IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000437
First-tier Tribunal No: HU/54137/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 June 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MISS EVERLYNE ATIENO NYAWWARA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Youssefian of counsel
For the Respondent: Ms Cunha, a Home Office Presenting Officer

Heard at Field House on 17 May 2023

DECISION AND REASONS

Introduction

1. The appellant appeals from a decision of FTT Judge Buckwell (the judge) to dismiss her appeal against the respondent's decision to refuse her human rights claim.

2. FTT Judge Grant-Hutchinson considered it to be at least arguable that the judge had erred in law in his approach to the evidence by not making adequate fact findings as to her relationship with her partner, the sponsor. The appellant may nearly have achieved 20 years

continuous residence and the delay in removing the appellant may have contributed to the strength of the relationship the appellant had formed with the sponsor.

3. The respondent had carried out an initial review but I have not been provided with a rule 24 response to this appeal to the Upper Tribunal.

The hearing

4. At the hearing I heard submissions by both representatives.

5. Mr Youssefian said that there were clear reasons why the sponsor could not reasonably be expected to go with the appellant to Kenya. The judge's findings in this and other respects were criticised. The judge had erred in his proportionality assessment particularly in relation to Hannah, his adult daughter by an earlier relationship. Hannah was financially dependent on the sponsor who was her natural father although she lived with her mother, it subsequently transpired, in Shrewsbury. The judge was also criticised for not referring to the case of **Kugathas [2003] EWCA Civ 31**, which established that in considering family life a wide range of factors had to be taken into account. I was referred to paragraphs 30-31 of the decision in this case and to later paragraphs in which the judge had acknowledged that Hannah was not leading an independent life and that the appellant continued to have an important role in her life. He suggested that there would be a "severing" of the relationship between Hannah and the appellant but I indicated a better description may be to suggest that the relationship would be interrupted by the appellant's return to Kenya. The evidence that Hannah continued to have close ties to the family unit formed between the appellant and the sponsor took this case outside the normal relationship between adult child and new partner and placed a greater duty on the judge to carry out a proportionality assessment. Mr Youssefian said that an issue that was fundamental to the balancing exercise which the judge had to carry out was the prospects of relocation to Kenya and for that reason the only safe way to proceed was to set aside the decision and remit the appeal to be decided again by a differently constituted FTT.

6. Mr Youssefian went on to deal with delay, pointing out that there were various periods of inactivity on the part of the respondent. He drew attention, especially, to the period from 2007 to 2013. He relied on **EB Kosovo [2008] UKHL 41** where Lord Bingham had pointed out (at paragraph 48) that the extent to which the delay might be relevant included a case where the respondent alleged that an appellant had illegally overstayed but that her partner had embarked on a relationship with knowledge that the appellant's immigration status was precarious. In this scenario, he said, each day that passed increased the

expectation on the part of the family member concerned that the appellant would be allowed to stay in the UK. The judge had referred to the respondent's failure to remove the appellant (at paragraph 48) but failed to go on and explain the significance of the delay in raising expectations on the part of the sponsor.

7. Finally he argued that the appellant had become close to achieving 20 years continuous residence in the UK, although the judge had rejected her claim. Mr Youssefian conceded that the appellant could not avail herself of a "near miss" argument, but each year that passed had deepened her links to the UK and that was a material factor in the appeal, which ought to have been weighed up by the judge.

8. Ms Cunha said that the judge had not been referred to **Kugathas**. The more recent case of **Rhuppiah** had been referred to, however, and, in any event the judge had carried out a proper proportionality assessment. Hannah was 19 and lived with her mother a long way from the appellant and the sponsor. According to paragraph 7 of the appellant's witness statement, the appellant saw Hannah every few weeks either in Shrewsbury or in Birmingham. In that paragraph, she described herself as "getting to know Anna" and "slowly forming a relationship". In the circumstances it was not necessary for the judge to place Hannah's relationship with the appellant at the heart of the case. **EB Kosovo** needed to be read in context and not every case of delay had any impact on the formation or consolidation of family life. There was no evidence that the sponsor was "responsible" for Hannah, although he provided her with some financial assistance. The ties between the appellant and Hannah and the sponsor and his daughter were no greater than those that would normally be expected. There was no error on the judge's part in attaching little weight to that relationship.

