



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

Appeal Number: HU/00989/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13 November 2019**

**Decision & Reasons  
Promulgated  
On 2 December 2019**

**Before**

**UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

**MRS THELMA GORDON  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Adophy, Counsel instructed by Archbold solicitors  
For the Respondent: Mr Clark, Senior Home Office Presenting Officer

**DECISION AND REASONS**

The appellant is appealing against a decision of Judge of the First-tier Tribunal Shiner promulgated on 18 June 2019 refusing her human rights (Article 8 ECHR) claim.

The appellant was born on 17 May 1970. On 10 July 1992 she married her husband ("the sponsor"), who, like her, is a citizen of Jamaica. They have two children, born in Jamaica in 1987 and 1990.

In 1998 the sponsor moved to the UK. He now has indefinite leave to remain.

The appellant entered the UK on 27 November 1999 and has lived continuously in the UK since.

The children of the sponsor and appellant moved to the UK in 2001.

The marriage between the appellant and the sponsor is genuine and subsisting. Their children (and grandchildren) reside in the UK.

The appellant's immigration history is a matter of contention between the parties. It is common ground that she entered the UK on 27 November 1999 as a visitor and she was subsequently granted leave to remain as a student, which was extended until 31 August 2002. It is from this date that there is a disagreement between the parties.

The respondent's position is that the appellant's leave expired on 31 August 2002 and thereafter she became an overstayer. She then made an application on 20 April 2003 for further leave to remain as a student, which was refused on 19 August 2003. On 13 June 2016, a letter from Immigration Enforcement was sent to the appellant stating that she had no permission to be in the UK. Thereafter, submissions were made by the appellant to regularise a position.

The appellant's claim, in contrast, is that the following occurred:

- (a) On 20 April 2003 she made a human rights application, receipt of which was confirmed by the respondent on 15 May 2003.
- (b) On 16 July 2003 the respondent contacted her solicitors asking them for further documents, which were provided on 9 August 2003.
- (c) On 19 August 2003 a notice of refusal was sent to the appellant on the sole basis that she had failed to supply the requested documents.
- (d) On 21 August 2003 the appellant's solicitors wrote to the respondent explaining that the documents had, in fact, been provided.
- (e) She then received no further correspondence from the respondent until 15 March 2011, when she received a letter stating that her case was part of a backlog of older cases, and further information was requested from her.
- (f) On 6 April 2011 the requested information was provided.
- (g) On 5 September 2012 the appellant requested an update.

- (h) On 18 October 2012 the respondent responded by stating that a timeframe could not be given.
- (i) On 13 June 2016, a letter from Immigration Enforcement was sent to the appellant stating that she had no permission to be in the UK.
- (j) Her solicitors wrote to the Home Office on 22 June 2016, and again on 13 October 2016. In the 13 October 2016 letter, reference was made to an application pending since 2011.
- (k) Further submissions were made in 2017.

The appellant claims that she has had a human rights application outstanding since 2003 and that by operation of Section 3C of the Immigration Act 1971 she has been in the UK lawfully.

### **The Respondent's Decision**

On 8 December 2017 the respondent notified the appellant that her human rights claim had been refused. It was accepted that she is in a genuine and subsisting relationship with the sponsor, who is settled in the UK, but not that there would be insurmountable obstacles to the relationship continuing in Jamaica. The respondent noted that the appellant's partner had travelled to Jamaica on several occasions, most recently on 25 November 2016.

The respondent did not accept that there would be "very significant obstacles" under paragraph 276ADE(1)(vi) to the appellant's integration into Jamaica, given that she had lived most of her life there and would be familiar with its customs, language and social norms.

The respondent did not accept that there were exceptional circumstances which would render refusal of leave a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for her or her family. The respondent noted that her children were aged 30 and 27 and lived separately to her; and that although she is a part of her grandchildren's lives (seeing them on most weekends) she could continue to play a part in their lives from Jamaica.

### **Decision of First-tier Tribunal**

The appellant's appeal against the decision of the respondent was heard by First-tier Tribunal Judge Shiner.

The judge found that the appellant is in a genuine and subsisting relationship with the sponsor, and that she has regular contact with her children and grandchildren, assisting with childcare from time to time.

The judge also found that the appellant has no adverse criminal history and that she has lived in the UK since November 1999.

