In the Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21190/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 January 2015	**On 21 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAVLIN ALPHONSO WRIGHT

Respondent

Representation:
For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondent: Mr E Eluwa of Finsbury Law Solicitors

DECISION AND REASONS

1. Mr Wright is a citizen of Jamaica whose date of birth is recorded as 15 November 1957. He entered the United Kingdom on 15 July 2003 as a dependant spouse. Leave was varied and then further extended until 31 October 2012. Shortly before that date, on 15 September 2012, his spouse was granted indefinite leave to remain in the United Kingdom on the basis of her ten years continuous residence. On 31 October 2012 he therefore made application as the spouse of a person settled in the United Kingdom. That application however, was rejected on 19 December 2012 because the specified fee was not paid. Notwithstanding the guidance in the case of Basnet

(Validity of Application – Respondent) [2012] UK UT00113 Mr Wright did not appeal the decision of the Secretary of State (it may be that there was no issue) but rather, on 23 January 2013, submitted a further application which, on 6 March 2013, was refused with no right of appeal. On 3 March 2014 he was served with a Notice of Immigration Decision pursuant to Section 10 of the Immigration and Asylum Act 1999 in respect of which he did have a right of appeal, which he exercised.

2. On 9 October 2014, Mr Wright's appeal was heard in the First-tier Tribunal, by Judge Thomas, sitting at Birmingham.

3. The evidence was that Mr Wright and his wife married in Jamaica in 1989. They had never lived apart and from April 2010 to January 2012 Mr Wright had worked as a bus driver with a salary of approximately £26,000. Mrs Wright is unwell with a number of conditions which physically restrict her. However, notwithstanding the disability her employers (she works as a part-time carer) have accommodated her illness. Her medication would, however, be available in Jamaica, though there, Mr and Mrs Wright have no home and it would be unlikely that Mrs Wright would be able to secure employment. The medical condition is deteriorating. Medical evidence in support, was led.

4. In submissions, Mr Eluwa who also appeared in the First-tier Tribunal, pointed to the fact that Mr Wright was, when he made application on the basis of his wife's settled status, only months short himself of the ten year requirement. That the Secretary of State took two months to return the application meant that the leave, by virtue of section 3C of the Immigration Act 1971, which Mr Wright had, expired prior to the Secretary of State informing him that the application was being rejected.

5. I do not need to decide the point in the context of the appeal that is before me, but given the case of Basnet, it may be that '3C leave' would have continued until such time when Mr Wright might have appealed the decision to reject his application, had expired. Be that as it may the Secretary of State in considering the grounds upon which Mr Wright argued that he should be permitted to remain in the United Kingdom, looked to insurmountable obstacles and contended that there were no sufficient insurmountable obstacles standing in the way of Mr and Mrs Wright continuing family life in Jamaica.

6. Judge Thomas had regard to the submissions. He considered Appendix FM to the Immigration Rules, and in particular exception EX.1, which raises "insurmountable obstacles". He recognised that there was no evidence that Mr and Mrs Wright could not live together in Jamaica and held, "there is no evidence that [Mrs Wright] could not receive appropriate medical care in Jamaica." For those reasons Judge Thomas found the requirements of Appendix FM and in particular EX1 not met. Having regard to paragraph 276ADE of HC395, the twenty year requirement was not met, and so Judge Thomas found that Mr Wright could not succeed under the Immigration Rules.

7. Judge Thomas however went on to consider the issue of proportionality, finding that Mrs Wright's medical condition and the immigration history of both Mr and Mrs Wright were not adequately provided for in Appendix FM nor paragraph 276ADE and went on having regard to Sections 117A and 117D of the Nationality, Immigration and Asylum Act 2002, to allow the appeal. Judge Thomas was clearly concerned by the Secretary of State's failure to inform Mr Wright for two months of the difficulty of the fee in relation to the latest application and suggested that the delay did not indicate effective immigration control. Judge Thomas looked at the positive aspects that there were, such as the willingness of Mr Wright to work; that he had not been, at any time, a burden on the tax payer, and the nature of the relationship. He came to the view, having regard to all of the factors, that the appeal should be allowed having regard to the wider application of Article 8 ECHR.

8. Not content with that decision, by Notice dated 12 November 2014, the Secretary of State made application for permission to appeal to the Upper Tribunal. The Secretary of State suggested that there was inconsistency on the part of the judge in finding that the appeal failed under Appendix FM but then having regard to the same factors, namely Mrs Wright's medical condition and the immigration history, found sufficient cause to look to the wider application of Article 8 and allow the appeal. It was also submitted, in contrast to the judge's finding, that private life having been established at a time when Mr Wright was precariously present in the United Kingdom because, it was submitted, at all material times Mr Wright was granted only periods of temporary leave. I pause to note however that the marriage was one that was entered into prior to Mr and Mrs Wright coming to the United Kingdom.

9. In the event, on 16 December 2014 Judge of the First-tier Tribunal Hodgkinson granted leave thus the matter came before me.

Was there an error of Law?

