Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24905/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 November 2017 and 25 January 2018	**On 13 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

GLS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Fripp, instructed by Sterling & Law Associates
For the Respondent: Mr S Walker, Home Office Presenting Officer (2 Nov 2017)
Mr E Tufan, Home Office Presenting Officer (25 Jan 2018)

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision made on 23 June 2015 refusing his application for leave to remain on private and family life grounds.

Background

2. The background to this appeal can briefly be summarised as follows. The appellant is a citizen of St Lucia born on [ ] 1981. He first came to the UK in 2004 with entry clearance as a student with leave until 15 February 2006. He returned to St Lucia and applied for entry clearance as a working holidaymaker. Leave was granted until 1 March 2008. On 26 February 2008, he applied for leave as a dependant joining a person with leave to remain and leave was granted until 31 October 2010 and on 30 December 2009 he was granted leave to enter accordingly. This application related to the appellant's previous marriage on 23 February 2008, which subsequently broke down and was ended by divorce on 13 November 2011.

3. On 10 March 2011, he applied for a Certificate of Approval for Marriage but this application was discontinued. On 15 January 2013, he applied as the spouse of a settled person but his application was rejected for reasons relating to the payment of the fee. A further application was made on 6 February 2013 as the spouse of a settled person but this was refused with no right of appeal. On 3 March 2015, he applied for leave to remain on private and family life grounds. This application was refused on 23 June 2015 and is the subject of this appeal.

4. The respondent was satisfied that the appellant was in a genuine relationship with his wife whom he married on 19 July 2012. She accepted that the appellant met the suitability and eligibility requirements of appendix FM but not the immigration status requirements which meant that to succeed under the Rules, he had to show under para EX.1.(b) that there were insurmountable obstacles to family life with his partner continuing outside the UK. The respondent was not satisfied that this was the case. She went on to consider the question of private life under para 276ADE(1) but found that the appellant could not meet any of its provisions. She considered whether there were exceptional circumstances which might warrant consideration of a grant of leave outside the requirements of the Rules but it was her view that the appellant had obtained qualifications and work experience whilst in the UK which would enable him to take employment in St Lucia and his partner, a British citizen, would have employment opportunities there.

5. The respondent also noted (at para 37 of the decision letter) that in March 2012 the appellant had contacted the Home Office to request the return of his passport to arrange for his marriage. He was informed that that could not be done and was advised of the reasons why. He was told that the Home Office could help with his removal from the UK and that if his intended spouse wanted to apply for entry clearance for him, that would be her choice. The appellant said that he would return to St Lucia and apply for entry clearance after his marriage. In summary, the respondent was not satisfied that this was an appropriate case for a grant of leave outside the Rules.

The Hearing before the First-Tier Tribunal

6. At the hearing before the First-tier Tribunal the judge heard oral evidence from the appellant and his wife. She noted that the respondent accepted that the marriage was genuine and subsisting but his wife's family were not aware of her marriage and believed that she was living with friends. The reason for this deception was because her family would not accept the relationship and she believed that if they became aware of it, she would be cut off from them and prohibited from having any contact with them. She would face ostracism from her friends and community. She believed that she would be able to continue to conceal her marriage while her husband was in the UK but, if she had to move to St Lucia, they would become aware of the relationship.

7. In support of the claim that his wife would be ostracised, the appellant relied on an expert report from Jasvinder Sanghera, the CEO of Karma Nirvana, a charity supporting victims of forced marriage and honour crimes. The judge accepted that the appellant's wife's family would not approve of and would very likely ostracise her because of her marriage to the appellant, although she did not accept that she would be at risk of physical harm: at no point in her detailed witness statement or in her oral evidence had she made any such claim and the focus of her evidence had been the impact of the ostracism she would face not only from her family but also from her friends in her community.

8. However, the judge said that she did not seek to underplay the genuine fear that the appellant's wife had of her family becoming aware of the marriage and the ostracism she would face. She commented that she was currently living a lie facing pressure from her parents to marry and that, realistically, one had to ask how much longer this deception could continue and, in any event, her relocation to St Lucia would be of benefit rather than detriment as St Lucia would be thousands of miles away from her family, enabling her to make a fresh start living openly with her husband. She noted that the expert report referred to the importance of the appellant's wife continuing to have support from her husband which she would have and also referred to “survivor support” and the judge was satisfied that she could access this via the telephone and internet from St Lucia.

