Upper Tribunal

(Immigration and Asylum Chamber)

R (on the application of Matthew) v Secretary of State for the Home Department FCJR [2013] UKUT 00466 (IAC)

Heard at Field House **Determination Promulgated**

On 18 July 2013

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Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

THE QUEEN

ON THE APPLICATION OF

MATTHEW

Applicant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances :

For the Applicant: Mr P. Turner, Counsel, instructed by Ferani Taylor

For the Respondent: Mr Z. Malik, Counsel, instructed by the Treasury Solicitor

JUDGMENT

Introduction

1. The applicant applies for judicial review to challenge the decision of the respondent on 31 July 2012 not to treat her representations made on 6 December 2011 as a fresh asylum or human rights claim, pursuant to paragraph 353 of the Immigration Rules. It is common ground that this decision of the respondent was supplemented by means of a letter dated 8 March 2013 and that this supplementary letter also falls within the ambit of the applicant's grounds of challenge.

2. Permission to bring judicial review proceedings was refused by Upper Tribunal Judge Latter on 6 September 2012 but granted on oral reconsideration by Upper Tribunal Judge Warr on 7 March 2013. Paragraphs 6 to 11 of Judge Warr's decision serve as a useful summary of the background:-

“6. The applicant has a lengthy immigration history having arrived on 27 th July 1998 as a visitor and her stay was extended as a student until 28 th February 2001.

7. Thereafter her stay in the United Kingdom has been without leave. She has, however, made repeated applications for her stay to be regularised.

8. The applicant initially relied on her marriage to Mr Matthew in March 2003 and there was an appeal before Immigration Judge Brown on 24 th May 2007 where the judge found the appellant could not succeed under the rules or the then prevailing policy (there being minimal if any evidence of a subsisting marriage) and he dismissed the appeal under Article 8. The applicant’s marriage ended in divorce on 8 th May 2008.

9. The appellant had a relationship meanwhile with Mr Jones whom she married on 31 January 2009. Prior to the marriage her case was considered as an unmarried partner of Mr Jones. The respondent refused her application for leave to remain on that basis and that decision was unsuccessfully challenged before Immigration Judge Simpson on 5 th December 2008. The judge found that he could attach little weight to the applicant’s evidence and treated what she said with considerable caution. The appeal failed under the rules and Article 8.

10. There was an unsuccessful attempt to challenge the decision and an unsuccessful judicial review application following an application based on the appellant’s marriage to Mr Jones which took place after Judge Simpson’s decision.

11. The applicant’s representatives made an application on 6 th December 2011. It was submitted that matters “had plainly moved on” since the decision of Judge Simpson and the parties were now married and in a durable relationship and it would be unreasonable for Mr Jones, a British citizen, to live with the applicant in Jamaica due to the ill-health of his mother. The applicant had a daughter who lived in Belfast and grandchildren who suffered from autism.”

Immigration Judge J Simpson’s determination

3. The following paragraphs of Immigration Judge J Simpson’s determination are of relevance:-

“8. I accept the Appellant has established family life. She lived for about 2 years with her aunt and for an uncertain period of time with her husband. She is now in a new relationship with Mr Jones which has currently lasted 15 months. There is nothing special about her relationship with her aunt which appears to be a normal reasonably close aunt/niece relationship. Her relationship with her cousin is more distant. She has no children. I treat her relationship with Mr Jones as being her closest one and it would be this which would be most affected if she were to return to Jamaica. I accept she has no family remaining in Jamaica to whom she could turn for support. She is a mature woman aged 37 who has taken advantage of some education and training in the UK. She asserts she has never been unemployed or drawn benefits from which I infer she has not encountered difficulty in finding employment. She will take these skills and experience with her to Jamaica which should assist her to find employment there. There are no health problems. Following the breakdown of her marriage the Appellant found accommodation for herself, which she shares with another woman and now Mr Jones. I see no reason why she should not find accommodation for herself in Jamaica. It will be a matter for Mr Jones to decide whether he wishes to accompany the Appellant to Jamaica whilst she makes a settlement application. If he prefers to remain here there is no reason why he cannot provide her with some financial support. They will be able to communicate by telephone or electronic means and there is no reason why Mr Jones cannot visit Jamaica.

9. The relationship with Mr Jones is comparatively new and has not yet stood the test of time. He merely lodges with the Appellant in a house in respect of which he is not a tenant. He espouses that at some time in the future he expects to enter into a tenancy jointly with the Appellant and that they hope to marry. There will be nothing to stop them from marrying in Jamaica if that remains their wish, following which a marriage application can be made.

