Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/47998/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th November 2015	**On 22nd December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MS. CAROL NANJALA WILSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Salam, Solicitor
For the Respondent: Ms. A. Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Kenya born on 14th May 1968. She appeals against the decision of First-tier Tribunal Judge Jerromes sitting at Birmingham on 23rd February 2015 who dismissed her appeal against decisions of the Respondent dated 26th November 2014. Those decisions were to refuse to vary the Appellant's leave to remain on the basis of her private and family life in the United Kingdom and to remove her by way of directions.

2. The Appellant entered the United Kingdom on 28th August 2009 as a spouse. On 1st October 2011 she was granted discretionary leave to remain in the United Kingdom

under Article 8 on the basis of her relationship with her husband Mr. Tony Wilson. On 3rd October 2014 she applied for further leave to remain in the United Kingdom on the basis of family and private life but this was refused by the Respondent on the grounds that she had failed to provide sufficient documentary evidence from official sources to show that she was still enjoying a family life with Mr. Wilson. The Respondent was not satisfied that the grounds under which the Appellant had previously been granted discretionary leave still persisted and the application for further discretionary leave was refused.

3. Furthermore the application was refused under paragraph 322(9) of the Immigration Rules, a discretionary ground whereby leave should normally be refused where an applicant has failed to produce within a reasonable time information documents or other evidence required by the Respondent to establish a claim to remain under the Rules. The Respondent had written to the Appellant on 6th November 2014 to request further evidence but the required information had not been submitted within a reasonable time. The Appellant had thus failed to provide sufficient evidence to show that she was still in a genuine and subsisting relationship with her partner and she failed under Appendix FM. She failed under the private life provisions of paragraph 276ADE(1) of the Rules. She had only lived in the United Kingdom for five years. There were no significant obstacles to her reintegration into Kenya. She had spent over half her life living there and was familiar with the language and culture.

4. In her appeal against that decision the Appellant accepted that she had separated from her husband Mr Wilson but still had her only son Antony living in the United Kingdom who she was extremely close to. Antony was in a permanent and long-term relationship in the United Kingdom with a British citizen, Lucy Barber and together they were planning to start a family. The Appellant herself was now in a long-term relationship with a British citizen, David Roberts and they intended to marry as soon as they were able to. She had not answered the Home Office letter dated 6th November 2014 because her previous partner had not informed her of its existence. Her first knowledge of the letter came with the notice of immigration decision dated 26th November 2014. There would be insurmountable obstacles to her continuing a normal family life with her partner Mr. Roberts outside the United Kingdom and it would be unreasonable for her to do so.

The Hearing at First Instance

5. At the hearing the Judge heard evidence from the Appellant and Mr. Roberts. The Appellant's final decision to separate from Mr. Wilson was made in August 2014 when the Appellant moved out of the family home. The Respondent did not pursue the argument that the Appellant had failed to provide information but the Judge found that the Appellant could not satisfy the requirements of the Immigration Rules in relation to private and family life. In the absence of a divorce the Appellant could not rely on her relationship with Mr. Roberts as he was not a partner as defined in GEN.1.2 of Appendix FM. The Judge went on to consider whether there were arguably good grounds for granting leave to remain outside the Rules and adopted the five stage approach required by the case of **Razgar [2004] UKHL 27.** Whilst

expressing considerable sympathy for the Appellant the Judge found that the Respondent's decisions were proportionate.

6. At paragraph 21.4 she wrote that the Appellant:

> "… has very successfully established herself in the UK both professionally and socially. Her only son is here and she is in a genuine and durable relationship with Mr. Roberts a British citizen. However although the disruption to her professional, family and social life is regrettable it does not amount to unjustifiably harsh consequences. … I cannot conclude that there would be insurmountable obstacles to the Appellant continuing her relationship with Mr. Roberts if she returned to Kenya; they do not currently live as a family and said in evidence that they will continue their relationship if the Appellant returns to Kenya and Mr Roberts will assist her to make a fresh application for entry clearance. I cannot conclude that there would be insurmountable obstacles to the Appellant continuing her relationship with her son Antony if she returns to Kenya; Antony is 22 years of age and lives independently of the Appellant. She can maintain contact with Mr. Roberts, her son and friends by modern communication means."

7. On the evidence before the Judge she could not find that all the requirements for entry clearance had presently been met and therefore could not conclude that the only matter weighing on the Respondent's side was public policy. The case thus did not fall within **Chikwamba [2008] UKHL 40**. This was not a case where the application should be considered in country.