9. The judge then said that she found that “insurmountable obstacles” referred to the practical problems that a couple would face on relocation and she was not persuaded that the appellant's wife's concerns regarding her family could be considered as such. The judge then said at[11]:

> "With regards to the practical issues of day-to-day living in St Lucia the appellant is a former police officer and his wife is an educated woman with a good employment history in retail although the appellant claims in his witness statement that they would not be able to find work there is no objective evidence before me to corroborate this very broad assertion.

> Further, the appellant's parents continue to live in St Lucia and I am not satisfied that the couple could not turn to them for practical support on their initial return. On these facts I am not persuaded that the couple would face very significant hardship."

10. The judge commented that she understood that the appellant's wife did not want to leave the UK. She was a British citizen and had her family, friends and employment here. However, in the light of the fact was that she was aware when she married that the appellant did not have permanent leave to remain in the UK and was always aware that he may not be able to remain, the judge was not persuaded that an intelligent and independent woman such as the appellant's wife, with the support of her husband and parents-in-law, would by moving to St Lucia face significant hardships that could not be overcome. Accordingly, she was not satisfied on the balance of probabilities that the appellant met the provisions of para EX.1.(b). The judge was not satisfied that there was any evidence that had not been fully considered or which considered under article 8 would lead to a different conclusion.

The Grounds of Appeal and Submissions

11. In the grounds of appeal, it is argued that the judge applied the wrong approach to the assessment of insurmountable obstacles and that serious emotional distress or psychological harm must fall within either insurmountable obstacles within the Rules or within article 8. The judge therefore erred, so it is argued, by rejecting the contention that community ostracism fell within the remit of insurmountable obstacles on the basis that these were solely concerned with practical issues or in the alternative by failing to consider community ostracism within the parameters of article 8 outside the Rules. The judge had also failed to have regard to the documents concerning the psychological effect of ostracism. She may have held that they did not take the case further but she should have given reasons if that was her view. Finally, it is argued that the appellant's wife is a British citizen who faces at a minimum huge distress if she does not retain autonomy over when and how to disclose her marriage to her family and this raised issues of the extent to which British citizens can be expected to endure distress and to what extent this is proportionate bearing in mind Chikwamba [2008] UKHL 40 and that the judge erred in her approach to these issues.

12. Mr Fripp adopted these grounds. He submitted that social ostracism was a factor which could properly be considered when assessing insurmountable obstacles which should not be limited to strictly practical issues. The fact that an insurmountable obstacle did not arise because of the general prospects a couple would face on return but rather would arise because a return would lead to the fact of the marriage becoming known to the appellant's wife's family should not be regarded as dispositive. He further submitted that the judge had failed to deal adequately with article 8 outside the Rules and had failed to consider the Chikwamba issue of whether there was any real purpose in requiring an application to be made

from St Lucia when the appellant could meet in substance the requirements of the Rules.

13. Mr Walker submitted that the judge had reached findings and conclusions properly open to her for the reasons she gave. She was entitled to find that the appellant had failed to show that there would be insurmountable obstacles to living in St Lucia and there were no additional factors which were capable of leading to a different decision outside the Rules.

Assessment of Whether the First-Tier Tribunal erred in law.

14. I must consider whether the First-tier Tribunal erred in law such that the decision should be set aside. The expression "insurmountable obstacles" used in para EX.1. is defined in para EX.2. as "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."

15. The issue of insurmountable obstacles has been considered by the Supreme Court in R (Agyarko) v Secretary of State [2017] UKSC 11. Lord Reed considered the jurisprudence in the ECtHR and said that it appeared that that Court intended the words to be understood in a practical and realistic sense rather than as referring solely to obstacles making it literally impossible for the family to live together in the country of origin of the non-national concerned, the Court's application of this issue indicating that it was a stringent test.

16. Lord Reed then referred to the provisions relating to insurmountable obstacles in appendix FM and paras EX.1 and EX.2 saying that that definition appeared to be consistent with the meaning which could be derived from the Strasbourg case law. Lord Reed then said at [45]:

> ‘By virtue of para EX.1.(b), insurmountable obstacles are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate.” Is that situation compatible with article 8?’

17. Lord Reed considered that issue in [46]- [48] and held that the Rules and Instructions were compatible with article 8 but added that that was not to say that decisions applying the Rules and Instructions in individual cases would necessarily be compatible with article 8: that was a question which,

if the decision was challenged, must be determined independently by the court or tribunal in the light of the particular circumstances of each case.