10. Whilst I accept that requiring the Appellant to return to Jamaica will be an interference with her right to respect for family life and perhaps also to private life, such interference will be in pursuit of a legitimate aim by the Respondent namely to maintain effective immigration control which invokes the principle of proportionality. In this event I have to balance the rights of the Appellant with the public interest. I take into account that the Appellant has been less than frank in her evidence from which I infer she has attempted to add greater weight to the strength and duration of her relationship with Mr Jones than is in fact the case. I also take into account the other factors mentioned above and conclude the Respondent's refusal of leave to remain is not disproportionate.

11. I was referred to the case of Chikwamba [2008] UKHL 40 but the facts of that case are very different from this one. This Appellant is not being asked to return to a place where she or Mr Jones are likely to be at risk and there is no child involved. I have also taken into account the other authorities cited by Ms Delany."

The submissions of 6 December 2011

4. The submissions made by the applicant's solicitors enclosed witness statements from the applicant and Mr Jones, a letter from the applicant's mother-in-law, a letter from the applicant's daughter, and various other letters of support, including from clergy at the church where the applicant and her husband worship and from the applicant's adult children, who are resident in the United Kingdom. There was also a letter from Mr Jones's GP, concerning Mr Jones's mother.

5. The following passages from the solicitor's submissions letter are of particular relevance to the present proceedings:-

"We say that matters have plainly moved on since the decision of the immigration judge in December 2010. Firstly our client married Mr Jones on 31 January 2009. They have been living together now as man and wife for just under 3 years. We say it is plain that the relationship is a loving and durable one, having been in existence for over 4 years. It is clear, we say, that the earlier concerns expressed by the previous immigration judge have been allayed by the passage of time.

It is our position that in this case it would be unreasonable to expect our client and Mr Jones to relocate to Jamaica.... The reason for this is simply, Mr Jones is the carer of his mother, Mrs Joan Jones. Mr Jones had a brother, his brother and he used to share responsibility for looking after his mother. Sadly, his brother died in 2010. Since his brother's death Mr Jones has been the primary carer for his mother in fact the applicant has also played an important part in the care provided to Mrs Jones as can be seen from the witness statement submitted.

It is clear that to compel Mr Jones to leave the United Kingdom would deprive his mother of the familial support she enjoys from him and indeed the applicant. There is nobody else other than the state to whom she could turn, we say in those circumstances it is plainly unnecessary and indeed unlawful for him to relocate to Jamaica. We would also draw your attention to the fact that Mr Jones is a British citizen, United Kingdom is his home, he has no family in Jamaica, no work in Jamaica, no house in Jamaica and is not rich.

We also say that it would be unnecessary and therefore unlawful to compel our client to return to Jamaica and make an application from abroad. We say this, as given her previous immigration history, it is likely that any application made from abroad will be refused. If such an application was refused it would need to be challenged by way of an appeal and we understand that this is a long process that is likely to result in a separation between husband and wife for a considerable period of time. Our client has no family or friends to whom she could turn to in Jamaica, Mr Jones would not be able to remain in Jamaica while she made the application because of course he would be required in United Kingdom to look after his mother.

Our client also has a daughter in the United Kingdom … [Mrs Shirley] who lives in Belfast, a person present and settled in the United Kingdom she has 3 children … you will see from the letter of support from Mrs Shirley that the applicant enjoys family life with her and her children. You will see from the letter of support that Mrs Shirley considers that her mother's removal would have a deleterious effect on her children."

The respondent's decision letters

6. In the decision letter of 31 July 2012, the respondent said this:-

"Although your client claims to have been in a relationship with Mr Jones since 2007, prior to her marriage to him on 31 January 2009, she had not had valid leave to remain since 28 February 2001. She therefore does not satisfy the requirement R-LTRP.1.1.(b) of Appendix FM of the Immigration Rules.

Furthermore, your client's relationship was considered by the Immigration Judge who heard her appeal on 5 December 2008 and found in paragraph 8 of the appeal determination…[see [3] above].

Your client became appeal rights exhausted in March 2009 but continues to submit applications and representations to remain in the United Kingdom on the basis that have already been considered and rejected before. Moreover, your client married Mr Jones after her appeal was dismissed when both were aware that their marriage would not give your client a lawful right to remain in the United Kingdom as the Immigration Judge had clearly found in paragraphs 9 and 10 of the determination '… He espouses that at one time in the future he expects to enter into a tenancy jointly with the appellant and that they hope to marry. There will be nothing to stop them from marrying in Jamaica if it remains their wish, following which a marriage application can be made …'

The Immigration Judge gave consideration to Chikwamba and stated in paragraph 11, ' I was referred to the case of Chikwamba [2008] UKHL 40 but the facts of that case are very different from this one. This Appellant is not being asked to return to a place where she or Mr Jones are likely to be at risk and there is no child involved. '

Consideration has also been given to the case of Beoku-Betts v SSHD [2008]. The House of Lords considered the extent to which Article 8 rights for family members who are not party to proceedings should be considered. However, it is not accepted that your client's case falls within the remit of this judgment … Your client and Mr Jones made the decision to continue their relationship knowing that she had no right to continue living here, and that there may be interference with the relationship should she have to return to Jamaica and Mr Jones makes the decision not to accompany her. Although it is claimed that Mr Jones would not be able to accompany your client to Jamaica as he would not be able to leave his mother, she would be able to approach the local authorities and social services for care and support. Mr Jones would therefore be free to accompany your client and the couple continue

their family life in Jamaica. It is therefore considered that there are no insurmountable obstacles to your client and Mr Jones continuing their family life abroad. Alternatively, Mr Jones can support any application she makes for return here while he remains in the United Kingdom to look after his mother.