The Onward Appeal

8. The Appellant appealed against that decision arguing that the Judge had failed to consider Section 55 of the Borders, Citizenship and Immigration Act 2009. The Sponsor had two children both of whom were British citizens. The Judge did not consider the impact of the decision on them or what their best interests were. As the Judge found the Appellant and Sponsor to be credible the matter should have been sent back to the Respondent as the Appellant could provide evidence which would confirm she was in a relationship with her current partner.

9. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal De Haney on 20th May 2015. In refusing permission to appeal he stated that the Grounds of Appeal were misconceived. The children referred to were not the children of the Appellant but those of her new partner. The Appellant did not live with them. The Respondent did not consider them in the decision because they were not brought to the attention of the Respondent until the appeal. The Judge had properly set out the law, her findings of fact and reasons. The grounds of onward appeal were nothing more than a disagreement with the Judge's findings and an attempt to reargue the appeal.

10. The Appellant renewed her application for permission to appeal to the Upper Tribunal in longer grounds than had been submitted to the First-tier. The first ground was that the Judge had misdirected herself on the meaning of Appendix FM

which provided that any previous relationship of the applicant or their partner must have broken down permanently. There was sufficient evidence to indicate that and that she was now in a new relationship with Mr. Roberts. The provision in Appendix FM did not refer to a divorce but to the factual circumstances of the breakdown. As the fiancé of the Appellant Mr. Roberts was covered in the definition of partner under Section GEN.1.2(iii). The second ground renewed the complaint that the Judge had failed to consider Section 55 of the 2009 Act. The Appellant spent several nights a week and weekends at Mr. Robert's home. The issue of the impact on the children if Mr. Roberts had to follow the Appellant to Kenya leaving the children behind had not been considered.

11. The third ground was that Article 8 had not been applied properly. The Judge had erred in law by not evaluating whether the Appellant could meet the requirements of entry clearance as a spouse. The Judge could and should have decided that for herself. However the Judge had not given weight to the various factors in the decision which weighed in the Appellant's favour. These were listed in the grounds at paragraph 16(a) to (m).

12. The renewed application for permission came on the papers before Upper Tribunal Judge Lane on 4th August 2015. In granting permission to appeal he wrote that it was arguable:

> "that the Judge erred by finding that the Appellant had to be divorced in order to show that her relationship with her husband had permanently broken down as provided for in E-LTR.1.9 of Appendix FM. It appears that the Judge also considered that the Appellant and her new partner could not be fiancés for the purposes of GEN.1.2 whilst the marriage of the Appellant was extant; a contrary view was also arguable".

It appears that the Respondent did not file a Rule 24 response to the grant.

The Hearing Before Me

13. On behalf of the Appellant her solicitor argued that there were different aspects of the case, it was not limited to the provisions of Appendix FM. The Appellant was refused on suitability grounds. The Appellant's immigration status had been acquired under a different regime decided before the provisions of Appendix FM were introduced in July 2012 and her application for an extension should have been considered under the same policy. If anything further was required she should have been interviewed. The Respondent's decision was thus not in accordance with the law.

14. Further there were compelling circumstances in this case. Her previous relationship had ended. She had arrived in the United Kingdom on a spouse visa and completed two years of her probation period. Due to the fact she was not professionally advised she had not provided a copy of her Life in the United Kingdom test and so only received discretionary leave. Her discretionary leave ended at the same time as her relationship. When she applied she did not claim she was with her husband, she did not put his name down on the form or say that the relationship was still

subsisting. The Judge had mentioned the positive points in the Appellant's favour but had gone on to say that there were no harsh consequences if the Appellant had to leave. The Appellant was employed as a teacher and was not a burden on the State. Further the Judge had forgotten to take account of the fact that her current partner had two young children and it would be difficult for him to go and live with the Appellant in Kenya or uproot the children.

15. The Appellant was living with her partner's children almost five days a week. There were compelling reasons why this appeal should be allowed outside the Rules. The Appellant was in a relationship with a British citizen and they were in the process of marrying once the Appellant's divorce was sorted out. Her son Antony was living here, he was not a UK citizen and his appeal was being decided separately. The Appellant did not have to return to Kenya she had valid leave. She was not an overstayer and had 3C leave at the present time. Even if the appeal went against her she could not overstay until after 28 days from the end of the appeal process.

