IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44794/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 8th May 2015	**On 20th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

E B
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Sarwar of Counsel instructed by J M Wilson Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge of the First-tier Tribunal Freer promulgated on 16th September 2014.

2. The Appellant is a male Jamaican citizen born 24th November 1981 who applied for leave to remain in the United Kingdom as the spouse of a British citizen, N J, to whom I shall refer as the Sponsor.

3. The Appellant arrived in the United Kingdom with a visitor's visa valid until 24th September 2002. He overstayed. The Appellant subsequently met the Sponsor, who he married on 23rd March 2005.

4. On 12th May 2010 the Appellant applied for leave to remain as the spouse of a British citizen, which application was refused on 6th July 2010 with no right of appeal. At the Appellant's request the decision was reconsidered, but the refusal was maintained on 27th July 2010.

5. On 16th March 2011 a further application for leave to remain was made, providing fresh information in relation to the Appellant and Sponsor undertaking IVF treatment in the United Kingdom. This application was refused on 9th May 2011 without a right of appeal.

6. A reconsideration request was made on 13th February 2012 and on 27th September 2013 the Appellant submitted further information. The Respondent refused this application on 8th October 2013, and made a decision to remove the Appellant from the United Kingdom. The reasons for this decision are contained in a letter dated 8th October 2013.

7. The Respondent considered the application with reference to Appendix FM of the Immigration Rules and accepted that it was appropriate to consider EX.1(b). It was accepted that the Appellant had a genuine and subsisting relationship with a British citizen, but it was not accepted that there were insurmountable obstacles to family life with that partner continuing outside the United Kingdom.

8. The Respondent did not accept that the Appellant satisfied any of the criteria set out in paragraph 276ADE of the Immigration Rules in relation to his private life.

9. The Respondent considered that the couple could reside together in Jamaica, in the absence of insurmountable obstacles, or that the Sponsor could remain in the United Kingdom, and the Appellant could return to Jamaica and make an application for entry clearance in order to satisfy the requirements of Appendix FM. No application had been made by the Appellant in relation to Appendix FM, as the Appellant relied only upon Article 8 of the 1950 European Convention (the 1950 Convention) outside the Immigration Rules.

10. In relation to Article 8 outside the Immigration Rules, the Respondent did not accept that there were any compassionate or compelling circumstances to justify a grant of leave to remain outside the Immigration Rules.

11. The Appellant's appeal was heard by Judge Freer on 11th September 2014 and dismissed under the Immigration Rules and on human rights grounds.

12. The Appellant was granted permission to appeal to the Upper Tribunal, and the appeal came before me on 21st January 2015. In brief summary I found that the judge had not considered the Immigration Rules, recording that it was agreed that the application could not succeed under the rules. Mr Sarwar confirmed that the appeal before the First-tier Tribunal had been based solely on Article 8 outside the rules as the application had been made prior to 9th July 2012. The judge, not having considered the Immigration Rules, found that there were no compelling reasons to consider Article 8 outside the rules, although he went on to consider section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) which was an error in that there is no requirement to consider section 117B unless Article 8(2) is being considered directly, which the judge had already decided against.

13. I found that the judge had erred by not carrying out an adequate consideration of proportionality either under the Immigration Rules, or under Article 8 outside the rules. The judge had considered and analysed the case law but as accepted by the Respondent, there was little evidence that the facts of this case had been applied to the legal principles, which was an error of law. Therefore the decision of the First-tier Tribunal was set aside.

14. Full details of the application for permission, the grant of permission by Judge Nicholson, and my reasons for finding an error of law are contained in my decision dated 26th January 2015. The decision of the First-tier Tribunal was set aside, but the findings that the Sponsor is a British citizen present and settled in the United Kingdom, and that the parties married on 23rd March 2005, and have a genuine and subsisting relationship were preserved. The hearing was adjourned so that further evidence could be given.

Re-making the Decision

Preliminary Issues

15. I ascertained that I had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed.

16. In addition to the documents that were before the First-tier Tribunal, I received from Mr Sarwar further evidence of the Sponsor's salary in the form of a wage slip dated 27th April 2015. I received from Mr Mills, a document confirming the visa processing times in Jamaica, together with case law, Singh and Khalid [2015] EWCA Civ 74, Naseem and Others [2014] UKUT 00025 (IAC), R (on the application of Chen) IJR [2015] UKUT 00189 (IAC), and the Queen on application of Agyarko and Others [2015] EWCA Civ 440.

17. Mr Sarwar confirmed that in the light of Singh and Khalid, it was accepted that the Respondent was entitled to consider Appendix FM and paragraph 276ADE, even though the application for leave to remain had been made before 9th July 2012, when those provisions were introduced into the Immigration Rules. Mr Sarwar confirmed that the Appellant relied upon EX.1(b) and Article 8 outside the rules.

