IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004402

First-tier Tribunal No: HU/58354/2023
LH/03331/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

27/11/2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

LYNTHIA ELSIE SHEIEDA CALLISTE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Neil Garrod, instructed by Bridgeway Solicitors
For the Respondent: Amrika Nolan, Senior Presenting Officer

Heard at Field House on 21 November 2024

DECISION AND REASONS

1. The appellant appeals with the permission of Judge Curtis against the decision of Judge Shiner, who dismissed her appeal against the respondent's refusal of her human rights claim.

2. Judge Shiner concluded that the appellant was unable to meet paragraph EX1 of the Immigration Rules. Judge Curtis considered it to be arguable that Judge Shiner had asked himself the wrong question under paragraph EX1.

3. Before me, Ms Nolan accepted that Judge Shiner had indeed erred, in that he had failed to consider the actual question posed by paragraph EX1, which is whether family life can continue abroad. She agreed with Mr Garrod that the judge's error in that regard was so fundamental that the proper course was for the entire decision to be set aside, and for the decision on the appeal to be remade in the Upper Tribunal.

4. Mr Garrod encouraged me to proceed to remake the decision on the appeal immediately. Ms Nolan urged me to take the same approach. I gave Mr Garrod time to take instructions and to confirm that there was no further documentary evidence which he wished to adduce. He returned after I had completed the remaining cases on my list to confirm that he was ready to proceed and that the appellant and the sponsor were to give evidence.

5. I therefore proceeded to consider the appeal de novo. What follows is the reasons that I have decided to remake the decision on the appeal by dismissing it.

Background

6. The appellant is a national of Grenada who was born on 12 December 1989. She arrived in the United Kingdom on 15 March 2018. She was granted leave to enter until 15 September 2018. She overstayed her visa. On 3 March 2023, she made an application for leave to remain as the spouse of a settled person.

7. The appellant's son, Londell Joshua Lamar, was born in Grenada on 1 July 2010. He arrived in the United Kingdom on 7 December 2019 and was granted leave to enter as a visitor. He overstayed upon the expiry of his leave.

8. The sponsor is Konstantins Vinakovs, a Latvian national who has lived in the United Kingdom since June 2013. He was granted Indefinite Leave to Remain under the EU Settlement Scheme on 11 October 2019. He works as a forklift truck driver in a factory, earning in the region of £30,000 per annum.

9. The respondent refused the appellant's application under the Immigration Rules because she was unable to meet the Immigration Status Requirement and because the respondent did not accept that paragraph EX1 of Appendix FM applied to her. The respondent gave the following reasons for the latter conclusion:

> You have a genuine and subsisting relationship with your Latvian partner. We note the points you have raised in your application. However, the Secretary of State has not seen any evidence that there are insurmountable obstacles in accordance with paragraph EX.2. of Appendix FM which means the very significant difficulties which would be faced by you or your partner in continuing your family life together outside the UK in Grenada, and which could not be overcome or would entail very serious hardship for you or your partner. from the information that you have provided, you have maintained a relationship with your partner in the knowledge that you do not have valid leave in the UK, and you have no legitimate expectation to remain here indefinitely. Therefore, you and your partner should have been aware of the possibility that your family life might not be able to continue in the UK. You have provided no specific evidence to suggest that you would face undue hardship if you returned to Grenada, and you could resume your life there supporting yourself as you did prior to arrival in the UK. It is viewed that you would be able to maintain relationships formed in the UK through modern forms of communication. You have told us that you still have family in Grenada, and you have provided no evidence that they cannot support you on your return. It is therefore open to you to return to Grenada and obtain

> the correct Entry Clearance to re-join your partner in the UK. Alternatively, although your partner is under no obligation to leave the UK, it is reasonable to suggest that it is open to him to relocate to Grenada with you (should he wish to do so) until you obtain the correct Entry Clearance into the UK.
>
> You therefore fail to meet the requirements of EX.1.(b) of Appendix FM of the Immigration Rules so paragraph EX.1. does not apply in your case.
>
> You have a child in the UK but you do not meet the requirements of paragraph EX.1.(a) of Appendix FM because your child is not a British Citizen and has not lived continuously in the UK for at least 7 years. From the information that you have provided, your child has no valid leave in the UK and therefore, it is considered that it would be reasonable to expect the child to leave the UK with you until you and your child obtain the correct Entry Clearance into the UK. Therefore paragraph EX.1. does not apply in your case.