…

The remaining points raised in your submissions, taken together with the material previously considered in the determination, would not have created a realistic prospect of success."

7. One of the grounds of challenge in the current proceedings is that the letter of 31 July 2012 addressed the issue of Article 8 of the ECHR solely by reference to the application of the current Immigration Rules (which came into force on 9 July 2012), instead of adopting the "two stage" approach which the Upper Tribunal Immigration and Asylum Chamber had held to be required, in the cases of MF (Article 8 – new rules) [2012] UKUT 00393 (IAC) and Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC). The supplementary decision of 8 March 2013 was a response to this criticism. The following paragraphs are relevant:-

"9. The Upper Tribunal in Izuazu (Nigeria) [2013] UKUT 45 (IAC) and MF (Nigeria) [2012] UKUT 00393 (IAC) decided that where a claimant does not meet the requirements of the Immigration Rules it remains necessary for the Tribunal to carry out a separate additional assessment of Article 8 applying the criteria established by current case law. As our letter of 31 July 2012 makes clear it is not accepted that your client meets the Immigration Rules and there are no exceptional circumstances which would make refusal of your application unduly harsh. While, with respect, we do not believe it to be necessary or appropriate to undertake the two-stage assessment identified by the Tribunal, it is acknowledged that the First Tier Tribunal is bound by those decisions. Accordingly, when considering whether or not your case is clearly unfounded, at present it is necessary to consider whether that claim would be bound to fail before an Immigration Judge if the criteria established by existing case law are applied. For the reasons set out in this letter it is considered that it would be.

10. Your client arrived in the United Kingdom on 27 July 1998. She was granted six months leave to enter as a visitor. On 18 January 1999, she submitted an application for leave to remain as a student. Leave was granted until 31 January 2000. Further leave as a student was subsequently granted until 28 February 2001. Your client then disappeared. She submitted an out of time application on 05 June 2002. On 08 June 2002 her application was rejected because your client failed to complete the correct form and her application was not fully completed. She also failed to supply any documents in support of her application. She married a Mr Victor Matthew on 12 March 2003 and submitted an application for leave to remain as a spouse on 23 July 2004. Again, your client's application was rejected on 14 August 2004 because she completed the wrong form. She submitted a further application for leave to remain as a spouse on 23 August 2004 which was refused with an in-country right of appeal. Her appeal lodged on 20 April 2007 was dismissed on 14 June 2007.

11. In August 2007, your client began a relationship with a Mr Neil Jones. On 04 September 2007, she submitted an application for leave to remain as an unmarried partner. Your client failed to submit the relevant documents and her application was rejected. On 27 October 2007, she re-submitted the application. Her application was refused on 27 October 2008 with a right of appeal. Her appeal was dismissed on 10 December 2008. Request for a review of the dismissal was refused on 15 January and 09 March 2009. Your client and Mr Victor Matthew were divorced on 08 May 2008.

12. Your client married Mr Neil Jones on 31 January 2009 and resubmitted an application for leave to remain as a spouse of a settled person on 21 April 2009. She was refused because she only made a partial payment of the fee. Your client then submitted an application for leave outside the Immigration Rules on the 26 May 2009. Her application for leave outside the rules was made void as on the same day she reapplied for leave as a spouse of a settled person. On 14 October 2010, your client's application was refused.

13. On 12 November 2010, your client lodged a judicial review claim. Her further representations were refused on 21 December 2010. The judicial review application was refused on 18 February 2011. Her permission to an Oral permission hearing was refused on 16 November 2011. You submitted a human rights claim relying on your letter dated 06 December 2011. A full account of your client's human rights have been duly considered and refused in our letter dated 31 July 2012.

14. It is accepted that your client's removal would interfere with her private life in a sufficiently serious enough manner to engage Article 8(1). However, her removal would be in accordance with the law and would pursue a legitimate aim of maintaining immigration control.

15. It is acknowledged that your client's claim to have remained in the UK without leave to remain. It is also acknowledged that she is in a relationship with Mr Neil Jones since 2007 but she had not had valid leave to remain since 28 February 2001.