The judge did not accept that the appellant has had a human rights application pending since 2003. She found that in 2003 the appellant applied for further leave to remain in the UK as a student, and that this application was refused on 19 August 2003.

The judge acknowledged the correspondence in 2011 referring to a backlog of older cases, and found, on the basis of this, that the appellant had made a human rights application at some point between 2003 and 2011, despite neither party producing a copy of the application. The judge found that she was unable to determine, based on the evidence that was before her, when the application referred to in the 2011 letter had been made. At paragraph 48 the judge stated:

“I remind myself that it is for the appellant to prove her case, and she has not proved to me that a human rights application or claim was made much before 2011. Upon the evidence I have I am unable to say when, with any precision, this might have been. It seems to me that the SSHD following intervention from the appellant’s solicitors did eventually consider that application resulting in the refusal letter of 7 January 2017 (page 32 of the appellant’s bundle). I note the delay between 2011 and 2017 in respect of this claim.”

The judge then considered whether there would be insurmountable obstacles to the appellant’s relationship with her partner continuing in Jamaica for the purposes of EX.1(b) of Appendix FM of the Immigration Rules. The judge found that even though the appellant had been in the UK for a long period of time, there would not be such obstacles given the frequency with which the sponsor has travelled to Jamaica and that the appellant had not shown why she or the sponsor would be unable to work in Jamaica or why they would face any practical or other difficulties in that country.

The judge also commented at paragraph 52 of the decision that the sponsor had not provided financial information that would show that the financial eligibility requirements under Appendix FM could be satisfied. The judge noted that the refusal letter was drafted on the basis that the financial requirements would not be met, as the financial position of the appellant and sponsor were not considered.

The judge found that there would not be very significant obstacles pursuant to paragraph 276ADE(1)(vi) of the Immigration Rules on the basis that the appellant had spent most of her life in Jamaica; was familiar with its customs, culture and language; is married to a person who frequently travels to Jamaica and who, if he decides not to return with her, would be able to visit and support her; and would be able to maintain contact with her children and grandchildren through modern communication.

The judge then considered Article 8 outside the Immigration Rules. She noted an argument had been advanced that it would be disproportionate to expect the appellant to leave the UK in order to make an application from Jamaica that would be bound to succeed. The judge stated that the appellant has not demonstrated she would meet the financial requirements of the Immigration

Rules and therefore that an application from Jamaica would be likely to succeed.

The judge considered the factors identified in Part 5A of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). She noted that Section 117B(4)(a) of the 2002 Act did not apply since the appellant and the sponsor established their family life in Jamaica. However, applying Section 117B(5) of the 2002 Act, she gave little weight to the appellant’s private life in the UK.

The judge stressed, on several occasions, that the appellant had been in the UK for a long time. At paragraph 72 he stated: “I consider the nineteen years the appellant has been in the UK as significant in her favour in this respect.”

The judge explicitly took into account the delay in dealing with the appellant’s human rights application, which the judge assumed was made in or around 2011. At paragraph 73 the judge referred to there having been a seven year delay but stated that there was “little evidence upon which to make findings that that delay has caused consequences to the appellant other than a greater sense of likelihood to remain”.

The judge concluded at paragraph 75:

“In determining my proportionality assessment I conclude that the public interest in maintaining an effective system of immigration control does outweigh this appellant’s and the sponsor’s Article 8 rights. I do so for all of the reasons that I have set out above. I have found that other than the matters to which I refer the appellant has not provided other than the barest of detail of her life, both private and family in the UK and I cannot upon the evidence that I have and findings made conclude that my proportionality assessment falls in the appellant’s favour. I so conclude notwithstanding the delay in the decision-making process by the SSHD and the matters to which I have referred.”

### **Grounds of Appeal**

The grounds argue that the judge fell into error by finding that there had only been a delay between 2011 and 2017 in dealing with the appellant’s outstanding human rights application when in fact there had been a delay between 2003 and 2017. The grounds assert that the judge failed to have regard to the substantial prejudice to the appellant from this delay and that by operation of section 3C of the Immigration Act 1971 the appellant has been in the UK lawfully.

The grounds also argue that the judge erred by finding that the financial eligibility requirements under Section E-LTRP of Appendix FM were not satisfied when the respondent did not have concerns in respect of this.

### **Analysis**

The evidence before the First-tier Tribunal does not support the appellant’s submission that she has had an outstanding human rights application since 2003.

