Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17111/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 May 2015	**On 9 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MISS FLORENCE KIZITO NANSUBUGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Ms A Fijiwala, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Lucas sitting at Taylor House on 3 November 2014) dismissing her appeal against the decision by the Secretary of State to refuse to grant her leave to remain on Article 8 grounds outside the Rules,

and to give directions for her removal from the United Kingdom under Section 10 of the Immigration and Asylum Act 1999. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The appellant is a national of Uganda, whose date of birth is 19 July 1972. On 5 December 2004 she was granted leave to enter the United Kingdom as a visitor. Her visit visa expired on 7 May 2005. The appellant overstayed, and applied on 24 August 2007 for leave to remain outside the Rules. This application is recorded as having been refused with a right of appeal on 19 December 2007. The appellant lodged an appeal on 23 April 2009, and her appeal was subsequently dismissed on 16 June 2009. A High Court review was refused on 3 July 2009. By 15 July 2009, the appellant had exhausted her appeal rights.

3. On 1 October 2013 the appellant's solicitors applied on her behalf for ILR on the ground that she qualified for ILR under the Legacy Programme. They submitted that in relation to Article 8, their client had established a private life by virtue of her residence since 2004 and any interference would not be in accordance with the law under the **Razgar** test. When considering the appellant's case, the Home Office was asked to give consideration to the fact that she had a long term partner in Fred Kaddu who was currently awaiting a decision on his own settlement application. The letter from Mr Kaddu was attached. They were not cohabiting at present, but intended to do so in the future.

4. On 16 February 2014, the appellant's solicitors wrote a follow up letter to the Home Office in which they said they had regrettably misunderstood their client's case. It now transpired that in fact the appellant and her partner had been living together in excess of two continuous years, since 2009.

5. The solicitors went on to submit that the appellant met the requirements of paragraph EX.1 of Appendix FM. It would be unreasonable to expect her partner to leave the UK and lose the rights and entitlements afforded to him under his (recent) grant of ILR. Furthermore, he would lose his employment as a bus driver and his pension entitlements etc. There were no sufficient factors which justified requiring him to leave the UK and to discontinue the enjoyment of his family life in the UK with the appellant. The correct test for insurmountable obstacles was one of "reasonableness".

6. On 24 March 2014 the Secretary of State gave her reasons for making directions for the appellant's removal to Uganda. She met the suitability requirements under Appendix FM, but not the eligibility requirements. She had not sought to raise the issue of a relationship of Mr Kaddu until she was faced with the imminent prospect of being removed from the UK.

7. In October 2013 it was stated that the appellant was not cohabiting at present with Mr Kaddu, but intended to do so in the future. The Home Office had requested further details to establish the appellant's relationship with Mr Kaddu. In a letter dated 16 February 2014 her solicitors said the appellant was unable to produce utility bills or bank statements to evidence cohabitation due to her inability to obtain employment. They also had sought to explain her failure to inform them or the Home Office of her change of address (when she allegedly moved from her old address to live at Mr Kaddu's address) as being due to her needing to keep her previous address so as to remain registered with her doctor's surgery in the locality of her previous address. She claimed that she was concerned that the GP surgery local to her partner's house would not register her, due to her immigration status. This was not accepted. General practitioners did not require evidence of a person's immigration status in the United Kingdom purely for registering with the practice. The practitioner's services website clearly provided instructions on the type of documentation normally required when registering with a new practice. It was limited to proof of identity and evidence of a new address. It was not known for the NHS to deny a new patient registration with a local surgery based upon their immigration status.

8. The respondent went on to review the documents which had been provided in support of the claim that the couple had cohabited since 2009. While the appellant and Mr Kaddu may have enjoyed some form of relationship, it was not accepted they were partners as defined for the purposes of the Immigration Rules. It had not been shown to the relevant standard that their relationship was one which was long term, committed and akin to marriage. So the appellant had not satisfied the eligibility requirement of Appendix FM of the Rules with regard to her relationship with Mr Kaddu.

9. As such, she therefore failed to fulfil EX.1(b) of Appendix FM of the Rules, and it was considered that her removal was entirely proportionate and in line with Article 8(2) of the ECHR.

10. With regard to an alternative claim on private life grounds, she was served with a form IS15A notice of 20 December 2007 informing her of the immigration status and liability to detention and removal. She had failed to establish that she had twenty years' residence in the UK, or that she had no social, cultural or family ties to Uganda remaining. She had spent the majority of her life in Uganda, including her formative years, before coming to the UK. So she would not suffer a flagrant denial of the right to a private life on her return, and she could reasonably be expected to re-establish a private life there.