10. The respondent did not accept that the appellant's removal would give rise to unjustifiably harsh consequences, as a result of which she concluded that the appellant's removal would not be contrary to Article 8 ECHR.

11. The appellant's appeal to the First-tier Tribunal was dismissed but I have set aside that decision for the reasons set out above.

Oral and Documentary Evidence

12. The consolidated bundle on which the appellant relies before me runs to 232 pages. It contains copies of the bundles which were placed before the FtT by the appellant and the respondent. The appellant's bundle contains witness statements from the appellant and the sponsor and documents to do with their family and employment circumstances. I will return to their contents in due course.

13. I heard oral evidence from the appellant and the sponsor. I permitted Mr Garrod to ask additional questions in chief. In summary, their evidence was as follows.

14. The appellant adopted the witness statement she had made before the FtT and said that she did not wish to update anything in that statement. She said that she would face difficulties if she went to Grenada, which she identified as being unemployment and the lack of a house. She was concerned that she would have no income there. She feared that going to Grenada would separate her from her husband and from the stable life that they have in the UK. She considered that it would be a 'very emotional struggle'. She thought that he would not join her in Grenada because she had no form of support there and the unemployment rate was very high. She said that he knew nothing about the country. If he stayed in the UK and she went back, that would also be a struggle. It would break up the family and would be a strain on the relationship.

15. Cross-examined by Ms Nolan, the appellant stated that she had lived in her mother's house in Grenada. It was a two bedroom house. At the time, her mother and three of her siblings had stayed there with their children. She named

her siblings, Thelma, Johnill and Evert, who had five children between them. Her sister was single. Her brothers had partners but did not cohabit with them. Ms Nolan asked the appellant why she could not return to the family home. She said that there had been a hurricane which had damaged the house. Her siblings still lived in the house but there was a tarpaulin on the roof. There was no electricity but there was running water. She had been told by her brother that the electricity company had refused to reconnect the electricity supply for the time being, as the house was not up to standard. The damage had occurred earlier in 2024. There was no documentary evidence of it.

16. The appellant confirmed that she had met her partner in May 2018. He was not aware that she was on a visit visa at the time but she told him a couple of months later. They had talked about her immigration status. He had said that it wouldn't work for him to relocate to Grenada but that he wanted to get know her anyway. They had discussed the subject further since the refusal and they were concerned that the Home Office was breaking the family apart. He could not move to Grenada because his job, family and friends were in the UK.

17. The appellant stated that she had worked in Grenada, as a nursery teacher. She had done so for a year before she came to the UK. Asked about her husband's ability to cope with Caribbean food, she confirmed that he ate the Caribbean chicken dishes she made. She stated that he was also aware of aspects of her culture, which they had discussed. Ms Nolan asked why in those circumstances it would be difficult for him to adapt to life in Grenada. The appellant said that it would be financially very difficult. Her husband was employed in a factory and he drove a forklift. He would not be able to get a job in Grenada, as it was a third world country. Her siblings struggled to find work. It would be a strain and a struggle for them. She said that he could not find similar work in Grenada; they did not have that kind of work on the island.

18. Mr Garrod did not re-examine the appellant.

19. The sponsor adopted the statement which had been prepared for the FtT hearing and said that there was no update. He said that it would be quite hard if the appellant went to Grenada. He thought he would be depressed and devastated as his family would be broken up. He would try to help her, although he would be sad and the family would be broken. He confirmed that he would stay in the UK if she left. He had a really good job and there was 'no way' that he could leave. He was responsible for supporting her and he needed to earn money. He noted that he would require more than £30,000 per annum in order to sponsor the appellant to return with entry clearance. If she left to go to Grenada, he worried that his mental health would change in a bad way. It would not be a good idea to split the family up, although he would try to maintain the relationship in that event. He would continue to support her as he does now, but the family would be broken.