9. Mr Youssefian replied. He confirmed no reference had been made by the judge to **Kugathas**, but he could not establish whether it had been cited before him. He had been referred to the case of **Singh [2015] EWCA Civ 6 3 0.** He said that in that case the Court of Appeal pointed out that the shift from childhood to adulthood was not "granular" – there was a gradual shift. A judge had to make findings on the evidence and just because a child is an adult did not mean that family life did not exist between the child and the parent. He also relied on a case called **N and T (Colombia) [2016] EWCA Civil 893**, a deportation appeal, where delay was a significant factor in the court's decision. He reminded me that the appellant had been in the UK for 19 years and 7 months at the date of the decision.

10. At the end of the hearing I decided to reserved my decision.

Discussion

11. The appellant had a right of appeal against the respondent's decision on human rights grounds. However, the case was considered under the Immigration Rules. The judge considered the factors in EX.1 and 2 of Appendix FM. However, as the judge acknowledged, at paragraph 37, it was also open to him to consider the case outside the rules. The judge referred to section 117A-B of the 2002 Act. Section 117B(1) provides that the maintenance of effective immigration control is in the public interest. Section 117 B (4) provides that little weight should be given to a relationship with a qualifying partner formed when the person is in the UK unlawfully. The judge took account of the arguments over delay in the same paragraph.

12. The issues therefore appear to be:

    (i) Whether the judge attached sufficient weight to the appellant's and the sponsor's relationship?

    (ii) What would the effect of the sponsor's removal be on Hannah should the sponsor leave the UK with the appellant?

    (iii) What is the significance of the delay in this case, if any? and

    (iv) Are the obstacles to the appellant's return to Kenya insurmountable?

(i) Whether the judge attached sufficient weight to the appellant's relationship with the sponsor?

13. It is said in the grounds of appeal (see PDF page 49) that the judge failed to make "any findings of facts in relation to whether the appellant's partner can/cannot reasonably be expected to follow the appellant to Kenya (see paragraph 12 of **EB (Kosovo) [2008] UKHL 41**)". That passage from **EB Kosovo** merely states that a careful evaluation of the facts is called for and that ordinarily the separation of spouses and children will not be proportionate.

14. Insofar as this represents a distinct ground (lack of any fact findings) from the wider the criticism over the lack of adequate findings as to insurmountable obstacles/the carrying out of an adequate balancing exercise, I consider it here.

15. The judge dealt in paragraph 18 et seq with the evidence given before him. In particular, the appellant stated that she had no family members in Kenya as her family were scattered around Europe. She had entered a "customary marriage" with the sponsor on 17 December 2021.

16. The judge accepted that the relationship between the appellant and the sponsor was genuine and subsisting (see paragraph 36). She referred to the appellant's long period of presence in the UK. The judge plainly did make fact findings. Having indicated in paragraph 44 that he took account of all the evidence, whether or not it was specifically referred to, the judge went on to accept that the appellant had formed a relationship with the sponsor which was genuine and subsisting. However, that alone did not permit the appellant to remain in the UK.

(ii) Whether the judge attached sufficient weight to the relationship between the sponsor, the appellant and the sponsor's child Hannah?

17. The sponsor's child is an adult now in full-time education. She has a close relationship with her mother with whom she lives. As well as continuing contact via social media and other modern means of communication there is no reason why the sponsor, should he wish to return to Kenya with the appellant, would not be able to make frequent visits back to the UK where he is, after all, a British citizen. At paragraph 32 of his decision, the judge records that the sponsor acknowledged that modern communications "could" enable him to maintain contact with Hannah, whom he believed was in a romantic relationship with another person in any event. He provides her principally with financial support which again could continue remotely.

18. As to the appellant's relationship with Hannah, the judge recorded at paragraph 34 that the sponsor acknowledged that the relationship between Hannah and the appellant was "warming up". It was clear from the evidence before the tribunal that Hannah's relationship with her mother was much closer than her relationship with either the appellant or the sponsor. Other than the financial relationship between the sponsor and Hannah, the extent of the relationship between the sponsor's adult child and himself has tended to be exaggerated . The extent of the relationship between the appellant and Hannah appears to have been exaggerated for the purposes of the appeal.

(iii) What is the effect of delay in this case?

19. It is raised in the grounds of appeal (see pdf page 50) that the effect of the delay in removing the appellant has been to strengthen the relationship between the appellant and "her partner" (see grounds at page 50).

