Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/28045/2013**

THE IMMIGRATION ACTS

Heard	**at**	**Field House**
		Determination promulgated
On 1 April 2014		**On 8 August 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant

and

Phyllis Muthoni Kariuki
(Anonymity direction not made)

Respondent

Representation

For the Appellant: Mr. T. Wilding, Home Office Presenting Officer.

For the Respondent: Mr. C. Mannan of Counsel instructed by Springfield Solicitors.

DETERMINATION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Monro promulgated on 6 February 2014, allowing Ms Kariuki's appeal against the Respondent's decision dated 21 June 2013 to refuse to vary leave to remain in the UK and to remove Ms Kariuki pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Although in the proceedings before me the Secretary of State is the appellant, and Ms Kariuki is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Kariuki as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of Kenya born on 24 April 1967. She was granted leave to enter the United Kingdom as a visitor on 28 January 2013 valid until 14 May 2013. On 9 May 2013 the Appellant applied for leave to remain as the wife of a British citizen, Mr Louis Cohen. The Respondent refused the Appellant's application for reasons set out in a 'reasons for refusal letter' dated 21 June 2013, and a Notice of Immigration Decision, which also communicated the section 47 removal decision, of the same date was served on 23 June 2013.

4. The Appellant appealed to the IAC. First-tier Tribunal Judge Monro dismissed the appeal under the Immigration Rules but allowed the appeal pursuant to Article 8 of the ECHR for reasons set out in her determination.

5. The Respondent sought permission to appeal to the Upper Tribunal which was granted on 25 February 2014 by First-tier Tribunal Judge Chohan.

Error of Law

6. Having considered the submissions of the representatives I have reached the conclusion that the Judge erred in three respects.

7. I accept the substance of the Respondent's principal basis of challenge – that the Judge had erred in her approach to the Appellant's precarious immigration status. The precarious nature of an applicant's immigration status – and a couple's knowledge thereof – are relevant and proper considerations to weigh in the balance when considering the merits of Article 8: see e.g. **Hayat [2012] EWCA Civ 1054** at paragraph 51.

8. However, Judge Monro stated no more than this on the subject: "*The respondent may submit that the appellant should not have entered into a serious relationship knowing that her status was*

uncertain; however, she did so..." (paragraph 26). In my judgement that is an inadequate way of dealing with the issue: indeed it avoids engaging with the issue of precarious status and inappropriately avoids according it any weight – thereby rendering it irrelevant rather than relevant.

9. Further, in my judgement, the Judge erred in not identifying that an element of 'exceptionality' was required to succeed under Article 8 in circumstances where the Rules were not met. Although the Judge cited case law in context of the two stage process (**Izuazu** and **Nagre** – see determination at paragraphs 22 and 23), and expressed herself as satisfied that it was appropriate to conduct an Article 8 assessment beyond the scope of the express wording of the Rules (paragraph 23), she nowhere identified the parameters of the ultimate test – essentially whether there were exceptional circumstances which would result in unjustifiably harsh consequences if the Appellant were removed from the UK - and did not make any specific finding as to the exceptional or compelling nature of the case.

10. Yet further, although the Judge identified that this was essentially a **Chikwamba** type case, and cited passages from **Chikwamba** [**2008] UKHL 40**, (determination at paragraphs 27 and 28), she did not explain how such passages applied in the context of the particular case, notwithstanding that the passages cited from the speech of Lord Brown of Eaton-under-Heywood (which the Judge wrongly attributed to Baroness Hale and also contain misnumbered paragraphs) identified that in some cases it will be reasonable and proportionate to expect an applicant to seek entry clearance from abroad. Judge Monro gave no reasons for her decision as to why proportionality favoured the Appellant in this regard.

11. In the circumstances I conclude that the First-tier Tribunal Judge erred in law in her consideration of the Appellant's case and her determination must be set aside.

Re-making the Decision

12. Although the Judge erred in her evaluation of proportionality for the reasons identified above, there is no criticism made of her primary findings of fact so far as they go. In all of the circumstances it seemed to me that this was a case where the decision in the appeal could be remade by the Upper Tribunal. Mr Mannan, after taking instructions, confirmed that the Appellant wished to proceed with the appeal before the Upper Tribunal.

13. Accordingly I heard evidence from the Appellant and from Mr Cohen. I then heard submissions from the representatives. I have kept a careful note of the evidence and submissions in my record of proceedings which is on file. I have had regard to all of the supporting documentary evidence, which is a matter of record on file, and everything that was said at the hearing in reaching my determination. (In this context, whilst there has been some delay in finalising this determination, I made preparatory notes at an early stage and have had the benefit of the record of proceedings: I do not consider that the passage of time has impacted upon recall of the issues, evidence, and arguments.)