20. Cross-examined by Ms Nolan, the sponsor confirmed that he arrived in the UK in 2013. He had had some friends in the UK at that stage but no family. He worked in a factory which produced jam and maple syrup. He did shift work as a forklift driver. He had only undertaken summer vacation work in Latvia. They had discussed her immigration status when they first got together. She had told him that she had entered using a visit visa and that she had overstayed. They had no secrets. He had not been concerned because the law said that if you were with your loved ones, you could fight to stay. The sponsor confirmed that he ate

Caribbean food, and that he had talked to the appellant about her culture. He knew that it was a small island which was close to the Dominican Republic. It was really hot there. He came from a country near Russia where it was often -20 degrees and he thought he would find it too hot. He also thought that they had small wages there. He worried about seeing his family; they were able to get to the UK in a couple of hours but it was an eight hour flight from Latvia to Grenada. Facetime and Whatsapp would not be the same and it was hard for them that they had lived apart for ten years already. He returned to Latvia once a year and his family came to visit the UK too.

21. The sponsor stated that the appellant's mother lived in the USA with the appellant's sister. He knew that she had other brothers and sisters but he had no idea about the size of the house. He knew that the appellant had 'loads' of siblings, and that her mother was not well.

22. I asked the sponsor one question for clarification. He stated that he was a qualified forklift truck driver but he did not know the name of the qualification; it had been arranged by his company and the licence had been sent straight to the company.

23. There was no re-examination of the sponsor. That completed the oral evidence.

Submissions

24. In her submissions, Ms Nolan adopted the refusal letter and submitted that there were no insurmountable obstacles to family life continuing in Grenada. The appellant had lived there for most of her life and had experience of the labour market. She had lived with her mother and siblings and her mother was now in the USA. The appellant and the sponsor had expressed concern about unemployment and the lack of a home but there was nothing in those points. They could live in the family home and there was no reason to think that they could not get jobs. There was no evidence of the damage to the house but it was habitable in any event. The sponsor's profession was a transferable skill and he spoke the language of the island. He was familiar with the diet and with the culture and the weather, whilst warm, would not create very significant hardship for him there. He had only had a few friends in the UK when he first came here but he had formed a circle, just as he could in Grenada. They had been aware of her immigration status when they formed a family life and little weight was to be attached to it by reference to s117B. There were no very significant obstacles to the appellant's re-integration to Grenada. There was no right to choose where a family life was pursued. Section 55 added little to the appellant's case, as the appellant's son was an overstayer and would be removed with his mother in any event. There was insufficient to tip the balance in favour of the appellant in terms of proportionality.

25. Mr Garrod adopted the skeleton argument he had prepared for the hearing before the FtT. The first question was in relation to EX1. The insurmountable obstacles test was not to be construed literally but practically. Looking at the question in that way, it was clear that the sponsor was asked to go to a country he was not familiar with and a climate which was likely to be difficult for him. The fact that he had eaten Caribbean food at home did not mean that he would be able to adjust to life in Grenada. The most significant problem was that they would have no income there, whereas the sponsor currently had a good job in the UK. Whilst it might be the case that being a forklift truck driver is a transferable

skill, the oral evidence was clear that there were no factories in Grenada; it was not a 'factory based island'. The sponsor would not be employable there.

26. Mr Garrod submitted that his second argument in relation to EX1 concerned the separation of the appellant and the sponsor. I suggested to him that separation was not part of that enquiry, although it might be relevant to a wider Article 8 ECHR enquiry. Mr Garrod enquired whether there was any authority in support of that approach, to which I responded that R (Agyarko & Anor) v SSHD [2017] UKSC 11; [2017] 1 WLR 823 was relevant and binding on me.

27. Mr Garrod returned to the question of the difficulties which the appellant and the sponsor would encounter in Grenada. He submitted that the house was already overcrowded and would be unsuitable for accommodating the appellant, the sponsor and the appellant's son. One of the appellant's brothers was said to be a police officer but he could not support the entire family. The appellant's mother had left Grenada and was living in the USA with the appellant's sister whilst she received cancer treatment.

28. It was submitted that the appellant would encounter very significant obstacles to re-integration to Grenada. She would be separated from her partner and would therefore lose a significant element of her personal integrity. It would be difficult to find accommodation and the appellant would have no accommodation.

29. As for Article 8 ECHR outside the Immigration Rules, Mr Garrod submitted that it would still be legitimate to attach weight to the appellant's family life despite section 117B. They had lived together for five years and there was evidently an element of permanency to the relationship. Beoku-Betts v SSHD [2008] UKHL 39; [2009] AC 115 was relevant. The sponsor enjoyed settled status and would lose that in the event that he was required to relocate. Section 55 was also of significance. The appellant's son was at a critical stage in his education.