16. It is noted that your client has her daughter and her children in the UK and they play a big part in her life. She mainly spends time with the daughter and her grand-children during the holidays. However, it is noted that many families maintain long distance relationships and her grandchildren will have the support of their mother following your client's return to Jamaica. As notified in our refusal letter dated 31 July 2012, there are modern methods of communication that your client and her family can rely on to maintain their relationship. Her daughter was born in Jamaica and her grandchildren can also visit her in Jamaica.

…

24. After taking all the above into account, it is considered that your client's claim to remain on the basis of Article 8 after having considered your claim in light of MF (Nigeria) and Izuazu remains clearly unfounded.

…

30. Consideration has been given to whether these further submissions, taken together with the previously considered material, create a realistic prospect of success before an immigration judge.

31. In all circumstances it is not considered that the decision to remove your client prejudices her private or any family life in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. There is no presumption of family or private life in the UK, it depends on the circumstances on each particular case.

32. After taking all of the above into account and having reconsidered your client's claim in light of MF (Nigeria) and Izuazu it is not considered that there is any need to demur from the conclusion expressed in our previous letters that your client should be removed from the UK, and that to effect the removal would not be in breach of Article 8.

33. For the reasons set out above, it is considered that there is no realistic prospect that your client's submissions will, when taken together with all the previously considered material, lead an

immigration judge to decide that your client should be allowed to stay in the United Kingdom and accordingly it does not amount to a fresh claim under paragraph 353. It has further been considered whether there is a realistic prospect of an immigration judge, considering the fresh material in light of the previously considered material, and applying the rule of anxious scrutiny, finding that there would be a real risk that your client's human rights would be breached on return to Jamaica. It has been concluded that there is not, and that the material do not, there create a realistic prospect of success.

34. Having considered the matter from the perspective of an immigration judge, taking all the evidence in the round and giving appropriate weight to the issues, the Secretary of State considers that your client's further submissions do not create a realistic prospect of success before an immigration judge, notwithstanding their rejection by the Secretary of State."

The law

8. The relevant law concerning judicial review of a respondent's "fresh claim" decision is most conveniently articulated in the judgment of Buxton LJ in WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495:-

"11. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return … The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

Discussion

9. As well as the grounds of application, the applicant's case finds expression in a detailed written skeleton argument of Mr Turner, which he supplemented in oral submissions on 18 July. The respondent's case is set out in her detailed grounds of defence, to which Mr Malik spoke at the hearing. Having considered the respective arguments and the relevant materials, my findings are as follows.

(a) A whirligig case?

10. For the respondent, Mr Malik sought to categorise the present proceedings as, in the words of Ward LJ:-

"… one of those whirligig cases where an asylum seeker goes up and down on the merry-go-round leaving one wondering when the music will ever stop. It is a typical case where asylum was refused years ago but endless fresh claims clogged the process of removal … it is time the music stopped and the merry-go-round stops turning." (TM v Secretary of State for the Home Department [2012] EWCA Civ 9; [1], [40]).

Mr Malik submitted that, in the present case, the respondent had considered the applicant's circumstances and submissions on a number of occasions and had, to date, made at least six adverse decisions, from March 2007 to March 2013.

11. It is, I consider, abundantly plain that Ward LJ was not in any way attempting to lay down a legal test or other identifying mechanism, in describing the application before the Court of Appeal as a whirligig case. To treat his words in this way is likely to obscure, rather than illuminate, the proper analysis of cases involving paragraph 353 of the Immigration Rules.

12. Paragraph 353 makes express provision for cases where the "further submissions" are not "significantly different from the material that has previously been considered". Submissions "will only be significantly different if the content:

(i) had not already been considered; and

(ii) taken together with the previously considered material created a realistic prospect of success, notwithstanding its rejection …"

13. If the same submissions are made, paragraph 353(i) will not be satisfied and the respondent need go no further. It is also correct to state that the respondent can bring the process to an end by making removal directions. Judicial review proceedings launched against or otherwise in the wake of such directions will not necessarily stop those directions from being carried out.

14. But, the longer an individual remains in the UK, the more likely it is that that individual's Article 8 rights, whether in the private or family life aspect, will change in character, compared with the position when his or her case was last tested by means of appeal or judicial review. That is, in a nutshell, precisely the applicant's argument in the present case. Through Mr Turner, the applicant contends that matters have, indeed, moved on since Immigration Judge Simpson's determination, and also since the judicial review proceedings of 2011 (in which she was unsuccessful).

(b) The MF issue: what is the proper ambit of an Article 8 consideration?