18. Applying this guidance to the approach taken by the judge in the present case, I am not satisfied that she erred in law in her assessment of insurmountable obstacles within the Rules. It is argued that at the end of [10] the judge erred in law by limiting "insurmountable obstacles" to practical problems and therefore left out of account the risk of ostracism from her family and friends if the fact of the appellant's wife's marriage came to light. However, when [10], [11] and [12] are read as a whole, I am not satisfied that the judge excluded from consideration the appellant's wife's fear of ostracism from her family not least in the light of her comment in [10] that relocation to St Lucia was more likely to be of benefit rather than detriment in that in St Lucia she would be thousands of miles away from her family, able to make a fresh start and live openly with her husband away from a hostile community. She also commented that the appellant would be able to provide her with support and she would have access to further support by telephone and internet.

19. The judge did not exclude the risk of ostracism from the assessment of insurmountable obstacles but was not satisfied in the circumstances of the appellant and his wife that, when taken with other difficulties which would arise, it could be said that there would be very significant difficulties which could not be overcome or would entail very serious hardship. Accordingly, I am satisfied that the judge did not err in law in her approach to the issue of whether there were insurmountable obstacles within the Rules. She approached this issue in a practical and realistic way consistent with the jurisprudence of both the ECtHR and the Supreme Court and reached a decision properly open to her for the reasons she gave.

20. I now turn to the issue of whether the judge erred in law when assessing whether the appeal needed further consideration under article 8 outside the Rules. She directed herself in accordance with SS (Congo) v Secretary of State (2015) EWCA 387 and said that she was not persuaded that there was any evidence that had not been fully considered or which, considered under article 8 would lead to a different conclusion. That restrictive approach has been superseded by the judgments of the Supreme Court in Agyarko and in R (MM (Lebanon)) and Others v Secretary of State [2017] UKHL 10 that the fact that the Rules could not be met did not absolve decision makers from carrying out a full merits-based assessment outside the Rules under article 8 where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules.

21. The judge did not have the benefit of the guidance of the Supreme Court as set out above and appears not to have considered whether, even though the appellant could not meet the test of insurmountable obstacles within the Rules, there were exceptional circumstances which would result

in unjustifiably harsh consequences such that a refusal would not be proportionate. To this extent and through no fault of her own as she applied the binding jurisprudence as at the date of her decision, I am satisfied that she erred in law by failing to give further consideration to the appeal under article 8. In the light of the evidence and the potential arguments based on Chikwamba, I am not satisfied that it can be said that there are no prospects of success under article 8 outside the Rules.

22. I am therefore satisfied that the article 8 decision should be set aside and that the appropriate course is for it to be retained in the Upper Tribunal for that part of the decision to be remade. As already indicated, there is no error of law in the decision relating to insurmountable obstacles under the Rules and that part of the First-tier Tribunal's decision stands.

23. As the appellant wished to file further evidence to update the position in respect of article 8, the hearing was adjourned. The appellant has filed a supplementary expert report from Jaswinder Sanghera, dated 24 January 2018, setting out further evidence about the impact of social ostracism when a family member is perceived to have broken codes of honour and thereby brought shame on the family.

Further submissions

24. Mr Fripp submitted that the appellant and his wife were in a genuine relationship where his wife's family were not aware of the marriage. If they became aware of it, his wife would face ostracism. She had been able to conceal the marriage in the UK but this would not be the case if they had to move to St Lucia. In the light of the finding that there would not be insurmountable obstacles to the appellant and his wife relocating in St Lucia, the issue was whether there were exceptional circumstances such that article 8 required the appellant to be given leave to remain. Mr Fripp relied on the evidence of Ms Sanghera. He pointed out that the First-tier Tribunal judge had not found that the fear of ostracism was unfounded and it was clear from the expert evidence that the effect on the appellant’s wife would be very serious if her family learned about the marriage.

25. Mr Fripp argued that this was a case where the appellant could meet the requirements of the Rules for leave to remain as a partner save for the immigration status requirements. It had not been shown that there was any basis for finding that he could not meet the suitability requirements or that he would be denied entry under para 320(11) as someone who had made frivolous applications. The appellant would have a good case, perhaps even a certain case, so he argued, of obtaining entry clearance. If he was required to return to St Lucia to do so, the effect of even a period of temporary separation taken with the fact that his wife would not be able to look to her family for support was such that the refusal of leave would be disproportionate to a legitimate aim within article 8 (2).