30. I reserved my decision at the end of the submissions.

Analysis

31. As an overstayer, the appellant is unable to meet the Immigration Status Requirement in Appendix FM of the Immigration Rules. She is therefore unable to satisfy the requirements for leave to remain under the 'Five Year Route to Settlement' in D-LTRP 1.1 of that appendix. The appellant may satisfy the requirements for leave to remain under the 'Ten Year Route to Settlement' in D-LTRP 1.2, however, if she can establish that she satisfies the test in paragraph EX1 of that appendix. EX1 and EX2 are materially as follows:

> EX.1. This paragraph applies if
>
> (a) …
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is … settled in the UK… and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. 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.

32. In R (Agyarko & Anor) v SSHD, Lord Reed traced the history of paragraph EX1. At [42], he referred to the decision of the Grand Chamber in Jeunesse v the Netherlands (2015) 60 EHRR 17, in which the court had set out a number of factors which were to be taken into account in assessing the proportionality under Article 8 ECHR of the removal of non-settled migrants from a contracting state in which they have family members. One factor identified was "whether there were "insurmountable obstacles" in the way of the family living in the country of origin of the non-national concerned".

33. At [43], Lord Reed stated that the ECtHR intended the words 'insurmountable obstacles' to be understood in a "practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned.". He went on in the same paragraph to say that the test was consistently a strict one, although the way in which it had been expressed by the Strasbourg Court had varied. At [44], Lord Reed said that the definition of insurmountable obstacles which appears at EX2 "appears to me to be consistent with the meaning which can be derived from the Strasbourg case law". The other Justices agreed with his judgment.

34. Agyarko was cited by the Court of Appeal in Lal v SSHD [2019] EWCA Civ 1925; [2020] 1 WLR 858. The Master of the Rolls stated at [12] that the Supreme Court had approved the respondent's guidance on EX1 as being consistent with the case law of the ECtHR. He went on to find, at [40]-[45], that the Upper Tribunal had erred in that case by failing to take account of the *cumulative* impact of the difficulties which would be faced by the sponsor if he was required to move to India.

35. The appellant and the sponsor are in a genuine and subsisting relationship. There are no grounds of suitability on which she was refused. It is therefore clear from the authorities that EX1(b) requires me to consider whether the sponsor or the appellant would face very significant difficulties, which could not be overcome or would entail very serious hardship, in attempting to continue their family life in Grenada. It is no part of that test to consider whether the appellant and the sponsor would encounter very significant difficulty in living apart, and it is not clear to me why Mr Garrod considered there to be any ambiguity in that regard.

36. The obstacles which are said to arise in the event of the appellant and the sponsor relocating to Grenada are as follows. He does not wish to live there. He has never been there and he knows little about the country, albeit he has spoken to the appellant about her culture and has sampled the cuisine. He worries about the heat. He also worries that it will be more difficult for his family to visit him from Latvia. Primarily, however, the couple's concern is that they would have nowhere to live and that they would not find employment. I consider that issue first before moving to the others.

37. The sponsor speaks excellent English, which is the language spoken in Grenada. He is a qualified forklift truck driver who earns a good wage in the UK. It was suggested to him and the appellant at the hearing that he has a transferable skill and that he could work there. They were both dismissive of the idea, with the

appellant saying that there are no factories on Grenada. There is nothing before me which begins to suggest that Ms Nolan's suggestion was incorrect, however, and there is no evidence to suggest that a qualified forklift truck driver could not find work in that island nation, whether in the ports or in a warehouse, or at a builder's merchant. He has a skill which is valued the world over and I do not accept that there is any reason why he would be unable to find work there within a short space of time. The appellant suggested that there is a high unemployment rate there but, again, there is no documentary evidence which supports that assertion, and the burden of proof is on the appellant to show that she meets the requirements of the Immigration Rules.

38. I reach a similar conclusion about the appellant's prospects of securing employment within a reasonable time on return to Grenada. She worked there in the past, in childcare, and there is no reason to think that similar employment would not be available in the future. As I have said, there is no evidence before me to support the suggestion that there is high unemployment in Grenada. Even if that is so, there is nothing to support the claim that there is a dearth of this kind of work in Grenada.

