**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/09479/2016**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 17 January 2018** | **On 8 March 2018** |

**Before**

**Deputy Upper Tribunal Judge MANUELL**

**Between**

**Miss MARCIA ANNMARIE MYERS**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr J Plowright, Counsel (instructed by Divine Legal Practice)
For the Respondent: Mr D Clarke, Home Office Presenting Officer

**DETERMINATION AND REASONS**

*Introduction*

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Landes on 9 November 2017 against the determination of First-tier Tribunal Judge A M Buchanan who had dismissed the appeal of the Appellant seeking settlement outside the Immigration Rules on Article 8 ECHR grounds on the grounds of her relationship akin to marriage to a British Citizen. The decision and reasons was promulgated on 19 October 2017.

2. The Appellant is a national of Jamaica, currently aged 51. The Appellant had entered the United Kingdom as a visitor, with leave nominally valid for 6 months, on 12 November 2001. She failed to leave the United Kingdom as required. From 19 November 2009 onwards she made various applications for leave to remain, all of which were refused, as was wholly predictable as she was an illegal overstayer who was unable to meet any relevant Immigration Rule. Nevertheless, she remained in the United Kingdom unlawfully. In April 2002 she met her British Citizen partner, with whom she has cohabited since 2007. It was accepted by the Secretary of State for the Home Department that the Appellant met the Eligibility and Suitability requirements of Appendix FM of the Immigration Rules, and that the relationship was genuine and subsisting. There were however no exceptional circumstances justifying a grant of leave to remain to her. The facts the Appellant's partner, originally from Barbados but now a British Citizen, suffered from diabetes and was registered as blind were not insurmountable obstacles as medical care was available in Jamaica. There was no disproportionality in Article 8 ECHR terms when the balancing exercise was performed. The judge dismissed the appeal on that basis. (There was no discussion of Chen [2015] UKUT 00189 (IAC) and the impact of temporary separation.)

3. Permission to appeal was granted on a limited basis and in qualified terms. It was considered arguable that the judge had erred in his approach to "insurmountable obstacles" for proportionality purposes under Article 8 ECHR. It was also considered arguable that the judge gave insufficient consideration to the ability of the Appellant's partner as a blind person to adapt to changed circumstances.

4. Standard directions were made by the tribunal. A rule 24 notice opposing the appeal was filed by the Respondent.

*Submissions*

5. Mr Plowright for the Appellant relied on the grounds of onwards appeal and grant. In summary he submitted that the judge had not addressed the central issue of insurmountable obstacles adequately. The Appellant's partner was from Barbados and had never lived in Jamaica. He had not left the United Kingdom for

some 44 years. The judge had applied the wrong test, as had been noted in the grant of permission to appeal. Agyarko [2017] UKSC 11 applied to reasonableness. The judge's findings could not be related to reasonableness. There was a difference between making a visit to Jamaica (which the partner said he was willing to do) and settling there. Adaptation had not been considered in sufficient depth. The judge's approach was irrational. The determination should be set aside and remade.

6. Mr Clarke for the Respondent relied on the rule 24 notice and submitted that there was plainly no material error of law. It had been accepted that Appendix FM had not been met and the judge's Article 8 ECHR findings were open to him. The substance of Agyarko had been applied. The judge had found as a fact that family life could be continued in Jamaica. There had been some conflicting evidence which the judge had resolved against the Appellant. The Appellant was her partner's principal carer and she would be there in Jamaica to help and support him. That was obvious and dealt adequately with the adaptation question. The perversity threshold had not been reached. Nor had there been speculation by the judge. The onwards appeal should be dismissed.

7. In reply, Mr Plowright reiterated that the impact on the Appellant's partner had not been sufficiently considered. Jamaica would be a foreign country for him as he had never lived there. He would not have the support he had in the United Kingdom. The judge had not looked into the case adequately.