Included within the evidence that was before the First-tier Tribunal is a Notice of Immigration Decision made under Section 105 of the Nationality, Immigration and Asylum Act 2002 dated 19 August 2003 which states that the appellant's application for further leave to remain in the United Kingdom as a student has been refused. The notice states that the application was made on 20 April 2003, that her leave to enter expired on 31 August 2002 and that she did not have valid leave to remain at the time of her application.

Based on this evidence, the judge was entitled to find that (a) the application made on 20 April 2003 was an application for leave to remain as a student, not a human rights application; and (b) at the time the application was made the appellant did not have leave to remain and therefore her leave was not extended by operation of Section 3C of the Immigration Act 1971.

The evidence before the First-tier Tribunal included a letter from the respondent dated 15 March 2011 stating that her case was in a backlog of older cases. There was no other documentary evidence in relation to an application between 2003 and 2011. The judge was entitled, based on this evidence, to infer that at some date prior to 15 March 2011 the appellant had made a human rights application and also to find, as she did at paragraph 48, that in the absence of any evidence as to when this application was made, given that the burden lies on the appellant to establish her case, the application could be presumed to have been made in 2011. Therefore I reject the submissions of the appellant that are based on the assertion that the appellant made a human rights application in 2003 (or on a date substantially before 2011).

Even if the judge's analysis of the 2003 application was wrong, and the application in April 2003 was, as claimed by the appellant, a human rights application that had not been addressed by the respondent until 2017, this would not have changed the outcome of the appeal. I reach this conclusion for two reasons.

Firstly, it would not have changed the fact that the appellant did not have leave at the time the 2003 application was made and therefore the application would not, in any event, have resulted in the appellant having leave to remain under Section 3C of the Immigration Act 1971.

Secondly, whether the delay was between 2011 and 2017 as found by the judge, or between 2003 and 2017 as claimed by the appellant, the assessment of the appeal under the immigration rules would have resulted in the same outcome. The issues for the judge to determine under the Immigration Rules were (a) whether there would be insurmountable obstacles to the relationship between the appellant and the sponsor continuing in Jamaica (paragraph EX.1(b) of Appendix FM of the Immigration Rules) and (b) whether there would be "very significant obstacles" to the appellant's integration into Jamaica (paragraph 276ADE(1)(vi) of the Immigration Rules). The judge has given clear reasons why she did not accept there would be either insurmountable or very significant obstacles given, in particular, that the appellant had spent most of her life in, and was familiar with the culture of, Jamaica; and that her husband

travels to Jamaica frequently. The length of delay in responding to an outstanding human rights appeal would not have any material bearing on this assessment.

With respect to article 8 ECHR outside the Immigration Rules, I am also satisfied that the same conclusion would have been reached whether the delay was thought to be 7 years or 14 years given that either way the appellant would not have had lawful leave and the only material consequence of the delay is that the appellant has been in the UK (without leave) for a substantially longer period.

The submission in the grounds that the judge failed to appreciate that the respondent accepted that the financial eligibility requirements under Appendix FM were satisfied is misconceived. In the respondent's decision, it is stated that the appellant met the eligibility requirements of Section E-LTRP under paragraph R-LTRP.1.1(d)(ii). R-LTRP.1.1(d)(ii) is the route to eligibility for applicants who do not meet the financial eligibility requirements and therefore need to satisfy the requirements of paragraph EX.1. The appellant had not submitted evidence to show that the financial eligibility requirements under Appendix FM were satisfied and the judge was clearly entitled to have regard to this when assessing, in accordance with *Chikwamba v Secretary of State* [2008] UKHL 40, whether temporary separation in order for the appellant to make an application from Jamaica would be disproportionate. As is clear from *Chikwamba* and subsequent cases addressing this issue (see *R (on the application of Agyarko) v Secretary of State* [2017] UKSC at [51]) it is necessary, in order to succeed with such an argument, that the appellant is able to show that she would satisfy the financial eligibility requirements upon making an application from outside the UK. The judge was clearly entitled to find that the necessary evidence had not been submitted for her to be in a position to find that the application from outside the UK would be certain to succeed.

### **Notice of Decision**

- a. The appeal is dismissed.
- b. The decision of the First-tier Tribunal does not contain a material error of law and stands.
- c. No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan    Dated: 28 November 2019