16. In reply for the Respondent it was argued that the claim that the Appellant's application for an extension of her discretionary leave should be treated under a pre-2012 regime was not cited in the grounds of onward appeal but should have been raised if it was going to be aired at the hearing at first instance. The appeal before the Upper Tribunal in this case was only in relation to Appendix FM and Article 8. There were no material errors in the Judge's decision. There was no in country switching to fiancés. The Appellant must have been granted fiancée status already to be able to do that. The Judge had conducted a proper balancing exercise. The Judge could not conclude that the entry requirements would be met and in those circumstances the case of **Chikwamba** did not apply, see the Court of Appeal decision in **Agyarko [2015] EWCA Civ 440.** There was no evidence in the Appellant's bundle that the financial requirements could be met and there would be no significant interference with the Appellant's private or family life by temporary removal whilst she returned to Kenya to apply for entry clearance. She could return and make application from there. As at the date of hearing at first instance the Appellant would not have been successful under a spouse application. The appeal was bound to fail. The Appellant and Mr. Roberts had not been cohabiting at the time for at least two years. The Judge had conducted a proportionality exercise correctly. Little weight could be attached to the Appellant's private life.

17. In conclusion the Appellant's solicitor argued that her case should have been decided under the discretionary leave policy and only then if it was not would one go on to consider whether removal would be a breach of Article 8. Nothing of that sort was done and the Judge had erred by not holding the Respondent's decision to be not in accordance with the law.

Findings

18. The Appellant applied in this case for leave to remain under the provisions of Appendix FM. To qualify for limited leave to remain as a partner the Appellant had to show that she could meet all of the requirements of paragraphs E-LTRP.1.2 to 4.2 of Appendix FM. The relationship requirements were that her partner must be a

British citizen living in the United Kingdom, the relationship must be genuine and subsisting and importantly for this case any previous relationship of the applicant (or their partner) must have broken down permanently. The Judge's view was that the Appellant was caught between two provisions of the Rules. She was no longer cohabiting with Mr. Wilson and their relationship was no longer subsisting and therefore she could not rely on that relationship under Appendix FM Section E-LTRP.1.7.

19. On the other hand the Judge found at paragraph 20.1 of her determination that the Appellant could not rely on her relationship with Mr. Roberts as he was not a partner as defined by Gen.1.2. This defines a partner as either a spouse, fiancé or someone with whom the Appellant has been living in a relationship akin to marriage for two years. In the absence of a divorce there was no evidence that the relationship with Mr. Wilson had broken down permanently. That was challenged in the grounds of onward appeal and permission to appeal was granted by the Upper Tribunal on the basis it was arguable that the Appellant did not have to show she was divorced in order to show that her relationship with Mr. Wilson had permanently broken down. The implication was that other evidence besides a decree absolute of divorce might be acceptable in establishing that. Further it was arguably wrong that the Appellant and Mr. Roberts could not be fiancés whilst the Appellant remained married to Mr. Wilson. No authority on that particular point was cited in the grant of permission nor adduced to me in argument.

20. Dealing with the second point first, much turns on the definition of fiancé. If a marriage is perceived as a species of contract an engagement is a promise to marry. In these circumstances the promise made by the Appellant would be made at a time when in fact she was not free to marry because she was already married. In those circumstances it is difficult to say that one is a fiancée since one cannot lawfully contract a marriage while one is already married. I appreciate the decision of Upper Tribunal Judge Lane when granting permission to appeal that there is some ambiguity in the point. However in the absence of authority that the Judge was wrong in this case to find that the Appellant could not be a fiancée of Mr. Roberts, I cannot discern that there is a material error of law in the Judge's conclusions that for that part of Section GEN.1.2(iii) the application by the Appellant could not show that Mr. Roberts was her fiancé and therefore he did not come within the definition of a partner.

21. This leaves the more difficult issue of the correct interpretation of Section E-LTRP.1.9 which provides that any previous relationship of the Appellant (in this case) must have broken down permanently. The Appellant and Mr. Wilson are still married. Their relationship has broken down in the sense that they are no longer together as a couple but they are still married. Again no authority was cited to the Judge at first instance or in the grounds of onward appeal and nothing was cited to me in support of the contention that a relationship can have broken down permanently even if the parties remain married.

22. In my view that flies in the face of commonsense, particularly given the circumstances of this particular case. At the date of hearing the Appellant and Mr.