39. In sum, I reject the claim that the appellant and the sponsor would be unable to find work in Grenada. They are both fit and well. They both speak the language. They both have experience in fields in which there is generally an abundance of work and there is no evidence to show that there is no such work in Grenada. In my judgment, therefore, the appellant and the sponsor would be able to find paid work in Grenada within a reasonable period of time.

40. I do not accept the claim that the appellant and the sponsor would have nowhere to live on return to Grenada. Ms Nolan did not seek to submit that the evidence about the house was untrue and I am content to proceed on the basis that the evidence given by the appellant about it was frank. It is a two bedroom house. She lived there with her mother and relatives in the past but her mother is now in the USA and the house is occupied by the appellant's siblings and their children. It is clear that the house has a good number of people living in it and that there is likely to be scant space for another three individuals. I also accept that the house was damaged in the well-publicised hurricane which took place. The damage is limited, according to the appellant's evidence. It has a tarpaulin on the roof and the electricity is disconnected but there is running water and the family continues to live there.

41. The appellant and her son and the sponsor could live in the family home on a short-term basis, however, whilst they adjust to life in Grenada. Whilst space might be at a premium, the evidence does not establish that the family home would not be available to provide a short-term staging post whilst the appellant and the sponsor find work and a place of their own. There was a suggestion at one point that they would find themselves destitute in the event that they went to Grenada but that is wholly unrealistic when they have family there who could take them in.

42. Taking account of my findings concerning the likelihood of the appellant and the sponsor finding work, therefore, my finding as to accommodation is that they are more likely than not to find short-term accommodation in the family home and that they will be able to acquire rented accommodation shortly thereafter. They will not be destitute.

43. There has been some suggestion in the past that the appellant is fearful of returning to Grenada because she was previously involved in an abusive relationship there. I record that nothing was said about that in oral evidence, despite Mr Garrod being permitted to ask additional questions in chief and despite Ms Nolan taking care to probe the obstacles to relocation during cross-examination. Nor did Mr Garrod make any submissions on the point orally. It was simply not identified at the hearing as a factor which has any relevance to the assessment under EX1, PL 5.1, s55 or Article 8 ECHR. There is insufficient evidence in this case to establish that there is any risk from the appellant's ex-partner.

44. It was suggested that the sponsor would be unable to tolerate the cuisine in Grenada but his response to Ms Nolan's question about his wife's Caribbean chicken was frank. Ms Nolan asked him whether he ate it, and he shrugged and said that he did. The impression was of a young man who has no particular difficulty with any style of food, and there is certainly no suggestion that he has a food allergy or intolerance, for example. I consider this to be a point of little significance.

45. There was no evidence before me to show that the temperatures in Grenada would be particularly difficult for the sponsor. He and the appellant said that it is hot, and I think it is permissible for me to take judicial notice of the fact that it is a popular holiday destination. I accept, of course, that the sponsor is Latvian and was raised in temperatures which were often appreciably below those in the United Kingdom, and significantly below those in Grenada. The sponsor's evidence on the point was frank and jovial, however. He stated that he would not like the heat but his evidence really went no further than that; there is certainly no suggestion that he would be unable to live and work in the temperatures which are enjoyed by those who holiday on the island. I do not consider this to be a point of any great significance but I take it into account in the cumulative assessment I am required to undertake.

46. Mr Garrod submitted that the sponsor is not familiar with the culture of the island. Insofar as he means that the sponsor has never lived there and experienced 'life as an insider', that is necessarily correct. But the appellant and the sponsor have been together for a number of years. They stated frankly in their evidence that they had spoken about her culture, just as one would expect of a couple with different heritage. The sponsor therefore has some idea of how life is carried on in Grenada. It is also relevant that it is a predominantly Christian country to which Western tourists are attracted in significant numbers. There is no reason to think in those circumstances that the sponsor will have any particular difficulty in familiarising himself with the way of life on the island.

