IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39249/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 21st January 2016	**On 19th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

BEATRICE GEORGE MAKUKE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Ahmed (Counsel)
For the Respondent: Mr D Mills (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge H Narayan, promulgated on 20th January 2015, following a hearing at Stoke-on-Trent on 5th January 2015. In the determination, the judge dismissed the appeal of Beatrice George Makuke, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female citizen of Tanzania, who was born on 6th February 1983. She appealed against the decision of the Respondent, dated 16th September 2014, refusing her a variation of leave to enter or remain her decision to remove her under Section 47 of the 2006 Act.

The Appellant's Claim

3. The Appellant's claim is that she is applying for an extension of stay in the United Kingdom as a spouse of a person present and settled in this country. Her spouse is a British citizen. He has a child and the child was born on 28th August 1999 and lives with her mother and the Sponsor is financially responsible for the child who is also British. The child is currently aged 15 years.

The Findings of the Judge

4. The judge observed that the Respondent's refusal letter of 15th April 2014 informed the Appellant of the fact that her application was considered and fell to be refused solely because she did not meet the financial income threshold requirement set out in Appendix FM of being able to show the Sponsor's earnings at £18,600 per annum. Judge Narayan observed how the skeleton argument by Counsel on behalf of the Appellant at the hearing "acknowledged the Appellant is unable to meet the minimum income requirements of the Immigration Rules". However, it was alleged that the appeal should be allowed under paragraph R-LTRP.1.1(d). The judge set these matters out at paragraph 5 of the determination.

5. At the hearing the Appellant gave evidence and stated that there was a family life with [C], the 15-year-old child of the Sponsor, and the Sponsor also gave evidence to this effect. However, the evidence from [C] was markedly absent to confirm this.

6. The Appellant said that she had asked [C] for a letter and [C] had agreed to give a letter confirming the relationship, but the judge observed that,

> "I find that even at the date of the hearing there has not been a statement from [C]. In all the circumstances I reject the evidence of both the Appellant and [M] [the sponsoring husband] that [C] has ever been willing to give a statement of support to support this Appellant and her husband [M] in their assertions that in fact they have a close family relationship with [C]" (see paragraph 25).

The judge also went on to say that there has,

> "Never been any effort to provide any of the information, least of all from [C] and/or her mother and/or this child's school, nursery, health visitor, GP or local authority or anyone else who could have seen [C] in contact with her father and the Appellant" (see paragraph 27).

7. The judge went on to hold that in these circumstances the Appellant could not satisfy the "suitability requirements" (see paragraph 28). The judge held that there was no family relationship with [C] (see paragraph 29). He went on to determine that the Respondent's decision "is proportionate in all the circumstances of this case".

8. Although it was the case that the parties had married on 4th May 2013, the Appellant was on a visa which did not give her permanent rights to stay in the United Kingdom. The judge went on to say that, "I have noted the evidence of [M] that they had never discussed living in Tanzania either before or after the marriage" (see paragraph 34).

9. The appeal was dismissed.

Grounds of Application

10. The grounds of application state that the judge failed to apply the principle in the case of **Chikwamba** in requiring the Appellant to return back to Tanzania to make an application from there in order to re-enter. The grounds also state that the judge did not have regard to Section 117 of the 2002 Act and failed to consider whether there were insurmountable obstacles of family life continuing outside the United Kingdom.

11. On 3rd March 2015, permission to appeal was granted with respect to two of the grounds but not the remaining two.

12. On 17th March 2015, a Rule 24 response was entered to the effect that the Appellant had failed under the suitability requirement and therefore the judge could not have gone on to decide that the Appellant could succeed under EX.1 because this was not a standalone provision (see **Sabir**). Permission had not been granted on the challenge to a suitability finding, and therefore the remaining grounds on which permission had been granted would also fail.

13. At the hearing before me Mr Ahmed of Counsel appeared on behalf of the Appellant. He had a preliminary application to make to begin with. He submitted that this Tribunal should consider all four Grounds of Appeal. These were, first, that the judge having dismissed the appeal under the Immigration Rules he had gone on to paragraphs 31 to 34 to consider Article 8 outside the Immigration Rules. However, at paragraph 34 he stated that there was no hardship to the Appellant travelling to Tanzania and applying to join her husband from there. This was contrary to **Chikwamba**.

14. Second, that Section 117A(2) of the 2002 Act applies to all appeals determined on or after 28th July 2014 and the public interest question must be considered. The judge had failed to do so.

15. Third, the Respondent maintained, and the judge found, that the Appellant was unable to benefit from Appendix FM because she fell for refusal on suitability grounds due to paragraph 5 – LTR.1.7 which mandates a refusal on account of her failure to provide information that had been requested. It was said here that the request was not for "information" but for "evidence" and so this provision did not apply.