15. Despite the emphasis placed by both sides on this issue, I consider it can be disposed of briefly. Although, in the light of the judgment of Sales J in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin), there is scope for argument that, in a particular case, any failure to examine Article 8 otherwise than through the prism of the Immigration Rules may be immaterial, in that no arguable case exists for reaching a different conclusion on Article 8, outwith those Rules, the respondent in the present case chose in the supplementary decision of 8 March 2013 to address Article 8 in its own terms. The respondent rightly acknowledged that, whether or not MF and Izuazu are ultimately found to be correct in holding that the new Rules are not dispositive of Article 8 issues, Judges of the First-tier Tribunal can be expected in the meantime to follow those cases. Accordingly, in assessing whether the appellant has a reasonable prospect of success, it is clearly right to assume that the hypothetical judge would look outside the confines of the Immigration Rules, in determining whether the appellant's removal would violate her Article 8 rights or those of relevant family members.

(c) Which Immigration Rules?

16. Another issue which featured in argument, but which I consider to be immaterial, is whether the respondent was correct to approach the submissions by reference to the "new" Immigration Rules or whether, as Mr Turner contends, she should have applied paragraph 284 of the previous Rules,

concerning the requirements to be met in the case of a spouse of a person present and settled in the United Kingdom. Mr Turner contends that the applicant's submissions of December 2011 in effect constituted an application which, since it was made before the coming into force of the new Rules on 9 July 2012, fell by virtue of the transitional provisions to those Rules to be considered under the "old" Rules, including paragraph 282.

17. As it happens, I agree with Mr Malik that this submission is misconceived. The transitional provisions apply only in respect of applications made before 9 July. The submissions of December 2011 did not constitute such an application. The reason I consider the matter to be immaterial is as follows. Whether "old" paragraph 282 or "new" R-LTRP.1.1(b) of Appendix FM applies, it is manifest that the respondent's decision of 31 July 2012 raises only a single issue, which is present in both the "old" and the "new" Rules: namely, that the applicant lacks valid leave to remain in the United Kingdom. Mr Malik suggested that this was not, in fact, the only reason why the applicant might not meet the requirements of the Rules. He asserted there was no evidence to indicate that the maintenance and accommodation requirements of the Rules could be met. There is not, however, anything in the materials, including the previous applications made by the applicant and involving Mr Jones, that accommodation and maintenance have ever been an issue. Mr Jones works as a builder and, whilst Immigration Judge Simpson noted that Mr Jones was, in late 2008, effectively a lodger, it is sufficiently clear that the issue of accommodation is not one which can properly be said to be amongst the reasons why the respondent concluded that the applicant has no realistic prospect of success before a hypothetical judge.

(d) Failure to engage with the submissions concerning the subsistence of the applicant's marriage

18. I find the applicant has shown that the respondent has not, in either of her letters, employed the requisite anxious scrutiny in respect of the submissions made to her in December 2011. My first reason concerns the issue of the applicant's marriage to Mr Jones. As we have seen from the determination of Immigration Judge Simpson, he found at [9] that the applicant's relationship with Mr Jones "is comparatively new and has not yet stood the test of time". The submissions of December 2011, made three years after the judge wrote those words, plainly demonstrate that the marriage is still subsisting and genuine. That is attested not only by the parties to it but also by various third parties. Neither of the respondent's letters recognises this important point. On the contrary, the letter of 31 July 2012, having noted that the applicant could not satisfy the relevant Immigration Rules because she has had no valid leave to remain, went on immediately to state that "your client's relationship was considered by the Immigration Judge who heard her appeal on 5 December 2008". There is no hint in either letter of engagement with [9] of the Immigration Judge's determination, which recorded what the judge plainly considered to be a highly salient feature of the applicant's Article 8 case, as it then was.

(e) The rights of others: Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39

19. The decision letters are also, I find, legally deficient in their approach to the Article 8 rights of those who would be affected by the applicant's removal from the United Kingdom. The letter of 31 July 2012 stated in terms that the applicant's case did not fall within "the remit of" the judgments in Beoku-Betts . On its face, that statement is a remarkable one. The passage which follows appears to indicate that the reason for the respondent's stance is that Mr Jones married the applicant knowing that her position in the United Kingdom was precarious. But that did not mean Mr Jones's Article 8

rights should not be considered; merely that there might be reasons why a hypothetical judge would nevertheless conclude that those rights would not be violated by the applicant's removal.

20. It may be said that this criticism of the letter is unjustified and that the respondent was doing no more than applying a "shorthand" approach; she did not need to set out matters in the way I have just described. However, the risk in truncating proper processes is that the decision-maker ignores salient matters.

21. I consider that this is precisely what has happened in the present case. One of the ways in which matters had "moved on", according to the applicant, was that Mr Jones's brother, who had formerly cared with Mr Jones for their 85 year old mother, had sadly died, with the result that the sole carers were now Mr Jones and the applicant. A letter from Mr Jones's GP put the matter in terms of the deceased brother having been the sole carer, with Mrs Jones now being "fully dependent on [Mr Jones]". The letter concluded: "She currently refuses any social services input. I do not feel it is currently safe for [Mr Jones] to leave his mother for any time".