47. In considering whether the sponsor's relocation would cause very serious hardship, I have also taken careful account of his immigration status. He has settled status. He is not in the same position as the sponsor in GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630; [2020] INLR 32, for whom the law posed a choice of relocating to Sri Lanka and relinquishing the path to settlement or remaining in the UK without the appellant. The sponsor in this appeal retains the right to enter and remain the UK indefinitely, and it will only lapse in the event that he remains outside the United Kingdom for a continuous period of five years: Article 13(4)(za)(ii) of the Immigration (Leave to Enter and Remain) Order 2000 refers. He could therefore live in Grenada for five years without any impact on his settled status.

48. There is no evidence to suggest that the sponsor would not be admitted to Grenada as the appellant's spouse. That point – to which there was a brief reference at [20] of Mr Garrod's skeleton argument, did not feature in his oral submissions, presumably for that reason.

49. The sponsor was concerned that he would not only leave well-paid employment if he joined the sponsor in Grenada; he also expressed concern that he would be unable to sponsor her to rejoin him in the UK if he was living with her there. That is correct, and I take the point into account in my holistic analysis. As Ms Nolan pointed out in her submissions, however, it is important to recall that the Convention does not afford couples a choice as to where they enjoy their family life, and that is the backdrop to EX1, as analysed in Agyarko.

50. The sponsor was also concerned that it would not be as easy for him to visit his family in Latvia, or for them to visit him, in the event that he relocated to the Caribbean. I accept that, although he is an independent man who has not lived in Latvia for many years. Whilst I do not suggest that these visits are unimportant to him, they are visits between independent adult family members who have chosen to live in different countries. They would obviously be able to remain in contact by phone and video call. I do not accept that this is a point of any great significance in the assessment required by EX1.

51. Neither Ms Nolan nor Mr Garrod addressed me on the relevance of the appellant's son to the assessment required by EX1. It is certainly arguable that he and his best interests play no part in the assessment required by the Immigration Rules. He is not a qualifying child to whom EX1(a) applies, and the focus of EX1(b) is on the appellant and the sponsor. Ultimately, however, I have concluded that it would be wrong to exclude the appellant's son from my assessment of whether the appellant and the sponsor would experience very serious hardship in Grenada. As a mother, the appellant is likely to feel her son's discomfort more keenly than her own. There is no doubt that the appellant's son would be removed with her. In considering whether she would experience very serious hardship in Grenada, therefore, it seems to me that I must consider how her son would adjust to life there, and what impact that process would have on the appellant.

52. I have little evidence from the appellant's son's school. I do not know when he is due to take his GCSEs and I do not accept that he is at a critical stage in his education for that reason. He is now 14, however, and it is likely that he is studying for those exams. He has been in the UK for more than five years, having arrived when he was nine years old, and returning to Grenada and leaving his friends is likely to be a wrench for him. That is not determinative of his best interests, however. Also relevant is the fact that he would be returning to Grenada (for the purposes of the EX1 assessment) with his mother and her partner. A further matter of relevance is that the appellant's son would be returning to the country of his nationality, as to which I recall what was said by Lady Hale at [30] of ZH (Tanzania) v SSHD [2011] UKSC 4; [2011] 2 AC 166. Considering all of these matters holistically and taking into account the findings I have made about the likely economic circumstances of the family on return to Grenada, I consider that the appellant's son's best interests would be served by following his mother to Grenada and resuming life in the country of his nationality, notwithstanding the short-term disruption and upset that will inevitably entail.

53. Taking all of those matters cumulatively, therefore, I stand back and consider whether it has been shown that the threshold in EX2 has been crossed. The answer is really very clear. For the reasons I have set out above, I accept that relocation to Grenada will bring about a period of upheaval for the appellant, her son and the sponsor. He would leave the job he has in the UK. They would need to find employment and, ultimately, accommodation in Grenada. They would need to settle the appellant's son into a new school. The sponsor would have to acclimatise and adjust to the climate and the culture in the appellant's country. But none of these matters begin to approach the threshold in EX2, and there are no insurmountable obstacles to the continuation of family life in Grenada. I conclude that the appellant is unable to meet the Immigration Rules for that reason.

54. For substantially the same reasons, I conclude that there would not be very significant obstacles to the appellant's re-integration to Grenada, even if she was required to re-adjust to life there without the sponsor. She has family and a home there and she can work. Applying the broad evaluative assessment most recently set out by Whipple LJ in NC v SSHD [2023] EWCA Civ 1379, I conclude that the obstacles which the appellant would encounter (as set out above) would not be very significant. The appellant is therefore unable to meet the test in PL 5.1(b) of Appendix PL of the Immigration Rules.

