**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/00995/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House** **Determination Promulgated**
**On April 13, 2015** **On April 24, 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

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

**and**

**MR ANTHONY SHERWIN HENRY**
**(NO ANONYMITY DIRECTION MADE)**
Respondent

**Representation:**
For the Appellant: Mr Tarlow (Home Office Presenting Officer)
For the Respondent: Ms Longhurst-Woods, Counsel, instructed by Obaseki Solicitors

**DETERMINATION AND REASONS**

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The Appellant is a citizen of Guyana. The appellant entered the United Kingdom as a spouse on July 2, 2010 with valid leave to enter until September 23, 2012. On October 2, 2012 he submitted an application for further leave to remain under

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private life under the Immigration Rules but the respondent refused this on May 2, 2013. On June 26, 2013 the appellant submitted an application for further leave to remain as the spouse of a person present and settled in the United Kingdom. The respondent refused this application on November 27, 2013 and gave directions for his removal under paragraph 10A of Schedule 2 to the Immigration Act 1971.

3. The appellant appealed this decision on December 23, 2013 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

4. The appeal came before Judge of the First-tier Tribunal Majid (hereinafter referred to as the "FtTJ") on August 14, 2014 and in a decision promulgated on September 3, 2014 he allowed the appeal under the Immigration Rules and article 8 ECHR.

5. The respondent lodged grounds of appeal on September 11, 2014 submitting the FtTJ had erred by materially in law.

6. On October 22, 2014 Judge of the First-tier Tribunal Lambert gave permission to appeal finding the "determination is so bad that I cannot divine from it either what decision of the respondent was being appealed or the basis on which the appeal was allowed."

7. The matter came before me on the above date and the parties were represented as set out above. The appellant and his wife were in attendance.

**<u>ERROR OF LAW SUBMISSIONS</u>**

8. Mr Tarlow relied on the grounds of appeal that had been lodged and submitted the FtTJ had failed to engage with the refusal letter and the issues raised in the "marriage interview". The FtTJ's conclusion in paragraph [17] of his determination was unreasoned and the respondent could not tell why the decision had been reached.

9. Ms Longhurst-Woods argued that the FtTJ's decision could be upheld because the FtTJ was entitled to find in the appellant's favour. The FtTJ had not commented on the alleged inconsistencies because they did not exist. She further submitted that the FtTJ was entitled to conclude that as the appellant had entered legally and as the respondent had not challenged the marriage in 2010 then the FtTJ was entitled to find the marriage was genuine and subsisting.

10. Having heard the submissions I reviewed the determination and submissions and found there was an error in law. The reason for the error is for the reason given in the permission namely there

was a total failure to engage with any of the evidence or to make findings on material issues or to consider the application against the appropriate Immigration Rule. The findings, as they were, were unclear. The FtTJ was entitled to allow the appeal but in doing so he had to give reasons for that decision and as his determination contained no reasons at all there was a material error.

11. I asked Ms Longhurst-Woods whether she intended to call any oral evidence and after taking instructions she indicated that her intention was to proceed with submissions only. I then asked whether she wanted the matter remitted back to the First-tier and again after taking instructions she confirmed the appellant wanted me to determine his appeal in the Upper Tribunal. In those circumstances I invited submissions from the representatives.

**SUBMISSIONS**

12. Mr Tarlow relied on the refusal letter and submitted there were a number of inconsistencies between their respective interviews and a failure by each party to answer questions on some occasions. Those inconsistencies led the respondent to conclude that they were neither living together at the time of the interview nor intending to live together permanently. Even if the Tribunal accepted they were in a genuine relationship there were no insurmountable obstacles to family life continuing in Guyana. There was nothing to prevent the appellant and his wife travelling to Guyana and enjoying a private and family life there. The appellant’s wife worked but her skills were transferable. Alternatively, it was not unduly harsh to require them to live outside of the United Kingdom.