14. As noted above it is unnecessary to disturb the primary findings of fact of the First-tier Tribunal: in particular that this was a genuine marital relationship, and the acceptance – indeed embracement – of the Appellant by Mr Cohen's family.

15. It continues to be the case that the Appellant does not dispute that she does meet the requirements of the Immigration Rules: paragraph E-LTRP.2.1(a) of Appendix FM stipulates that an applicant must not be in the UK as a visitor. As regards paragraph 276ADE(iii)-(v) the Appellant does not meet any of the qualifying periods, and in respect of (vi) it is not disputed that the Appellant retains family and business ties with Kenya (see further below).

16. I pause to note that as regards the financial requirements, although Mr Cohen's employment is limited, the Appellant would benefit from the more relaxed requirements consequent upon Mr Cohen being in receipt of Disability Living Allowance (E-LTRP.3.3(a)(i), and see also E-ECP.3.3(a)(i)). Indeed Mr Mannan acknowledged in the course of submissions that it appeared that the Appellant would satisfy the requirements of entry clearance were she to have to apply from abroad – although he rhetorically questioned how long such a process might take.

17. The Respondent did not dispute before me that this is essentially a **Chikwamba** type case. It is unrealistic to expect Mr Cohen to relocate to Kenya given in general terms his age and strength of family connections in the UK, and more specifically that his anxiety and panic attacks prevent him from flying: see per Judge Monro at paragraphs 21 and 26, (although of course flying is not the only method of travel). Accordingly the real issue is whether Article 8

would be breached by the Appellant returning to Kenya to pursue an application for entry clearance.

18. In this context I make the following observations and findings:

(i) In oral evidence before me both the Appellant and Mr Cohen emphasised concern over the possible delay and/or failure to secure entry clearance as a spouse were the Appellant to return to Kenya for that purpose. Indeed this was the main objection raised to following the route expected under the scheme of immigration control represented by the Immigration Rules. Both made reference to people they knew who had found themselves 'stranded' and denied visas - a couple of Kenyans, some Nigerians and some Jamaicans. As the Appellant repeatedly stated, they did not wish to take a chance.

(ii) Whilst subjectively understandable, there is no evidence that the concerns expressed in this regard are objectively well-founded. As noted above, Mr Mannan accepted that on the face of it the Appellant appeared to meet the requirements for entry clearance. Further, there was no evidence of any undue delay in processing applications from Kenya. I do not accept that the essentially anecdotal evidence (which is in any event devoid of any particularisation of the specific circumstances of any of the referenced individuals) is persuasive of either a lack of prospective success for the Appellant if required to make an application for entry clearance, or likely significant delay in processing an application by the Appellant. Indeed given the acceptance of the relationship by the Respondent – and indeed the findings in this regard made by the First-tier Tribunal – much of the application should be processed readily and without controversy.

(iii) Ultimately the Appellant's and Mr Cohen's reluctance to submit themselves to the inherent uncertainty of the application process cannot in my judgement sound with any material significance – far less be a determinative factor – in the absence of any adequate evidence that the system does not operate fairly. Such uncertainty as is engendered – which is inherent in any system involving a process of application, evaluation, and decision - cannot in itself provide a justification for by-passing the established system of immigration control.

(iv) The Appellant and Mr Cohen have also made reference to Mr Cohen's state of health. Supporting evidence was provided by way of a GP's letter (Appellant's bundle page 74), and the First-tier Tribunal Judge made comments and findings accordingly (paragraphs 21 and 26). I note that the GP

refers to ‘blackouts’ as matters in the past: “*He has fainting episodes as well in the past*”. In any event, as pointed out by Mr Wilding Mr Cohen has coped previously without the support of the Appellant, and there is no evidential basis to consider that he would be unlikely to cope again during any period of the Appellant’s absence – notwithstanding the element of uncertainty and concomitant worry as to if, and when, he might be reunited with his partner.

(v) In this context I acknowledge that previously Mr Cohen had had the advantage of receiving assistance and care from a person who had also been a lodger – and that such immediate assistance is not presently available to him were the Appellant to quit the UK. However – whilst I accept that there is a difference between receiving practical care from a carer and receiving love and practical care from a spouse or partner - I find on a balance of probabilities that Mr Cohen would have available to him adequate care to meet his particular needs in the absence of the Appellant. I observe Disability Living Allowance is paid to him for the very reason of assisting in his care needs. Moreover he has children who I find may offer help and assistance. When asked why his children could not help he replied that they had families; that may be so but I am not persuaded that they could not between them provide some support on a temporary basis during any absence of the Appellant.

