



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
HU/04898/2016

Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23rd April 2018**

**Decision and Reasons  
Promulgated  
On 26<sup>th</sup> April 2018**

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**Mr RAMELS SMITH  
(Anonymity Direction Not Made)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation**

For the Appellant: MS N Mallick, instructed by Cleveland law Ltd.

For the Respondent: Ms A Fijiwall, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Jamaica born on 7<sup>th</sup> October 1965 and he appealed on human rights grounds against the respondent's decision dated 1<sup>st</sup> February 2016 to refuse his application dated 23<sup>rd</sup> September 2015 for leave to remain in the United Kingdom on the basis of his relationship with his spouse.

2. In a determination dated 21<sup>st</sup> of June 2017 Judge of the First Tier Tribunal Talbot dismissed the appellant's appeal on all grounds. The appellant appealed the First-tier Tribunal decision.

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

3. The application for permission set out the following grounds
  - (i) the immigration judge made an error of law by failing to give effect to material evidence provided in the trial bundle. The judge in paragraph 23 accepted the relationship was genuine and subsisting and the couple had been living together since January 2011 but he did not give effect to that evidence before the court and overturn the Secretary of State's decision
  - (ii) the decision was irrational as the immigration judge had made an error in the application of the law. He failed to apply paragraph 51 of **Agyarko** [2017] UKSC 11 which detailed 'the lack of public interest in deporting those who would otherwise be granted leave to enter by an application made from outside the UK'.
  - (iii) The decision was perverse as the judge had failed to allow the appeal in considering the appellant's private and/or family life. At paragraph 18 of the decision, the judge had identified the difficulties the appellant would face in establishing family life in Jamaica. The judge failed to consider all the factors as presented and failed to apply the jurisprudence in relation to article 8. The enquiry into proportionality should be a balanced judgement of what could reasonably be expected in the light of all the material facts. The likelihood of returned via entry clearance should not be ordinarily treated as a factor rendering removal proportionate

### **The Hearing**

4. At the hearing, Ms Mallick submitted that the judge had failed to give adequate reasons and failed to consider that the appellant had been in the United Kingdom since 2002 and that he had not been removed. Particularly the judge had failed to consider the aunt who experienced ill health, was on dialysis and relied on the appellant for care. Miss Mallick accepted that the aunt had children of her own, and her daughter was her assigned carer in the United Kingdom and that they did not live together but I was referred to the witness statement in which the aunt had expressed her attachment to the appellant. The aunt was not at the hearing because she had been taken to the London free Hospital for dialysis.

5. The appellant and his partner had been in a relationship since January 2011. The judge had given inadequate reasons for his findings in relation to the lack of insurmountable obstacles on return to Jamaica. The partner (and sponsor) was born in the United Kingdom; her parents had come to the United Kingdom in 1959. The partner was British and had a child here who was aged 38 years. He had a job in the United Kingdom and lived with his mother and her partner (the appellant).
6. The partner had been involved in the community and had a full-time employment since 1991 and she had lived and worked in the UK for all her life and had very strong ties in the UK. She could not be expected to relocate to Jamaica. The appellant himself had not lived in Jamaica since 2002 and the Home Office had not removed the appellant since he had overstayed. The appellant and his partner had been together for eight years. The judge had noted that the appellant had no family in Jamaica and there was no support and no accommodation for him there. The judge had not taken this into account. Further, the judge had not considered how the appellant and his partner could be expected to continue their family life in Jamaica.
7. Mr Fijiwala, on behalf of the Secretary of State, advanced that the application was merely a disagreement with the determination which was clear and well balanced. The judge had properly directed himself in relation to EX. 1 of Appendix FM and in relation to the question of insurmountable obstacles. The judge's reasoning was set out at paragraphs 18 and 19 and his findings were sound. The judge noted that the appellant's partner had a knowledge of the culture of Jamaica and also noted that she had savings such that his employability and support in Jamaica would not be an issue. The judge had recognised that the EX.1 was a stiff test and the reasoning was adequate. Ms Fijiwala asserted that paragraph 276 ADE had not been challenged and there were no very significant obstacles to the appellant's reintegration in Jamaica.
8. The judge had carefully considered article 8 outside the rules and whether there were any unjustifiably harsh consequences from the refusal or for the appellant and his partner returning to Jamaica. It was not correct to assert that the judge had failed to take into account or balance the factors. The judge in particular considered Section 117 of the Nationality Immigration and Asylum act 2002. There were no exceptional or compelling circumstances and there was an option and this was a further option to make an application for entry clearance to return spouse. It was submitted that the aunt did not give evidence at the hearing before the first Tier Tribunal and the appeal was not argued on the basis of Zambrano. The judge

properly considered the factors that were before him. The Secretary of State could not be criticised for failing to remove the appellant when he had chosen to remain in the United Kingdom unlawfully and she did not know that he was even in the United Kingdom.