13. Ms Longhurst-Woods submitted the marriage was genuine and the parties had and intended to continue to live together as husband and wife. There was documentary evidence that both lived in the same property and had done so for a period of time. The reason for gaps in the interview was because some of the questions were posed to only one party as they did not need a response from the other. Any inconsistencies were minor and should not be held against them and in some instances the parties had corrected any error during the hearing. The interview should be considered as a whole and questions should not be considered in isolation. She submitted the respondent should have considered the application under Appendix FM of the Immigration Rules, paragraph 276ADE and article 8 ECHR. She submitted the appellant’s wife would face insurmountable obstacles if she were required to return to live in a foreign country as she was now a British citizen having been found to face persecution if returned to Uganda. Ms Longhurst-Woods did

not argue under paragraph 276ADE but submitted that if there no insurmountable obstacles then it would be unduly harsh to expect her to give up well-paid employment especially as she had been living here for many years and was settled. There was no evidence to show she would be able to obtain work and she submitted it would be disproportionate to refuse the appellant leave to remain.

14. I reserved my decision.

**ANALYSIS AND FINDINGS**

15. The appellant entered the United Kingdom legally as a spouse but failed to apply to extend his stay and consequently became an overstayer. His first attempt at regularising his stay was refused and this is his second attempt so to speak.

16. I have before me witness statements from the appellant and his wife (pages 34-42 of the appellant's bundle). These statements tell me that the parties married in 2008 in Guyana but the appellant was only granted leave to enter in June 2010.

17. Ms Longhurst-Woods submitted that as he entered legally I should accept the marriage is genuine. However I prefer Mr Tarlow's submission on this issue namely that the parties have to show the marriage was subsisting and they intended to remain together as husband and wife because section E-LTRP 1.7 and 1.10 of Appendix FM require the appellant to demonstrate not only that the relationship between them is genuine and subsisting but that they also intend to live together permanently in the United Kingdom. I therefore find that the appellant must demonstrate this in order to come within Section R-LTRP of Appendix FM.

18. The application was refused because of alleged inconsistencies in the interviews they had with the respondent. During those interviews they were asked similar questions and the whole interview appears in the respondent's bundle.

19. During his submissions I invited Mr Tarlow to identify his concerns to me and he referred me to questions 2, 3, 5, 9, 10, 39, 40 and 42. I have considered those questions along with the rest of the interviews and I make the following findings:

    a. The appellant told the interviewing officer he and his wife had only been apart on two occasions namely for one month in 2011 and between September and November 2013 (he corrected the answer given at Q2 in Q10. His wife was asked a similar question and at Q5 she stated they had been apart briefly in April 2011 for four weeks and then at Q11 she confirmed that shortly before he was due to apply for

indefinite leave to remain they separated and she refused to support his application. I accept they gave consistent answers on this issue.

b. However, when asked where the appellant stayed when they separated in 2013 the appellant stated he lived with his uncle (C Ross) in London whereas his wife stated he went to stay with his uncle Dexter in Sunderland. Whilst the appellant's wife referred to him staying with his uncle in London she stated this was on the first occasion (April 2011). This is an inconsistency.

c. In question 9 the appellant tried to explain the alleged discrepancy in the evidence he gave in questions 3 and 6 to 8 when he made it clear that he was only referring to their time in the United Kingdom. I find his explanation credible.

d. The respondent questioned the answers given by them at question 16 in relation to why they received a single person's discount on the council tax. Whilst they may have deceived the local authority I am satisfied that their answers do not demonstrate any inconsistency.

e. They both gave consistent evidence about how they travelled to Liverpool for their interview that day and who paid for the bus tickets.

f. They gave consistent evidence about where they were each born.

g. The appellant accurately described how his wife came to be a British citizen.

h. At question 27 the appellant's wife suggested that her husband went to church on a Saturday and she went to church on a Sunday and at question 28 the appellant confirmed they had not attended church together since 2011.

i. The appellant accurately stated when his wife moved to her current address.

j. At question 31 they both stated the appellant's uncle financed the wedding although they did give inconsistent evidence about who made the arrangements. Ms Longhurst-Woods submitted that the discrepancy could be explained by the fact she was in the United Kingdom but I accept Mr Tarlow's submission that the answers were inconsistent.

k. Their explanations about when they became serious and how marriage was proposed do contain inconsistencies but I do not find they are so different that they could be said to undermine their accounts.

l. They gave consistent evidence about who attended the marriage in 2010 but they gave inconsistent evidence about

where the wedding rings came from (question 40 and 41) with the appellant claiming he purchased the ring in a shop whereas his wife claimed the appellant's uncle gave her the ring before she travelled to Guyana.

m. The appellant did not know his wife had a child from a previous relationship although she claimed this was simply because she had never told him.

n. They both mentioned the fact they were starting IVF treatment.

o. In so far as Christmas Eve and Day 2012 were concerned the appellant stated that they were together over that period and that they slept together on Xmas Eve. His wife stated that he went to Sunderland two days before Christmas and they were not together over Christmas. This is a significant discrepancy.

p. They corroborated their tea and coffee habits. The appellant's wife confirmed his periods of employment and he confirmed where the department and hospital she worked in and the frequency and method of payment.

