding an error of law in the judge's decision at [11] above.

16. In re-making the appeal the only issue is whether the appellant has demonstrated that there are very compelling circumstances justifying a grant of leave outside the immigration rules on wider Article 8 grounds which would render her removal disproportionate. The findings of Judge Watson in relation to the immigration rules are not disturbed and it is therefore the case that the appellant is unable to meet the requirements of the rules in Appendix FM and paragraph 276ADE(1). There are no insurmountable obstacles to the appellant and her husband maintaining their family life in Jamaica for the reasons given at [32] of the judge's decision and there are no very significant obstacles to the appellant's integration in Jamaica as the judge found at [34]. Weight has to be given to the fact that the appellant cannot meet the requirements of the rules.

17. As regards very compelling circumstances, I do not accept that any have been demonstrated. A factor in the appellant's favour is her lengthy residence in the UK of 19 years. However length of residence is catered for within the rules and is not sufficient to establish a case on private life grounds. In any event it is relevant to consider that the appellant had no lawful basis of stay in the UK for around 14 to 15 of those years prior to being granted discretionary leave as a carer for her sister's children. Whilst it is the case that she did not go underground, but made repeated attempts to regularise her stay, she was unable to succeed in any of her applications and ought to have left the UK but decided to remain here unlawfully. Although the appellant was granted leave to care for her sister's children, that was only for a relatively short period of time and the children returned to live with their parents. Judge Watson found in her decision that the appellant was no longer needed to care for them. Although the appellant's evidence before me was that she still played an integral part in their care I had the distinct impression that she was attempting to overplay her role, suggesting initially in her evidence that her sister was too ill and bed-ridden to care for them, but then after being referred to her evidence that her sister worked as a care worker, claiming that she helped on the occasions when her sister could not go to work. The appellant's evidence was also that she was extremely busy with her own work, including her care for an elderly lady and her own business, as well as the 40 hour week referred to in her employer's letter. I note also that the focus of her application of 27 February 2017 was on her claimed role in the care of her husband's son Tyrone, with only a passing mention of her niece and nephews. Therefore whilst I accept that the appellant has played a significant part in the care of her sister's children in the past and retains a close relationship with them, I find that her role is now limited and do not consider that relationship to be of any particularly significant weight.

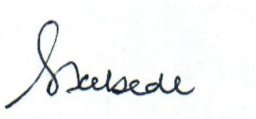
18. As for the appellant's relationship with, and care for, Tyrone, it is plain from Judge Watson's decision that she did not find the appellant's evidence completely credible in that regard. Indeed the appellant provided inconsistent evidence as to whether or not Tyrone lived with her and her husband, and Judge Watson considered that his recent move to her property was one of convenience. Again it seems that the appellant was seeking to exaggerate her role in Tyrone's care for the purposes of her application for leave to remain and there is no further evidence suggesting that her presence in the UK is required for his care given that he lives with, and is cared for, by his mother and in any evet is now an adult of almost 20 years of age.

19. As to the appellant's work with vulnerable clients, I accept that she has produced a supportive letter from her employer and that she provides an important role in the care of other people. However there is no evidence to suggest that she is irreplaceable or that her clients would significantly suffer as a result of her departure. It is also of some relevance to note that the appellant's work has been relatively short-term, given that she has only been permitted to work for the past three years and commenced her current job only two years ago.

20. Accordingly, and having considered all the evidence produced and the cumulative effect of all the various factors in her favour, I am unable to conclude that there is anything amounting to very compelling circumstances so as to outweigh the public interest in the appellant's removal, given in particular the findings, and reasons at [31] to [34] for the findings, that there are no insurmountable obstacles to family life with her husband continuing in Jamaica and that there are no very significant obstacles to integration in Jamaica and considering her length of stay without leave and inability to meet the requirements of the immigration rules. Regard has also to be given to the appellant's criminal conviction in assessing proportionality, albeit the weight to be attributed to that has somewhat diminished with time. It is always open to the appellant to apply for entry clearance to settle in the UK as the spouse of her husband and it is therefore not the case that her removal would permanently separate her from her family members. For all of these reasons, and having regard to the public interest considerations in section 117B of the 2002 Act, including the limited weight to be attached to her private life when she was in the UK unlawfully, and considering the neutral factors of her English language ability and financial independence, I find that the appellant's removal would not be disproportionate and would not be in breach of her Article 8 human rights.

DECISION

21. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside as stated above. I re-make the decision by dismissing Mrs Donaldson's appeal on all grounds, under the immigration rules and on human rights grounds.

Signed 
Upper Tribunal Judge Kebede

Dated: 20 June 2017