20. Noting the appellant's long period of unlawful presence in the UK, since her initial three month visit visa expired (see paragraph 48), the judge pointed out that whilst the respondent had not taken action to remove her, this seems to have been connected with her frequent attempts to "regularise" her immigration status. In fact she seems to have made

numerous immigration applications which were without merit. It was incumbent on the respondent to properly consider those applications before concluding that the appellant should be removed as subsequently occurred.

(iv) Whether there are insurmountable obstacles to the relationship between the sponsor and the appellant continuing abroad

21. Both the appellant and the sponsor are from a Kenyan background. Although the appellant has been in the UK since 2003 the evidence of their being insurmountable obstacles to family life continuing there was not substantial. Section 117B (4) of the 2002 Act provided that little weight attached to "a relationship formed with a qualifying partner" in circumstances where the appellant's presence in the UK was unlawful.

22. There were plainly no insurmountable obstacles to the appellant's return to Kenya. The appellant claimed to have no remaining family members there but this fact, like a number of others, was not accepted by the judge (see paragraph 52). Having been born in 1982 the appellant would have been in Kenya for the first 20 years of her life where she would have had her formative influences and it would not be harsh for her to return to Kenya where English is spoken.

Conclusions

23. This is a case in which an experienced judge gave a fully reasoned decision, referred to appropriate statutes and case law and reached clear conclusions. I am satisfied he fully understood the issues before him and considered them at appropriate length. The appellant did not qualify under EX.1 because she had not been in the UK for a continuous period of twenty years nor did EX.2 apply because there were no insurmountable obstacles to the relationship between the appellant and the sponsor continuing in Kenya.

24. The appellant, who has been in the UK illegally, or at least precariously, for much of the time she has spent here, has made numerous applications. That is the principal reason for the delay. The only delay of any length Mr Youssefian was able to point to was between 2007 and 2013 but that was not the period within which she established her relationship with the sponsor, nor was delay the reason or cause of her establishing that relationship in 2019. The period of delay up to 2013 was followed by a resumption of applications which seem to have been without merit. In particular, she made a further application on 28 October 2014 on the basis that she claimed to be "stateless". That application was also rejected. The delay was by no means causative of the depth of private or family life formed in the UK, which, apart from

her relationship with the sponsor is not particularly substantial for such a long period of residence.

25. The judge had in mind that the sponsor's evidence was that he "may not" return to Kenya. Hannah was an adult and did not live with the sponsor. The appellant has exaggerated the extent of her relationship with Hannah in submissions before the Upper Tribunal. Paragraph 6 of the appellant's witness statement referred to the "great support" the sponsor provided for Hannah but, as Ms Cunha reminded me by reference to paragraph 7 of her witness statement, the evidence before the FTT was that the appellant's relationship with Hannah was a developing one. The sponsor had "regular contact" but as an adult child Hannah does not need to live with her father. Hannah lives with her mother. If Hannah is concerned at losing contact with the sponsor, assuming he does wish to return to Kenya with the appellant, she may visit him and maintain contact remotely. The appellant's evidence was that she had "no family life" in Kenya and her remaining family members were scattered around Europe. The judge found that she did have family members in Kenya, however (at paragraph 52), pointing out that they were said to have attended the wedding ceremony to the sponsor. I do not understand the appellant to challenge that finding of fact. The judge concluded, I consider correctly, that it would not be disproportionate to return her.

26. I find that the judge took full account of the evidence before him. This suggested a long period of presence in the UK which had been unlawful. The judge took account of the importance of the need for effective immigration control as provided for by section 117A of the 2002 Act.

27. The judge carried out an appropriate balancing exercise having referred to a number of the leading authorities under article 8 including **Razgar** , **Agyarko** and **Ruppiah**.

28. In all the circumstances the judge was entitled to conclude that the appellant's compulsory return to Kenya was not disproportionate. She would be returning to a relatively well-off English-speaking country. Although she has now spent the last 20 years in the UK it appears that the judge was entitled to take account of her precarious or unlawful immigration status. The judge was also entitled to conclude that she "would have family members there". The judge properly had regard to section 117 B of the 2002 Act in reaching his conclusion and the public interest in enforcing immigration controls. Therefore the judge was entitled to come to the conclusion he came to on the evidence before him and there was no material error of law.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed  Date 2nd June 2023

Deputy Upper Tribunal Judge Hanbury