### **Conclusions**

9. Ground (i). It is not evident from a reading of the determination as a whole that the judge failed to take into account material evidence. The judge departed from the previous decision of first Tribunal judge Russell who rejected the assertion that the relationship was genuine and subsisting and indeed found at paragraph 16 that the relationship was genuine. The judge specifically noted that the requirements of Appendix FM of the immigration rules and correctly directed himself with reference to EX.1 (b), noting that insurmountable obstacles meant *'very significant difficulties which would be faced by the applicant or their partner continuing their family life together outside the UK and which could not be overcome or would entail very serious hardships of the applicant or their partner'*.

10. In that context the judge ranged the evidence in his decision. At paragraphs 18 and 19, the judge acknowledged that the partner and sponsor was someone who was born and had lived in the United Kingdom for all of her 54 years. He noted that her son lived with her in the UK and that all her network of family and friends were also in the UK. The judge also identified that the partner had a good job with Hackney Council which she had held for some 27 years it was clear that the judge had a full grasp of the underlying material facts of this case. He acknowledged that he had

*"no doubt that a move to Jamaica would be highly disruptive for her both in terms of her employment/career and her social and family life"*.

11. It simply cannot be argued that the judge ignored relevant points. The judge identified all the salient points and recorded the oral evidence that he had considered. He noted that the appellant and his partner had moved in together in January 2011 [7] and that the partner's son lived with them. He noted the appellant had no family in Jamaica save his brother with whom he had had no contact for many years and that it was asserted that his partner would be unable to follow him, and, if she did there would be no accommodation. The judge also identified at [8] that the appellant had volunteered during the Olympics. The judge made a full assessment of the evidence of the partner identifying that she was currently renting and

that her son Sean lived with them. The judge also recorded that the partner advised that she became aware of the immigration status after they embarked on a relationship but was aware of it by 2010 [9]. I note, however, that the appellant and partner in fact moved in together in January 2011. The judge identified that it was the appellant's partner's case that she could not relocate to Jamaica and she had her job and family in the UK and he accepted that now she was over 50 years old it may be difficult for her to find a job in Jamaica. Although she had gone to Jamaica for a holiday about three years ago and her parents were born there, she had only distant relatives there whom she had not met. The judge also recorded the evidence in relation to the appellant's partner's son. He was 37 years old, lived with the couple and that they had a close relationship. He was employed as a site manager and had himself visited Jamaica approximately six times.

12. The judge acknowledged that the assessment was finally balanced and specifically set out the relevant in competing factors at paragraphs 18 and 19. As indicated above he was fully aware of the relevant facts. He identified that Miss Davies, the partner, was a 54-year-old British national who had lived in the UK all her life and that her son lived with her and all of her network of family and friends were in the UK and she had a good job with Hackney Council. He acknowledged that any relocation would be highly disruptive in terms of both her employment/career and her social and family life and that it would be very difficult for her to find employment in Jamaica is a newly arrived foreigner in her mid-50s. The judge also recognised that her employment pension rights in UK would be adversely affected. The judge acknowledged that the appellant had no close family in Jamaica apart from a brother and that he was 51 years of age and may find it difficult to maintain obtain employment and accommodate himself.
13. At paragraph 19 however the judge balanced the fact that the appellant and his partner were in good health and that he had lived in Jamaica up till the age of 37 prior to entering the UK. The judge also considered that Miss Davies, the partner, had been on visits to Jamaica and was of Jamaican heritage and her parents were born there and the culture would not be totally "alien". The judge was a realistic in and identifying that there would be considerable difficulties and a high degree of disruption if they needed to pursue their family life together in Jamaica, but it was open to the judge to find that those difficulties would not be "insurmountable" in the sense that they would involve very serious hardship. In the analysis undertaken by the judge, who had directed himself appropriately, that finding was open to him bearing in mind

that the test in relation to “insurmountable obstacles” is an exacting test.

14. Having identified the relevant evidence and directed himself appropriately it is a matter for the judge as to the weight he accords to the evidence when concluding as to whether there were insurmountable obstacles to the appellant relocating to Jamaica with his partner.
15. That the judge did not specifically refer to the aunt to my mind is not a material error. The aunt on neither occasion attended to give oral evidence and although I appreciate that she has kidney difficulties and undergoes dialysis, but the evidence was that she did not live with the appellant, and the application was made on the basis of his relationship with his partner, and further, the statement of the aunt noted that the assigned carer was in fact her daughter. I am not persuaded that there was any article 8 right in relation to the aunt such that the failure to take her into account was material. The case before the first Tier Tribunal was not put on the basis that the appellant was a carer for the aunt but that she featured as part of his overall network. The judge was clearly aware of and considered the relationship between the son and the appellant and his partner when making his findings. The son, however, is 37 years old with his own job and own partner. The judge’s findings cannot be undermined by the criticism of his approach which was open to him. He did consider the overall impact on the family.
16. The judge clearly found that even the relationship with his partner did not suffice to outweigh the public interest. The judge looked at the private life of the appellant at paragraph 20 and was not persuaded that there would be very significant obstacles to the appellant’s integration into Jamaica. He found that the appellant had lived in Jamaica until he was aged 37, had experience of having worked in Jamaica in the building trade, and that he could be sent some financial remittances to ease his life there by his partner and family here. The judge also concluded that the appellant may have some more distant family or friends with whom he would be able to resume contact in Jamaica. The judge did take the evidence in the round and was not satisfied that the appellant had shown that they would be very significant obstacles to his return. Nevertheless the judge proceeded to make an analysis outside the immigration rules and against this background as set out above.
17. Ground (ii) asserted that the decision ignored the principle enunciated in **Agyarko** such as ‘the lack of public interest in deporting those who would otherwise be granted leave to enter