16. Fourth, it was said that the Appellant relied on paragraph EX.1(b) which refers to the requirement of "insurmountable obstacles" as amounting to "very significant difficulties which would be faced by the applicant or their partner in continuing their

family life together outside the UK" and the judge had erred in respect of this determination.

17. Mr Mills submitted that I should reject the application to allow other grounds to be considered because after the rejection of the two grounds by the First-tier Tribunal Judge, it was open to the Appellant's representatives to make an application in writing to the Upper Tribunal, pursuant to the Procedure Rules, to be allowed to also argue the remaining two grounds on which permission had been rejected. This had not been done. It was therefore not appropriate for these matters to be raised now at this substantive hearing. I considered the position, and in light also of the materiality of these additional grounds to what had already been determined by the judge, rejected Mr Ahmed's application to resurrect the two remaining grounds that had not been permitted to be raised at this hearing.

18. Subject to this, Mr Ahmed began by saying that he would rely upon the Grounds of Appeal with respect to the two grounds upon which permission had been granted. He said that proportionality had not been properly undertaken. Also Section 117A(2) had not been considered as was required under the Rules. This was a material error. It had to be remembered that the Appellant had been in the UK lawfully since she entered in 2007 and that she had never breached the Immigration Rules. This went directly to the public interest and this ought to have been properly considered.

19. For his part, Mr Mills submitted that **Chikwamba** did not apply in a case such as the present because in this case the Appellant's representatives expressly conceded that the financial threshold requirement could not be met under the Immigration Rules (see paragraph 5) and so the Appellant could not have succeeded under the Rules. Second, the Appellant would have failed, given that she could not comply with the "suitability requirements". Furthermore, if the judge had refused the appeal under Ground 3 then he ought to have automatically also refused it under Ground 4.

20. Mr Mills drew my attention to the case of **Muhandiramge [2015] UKUT 00675** which is to the effect that where an application for leave to remain in the United Kingdom is refused under Section 7 – LTRP.1.7 of Appendix FM on the ground of the applicant's failure without reasonable excuse to comply with the requirement to provide information, the burden establishing a reasonable excuse rests on the applicant and the standard of proof is on a balance of probabilities. In this case there had been a failure to provide the requested information.

21. The suitability requirement could not be met. It was not accepted that there was a viable relationship between the adults in this case and [C], the child. Three requests had been made for the provision of information and they had not been complied with. It is difficult to see how this cannot be regarded as a request for "information" rather than a quest for "evidence". The burden was on the Appellant. Therefore Ground 3 did not in any way succeed. This was what the judge himself decided. That Ground 3 was not material. If Ground 3 was not complied with then Ground 4 automatically became unarguable. The Appellant did not get through the Rules because of the suitability requirements and that was the end of the matter.

22. With respect to the suggestion that the Appellant would have succeeded because the "public interest requirement" actually benefitted the Appellant given that she had been in the UK lawfully since 2007 and had never breached the Immigration Rules, the latest decision of the Tribunal in **AM (S.117B) Malawi [2015] UKUT 0260** confirmed that an Appellant can obtain "no positive right to a grant of leave to remain from either S117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources". In the circumstances this appeal would inevitably have failed anyway.

23. In reply Mr Ahmed submitted that Section 117 has nevertheless to be looked at. The law was clear. At paragraph 34 of the determination the judge should have factored this in in his assessment of the proportionality principle. The fact that the Appellant had been in the UK lawfully, and with leave, and had not breached the Immigration Rules, was a positive factor in her favour. Mr Ahmed submitted that I should make a finding of an error of law and remit the matter back to the First-tier Tribunal to be determined again.

Error of Law

24. The failure of the judge to make express reference to Section 117, and to properly take it into account was an error, but it is not a material error, such that this decision should be set aside. For the reasons that Mr Mills has already outlined this was an appeal that was bound to fail in the end. The Appellant did not meet with the Immigration Rules because she could not comply with the financial threshold requirement. She did not meet with the suitability requirements. She was unable to show that there was an Article 8 right outside the Immigration Rules because of her own failure to provide evidence in relation to her family life with [C]. That left only the matter of Section 117A(2). The case of **AM (S.117B) Malawi [2015] UKUT 0260** now confirms that "no positive right to a grant of leave to remain" arises from Section 117. In the circumstances, this is a case where the Upper Tribunal may (but need not) set aside the decision of the First-tier Tribunal (see Section 12(2)(a) of the TCEA 2007). The decision shall stand.

Notice of Decision

25. There is no material error of law in the original judge's decision. The determination shall stand.

26. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 13th February 2016