Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/53307/2013

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 1st December 2014	**On: 3rd February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Charmaine Sherrilyn Simpson
(no anonymity direction made)

Respondent

Representation:
For the Appellant: Mr Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr Eaton, Counsel, Garden Court Chambers

DECISION AND REASONS

1. The Respondent is a national of Grenada date of birth 31st January 1974. On the 8th September 2014 the First-tier Tribunal (Judge Phull) allowed her appeal against a decision to remove her from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999. The Secretary of State now has permission to appeal against that determination[1].

[1] Granted on the 21st October 2014 by First-tier Tribunal Judge Nicholson

2. The appeal before the First-tier Tribunal concerned Mrs Simpson's Article 8 rights. She had come to the United Kingdom in 1998 as a visitor and had thereafter sought, unsuccessfully, to vary that leave. The basis of the present application was her 'long residence'/private life and the fact that she was in a long term relationship with a British citizen, Mr Howard Morant.

3. The First-tier Tribunal heard evidence from both Mrs Simpson and Mr Morant. Judge Phull found as fact that theirs is a genuine and subsisting relationship. The Judge was directed to the test of "insurmountable obstacles" in paragraph EX.1 of Appendix FM. The nature of the relationship accepted, Mrs Simpson could succeed under that provision if she could demonstrate that there were "insurmountable obstacles" to Mr Morant relocating to Grenada with her, and in so doing leaving the UK. Mrs Simpson relied on the decision in **MF (Nigeria) [2013] EWCA Civ 1192** which underlined that there is no 'exceptionality' test in Article 8 and that the overall question was one of reasonableness. Judge Phull considered that a number of cumulative factors meant that this test, however it was framed, was passed. Those factors were that Mr Morant's entire private and family life was in the UK, he having left his country of origin Jamaica some 33 years ago; he has children in the UK with whom he enjoys a close relationship; his elderly mother has considerable health problems (at the date of appeal she was in hospital having undergone heart bypass surgery) and he was required to provide her with regular care; he has a business which he runs in the UK which would close down if he had to leave. Having made those findings Judge Phull found there to be insurmountable obstacles to Mr Morant leaving the UK and resettling in Grenada and allowed the appeal with reference to EX.1. In the alternative the appeal was allowed on Article 8 **Razgar** grounds.

4. The Secretary of State appeals on the grounds that the First-tier Tribunal was wrong to have equated "insurmountable obstacles" with a test of whether it is "reasonable" to expect Mr Morant to leave the UK. It is submitted that this determination represents the kind of "free-wheeling Article 8 analysis" deprecated by Cranston J in **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC)**. The Tribunal has failed to apply the "seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience" set out in **VW (Uganda)** and **AB (Somalia) [2009] EWCA Civ 5**.

No Error of Law

5. At the hearing before me Mr Duffy candidly acknowledged that the Secretary of State could not realistically argue that

"insurmountable obstacles" meant something very different from "reasonableness" when she had conceded precisely that point in **MF (Nigeria)**: see paragraph 24, endorsed by the court at 47-49. The question was whether the First-tier Tribunal had appreciated the weight to be attached to the public interest in removing persons with no right to remain, and balanced against that matters which went beyond a mere inconvenience for the parties concerned. There was a "seriousness test" in **VW (Uganda)** which, Mr Duffy submitted, the Tribunal had failed, in this instance, to refer itself to.

6. I have read the grounds with care, alongside the determination. It seems to me that the matters identified by the Tribunal in reaching this decision are precisely the kind of matters that go beyond mere inconvenience or preference. Mr Morant was not objecting to going to live in Grenada simply because he likes living here; his objection was far more fundamental. He has responsibilities here which include his own children, his business, and crucially, the care for his elderly and unwell mother. All of those factors, considered cumulatively, were found by the Tribunal to amount to "insurmountable obstacles" to his relocation such that the test under EX.1 was met. That was a finding that was open to the Tribunal on the evidence before it. There was no error in approach to either EX.1 or Article 8 ECHR.

Decision

7. The determination of the First-tier Tribunal does not contain an error of law and it is upheld.

Deputy Upper Tribunal Judge Bruce
28th January 2015