by an application made from outside the UK'. The test for irrationality is a high test and that the judge's decision was irrational is simply not made out in this case. He properly directed himself and the decision was open to him having weighed the evidence. The judge was obliged to consider the immigration rules as they expressed the position of the Secretary of State. It was the case that the appellant partner was said to earn sufficiently to fulfil the requirements of the Immigration Rules but the judge nevertheless, explored the circumstances of return to Jamaica and the difficulties on relocation. The judge found they were not insurmountable. It is not arguable that there would be no public interest in removal in line with paragraph 51 of Agyarko. The applicant could not comply with the immigration rules because he was an over stayer and in relation to section 117 the evidence given was that the relationship was formed at a time when both parties knew that the appellant was in the United Kingdom unlawfully. There clearly is a public interest in the maintenance of the immigration rules and although the judge stated that it was open to the appellant to return to Jamaica and make an application for entry clearance as a spouse it cannot be said that it would be certain that that application would be successful (indeed there should not be speculation on the success or otherwise of an application). It was open to the judge to reflect in his assessment of article 8 the position of the Secretary of State as expressed in the immigration rules and further the judge was obliged to apply section 117 of the Nationality Immigration and Asylum Act such that "little weight should be given to a private life or relationship the qualifying partner that is established by persons time when the person is in the UK unlawfully".

18. The fact is that the judge noted that the couple had a choice. There is no right to choose which country to enjoy family life under the ECHR Article 8 **Abdulaziz** v UK App No 9214/80 where by couples cannot choose where to pursue their article 8 family life. The judge fully recognised the difficulties which faced the couple but nonetheless found that the partner could either go with the appellant to Jamaica or withstand a separation while he returned to Jamaica and made an application through lawful channels for entry clearance to join his partner in the UK on the basis that, as the judge found, the relationship was genuine and subsisting. This case can be distinguished from **Tikka v SSHD** [2008] EWCA Civ 642. Specifically in that case it was found that the putative entry clearance application from abroad **was certain** to be refused because the appellant would fail the rules relating to suitability. In that case the appellant had been in the UK lawfully throughout and when he married, but it was also found that there were obstacles to the spouse returning to the appellant's home country. That, as the judge

cogently argued, was not the case here. It cannot be said that it is 'certain' that the immigration rules would be met 'but for' the appellant's unlawful stay in the UK. Judge Talbot considered the rules and found, as I have discussed, that there were no insurmountable obstacles to the appellant and his partner returning to Jamaica under EX.1. That is a consideration of the application of the immigration rules which takes into account the fact of the appellant being here unlawfully under R-LTRP.1.1(d).

19. I find no error of law in the judge's analysis with reference to **Agyarko** or **Chikwamba v SSHD [2008] UKHL 40**. In sum this is not a case where the judge found that there would be very significant obstacles to return to a country of origin. It is feasible to factor into the balancing exercise whether a further application could be made from abroad. There was no evidence, regardless of speculation on its success, that such a course of action was *not* open to the appellant and his partner or that the application would certainly be refused.
20. Ground (iii). This asserts that the judge was perverse in failing to allow the appeal and because he identified the difficulties but did not allow the appeal. On the one hand the ground states that the judge failed to give effect to material evidence and on the other hand states that the judge having taken into account the relevant evidence should have allowed the appeal. Neither ground is sustainable and is addressed above. There is no traction in the assertion that the Secretary of State failed to remove this appellant. From 2002 when the appellant entered the United Kingdom on a six-month visit visa and promptly overstayed, he remained in the United Kingdom without voluntarily removing himself and unbeknown to the Secretary of State. It was not until he made an application in 2012 that the Secretary of State was aware that he was even in the United Kingdom.
21. The judge carefully assessed the factors in relation to whether the partner should relocate with the appellant to Jamaica and the key test in relation to this assessment is having considered the relevant factors, whether the removal would result in unjustifiably harsh consequences. The judge found none and he was entitled to do so. The judge carefully analysed the evidence and the determination discloses no arguable material error of law.
22. The decision of First Tier Tribunal Judge Talbot shall stand and the application is dismissed.



Signed                    Helen Rimington  
Upper Tribunal Judge Rimington

Date    23<sup>rd</sup> April 2018