(vi) Two other matters are, in my judgement, significant. The Appellant continues to maintain a business in Kenya; and she has a 10 year old son in Kenya. She said her son had been a school boarder since the age of 7 so she was used to not seeing him for protracted periods - he would be at school for 3 months at a time; necessarily this in no way has weakened the mother/child bond, and when asked if she did not want to see him she answered “*Of course I do*”. As regards her business this I was told that this was currently administered by the Appellant’s sister – with whom the Appellant’s son stays out of term time. Although the Appellant has now given up her own rented property in Kenya, she acknowledged that she could stay with her sister, albeit this was not ideal given her sister had her own family.

(vii) Whilst I accept that it is the Appellant’s ambition that her son join her and Mr Cohen in due course in the UK – and Mr Cohen spoke of the wish to adopt him – I find it is more likely than not that were the Appellant to be granted leave to remain she would then visit her son in Kenya before such an eventuality. In this context it is to be remembered that he is still of relatively tender age, and when he last saw his mother it

would have been with the expectation that she would be returning to Kenya after a short visit to the UK. I acknowledge that Mr Cohen expressed reluctance when asked if the Appellant would go back to Kenya if she secured status in the UK, saying that he did not want to be parted from her for any length of time, and that he would not like it if she went to visit her son. However, I do not accept that on reflection he would stand in the Appellant's way. Moreover, in my judgement, it is inevitable that both the Appellant and Mr Cohen have contemplated the reality of such a visit by the Appellant and therefore have recognised the likely necessity of spending some time apart – although in this context I acknowledge the different nature of a period apart spent with the security of a leave to be resumed in the UK, in contrast to the uncertainty of awaiting the outcome of an entry clearance application.

(viii) In general terms, outside the concept of an arranged marriage, any couple in love seeking to marry will inevitably have discussions about their prospective married life, and such discussions will inevitably involve consideration of matters beyond the romantic and will include some consideration of where will be the marital home. If one or other or both of the prospective parties to the marriage is subject to immigration control then necessarily that will add a further dimension to such discussions - particularly in the context of where the couple may live. If they think they may like to live together in the UK, then necessarily with reference to the Immigration Rules this will add a particular further dimension. In this case it is acknowledged that just such discussions were had and there was a recognition of the expectation that the Appellant should return to Kenya – but nonetheless it was decided that solicitors should be consulted and the instructions in due course given to make the application that is the foundation of these proceedings. The Appellant and her husband went into the marriage, and made the application, knowing full well the possible outcome. They must be taken to have married in that knowledge and to that extent to have factored in the possible adverse outcome, and therefore have resigned themselves to the possibility of dealing with it if it eventuated. (If not – they were reckless, and that should not now sound in their favour.)

(ix) Ultimately, this is essentially a couple who would prefer not to be apart for any time. That is not an exceptional feature. In any event, both recognised that that might be forced upon them by reason of the Immigration Rules; and further both recognised – as I find – that some future separation was likely even if only for the Appellant to visit her son in Kenya.

19. In all of the circumstances of this particular case I do not consider that any exceptional or compelling factor has been shown as to why the Appellant's circumstances and those of her partner should be determined in a more generous way than the Rules would allow. Accordingly, whilst there is no particular controversy in respect if the first four **Razgar** questions, I find that the fifth question – proportionality, is not to be answered in the Appellant's favour bearing in mind the public interest in maintaining a fair and consistent system of immigration control primarily through the consistent application of a published body of Rules approved by Parliament.

20. There is present here nothing of comparable circumstance to the presence of a child of the couple or a difficult country situation that were identified in **Chikwamba** as favourable factors in an evaluation. I do not consider Mr Cohen's age or health to be similarly compelling.

21. Accordingly, on the very particular facts of this case, I find that the Immigration Rules provide a complete answer to the Appellant's case under Article 8. There are not exceptional circumstances in this case which would result in unjustifiably harsh consequences if the Appellant were removed from the UK with the expectation that she seek entry clearance from abroad

22. I find that the Respondent's decision to refuse to vary leave and to remove the Appellant from the UK does not breach her, or anybody else's human rights.

Decision

23. The decision of the First-tier Tribunal Judge contained an error of law and is set aside.

24. I remake the decision in the appeal. The appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 6 August 2014