*No material error of law finding*

8. In the tribunal's view the grant of permission to appeal was generous and had the effect of prolonging an appeal with limited merit. Unfortunately the appeal is typical of many appeals seen in the First-tier Tribunal and again in the Upper Tribunal, involving couples seeking to rely on Article 8 ECHR grounds. All manner of peripheral issues for Article 8 ECHR purposes had been raised, which Mr Plowright (who had not appeared below) wisely avoided. It has to be observed that had the Appellant returned to Jamaica as she could and should have done long ago, she would have been able to enter the United Kingdom to join her partner under the far less stringent provisions of the now repealed paragraph 281 of the Immigration Rules. Those Immigration Rules were replaced by from 9 July 2012 by the much more demanding provisions of Appendix FM. Even so, there was no evidence that those provisions could not with appropriate efforts be complied with, as special provisions are made for persons in the Appellant's partner's position. The current unhappy situation was created entirely by the parties, in failing to recognise the consequences of the Appellant's breach

of her visa conditions and overstay, and engaging in hopeless repeated applications. Compliance with the law is not a matter of individual choice. Time and money have been wasted seeking the impossible, when obvious, practical and satisfactory solutions were available.

9. The main issues before the judge were whether family life could be lived in Jamaica and whether that would be proportionate in Article 8 ECHR terms, in other words, whether there would be "insurmountable obstacles": see the reasons for refusal letter.

10. The evidence before the judge asserted to amount to "insurmountable obstacles" was found by him to have been somewhat exaggerated by the Appellant, although he accepted her evidence as generally credible. There was evidence of weight which showed that health care was available for the Appellant's partner in Jamaica. Indeed, that country background material as advanced by the Respondent was uncontradicted. It was not as though there was any prospect of improvement in the partner's chronic health conditions if he remained in the United Kingdom. By necessary implication they could only be managed, whether in the United Kingdom or in Jamaica, by standard medical procedures. There was no evidence of weight to the contrary. It was obvious that the partner has adapted to his long term disabilities, hence his willingness to travel to Jamaica if required to maintain contact with the Appellant. It was not in dispute that the partner has never been to Jamaica, but it is equally obvious that there are strong cultural affinities between all of the former British West Indies colonies, with shared language, history and democratic institutions. That means that adaptation would be a relatively straight forward process, especially for someone such as the Appellant's partner who has lived in London with its significant population of Caribbean origin or heritage. The Appellant and her partner demonstrate that shared culture in their relationship. As Mr Clarke submitted, the fact that the Appellant would be present in Jamaica with her partner would enable his daily care needs to be met if he decided to live there with her permanently, as well as with any other adaptation required: see [39] of the decision.

11. The judge examined all of the possibilities for the reasonable continuation of family life at [43] of his decision, and found that they were all viable in that none was subject to insurmountable obstacles, as opposed to varying degrees of inconvenience. He directed himself in accordance with Agyarko (above): see [45]. Ultimately the location of family life was a question of choice for the Appellant, subject of course to compliance with the Immigration Rules if she wished to live with her partner in the United Kingdom. There was no need for the judge to go into the Appellant's partner's circumstances in any more depth than he

had done. The judge further analysed the facts he found in accordance with section 117B of the Nationality and Asylum Act 2002, expressly following the "balance sheet" approach recommended by Lord Thomas in Hesham Ali [2016] UKSC 60.

12. There was no sustainable suggestion that the experienced judge had misunderstood any of the evidence, let alone had taken a perverse or irrational approach. The Appellant had been in the United Kingdom precariously for some 15 years by the date of the hearing and her partner was well aware of her lack of status. The public interest was decisive and the balance fell against the Appellant for the reasons the judge gave. Ultimately the submissions made on the Appellant's behalf, like the onwards grounds, amount to no more than disagreement with the judge's decision.

13. The tribunal finds that there was no material error of law in the decision challenged. Plainly the Appellant and her partner have several reasonable options open to them for the continuation of their family life, i.e., to live together in Jamaica or to travel there together on a visit while entry clearance is sought or to separate on a temporary basis while the Appellant obtains entry clearance on the terms prescribed by the Immigration Rules. With reference to Chen (above), there was no evidence before the judge to show that temporary separation in the United Kingdom while entry clearance was sought in Jamaica would create any significant difficulties, given the family and local authority support available to the Appellant's partner.

**DECISION**

The appeal is dismissed

The making of the previous decision did not involve the making of a material error on a point of law. The decision stands unchanged.

**Signed** **Dated** 7 March 2018

**Deputy Upper Tribunal Judge Manuell**