Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01572/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 September 2017	**On 12 October 2017**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHELLY-ANN PHELOMENA THOMPSON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Armstrong, Senior Home Office Presenting Officer
For the Respondent: Mr K Shafiullah, a Legal Representative from Cleveland Law Ltd

DECISION AND REASONS

1. Although this case touches on the welfare of a child ("Z") I see no basis for thinking, still less finding, that there is a risk of publicity harming them and I do not make an order restraining publication about this case.
2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant" against the decision of the Secretary of State refusing her leave to remain outside the Rules on human rights grounds.
3. The claimant entered the United Kingdom in September 2009, lawfully, as a wife. She left the United Kingdom for a short period between March and April 2010 and applied for permission to bring her son into the United Kingdom and

she returned to the United Kingdom on 17 June 2011 accompanied by her son who entered with permission.

4. The appellant's permission to be in the United Kingdom and her son's permission to be in the United Kingdom expired on 18 November 2011.

5. On 15 December 2012, that is more than a year after her leave lapsed, she applied for leave to remain on "private and family life" grounds. The application was refused. There was a further application made in October 2014 which was also refused. On 13 April 2015 she was served with notification of a liability to removal and she served additional grounds under Section 120 of the Nationality, Immigration and Asylum Act 2002 arguing that she was entitled to remain on human rights grounds. She particularly relied on Article 8 of the European Convention on Human Rights. The application was refused on 20 May 2015 and it is the appeal against that refusal that came before the First-tier Tribunal.

6. The applicant's husband is a British citizen and also a convicted criminal who has been sentenced to 76 months' imprisonment for drugs related offences. I emphasise that this is not a deportation case. As far as I am aware the claimant has no criminal convictions and her husband is a British citizen.

7. It is a feature of the case that although the claimant says that she maintained a relationship with her husband during his incarceration she had only visited her husband in prison on one occasion. The claimant's husband had made a home visit once in August 2016. Her child is not the natural child of her husband. The claimant said that her child had some contact with his natural father but she did not know his whereabouts. At paragraph 45 the judge said:

> "Looking at the position today, the [claimant's] removal to Jamaica would not have a significant impact on the restricted family life she and Z are currently enjoying with Mr Martin. They are not enjoying de facto family life and therefore her removal would not change the current circumstances; there are no reasons why telephone contact could not continue to be maintained from Jamaica. Although the [claimant] is not working at present and has no income, she still has family in Jamaica to provide her with emotional support in the absence of her husband. In those circumstances, I am unable to find as at today that there are insurmountable obstacles to family life continuing outside the UK in order to meet the exceptions of EX.1.(b)."

8. The judge then went on to say the position would be different upon the claimant's husband being released from prison which was something she regarded as "imminent". She did not think that the claimant's husband could go to Jamaica. There was no evidence before her but she thought it:

> "highly unlikely that a British citizen with a criminal record for drugs offences and having been sentenced to a lengthy term in prison would be permitted to enter Jamaica, whether as a visitor or to join his Jamaican national spouse permanently."

9. The judge found there would be insurmountable obstacles to family life continuing outside the United Kingdom in those circumstances.

10. She then considered the position outside the Rules. She accepted that the claimant and her son had not deliberately overstayed. The judge said:

> "The [claimant] should have realised, but did not, that she needed to apply for further leave both for herself and for Z, but I accept that her failure to apply was not deliberate and her intention was not to remain in the UK unlawfully."

11. She found that on this alternative basis the appeal should be allowed because of the impossibility of family life continuing if she was in Jamaica.

12. The judge accepted that the child Z did not have a close relationship with his natural father and that the claimant's husband was regarded as his "real father" in the sense that he was the man providing influence and support. The judge was satisfied that Z's best interests lay in his remaining in the United Kingdom with both parents.

13. The decision to allow the appeal was challenged.

14. Point seven of the Secretary of State's grounds is very critical of the finding that the claimant did not realise that her visa had expired. I have reflected on this. I too find it a very surprising decision. However the judge had the advantage of listening to the evidence and however unlikely it might seem it is not impossible that a person did not appreciate that her leave had lapsed. The finding is not perverse and stands.