26. He relied on Chikwamba and referred to [51] of Agyarko, where the Supreme Court accepted that there might be no public interest in the removal of an applicant, even if residing in the UK unlawfully but otherwise certain to be granted leave to enter in an application made from outside the UK. He submitted that the fact that an application was very likely to be successful should weigh heavily in the assessment of proportionality. When this factor was considered with the fact that the appellant's wife was unable to look to her family for support during a period of absence, this was a case which could properly be regarded as one of the small minority of cases where removal would be disproportionate.

27. Mr Tufan submitted that the issue of ostracism had a limited, if any, bearing on the issues under article 8. The First-tier Tribunal judge had accepted that the appellant's wife had a genuine fear that if her family became aware of her marriage, this would result in ostracism although the judge did not accept that she would be at risk of physical harm from her family. He submitted that the fact of her marriage would surface sooner or later and any reaction from her family would have to be faced at some point. If the appellant returned to St Lucia to make an application for entry clearance, there would only be a temporary separation if the requirements of the Rules could be met. He submitted that there were no exceptional circumstances to support a finding that the removal of the appellant would lead to a breach of article 8.

Assessment of the Issues

28. The First-tier Tribunal judge did not accept that the appellant's wife would be at risk of physical harm from her family for the reasons she set out in [9] of her decision but she did not seek to underplay her genuine fear of ostracism if her family became aware of her marriage. There is nothing in the evidence which leads me to take any different view on this issue. I accept that the fears that the appellant's wife has expressed are genuinely held and that the report from Ms Sanghera sets out what the consequences may be if someone is ostracised from their family and the emotional and psychological consequences which may follow.

29. The First-tier Tribunal judge asked herself how much longer the deception of whether the appellant's wife had married could continue and also questioned whether a relocation to St Lucia would not be a benefit rather than a detriment as she would be thousands of miles further away from her family and could make a fresh start living openly with her husband away from a potentially hostile community. In [39] of her witness statement of 7 November 2016, the appellant's wife sets out the basis of her concerns. Her family would not approve of her leaving the UK to live in St Lucia. They would feel that she was ungrateful for all they have done to have her brought up and educated in the UK and would not understand why she was leaving. She does not see a way of preventing her family from finding about her marriage and feels that by going to St Lucia she would be forced into telling her parents about her relationship with the

appellant. She wants to be the one to tell them rather than them finding out accidentally from someone else and this is not something she is ready to do.

30. Whilst I can understand her fears, the fact remains that she has successfully kept her marriage hidden from her family since November 2012 and if she were to move to St Lucia, it does not necessarily follow that she would have to disclose the fact of her marriage if she chose not to do so. If she did or her family otherwise found out about the marriage, there is some force in the judge's comments that living in St Lucia would enable her to make a fresh start. In this context I note from Ms Sanghera's report that one reaction to ostracism is relocation to protect the new family from the feared repercussions and to rebuild their lives successfully, albeit without their families: 4.4 of the report dated 24 January 2018.

31. It is implicit in the evidence of the appellant's wife that if she remains in the UK, her family are unlikely, or perhaps less likely, to find out about the marriage. Assuming this to be the case, it leads to a consideration of whether it would be disproportionate to expect the appellant to return to St Lucia by himself to enable him to make an application for entry clearance in accordance with the Rules. It is Mr Fripp's submission that the appellant has a good case, maybe even a certain case of success. He pointed to evidence to support the fact that the appellant's wife is earning sufficient to meet the financial requirements of the Rules and argues that there is no basis for the appellant being refused on suitability grounds. When these factors are taken with the issues arising from the fear of ostracism, he submits that the refusal of leave under article 8 would be disproportionate.

32. However, the fact remains that family life has been formed when the parties were aware that the immigration status of one of them was such that the creation and continuance of family life would be precarious. In Agyarko, the Supreme Court considered the issue of precariousness in [49] - [53], noting the judgment of the ECtHR in Jeunesse v The Netherlands (2015) 60 EHRR 17 which said that where the parties were aware that the relationship was precarious, "it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8". Lord Reed went on to say, having referred to the immigration instructions that "precariousness" was not a preliminary hurdle to be overcome, rather, the fact that family life had been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affected the weight to be attached to it in the balancing exercise.