Wilson had only been separated for some six months. The Appellant had not instructed solicitors to commence divorce proceedings; indeed I have seen no evidence that she has yet instructed solicitors to commence divorce proceedings. That last point while not relevant to the issue of an error of law, does confirm the Judge's doubts that the relationship with Mr. Wilson could be said to have permanently broken down within the definition of Section E-LTRP.1.9. The Judge recorded evidence from the Appellant and Mr. Roberts of the time they spend together and their plans to spend Christmas and holidays together. They were in a relationship but it had not lasted for at least two years prior to the date of application. Indeed even if the Judge was wrong in her interpretation of Section E-LTRP.1.9 and that the relationship between the Appellant and Mr. Wilson had broken down permanently, notwithstanding that they remained married, the Appellant could still not meet the requirements of GEN.1.2(iv). Mr. Roberts was not a partner as he and the appellant had not been living together for at least two years prior to the date of application.

23. For the reasons given by the Judge at paragraph 20.2 of her determination EX.1 of Appendix FM did not assist the Appellant as Mr. Roberts could not qualify as a partner and EX.1 was parasitic on the relevant Rule (see the case of **Sabir [2014] UKUT 63**) that EX.1 is not a freestanding ground for leave to remain.

24. That being the case the Judge was correct in law to find that the Appellant could not bring herself within the Immigration Rules. Mr. Roberts was not a partner within the definition of the Rules. The matter fell to be determined outside the Rules under Article 8. For the Appellant to succeed on this basis she had to show that there were compelling reasons why the appeal should be allowed outside the Rules. The Judge considered this matter very carefully and found that the decision to refuse the application would not result in unjustifiably harsh consequences for either the Appellant or Mr. Roberts or their respective families.

25. The Appellant makes two main arguments against the treatment by the Judge of the case outside Article 8. The first is that there has been insufficient consideration by either the Respondent or the Judge of the impact of Section 55 and specifically the duty to consider the best interests of Mr. Robert's two children. This point was dealt with in the refusal at first instance to grant permission and noticeably the Upper Tribunal did not specifically grant permission on that ground. The Appellant does not live with Mr. Roberts and his children. She spends time with them according to paragraph 15 of the determination, several nights a week and weekends. There is no indication that the Respondent was put on notice as to the need to take these two children into account but in any event, as Judge De Haney pointed out, they were not the Appellant's children and she was not living with them. It is difficult to see how their welfare has been overlooked in this case since it would not appear to be relevant.

26. The second point made about Article 8 is that in some way the Respondent's treatment of this case was procedurally unfair since the Appellant's case should have been looked at under the discretionary leave regime and not the post-July 2012 Immigration Rules. I accept the point made by the Respondent in this appeal that

this ground was not raised at first instance nor indeed in the grounds of onward appeal but leaving aside the question of jurisdiction I do not consider that it has merit. The Respondent is obliged to consider applications under the Immigration Rules as they are in force on the date of decision and therefore the Respondent correctly applied the post-July 2012 Rules to this case. I was not pointed to any instruction to Immigration Officers or other policy or concession that, notwithstanding the introduction of the July 2012 Rule changes, the Respondent would continue to treat cases in certain categories quite differently from the main scheme. There was in short no authority for the proposition that the Respondent had behaved unfairly in this case and I see no reason to come to that conclusion. The remainder of the Appellant's objections to the Judge's treatment of Article 8 are in my view a mere disagreement with the Judge's conclusions. As I have indicated the Judge examined all matters very thoroughly and gave cogent reasons for her decision.

27. The position remains that the Appellant can return to Kenya and make an application for entry clearance from there. There are at present a number of obstacles to a successful application, that she does not have a partner who can come within the definition in GEN.1.2 and that she remains married to Mr. Wilson. The Judge was correct at paragraph 21.4 not to conclude that all of the requirements of entry clearance would otherwise be met or that the only matter weighing on the Respondent's side was public policy. There remains sufficient obstacles to the application being granted such that it is proper for the Appellant to return to Kenya and apply for entry clearance from there. No evidence was given to the Judge that this would take an unduly long time and the Judge herself did not consider that it would be unduly harsh to expect it, notwithstanding the disruption to the Appellant's private and family life in this country. I do not find therefore that there was any material error of law in the Judge's determination and I uphold her decision to dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 11th day of December 2015

…….
Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed this 11th day of December 2015

…….
Deputy Upper Tribunal Judge Woodcraft