22. There is no hint of engagement in the letter of 31 July 2012 with the Article 8 rights of Mrs Jones. All that is said about her is that "she would be able to approach her local authorities and social services for care and support in the event that Mr Jones accompanied the applicant to Jamaica". I do not consider that this exiguous comment constitutes anxious scrutiny, as regards the Article 8 rights of the relevant third parties. In this regard, the supplementary letter provides no support for the respondent.

(f) Insurmountable obstacles

23. In the letter of 31 July, almost immediately after the short passage relating to Mrs Jones and the fact that the applicant and her husband would be able to continue their family life in Jamaica, we find this sentence: "It is therefore considered that there are no insurmountable obstacles to your client and Mr Jones continuing their family [sic] abroad". Mr Turner criticised the reference to "insurmountable obstacles", contending that it is indicative of an incorrect legal test being applied by the respondent.

24. Mr Malik's response to this was two-fold. First, he drew my attention to the judgment in Nagre , where Sales J considered the concept of "insurmountable obstacles" in the context of the new Immigration Rules:-

"[42] I consider that the Strasbourg guidance does indicate that in a precarious family life case, where it is only in 'exceptional' or 'the most exceptional' circumstances that removal of the non-national family member will constitute a violation of Article 8, the absence of insurmountable obstacles to relocation of other family members to that member's own country of origin to continue their family life there is likely to indicate that the removal will be proportionate for the purposes of Article 8. In order to show that, despite the practical possibility of relocation (i.e. the absence of insurmountable obstacles to it), removal in such a case would nonetheless be disproportionate, one would need to identify other non-standard and particular features of the case of a compelling nature to show that removal would be unjustifiably harsh."

25. As I understood Mr Turner's submissions, he took issue with the treatment of the concept of "insurmountable obstacles" in Nagre , as compared with that of the Upper Tribunal in MF . However, I do not find it is necessary for me to consider whether there is, in reality, a real tension between those cases. Both MF and Nagre are, I consider, at one on the following point; namely, that the

question of whether there are insurmountable obstacles to relocation of a family abroad is not the determining issue of whether removal of a family member would or would not violate Article 8. In the present case, I find that the reference to “insurmountable obstacles” in the relevant paragraph of the 31 July decision letter, coming at the end of a number of considerations and coupled with the word “therefore” makes it plain that the writer of the letter was, in fact, using “insurmountable obstacles” as the determining factor. The decision is, accordingly, flawed for this reason.

(g) The “Chikwamba” principle

26. In Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 the House of Lords considered the interplay between Article 8 and the Secretary of State’s policy, expressed through Immigration Rules, that those seeking leave to enter or remain on the basis of marriage or other relationships should obtain entry clearance, by applying for it whilst they are outside the United Kingdom. For some time after the House of Lords’ decision, there was uncertainty as to the scope of the principle articulated in the leading judgment of Lord Brown. The uncertainty was comprehensively addressed by the Court of Appeal in Secretary of State for the Home Department v Hayat (Pakistan) [2012] EWCA Civ 1054. The following passages are taken from the judgment of Elias LJ:-

“11. Lord Brown accepted that the maintenance and enforcement of immigration control was a legitimate aim. However, he was unpersuaded by the argument, accepted by Laws LJ in Mahmood , that others required to apply from abroad would feel it unfair if persons like the appellant who also fell within the policy were permitted to have their cases determined without first returning home. Consistency of treatment was not such a virtue that it dictated an unthinking enforcement of the policy. Lord Brown identified a different justification for the policy (paras 41-42):

"Is not the real rationale for the policy perhaps the rather different one of deterring people from coming to this country in the first place without having obtained entry clearance and to do so by subjecting those who do come to the very substantial disruption of their lives involved in returning them abroad?

Now I would certainly not say that such an objective is in itself necessarily objectionable. Sometimes, I accept, it will be reasonable and proportionate to take that course....."

12. He then identified situations where the enforcement of the policy would be appropriate, such as where a claimant's immigration history was poor, as in Ekinci . He also identified factors which might have a bearing on whether the policy should be implemented. For example, it would be relevant that an applicant who had arrived illegally had good reason to do so, such as where he has a genuine asylum claim; in an Article 8 family claim the prospective length and degree of disruption involved in requiring the applicant to return would be material; and it would be legitimate to enforce the policy where the entry clearance officer abroad was better placed to investigate the claim.

13. Moreover, Lord Brown emphasised that the routine dismissal of Article 8 cases on this basis was not consistent with a proper respect for Article 8 rights, and nor did it make sense in administrative terms (para 44):

"I am far from suggesting that the Secretary of State should routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. Besides the considerations already mentioned, it should be borne in mind that the 1999 Act introduced one-stop appeals. The

article 8 policy instruction is not easily reconcilable with the new streamlined approach. Where a single appeal combines (as often it does) claims both for asylum and for leave to remain under article 3 or article 8, the appellate authorities would necessarily have to dispose substantively of the asylum and article 3 claims. Suppose that these fail. Should the article 8 claim then be dismissed so that it can be advanced abroad, with the prospect of a later, second section 65 appeal if the claim fails before the ECO (with the disadvantage of the appellant then being out of the country)? Better surely that in most cases the article 8 claim be decided once and for all at the initial stage. If it is well-founded, leave should be granted. If not, it should be refused."