15. The grounds also point out that the child Z has had very little contact with his stepfather during his time in prison. In effect he is in a single parent family. These observations are correct but I do not find them particularly helpful. The judge clearly took the view that the claimant and her husband intend to reunite and the best interest is for the child to be with a natural mother and a committed stepfather. There is nothing controversial about that finding.

16. However the grounds identify two errors that cannot be answered.

17. First, they point out that there is no evidence before the First-tier Tribunal that the claimant's husband would be refused entry to Jamaica. Like the First-tier Tribunal Judge I would not be in the least bit surprised if he does in fact have difficulties but it is something that has to be proved and something that has to be proved by the appellant. I am aware that there are occasions when the rules of evidence permit an assumption that the laws of a foreign country are the same as the laws for the United Kingdom but that does not engage until it has been shown that the correct position cannot be established. I realise that the rules of evidence do not apply in Tribunals but that does not obviate the need to prove matters that are capable of being proved. There is no need to guess and this gap in the evidence could have been addressed, ideally by an opinion from someone learned in thein Jamaica. It may well have been a proposition which, supported by appropriate evidence, the Secretary of State could have been invited to admit. The point has just not been covered and the judge did err by assuming that something could have been proved but was not proved.

18. The judge also erred in finding that the claimant's husband's release was imminent and dealing with the case as if he had been released. There was in fact only the sketchiest of evidence that her husband's release was imminent. It was an unsubstantiated claim made by the claimant for reasons that were not explained well. In any event the fact is the husband was in prison and the judge was wrong to deal with the case as if he was at liberty.

19. It follows therefore that I am satisfied that there are two irreparable errors in the First-tier Tribunal's decision and I set it aside. I must now decide how to proceed. I see no need for a further hearing. The evidence relied on has been considered.

20. It is perfectly clear to me that the claimant and her son have established significant private and family life in the United Kingdom. Setting aside a failure to secure leave they appeared to have lived respectably. The claimant has worked and the claimant's son has attended college. There is some community support from a friend showing that the claimant goes to church.

21. All this is entirely sensible, credible evidence that the claimant and her son have established a "private and family life" in the United Kingdom. However, these things developed at a time when she did not have permission to be in the United Kingdom and I am required by statute to give them little weight. It is also clear that the claimant's son is not a "qualifying child" because he has not lived in the United Kingdom for long enough to gain that status. He was born in 2000 and has lived in the United Kingdom since June 2011.

22. The First-tier Tribunal had listed the neutral factors under Section 117B of the Nationality, Immigration and Asylum Act 2002. However once it is appreciated that the case cannot be decided on the basis of what might happen when the claimant's husband is released whenever that might be, there is little in favour of allowing them to remain. The fact that the claimant did not realise that she needed further permission takes a little bit of the sting out of the need to show that people who defy immigration control do not easily prosper but, as the First-tier Judge pointed out, it was the claimant's business to know when she needed further leave and the only significance of this is that it makes a negative point, not quite as negative as it might otherwise be. It is certainly not a reason to permit it to remain. As far as the claimant herself is concerned I see no basis whatsoever on which her appeal can be allowed responsibly.

23. Neither do I find the situation changed materially by the considerations appropriate for her child. No particular evidence was relied on about the disruptive effect that removal would have on him and as indicated above he has not lived in the United Kingdom for long enough to attract the "seven years' protection. His private life has been established while he has been in the United Kingdom unlawfully and again it is not a weighty matter.

24. The best solution is not possible here. As far as the evidence goes the claimant's husband is not in position to re-establish a nuclear family. There are no insurmountable obstacles in the path of establishing themselves in Jamaica and immigration control is meaningless if it not enforced.

25. None of this prevents the claimant and her son applying to return to the United Kingdom if and when the claimant's husband is in a position to provide for them financially and once his personal circumstances are clear there may be merit in taking advice about a further application even if he is not in work.

26. However the evidence here supports only one conclusion and that is that the claim on human rights grounds should be dismissed.

Decision

I allow the Secretary of State's Appeal and I substitute a decision dismissing the claimant's appeal against the Secretary of State's decision.

Signed

Jonathan Perkins, Upper Tribunal Judge Dated: 12 October 2017