10. This is yet another of the many cases that have troubled the Upper Tribunal concerning the issue as to when it is appropriate for a judge to look beyond the Immigration Rules and examine whether Article 8 of the ECHR is engaged and whether the decision of the Secretary of State, usually to remove an applicant, is proportionate to the legitimate aim of the Secretary of State, usually the economic wellbeing of the United Kingdom expressed as immigration control.

11. I do not propose to add any gloss to the considerable guidance which has emerged on point. In the case of R (On the application of Halimatu SA Adiya Damilola Aliyu and Fatima Owakemu Aliyu v Secretary of State for the Home Department [2014] EWHC 3919, Judge Grubb, sitting as a Deputy High Court Judge, having considered the various authorities, at Paragraph 59 said:

> *"In my judgment the Secretary of State (apart from "Complete Code" situations) always has a discretion to grant leave outside the rules. That discretion must be exercised on the basis of Article 8 considerations in particular assessing all relevant factors in determining whether a decision is proportionate under Article 8.2. There is,*

in principle, no "Threshold" criterion of "Arguability." I especially agree with what Aikens LJ said in this regard in MM (at 128). However that factor, taken together with other factors such as the extent to which the rules have taken into account an individuals circumstances relevant to Article 8, will condition the nature and extent of the consideration required as a matter of law by the Secretary of State of an individuals claim under Article 8 outside the rules. If there is no arguable case, it will suffice for the Secretary of State simply briefly to say so giving adequate reasons for that conclusion. At the other extreme, where there are arguable good grounds that the rules do not adequately deal with an individuals circumstances relevant in assessing Article 8, the Secretary of State must consider those circumstances and identifiably carry out the balancing exercise required by proportionality in determining whether there are "Exceptional Circumstances" requiring the grant of leave outside the rules under Article 8."

12. Clearly the reference to the Secretary of State in the guidance set out above applies to the judge whose decision is under consideration in the instant appeal. I remind myself in determining whether there is a material error of law that cases are often fact specific and that there will be a margin of appreciation (to use a European term) between judges.

13. My approach to this appeal is helped by the guidance in the case ***of*** R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982**.** At paragraph nine of that judgment Brooke LJ said:

"…It may be convenient to give a brief summary of the points of law that will most frequently be encountered in practice:

i) Making perverse or irrational findings on the matter or matters that were material to the outcome ("Material Matters");

ii) Failing to give reasons or any adequate reasons for findings on material matters;

iii) Failure to take account and/or resolve conflicts of fact or opinion on material matters;

iv) Giving weight to immaterial matters;

v) Making a material misdirection of law on any material matter;

vi) Committing or permitting a procedural other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;

vii) Making a mistake as to the material fact which could be established by objective and uncontentious evidence, where the Appellant and/or his advisors were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

14. Pregnant in the grounds, the Secretary of State suggests, that what the judge did was perverse since on the one hand he found that it would not be unduly harsh for the

Appellant and his wife to return to Jamaica and live there notwithstanding the medical conditions, dismissing the appeal under the rules and then, based on the same factors, allowed the appeal on human rights grounds.

15. It seems to me that whilst in many cases one can say that what is unduly harsh may well determine the outcome of an appeal, "undue hardship" and "proportionality" after consideration of to the totality of the evidence and the circumstances appertaining to a particular appellant will not always lead to the same result.

16. Judge Thomas was, in my view, entitled to have regard to the immigration history. The immigration history included, importantly, the fact that Mr Wright fell foul of the immigration rules on account only of an incorrect fee having been submitted in circumstances in which, had the Secretary of State been more prompt in pointing the error to Mr Wright, might have been corrected in time (without regard to any of the issues that arise from the guidance of Basnet). In other words as Mr Eluwa pointed out in the course of his submissions, everything in this case flowed from that error. This is not a point based case with its strict requirements prescribed by the rules. The judge therefore looked again at Mrs Wright's medical condition as a factor that was to be put in the balance with all other factors including immigration history and those statutory matters set out in sections 117A and B and concluded that the balance favoured the *status quo* namely that Mr Wright should be allowed to remain in the United Kingdom.

17. Reading the determination as a whole it does read as if the judge posed for himself this simple question, "Is it proportionate in all the circumstances to require Mr and Mrs Wright, who in the case of Mrs Wright is settled in the United Kingdom and has been in the United Kingdom for over ten years and Mr Wright who by the time the matter came before the Tribunal had himself been in the United Kingdom in excess of ten years and almost ten years at the date of the application to be required to uproot and start a new life in Jamaica where they had no home and no work or because in reality a wrong fee had been submitted in circumstances in which the Secretary of State had delayed letting them know having regard to all other factors?"

18. It is not for me to decide whether I would have determined the matter differently, it is for me to decide whether having regard to the guidance in R (Iran) the decision taken by this judge was open to him. In my view it clearly was. There is nothing perverse or irrational in the approach taken. It was open to the judge to look to the wider application of Article 8.

Notice of Decision

19. In all the circumstances the appeal is dismissed and the decision of the First-tier Tribunal is affirmed.

Judge Zucker
Deputy Judge of the Upper Tribunal **20 January 2015**