18. I retired briefly to enable Mr Sarwar to consider the case law submitted by Mr Mills, and when the hearing resumed both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Oral Evidence

19. I firstly heard evidence from the Appellant who adopted his witness statement dated 11th September 2014. I then heard evidence from the Sponsor who adopted two witness statements both dated 11th September 2014.

20. Both the Appellant and Sponsor were questioned by the representatives and I have recorded all questions and answers in my Record of Proceedings and it is not necessary to repeat them in full here.

21. In summary the Appellant stated in his witness statement that he came to the United Kingdom in March 2002 aged 19. He met the Sponsor in October 2003 and they started a relationship, and married on 23rd March 2005 and have been living together since that date.

22. Both want a child but there has been a difficulty in conceiving. The Sponsor underwent IVF treatment in 2010, and again in 2011, which was unsuccessful. The couple plan to pay for another course of IVF treatment.

23. The Appellant has no close relatives in Jamaica, his mother lives in Canada and his grandmother in the United States. The Appellant stated that the Sponsor would not be able to work in Jamaica and the IVF treatment is needed in the United Kingdom because specialised treatment is required as he is a Hepatitis B carrier.

24. In his oral evidence the Appellant had said that the Sponsor had tried to find out if IVF treatment for people with Hepatitis B was available in Jamaica by emailing a hospital but there had been no response. The Appellant stated that when in the United Kingdom he had done some labouring and cleaning work. He did not think that there would be work available in Jamaica. He has no near relatives in Jamaica. The Appellant confirmed that the first round of IVF treatment had been paid for by the NHS but he was not sure about the second round.

25. The Sponsor in her witness statement stated that if the couple had to go to Jamaica they would have no employment, no income, and no home. She did not believe they would be able to have IVF treatment there. She confirmed that she had undergone two IVF treatments both of which had been unsuccessful. She described in her statement the suggestion that she could go and live in Jamaica as preposterous, pointing out that the employment prospects would be extremely poor and she would need a work permit which could not be obtained unless she already had an offer of employment.

26. In her oral evidence the Sponsor explained that no attempt was made to regularise the Appellant's immigration status as "we just did not get round to doing it." The Sponsor believed that she had had her first round of IVF treatment in 2007, and the

second in 2010 but she was not sure of the dates. She confirmed that both rounds of treatment had been paid for by the NHS. The couple were trying to save up for a further round of treatment.

27. The Sponsor confirmed that she works in IT administration for the NHS and has been doing this for approximately eleven years. She did not think that this work experience would assist her in finding employment in Jamaica and the IT systems would be different. The Sponsor said it made sense for the couple to remain in the United Kingdom and have IVF treatment, as the Sponsor has employment here and they have a home.

The Respondent's Submissions

28. Mr Mills relied upon the reasons for refusal letter dated 8th October 2013. I was asked to find that the evidence did not demonstrate that there were insurmountable obstacles to the couple relocating to Jamaica. Mr Mills submitted that the threshold is higher than the test of reasonableness. I was asked to note that the Appellant had found employment in the United Kingdom, and there was no reason why he could not do so in Jamaica, and the Sponsor had transferable employment skills.

29. The Appellant had not produced evidence to indicate that IVF treatment would not be available in Jamaica. Mr Mills submitted that the First-tier Tribunal had been correct to find that there was no duty to grant leave to remain in this country so that IVF treatment would be available, and relied upon the Queen (on the application of Erimako) [2008] EWHC 312.

30. In relation to Article 8 outside the rules Mr Mills referred to paragraph 28 of Agyarko, and submitted that the Appellant could only succeed if the case was for some reason exceptional. I was asked to find that there were no compelling or exceptional features, and to note that the evidence given by the Sponsor and Appellant was that the last cycle of IVF was in 2010, and there had been no further attempt to undergo IVF treatment privately.

31. In considering Article 8 outside the rules I was reminded of section 117B(4) of the 2002 Act in that little weight should be given to family life established when the Appellant is in this country unlawfully.

32. In relation to the Appellant leaving the United Kingdom to make an entry clearance application, and the Sponsor remaining in this country, Mr Mills referred to Chen submitting that it is for the Appellant to produce evidence that temporary separation will interfere disproportionately with family life. I was asked to note that 90% of visas were processed in Jamaica within 60 days. This would not delay IVF treatment. Mr Mills explained that it was not suggested that the Appellant leave the United Kingdom simply for the sake of procedure, to make an entry clearance application from abroad, as in this case there had been no application made under Appendix FM, and such an application was appropriate to ascertain whether the financial requirements could be met.