14. In this case it was held that the removal of the applicant with her child to the harsh and unpalatable conditions of Zimbabwe would cause a grave disruption to the family which was not justified simply by invoking the mantra that rules are to be obeyed. There has to be good reason for enforcing the policy and there was none in this case. Lord Brown held that in the longer term no one doubted that the family would be allowed to live together and accordingly, on the particular facts he concluded that her removal would violate her Article 8 rights.

…

17. In Chikwamba the Article 8 claim was particularly strong. But in my view it is clear from paragraph 44 of his judgment that Lord Brown's objection to the routine enforcement of the policy was not limited to such cases. His observation that a one-stop appeal process should generally be adopted is equally valid where the claim might appear to be weak. It is true that the enforcement of the policy is likely to be particularly futile where entry clearance will ultimately be granted because it is requiring a temporary disruption of family life for no good purpose. To that extent, a preliminary assessment that the substantive merits are strong may be relevant to determining whether the policy should be enforced or not. But often the merits will not be clear until a careful assessment of the facts is made, and the dogmatic adherence to policy may in those cases too be a disproportionate interference with Article 8 rights.

18. It may at first blush seem odd that Article 8 rights may be infringed by an unjustified insistence that the applicant should return home to make the application, even though a subsequent decision to refuse the application on the merits will not. The reason is that once there is an interference with family or private life, the decision maker must justify that interference. Where what is relied upon is an insistence on complying with formal procedures that may be insufficient to justify even a temporary disruption to family life. By contrast, a full consideration of the merits may readily identify features which justify a refusal to grant leave to remain.

…

26. … If it is clear there is a good claim, it should be granted; if not, it should be dismissed. Chikwamba provides that at least where Article 8 is engaged, the decision maker should not, absent some good reason, fail to engage with the merits and dismiss the claim on the ground that the application should be made from abroad.”

27. Having considered a number of Court of Appeal authorities concerned with the application of Chikwamba , Elias LJ summarised the principles as follows:-

“30. In my judgment, the effect of these decisions can be summarised as follows:

a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should

have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.

b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.

c) Whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in Chikwamba . They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK.

d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance.

e) It will be a very rare case where it is appropriate for the Court of Appeal, having concluded that a lower tribunal has disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. Chikwamba was such an exceptional case. Logically the court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question.

f) Nothing in Chikwamba was intended to alter the way the courts should approach substantive Article 8 issues as laid down in such well known cases as Razgar and Huang .

g) Although the cases do not say this in terms, in my judgment if the Secretary of State has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise."

28. Returning to the facts of the present case, the respondent's letter of 31 July 2012 said this:-

"The Immigration Judge also gave consideration to Chikwamba and stated in paragraph 11, ' I was referred to the case of Chikwamba [2008] UKHL 40 but the facts of that case are very different from this one. This Appellant is not being asked to return to a place where she or Mr Jones are likely to be at risk and there is no child involved. '"

The same passage from the judge's determination is repeated later in the same letter, in the context of the applicant's private life.

29. It is apparent that the decision of 31 July 2012 is citing with approval the Immigration Judge's observations on Chikwamba . In the light of Hayat , it is plain that this is an error. It is evident from what I have said earlier about the absence of any challenge regarding maintenance and accommodation that, in the light of Hayat , the Chikwamba principle was, in law, an issue that needed to be substantively addressed by the respondent. I find that she has not done so. This is in no way to find that proper engagement with Chikwamba by the respondent would, at the end of the day, compel the respondent to grant the applicant a fresh right of appeal, still less grant her leave to remain. But, by the same token, it cannot be said that this error on the part of the respondent is necessarily immaterial. The respondent needed to address in terms whether there were, on all the facts of the present case (including those relating to Mr Jones's mother), sound reasons for requiring the applicant to return to Jamaica to make an entry clearance application; and then to assess how the hypothetical judge might view the issue. None of this has been done.

30. In his submissions on this matter, Mr Malik advanced the interesting proposition that the respondent did not err in relation to the Chikwamba principle because her case was that the applicant

should leave the United Kingdom on a permanent basis. However, that submission ignores the following sentence in the letter of 31 July:-

“Alternatively, Mr Jones can support any application she makes for return here while he remains in the United Kingdom to look after his mother.”

The submission also ignores the fact that, even if that were the respondent’s stance, it might not be how the hypothetical judge would approach the case.