55. As Lord Reed explained at [45]-[48] of Agyarko, however, Article 8 ECHR might still require that leave to remain is granted where the Immigration Rules are not met but where the refusal of such leave would give rise to unjustifiably harsh consequences. That entails a proportionality test, which must ensure that a fair balance is struck between competing public and private interests.

56. I will turn first to the public interest in the removal of the appellant and her son. It is clearly cogent. The appellant chose to overstay her visit visa by several years before seeking to regularise her position. She also chose to bring her son to the UK and for him to remain without leave, enrolled in the state school system. Section 117B(1) states that the maintenance of effective immigration controls is in the public interest. The weight to be attached to that consideration is not a fixity, however. In my judgment, it must be given significant weight in a case such as the present, involving an overstayer who attempts to present the authorities with a fait accompli: Agyarko refers, at [54].

57. The appellant speaks perfect English and there is no reason to think that she is a burden on the state. Section 117B(2) and (3) are therefore neutral considerations.

58. Section 117B(4) states that little weight should be given to a relationship formed with a qualifying partner that is established at a time when the person is in the UK unlawfully. The provision is to be read as part of Part 5A of the Nationality, Immigration and Asylum Act 2002. It therefore requires a court or tribunal to have regard to the consideration that little weight should be given to such a family life, although that generalised normative guidance might be overridden in an exceptional case: Rhuppiah v SSHD [2016] EWCA Civ 803; [2016] 1 WLR 4203, at [53]. That dictum was left untouched when the case went on appeal, causing Green LJ to observe at [28] of GM (Sri Lanka) v SSHD that s117B "must, however, have injected into it a limited degree of flexibility so that the application of the statutory provisions would always lead to an end result consistent with Article 8." In this case, it is clear from the evidence that family

life was established in the UK when the appellant was here unlawfully. The real question is whether there is anything special or compelling which suffices to escape the generalised normative guidance provided by the statute.

59. I return then to the circumstances of the appellant and her son and the sponsor. I consider, firstly, whether their leaving the UK to live in Grenada would give rise to unjustifiably harsh consequences. In my judgment, it would not give rise to harsh consequences, let alone unjustifiably harsh consequences, for the reasons which I have already set out above. That course is amply justified by the public interest set out above.

60. The more likely outcome from the dismissal of this appeal, however, is that which the appellant and the sponsor set out in their oral evidence; he would remain in the UK whilst the appellant and her son return to Grenada. That 'real world' situation would bring about the separation of the family unit, which would be distressing for each of the three members of the family. It would also require the appellant and her son to adjust to the life they knew in Grenada in 2018 and 2019 respectively.

61. Even taking account of the separation of the appellant's son from the sponsor, however, I consider that it would be in his best interests to follow his mother to his country of nationality. I consider the family unit to be a strong one, and I consider it more likely than not that they will remain as such for as long as they are separated. Taking full account of the matters which militate for and against that separation, however, I consider that the public interest in that course clearly outweighs the disruption to the family life at the centre of this case, not least because it was understood on all sides and from the outset to be at constant risk of severance by the removal of the appellant and her son.

62. Submissions were made in Mr Garrod's skeleton argument about the effect of Chikwamba v SSHD [2008] UKHL 40; [2008] 1 WLR 1420 in this case. Such submissions have no place in a case such as the present, which was not refused on the narrow procedural ground that the appellant should leave the UK to make an application for entry clearance: [6]](i) of Alam v SSHD [2023] EWCA Civ 30; [2023] 4 WLR 17 refers. This application was refused, as I have said, on the basis that there were no insurmountable obstacles to the continuation of family life in Grenada, thereby distinguishing the case from Chikwamba. Even if the appellant is certain to be granted entry clearance as a spouse (and I cannot presently see why she would not be), there remains a weightier public interest in requiring her to make that application.

63. The appellant cannot meet the requirements of the Immigration Rules. The respondent's decision is proportionate under Article 8 ECHR, and therefore lawful under section 6 of the Human Rights Act 1998. The appeal will therefore be dismissed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. That decision is set aside. The decision on the appeal is remade by dismissing it.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 November 2024