The Appellant's Submissions

33. In relation to EX.1(b) Mr Sarwar submitted that there are insurmountable obstacles to the couple living outside the United Kingdom, those being the lack of family connections, financial considerations, and lack of employment in Jamaica. These factors underpin the difficulty that the couple would have in undergoing IVF treatment in Jamaica.

34. I was asked to find both the Appellant and Sponsor credible, and to take into account the nature of the Sponsor's employment, in that she had given evidence that different IT systems would be used in Jamaica to those used in the United Kingdom, and therefore she would not have transferable skills.

35. In answer to the suggestion by Mr Mills that even if the couple were only able to obtain relatively menial jobs, this would not amount to insurmountable obstacles to relocation in Jamaica, Mr Sarwar pointed out that they could not undertake such low paid employment, because they needed to pay for IVF treatment.

36. I was referred to an NHS document prepared on 13th December 2011 which indicated at page 7 that there were only three facilities in the United Kingdom that could undertake IVF where an individual has Hepatitis B. I was therefore asked to find that such specialised treatment would not be available in Jamaica.

37. Mr Sarwar explained that no further IVF treatment had been commenced in the last five years, because the couple were saving to enable the necessary funds to be available.

38. Mr Sarwar indicated that documentary evidence proved that the Sponsor earned £20,147 per annum, and therefore the financial requirements of Appendix FM would be satisfied.

39. I was therefore asked to find that insurmountable obstacles existed to relocation in Jamaica and therefore the appeal should be allowed under EX.1(b). In the alternative, Mr Sarwar submitted that there were exceptional circumstances that justified a grant of leave to remain under Article 8 of the 1950 Convention, those being the need for the couple to undertake IVF treatment.

40. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

41. I have taken into account all the evidence, both oral and documentary that has been placed before me, and taken into account the submissions made by both representatives. I have considered the evidence in the round, and taken into account that in considering the Immigration Rules, such as EX.1(b) the burden of proof is on the Appellant, and the standard of proof is a balance of probability.

42. I set out below EX.1(b) together with EX.2;

EX.1(b) 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.

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.

43. I accept the immigration history in this case, in that the Appellant arrived in the United Kingdom in 2002 as a visitor and remained here illegally thereafter, and married the Sponsor, who is a British citizen, on 23rd March 2005.

44. I accept that the Sponsor was born in the United Kingdom and has not visited Jamaica. I accept that the couple have a genuine and subsisting relationship as husband and wife.

45. I find that the Sponsor knew that the Appellant had no legal status in this country when they married. When asked about this in her oral evidence, the Sponsor did not explicitly accept this, but I note (paragraph 16 of the First-tier Tribunal decision) that when giving evidence before the First-tier Tribunal, the Sponsor agreed that she was aware of the Appellant's immigration status when she married him. I find that to be the case. The couple made no attempt to regularise the Appellant's status following their marriage, until an application was made on 12th May 2010, just over five years after the marriage.

46. I accept that the Appellant is a Hepatitis B carrier, and that the Sponsor has undergone two cycles of IVF treatment without success. Neither the Appellant or Sponsor were sure when the last cycle of treatment had taken place, but in my view the evidence indicates that it was in 2011. The phrase "insurmountable obstacles" is defined in EX.2 as being very significant difficulties which could not be overcome or would entail very serious hardship for the parties. I set out below paragraphs 21 and 22 (in part) of Agyarko;

> "21. The phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.
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> 22. The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para [117]); there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so."

47. The Court of Appeal in paragraph 23 of Agyarko confirmed that although the term "insurmountable obstacles" involves a stringent test, it must be interpreted in a

sensible and practical, rather than in a purely literal way. In paragraph 25 the court found the mere fact that an individual is a British citizen, has lived all his life in the United Kingdom and has employment here, and hence might find it difficult and might be reluctant to relocate to Ghana to continue family life, could not constitute insurmountable obstacles to his doing so.

48. In this case the Sponsor is British, and was born here, has lived here all her life and has employment here. She might find it difficult to relocate to Jamaica, but this without more does not amount to insurmountable obstacles.

49. There is a health service in Jamaica, and the Appellant has not provided evidence to prove that he and the Sponsor would not have access to that health service. No evidence has been submitted to prove whether IVF treatment would be available. In any event, I conclude that the decision in Erimako, although not binding, is strong persuasive authority to confirm that the Respondent is not under a duty to grant leave to remain even for a limited period so that a couple can undergo IVF treatment.

50. The Sponsor would not experience language difficulties if she relocated to Jamaica. The Sponsor was aware when she married the Appellant that he had no legal status in this country. While I accept that the Sponsor and Appellant would have no close relatives in Jamaica, they are both adults, and the Appellant has been able to find employment in the United Kingdom even though he has had no legal status here. I find that the Sponsor does have transferable employment skills, having worked in IT for the NHS for the last eleven years.