20. Mr Tarlow had submitted the interviews demonstrated inconsistencies but in considering those discrepancies I have to consider the whole of their interviews. Whilst I accept there are some inconsistencies I am satisfied they are limited when placed against the background of the whole interview and having considered all of the evidence I am satisfied the appellant has satisfied sections E-LTRP 1.7 and 1.10 of Appendix FM. I therefore conclude the marriage is genuine and subsisting and the parties intended to continue living together as husband and wife.

21. Having assessed the genuineness of the relationship I have to consider whether the appellant satisfies the remaining requirements of Section R-LTRP of Appendix FM.

22. In order to succeed under the Rules the appellant must either demonstrate he meets all of the requirements of Section E-LTRP and that includes demonstrating the relevant requirements of Appendix FM-SE are met.

23. The financial documentation is contained in the appellant's bundle from pages 52 onwards. The pages are not indexed but it seems pages 52 to 135 relate specifically to the appellant and in assessing whether the financial requirements are met I can only have regard only to his wife's income. Evidential requirements of income are governed by Section A1(bb) of Appendix FM-SE which makes clear that both wage slips and a letter from the employer confirming the wage slips are authentic is required and Section 2 of Appendix FM sets out additional requirements that have to be

met. The appellant does not satisfy these requirements and consequently in order to satisfy Appendix FM he must satisfy Sections E-LTRP 1.2 -1.12 and 2.1 (which he does) and come within the remit of Section EX.1(b) of Appendix FM. This states-

> "the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection and there are insurmountable obstacles to family life with that partner continuing outside the UK."

24. Section EX.2 defines insurmountable obstacles as

> "… very significant difficulties which would be faced by the applicant or their partner in continuing family life together outside the United Kingdom and which could not be overcome or would entail very serious hardship for the applicant or their partner."

25. The respondent's own guidance confirms the high test the appellant needs to satisfy when demonstrating insurmountable obstacles (Section EX.2) by stating:

> "The assessment of whether there are insurmountable obstacles" is a different and more stringent assessment than whether it would be reasonable to expect the applicant's partner to join them overseas…. A significant degree of hardship or inconvenience does not amount to an insurmountable obstacle…."

26. I have accepted the parties are in a genuine and subsisting relationship and so the issue is whether there would be insurmountable obstacles.

27. Ms Longhurst-Woods submits the following factors amount to insurmountable obstacles namely:

    a. The appellant's wife is Ugandan refugee and has been living in the United Kingdom since 2001 and is now a British citizen and has been since 2007.

    b. The appellant's wife has a good job here.

    c. No evidence the appellant's wife would be able to work in Guyana and the appellant would be unable to support any application she may make to join him in Guyana.

28. Mr Tarlow's argument is simply that these circumstances are not insurmountable.

29. I have considered these issues and I find there is nothing before me that supports the submission the appellant's wife would be unable to accompany him to Guyana or be unable to obtain work especially given the fact she has a transferable skill as a nurse. All of the reasons put forward are valid reasons for not wanting to have to relocate to Guyana but they cannot be said to be

insurmountable. Insurmountable obstacles are a high test to meet and having considered all of the factors I am not persuaded the appellant has met that part of the test. I therefore find that the appellant does not satisfy the family life provisions of the Immigration Rules. It may well be that the appellant and his wife would meet the financial requirements if the correct documentation was submitted but that would require a fresh application being submitted to the respondent.

30. Ms Longhurst-Woods indicated to me that she did not intend to argue that removal would breach paragraph 276ADE HC 395 but she would be arguing that the appellant’s case should be considered outside of the Rules under article 8 ECHR.