33. Lord Reed went on to say at [51]:

> "Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends

> on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal would generally be very considerable. If, on the other hand, an applicant - even if residing in the UK albeit unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. This point is illustrated by the decision in Chikwamba v Secretary of State for Home Department."

34 Chikwamba was considered by the Upper Tribunal in R (Chen) v Secretary of State IJR [2015] UKUT 189 where the Tribunal accepted that there may be cases in which there were no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate and that in all cases it would be for the individual to place before the Secretary of State evidence that such temporary separation would interfere disproportionately with protected rights and it would not be enough solely to rely upon the case law concerning Chikwamba.

35. There is no dispute that the removal of the appellant would be a breach of sufficient significance to engage article 8 (1). The decision is in accordance with the law and is for a legitimate aim, the maintenance of immigration control. The issue is whether requiring the appellant to return to St Lucia is necessary and proportionate to a legitimate aim. In [57] of Agyarko, Lord Reed confirmed that in general in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control. In the present case the marriage was entered into when the appellant's immigration status was precarious and it has continued to be so.

36. The appeal was not successful under the Rules. The judge found that there were no insurmountable obstacles to the parties living together in St Lucia. However, it is clear that the appellant's wife fears that if she does go to live in St Lucia, her family will not approve of that course and it may lead to the fact of her marriage being discovered or she feels that she may be forced to disclose it and so bring about the risk of ostracism. She has successfully managed to conceal her marriage to date and I think the likelihood is that she would be able to continue to do so even if she moved to St Lucia. There are of course other reasons why she may not wish to move to St Lucia: she is settled in the UK, her life is here and she has submitted evidence of employment, which if accurate, shows that maintenance requirements of the Rules can in all likelihood be met.

37. The option remains of the appellant returning to St Lucia to make an application for entry clearance whilst his wife remains in the UK. It appears to be the case that an application has good prospects of success, but it cannot be said to be certain of success. It would be wrong to prejudge the position or to pre-empt the decision of the entry clearance officer as an application must be assessed at the date of decision on the

evidence presented. Mr Fripp submitted that there was no reason to believe that the suitability requirements of the Rules could not be met it but, again, that must be a matter for the entry clearance officer to consider on the basis of the evidence before him.

38. I must take into account the provisions of Nationality, Immigration and Asylum Act 2002 and in particular that the maintenance of effective immigration control is in the public interest (s.117B(1)), the appellant is able to speak English (s.117B(2)) and little weight should be given to a relationship formed when a person is in the UK unlawfully (s.117B(4)). I also take into account that in March 2012 the appellant contacted the Home Office and there was a discussion about the return of his passport. It is recorded that he said that he would return to St Lucia after the marriage and apply for entry clearance. That option was open to the appellant at that stage and has remained open to him since then.

39. If that course is taken, it would not increase the risk of their marriage coming to the knowledge of his wife's family. There would be a temporary separation, assuming that the requirements of the Rules could be met. There is no evidence before me of the length of time applications normally take when made from St Lucia but there is no reason to believe that it would be for an unreasonable or disproportionate length of time. I am not satisfied that requiring the appellant to take that course of action would be disproportionate. It must also be kept in mind that Chikwamba was decided at a time before the amendment to the Rules in 2012 and 2014 and, more significantly, before the statutory enactments relating to the public interest considerations in the 2002 Act and that whilst in the UK, the appellant cannot meet the immigration status requirement, a substantive rather than a procedural part of the Rules in Appendix FM. The appellant's case is not one where it can be said that there is no public interest in removal.

40. Taking all the relevant factors into account including those in S117B of the 2002 Act, I am not satisfied that the decision to remove the appellant is disproportionate to a legitimate aim in circumstances where there are no insurmountable obstacles to the parties returning to St Lucia and where the appellant can return by himself and make an application for entry clearance. He fails to show that there are strong or compelling reasons to outweigh the public interest in maintaining immigration control. Accordingly, I am not satisfied that the decision to remove the appellant would be in breach of article 8.

Decision

41. The First-tier Tribunal did not err in law its assessment of the appeal under the Rules. It did err in its assessment of the article 8 appeal. That decision set aside. I re-make the decision and dismiss the article 8 appeal.

42. The anonymity order made by the First-tier Tribunal remains in force until further order.

Signed: H J E Latter Dated: 8 February 2018

Deputy Upper Tribunal Judge Latter