(h) Use of “clearly unfounded”

31. Mr Turner criticised the following passages in the supplementary letter of 6 March 2013:-

“Accordingly, when considering whether or not your case is clearly unfounded, at present it is necessary to consider whether that claim would be bound to fail before an Immigration Judge if the criteria established by existing case law are applied. For the reasons set out in this letter it is considered that it would be.

…

After taking all the above into account, it is considered that your client’s claim to remain on the basis of Article 8 after having considered your claim in light of MF (Nigeria) and Izuazu remains clearly unfounded.”

32. These passages indicate that the writer of the supplementary letter was using the language of certification in section 94 of the Nationality, Immigration and Asylum Act 2002, rather than the test for the purposes of paragraph 353 of the Immigration Rules, which is whether there is a “realistic prospect of success” before the hypothetical judge. Although these passages do nothing to support Mr Malik’s submissions that the decision letters contain the requisite anxious scrutiny, I do not find that they constitute discreet reasons for quashing those decisions. The “clearly unfounded” test, if it was in truth applied, is a more challenging one for the respondent than the test under paragraph 353. In any event, at paragraph 30 of the supplementary letter the correct test is set out.

(i) A question of weight? Tesco Stores Ltd v Secretary of State for the Environment [1995] 1WLR 759

33. Mr Malik submitted that the applicant’s criticisms of the decision letters amounted to no more than disagreements with the weight that the respondent had chosen to place on various issues, such as the relationship between Mr Jones and his mother, and that the applicant had therefore not shown that the decisions were irrational. It was not enough, according to Mr Malik, to say that a judge could come to a different view.

34. Mr Malik prayed in aid the Tesco Stores case. This involved rival applications for planning permission to build superstores in or near the town of Whitney. On appeal to the Secretary of State, the latter allowed the appeal by Tesco’s rival developer, against the refusal of planning permission to that developer, and dismissed Tesco’s planning application. Those decisions were upheld by the House of Lords, which found that planning obligations offered under section 106 of the Town and Country Planning Act 1990 (namely, an offer by Tesco to build a link road) was a material consideration to which regard should be had under section 70(2) of that Act; but that the weight to be given to such an obligation was a matter entirely within the discretion of the decision-maker. At [13] Lord Hoffman said that:-

“The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (providing that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.

…

17. Little weight or no weight

Finally I should notice a subsidiary argument of Mr Vandermeer [leading counsel for Tesco]. He submitted that a material consideration must be given some weight, even if it was very little. It was therefore wrong for the Secretary of State, if he did accept that the offer was a material consideration, to say that he would give it no weight at all. I think that a distinction between very little weight and no weight at all is a piece of scholasticism which would do the law no credit. If the planning authority ignores a material consideration because it has forgotten about it, or because it wrongly thinks that the law or departmental policy … precludes it from taking it into account, then it has failed to have regard to a material consideration. But if the decision to give that consideration no weight is based on rational planning grounds, then the planning authority is entitled to ignore it.”

35. The proposition that, as a general matter, the weight to be given to a particular piece of evidence or other factor is for the person or body charged with making the decision, is uncontroversial. It is as important a principle in the immigration field, as it is in that of planning. There are, however, two reasons why the Tesco Stores case does not assist the respondent. The first is that, for the reasons I have given, the respondent has not had regard to all relevant matters. She has, for example, had no regard at all to the Article 8 rights of Mr Jones’s mother and to the related evidence of the GP. It cannot properly be said that, just because the decision letter makes reference to the mother, the respondent must be taken to have been aware of her Article 8 rights but to have decided to give them “no weight”. Ignoring relevant Article 8 issues or approaching them on a misconceived basis (for example, as identified above in relation to Beoku-Betts) cannot be categorised as an issue of weight. Contrast, however, the handling of issues in the context of a proportionality balancing exercise where, of course, the principle articulated in the Tesco Stores case will have direct application. In striking that balance, the weight to be given to a particular matter will ordinarily be for a judicial decision-maker to determine.

36. This brings us to the second problem with Mr Malik’s submission. It ignores a fundamental aspect of the “fresh claim” jurisprudence, articulated in WM (DRC) , whereby a distinction is drawn between the respondent’s own views on an asylum or human rights matter and the question of how that matter is likely to be viewed by a hypothetical judge. As Buxton LJ said at [11] of WM (DRC) :-

“The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind.”

37. For these reasons, I find that Mr Malik’s reliance on Tesco Stores carries the respondent’s case nowhere.

Decision

I grant the applicant’s application for judicial review. I quash the respondent’s decisions contained in the letters of 31 July 2012 and 8 March 2013. I am minded to order that the respondent shall pay the applicant’s costs. Any representations to the contrary must be put in writing, so as to be received no later than 14 days after service of this judgment.

Signed

Upper Tribunal Judge Peter Lane