31. I am satisfied that although Appendix FM provides a route for the appellant to remain in the United Kingdom it is not a complete code in this case. The appellant lawfully came to the United Kingdom as a spouse and lived with his wife during the following two years albeit there were two brief separations one of which coincided with the time when he was supposed to submit his application for indefinite leave to remain. If that application had been submitted in time then the appellant’s application would have fallen to be considered under paragraph 287 HC 395. Given the only objection would have been the relationship the appellant may well have succeeded as the financial requirements of paragraph 287 HC 395 are not as stringent as the provisions of Appendix FM. I make it clear that a near miss does not entitle an applicant to succeed under article 8 ECHR.

32. I have applied the guidance set out in Razgar [2004] UKHL 00027. I accept there is family life based on my findings about the relationship and removal of the appellant from this country would interfere with that relationship but such removal would be in accordance with the law and for the purposes of immigration control. The issue it seems is whether requiring the appellant’s wife to relocate would be unduly harsh.

33. In R (on the application of Onkarsingh Nagre) 2013 EWHC 720 Sales J at paragraphs [42] and [43] said:

> "The approach explained in the Strasbourg case-law indicates that ... consideration of whether there are insurmountable obstacles to the claimant's resident spouse or partner relocating to the claimant's country of origin to continue their family life there will be a highly material consideration. This is not to say that the question whether there are insurmountable obstacles to relocation will always be decisive.... Therefore, it cannot be said that in every case consideration of the test in Section EX.1 of whether there are insurmountable obstacles to relocation will necessarily exhaust consideration of proportionality, even in the type of precarious family life case with which these proceedings

are concerned. I agree with the statement by the Upper Tribunal in Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC) in the latter part of paragraph [56], that the Strasbourg case-law does not treat the test of insurmountable obstacles to relocation as a minimum requirement to be established in a precarious family life case before it can be concluded that removal of the claimant is disproportionate; the case-law only treats it as a material factor to be taken into account. Nonetheless, I consider that the Strasbourg guidance does indicate that in a precarious family life case, where it is only in "exceptional" or "the most exceptional" circumstances that removal of the non-national family member will constitute a violation of Article 8, the absence of insurmountable obstacles to relocation of other family members to that member's own country of origin to continue their family life there is likely to indicate that the removal will be proportionate for the purposes of Article 8".

34. I must also have regard to Section 117B of the 2002 Act when considering the public interest in removal and in particular I must have regard to the following:

    a. Maintenance of immigration control is in the public interest.

    b. The fact the appellant can speak English, as this would affect his ability to obtain work. I note he had previously worked in the United Kingdom as evidenced by the payslips in the bundle.

    c. The appellant’s wife is said to be in employment at Guy’s Hospital although the wage slips all pre-date June 2013 and I did not have any documentary evidence that she was still employed there or how much her income currently is.

    d. The parties married before they came to the United Kingdom and have lived together as husband and wife since his arrival in 2010.

35. I have considered all of the evidence along with the various submissions. I have had to balance the following positive factors:

    a. The appellant came here lawfully and sought to regularise his status since his leave expired.

    b. The appellant’s wife was granted refugee status in 2001 and is now a British citizen.

    c. She has only been to Guyana once and that was to marry.

    d. She maybe employed as a nurse.

    e. The appellant speaks English.

36. I have to balance those factors against the following:

    a. He does not meet the Immigration Rules under Appendix FM.

b. The appellant has family in Guyana and lived there as recently as 2010.

c. No evidence that the appellant's wife is in employment now as claimed or earning sufficient funds to ensure they would not be financially dependent on the taxpayers.

d. No evidence that the appellant's wife would be unable to enter Guyana or work there.

e. No other evidence of family life submitted.

f. Importance of immigration control.

37. Having considered all of the above factors I am satisfied that removal would not be unduly harsh and removal would not breach the appellant's and his wife's rights to family and private life.

**DECISION**

38. There was a material error. I have set the decision aside and remade the decision by dismissing the appeal under both the Immigration Rules and article 8 ECHR.

39. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to alter that order.

Signed: Dated: **April 23, 2015**

Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT**
**FEE AWARD**

As I have dismissed the appeal I make no fee award.

Signed: Dated: **April 23, 2015**

Deputy Upper Tribunal Judge Alis