



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/48939/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 8th March 2016**

**Decision & Reasons Promulgated
On 11th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS JACKQUELINE WANGUI GITHAIGA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Ms H Foot, Counsel instructed by Legal Rights Partnership

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were before the First-tier Tribunal.
2. The Appellant, a citizen of Kenya, appealed to the First-tier Tribunal against a decision by the Respondent dated 21st November 2014 to refuse to vary her leave to

remain in the UK on the basis of discretionary leave. First-tier Tribunal Judge Oakley allowed the appeal and the Secretary of State now appeals with permission to this Tribunal.

3. The background to this appeal based on the material facts found by the First-tier Tribunal Judge (which have not been challenged) are that the Appellant came to the UK in September 2000 and was granted a student visa and successive extensions as a student until March 2007 when she was granted two years' leave to remain until March 2009 as the spouse of a British citizen whom she had married in December 2006. She applied for further leave to remain as a Tier 1 Migrant in April 2009 and this was refused. In June 2011 the Appellant submitted an application for indefinite leave to remain on the basis of ten years' residency but this was refused because there had been a break in her continuous leave owing to the refusal of the Tier 1 application in June 2009. The refusal letter dated 19 August 2011 stated that, although the application for indefinite leave to remain was refused, she was granted leave to remain on the discretionary basis until 18th August 2014.
4. On 6th August 2014 the Appellant applied for further leave to remain on the basis of long residency, private and family life in the UK and at that time her relationship with her husband subsisted but he was abroad and she was unable to obtain a statement or passport from him as requested by the Respondent and the application was refused on 21st November 2014. The Reasons for Refusal letter stated that the appellant had been granted discretionary leave on 19 August 2011 on the basis of her relationship and that, as she was no longer enjoying family life with her husband, the Secretary of State was not satisfied that the grounds of appeal under which she had previously been granted discretionary leave still persisted and her application for further discretionary leave was refused. Her application was also refused under paragraph 276ADE of the Immigration Rules and the Secretary of State considered that there were no exceptional circumstances in the Appellant's case.
5. The judge found that at the date of the hearing the relationship between the Appellant and her husband was no longer subsisting, that the Appellant works as a teacher receiving an income of £32,588 per annum and is an active member of her local church, that she has a wide circle of friends and is close to her sister, whom she sees regularly. The judge accepted that the Appellant resides with her friend and her friend's two sons aged 7 and 9 for whom she provides significant childcare to enable her friend to work as a midwife and a nurse. The judge found that the Appellant's mother resides in Kenya but suffers from arthritis and has a carer to assist her and is supported financially by the Appellant and her sister, who send approximately £600 each per month for their mother's support. The judge accepted that the Appellant has no other close relatives living in Kenya except for an aunt with whom she does not have regular contact.
6. Having made his factual findings the judge decided that the Appellant could not satisfy the requirements of paragraph 276ADE(vi) and went on to consider the appeal under Article 8 of the ECHR. The judge concluded that the removal of the Appellant would interfere with her right to private life in the UK.

7. The judge considered the appeal in accordance with the five stage approach set out in R v SSHD ex parte Razgar [2004] UKHL 27. In considering proportionality at paragraph 34 of his decision the judge took into account the fact that the Appellant has resided in the UK for almost fifteen years, she has a strong private life in the UK and makes a significant contribution to her community through her work as a teacher, that she has a strong network of friends and is an active member of her church, that she earns a good income, pays her tax and is financially independent and speaks fluent English. The judge took these factors into account in relation to Section 117B of the Nationality, Immigration and Asylum Act 2002 and said:

“Taking into account the factors listed in Section 117B of the 2002 Act it is doubtful that her removal would be in the public interest since her significant private life has been established when she enjoyed leave to remain and her immigration status was not precarious.”

8. The judge went on to consider other factors including the fact that the Appellant enjoys a close relationship with her sister although he accepted that this is unlikely to be more than the usual emotional ties between adult siblings and that she is close to her friend’s children who she looks after when her friend is working shifts in the NHS.
9. The judge also considered the terms of the Respondent’s policy in relation to discretionary leave. The judge noted that the policy requires “a significant change of circumstances in order to justify a refusal to continue discretionary leave as previously granted”[35]. The judge said that it would clearly be wrong to interpret the policy as requiring any change of circumstances since any renewal application will involve a change of circumstances at least in respect of the length of time of the residence and that, taking into account the aims and objectives in the policy, any change of circumstances “will need to be capable of tipping the balance in favour of removal and away from the grant of leave”. The judge found on the fact of the Appellant’s case that it could not be said that;

“... the breakdown in communication between the Appellant and her husband is a significant change in circumstances, all the more so when the Appellant has continued to work and contribute to society and develop her private life in the United Kingdom as referred to above.” [36]

10. The judge concluded that the Respondent misinterpreted the basis on which the Appellant was previously granted leave and the judge concluded that the thrust of the 2011 application was primarily related to the Appellant’s private life and long residence and that the decision granting discretionary leave says nothing about the relationship with her husband, despite the misleading terms of the decision under appeal in this case. The judge concluded that it could not therefore reasonably be maintained on reading the 2011 application and the decision that “in August 2011 you were granted discretionary leave on the basis of your relationship” as stated in the reasons for refusal letter. The judge said that this was clearly not the case and

that the Appellant therefore fell within the terms of the Respondent's own policy and that this is a further factor to be considered in relation to proportionality.