51. In conclusion, in relation to EX.1(b) I find that although the couple may experience some difficulty if they have to relocate to Jamaica, there are no insurmountable obstacles to them doing so. The appeal therefore cannot succeed under EX.1(b).

52. It was not suggested that the Appellant could succeed with his appeal under paragraph 276ADE in relation to his private life, and I so find. The Appellant is 33 years of age and has not resided in the United Kingdom continuously for at least twenty years and therefore he cannot succeed under paragraph 276ADE(iii). It was not suggested that there would be very significant obstacles to the Appellant's integration back into Jamaica if he had to leave the United Kingdom, and I agree that there would be no such obstacles, and therefore the Appellant cannot succeed under paragraph 276ADE(vi).

53. I now consider Article 8 outside the Immigration Rules and in doing so take into account the principles which are summarised in paragraph 28 of Agyarko which I set out below;

> "28. So far as concerns Mrs Agyarko's claim under Article 8 for leave to remain outside the Rules, since her family life was established with knowledge that she had no right to be in the United Kingdom and was therefore precarious in the relevant sense, it is only if her case is exceptional for some reason that she will be able to establish a violation of Article 8: see Nagre, paras [39] – [41]; SS (Congo), para [29] and Jeunesse v Netherlands, paras [108], [114] and [112]."

54. I have followed the five stage approach advocated in Razgar [2004] UKHL 27. I find that Article 8 is engaged, as the Appellant has established a family and private life in the United Kingdom. I find that the proposed interference with that family and private life is in accordance with the law, as the Appellant cannot satisfy the Immigration Rules in order to be granted leave to remain.

55. I find that the proposed interference is necessary in the interests of maintaining effective immigration control, which is necessary to protect the economic well-being of the country, and I then have to conduct a balancing exercise, to ascertain whether the proposed interference is proportionate to the legitimate public end sought to be achieved. The decision in Beoku-Betts [2008] UKHL 39, means that I must consider the private and family life of the Sponsor as well as the Appellant.

56. In assessing proportionality, I take into account the wishes of the Appellant and Sponsor to live in the United Kingdom, and the fact that the Sponsor is a British citizen who has lived here since birth, and the Appellant has been resident here since 2002. I also take into account that the Sponsor's close family members reside in this country, and that she has long-standing employment. I also take into account that the couple have undergone IVF treatment, and wish to undergo further treatment in the future. I have to take into account section 117B of the 2002 Act, which confirms that the maintenance of effective immigration controls is in the public interest. I note that the appellant can speak English, and that the Sponsor is financially independent.

57. Section 117B(4) states;

> 'Little weight should be given to –
>
> (a) private life, or
>
> (b) a relationship formed with a qualified partner;
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.'

58. I therefore attach little weight to the Appellant's private life, and his relationship with the Sponsor, who is a qualifying partner, because this has been formed when the Appellant has been in this country unlawfully.

59. I find that the weight to be attached to the maintenance of effective immigration control, outweighs the weight to be placed upon the wishes of the Appellant and Sponsor to remain living together in the United Kingdom, despite the fact that they cannot satisfy the Immigration Rules.

60. I have considered the suggestion made in the refusal letter, that as an alternative to the couple relocating to Jamaica, the Appellant should return to Jamaica and make an application for entry clearance as the spouse of a British citizen. I do not find that the principles in Chikwamba [2008] UKHL 40 assist the Appellant in this case. This was considered by the Upper Tribunal in Chen and it was decided in very brief summary, that while there may be situations where there are no insurmountable obstacles to family life being enjoyed outside the United Kingdom, but temporary separation to

enable an individual to make an application for entry clearance may be disproportionate, it is for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. The Upper Tribunal decided that it would not be enough to rely solely upon the case law concerning Chikwamba.

61. In this appeal, I do not find that evidence has been submitted to prove that requiring the Appellant to leave to make an entry clearance application from Jamaica would be disproportionate. This is not a case where this course of action is being suggested simply for the sake of procedure. In this case, the Appellant has not made an application for leave to remain under Appendix FM, which would involve satisfying the requirement for the Sponsor to have a minimum income requirement, or appropriate savings, and the necessary evidence provided to prove this. As no such application has been made, I find this is a cogent reason for requiring the Appellant to return to Jamaica to make an application for entry clearance, and I conclude that it would be proportionate for him to do so. The likelihood or otherwise of him being able to meet the requirements of the rules for entry clearance is not a relevant consideration, as confirmed by SB (Bangladesh) v SSHD [2007] EWCA Civ 28.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is dismissed under the Immigration Rules.

The appeal is dismissed on human rights grounds.

Anonymity

The First-tier Tribunal made an anonymity direction and I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date 12th May 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award

Signed Date 12th May 2015

Deputy Upper Tribunal Judge M A Hall