11. The Secretary of State contends in her Grounds of Appeal that the judge materially misdirected himself in relation to Section 117B and Article 8. It is contended that the judge erred in relation to the assessment as to whether the Appellant's leave was precarious and relied on the case of **AM (S.117B) Malawi [2015] UKUT 0260 (IAC)**.
12. Ms Foot conceded that the judge made an error in considering whether the Appellant's immigration status had been precarious. She accepted that the case of **AM Malawi** makes it clear that, despite having lawful leave to remain, the Appellant's immigration status over the years of her stay in the UK was 'precarious'. However, she submitted that this is not a material error as, due to her circumstances, the Appellant was always going to do well in an assessment of the other factors in Section 117B.
13. Ms Foot submitted that the Appellant could speak English and was financially independent and that there were other factors also in her favour in relation to Article 8, for example her role in the community, her role in relation to her sister and her friend's children. She submitted therefore that the error in relation to the Appellant's immigration status was not capable of tipping the balance towards the Secretary of State. She also submitted that the Appellant fell within the discretionary leave policy which enables a further grant of discretionary leave if there has been no significant change of circumstances. She submitted that the case law makes it clear that, where an Appellant falls within the terms of a policy, this is relevant to a proportionality assessment in relation to the assessment of the public interest. She submitted that in this context and with reference to that policy the error in relation to the precariousness of the Appellant's status was not capable of tipping the balance back to the Secretary of State.
14. I accept Ms Foot's submissions in relation to this issue and I am satisfied that the accepted error at paragraph 34(iv) is not a material error. It is clear that all of the other factors in Section 117B of the 2002 Act are in the Appellant's favour. I accept, looking at the decision overall, that the judge took into account many factors in the Appellant's favour including the factors listed at paragraph 34.
15. Ms Foot also referred to the case of **Dasgupta [2016] UKUT 0028** and in particular paragraph 26 in relation to proportionality which emphasises the substance of the judge's conclusions. She submitted that the Secretary of State's appeal falls foul of the decision in **MR (permission to appeal: Tribunal's approach) Brazil [2015] UKUT 00029 (IAC)** as the Grounds of Appeal in this case amount to a quarrel with the judge's assessment. She submitted that, although it may be arguable that the Appellant was granted discretionary leave on the basis of her marriage, it is equally arguable that the 2011 grant of leave was based on the Appellant's private life. She submitted that the policy refers to a significant change of circumstances and it was open to the judge to conclude that there was not in this case.

16. Ms Foot referred to the Appellant's application letter dated 3rd June 2011 at page 55 of the Appellant's bundle. The letter is from the Appellant's solicitors and begins by indicating that the Appellant had instructed them to submit an application for indefinite leave to remain in the UK under the long residence Rules and Article 8 of the ECHR on the basis that she has completed ten years' lawful residence in the UK and has established a private and family life in the UK. The letter goes on to outline the Appellant's circumstances including the length of her residence and her marriage, and the fact that she is engaged in employment and has not had recourse to public funds in the UK. Ms Foot drew my attention to the letter from the Secretary of State dated 19th August 2011 informing the Appellant that discretion was exercised in her favour and she was granted limited leave to remain until 18th August 2014.
17. I accept that the letter of 3rd June 2011 refers to the Appellant's lengthy residence, her private life and her family life in the UK and that the letter granting discretionary leave does not indicate the basis on which discretionary leave had been granted. In these circumstances I am satisfied that it was absolutely open to the judge to conclude that it was not clear that the Appellant was granted discretionary leave on the basis of her relationship as indicated in the reasons for refusal letter of November 2014. It was equally open to the judge to conclude that the Appellant was granted leave to remain on the basis also of her private life and length of residence in the UK.
18. I am satisfied that it was open to the judge to conclude in these circumstances that the breakup of the Appellant's relationship was not a significant change of circumstances. It was rational and the judge gave good, sustainable reasons for his conclusions. I accept the submission made by Ms Foot in relation to the guidance given in the case of **Dasgupta** approving the decision in **Edwards v Bairstow [1956] AC 14** and I accept that the judge's decision was open to him on the evidence and was not perverse.
19. In these circumstances I conclude that there is no material error in the judge's decision.

Notice of Decision

I am satisfied that there is no material error in the judge's decision.

The decision of the First-tier Tribunal shall therefore stand.

No anonymity order is made.

Signed

Date: 23rd March 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 23rd March 2016

Deputy Upper Tribunal Judge Grimes