The Hearing Before, the Decision of, the First-tier Tribunal

11. At the hearing before Judge Lucas, both parties were legally represented. At the outset of the appeal, Mr Turner, Counsel for the appellant, stated that this was an Article 8 case outside the Rules. The appellant, Mr Kaddu

and two supporting witnesses gave oral evidence. They adopted as their evidence-in-chief their witness statements in the appellant's bundle. As noted by the judge at paragraph [13], Mr Power on behalf of the Secretary of State chose not to ask any questions of the witnesses, and the appeal therefore proceeded by way of submissions.

12. On behalf of the Secretary of State, Mr Power relied upon the refusal decision. He pointed out, and Mr Turner agreed, that the appellant could not meet the requirements of the Immigration Rules in this case. He submitted that her case was not exceptional, and the public interest in her removal displaced any interference with her private life in the UK.

13. On behalf of the appellant, Mr Turner submitted that the appellant was in a durable relationship within the UK and it was unreasonable to expect her to return to Uganda. There was no possibility of her failing to meet the financial requirements in an application for entry clearance, as her husband was employed as an accountant, and there was no recourse to public funds. So the only issue in this case was whether it was reasonable to expect the appellant to return to Uganda, and apply for entry clearance to return. He argued that this would be disproportionate, as it would serve no reasonable public interest.

14. At paragraph [19] of his subsequent decision, Judge Lucas set out verbatim Mr Kaddu's explanation for the appellant hitherto concealing the fact that she had (allegedly) been cohabiting with him at his address since 2009, rather than continuing to reside at 244A Godstone Road. His explanation in paragraph 11 of his witness statement was that she had continued to give the Godstone Road address as her address for official purposes even after she moved in with him, as she did not want the other occupants at their present address to open letters to her from the Home Office and or her solicitors. She also had problems in registering with a GP in the area they lived now. For these reasons, she used the old address and they now regretted not disclosing to their solicitors that they had cohabited from 2009 and that the appellant had changed her address.

15. The judge's findings were set out in paragraphs [22] to [39] of his decision. He was not persuaded that the relationship relied upon was either genuine or even if it was, that it was of the depth and durability to engage Article 8 rights within the UK. He found that the relationship was being relied upon in order to ensure the appellant's continued presence in the UK in the light of there being no other rights or reasons to be here. There was no conclusive evidence to show that the appellant and her partner were in a durable and long term relationship, and there was certainly little or no evidence of cohabitation since 2009. He did not accept that her supporters had done anything else than try to assist her with her present application. They could not be faulted in trying to assist her, but the Tribunal placed little weight upon their evidence which attempted to paint the picture of a durable and long term relationship in the present case. The evidence of the appellant and her partner was of limited weight as to the fact and durability of their relationship. She clearly had an interest in

seeking to remain in the UK as she clearly had done since her appeal rights were exhausted in 2009. It was against this background that the present application was considered. Given the flimsy evidence of the relationship, it was not at all unreasonable to expect and require the appellant to leave the UK and apply for entry clearance if that was to be her wish. There were little or no grounds for the assertion that Article 8 of ECHR applied in this case.

16. The judge went on to dismiss the appeal under the Rules, and also under Article 8 ECHR.

The Application for Permission to Appeal

17. The appellant applied for permission to appeal, arguing that the judge had erred in law in the following respects: he had been wrong to find no durable relationship in the absence of cross-examination on the subject; he had failed to follow the two stage **Nagre [2013] EWHC 720 (Admin) v SSHD** approach; he had wrongly assessed Article 8; and he had applied the wrong standard of proof at paragraph [22].

The Grant of Permission to Appeal

18. On 20 January 2015 Judge Frankish granted permission to appeal on all grounds raised.

The Rule 24 Response

19. On 30 January 2015 a member of the Specialists Appeals Team settled the Rule 24 response opposing the appeal. The grounds advanced raised no material arguable errors of law that would be capable of vitiating the appeal outcome and they were advanced in mere disagreement with the negative outcome of the appeal. In summary, the respondent submitted that the First-tier Tribunal Judge directed himself appropriately and made findings that they were reasonable and sustainable on the evidence before him.

The Hearing in the Upper Tribunal

20. At the hearing before me, there was no appearance by or on behalf of the appellant. The explanation provided by the appellant's solicitors was that the appellant had notified them that she had no financial resources to pay for legal representation at the hearing, and that she was in a state of depression such that she was unable to attend the hearing to give witness evidence. The appellant had instructed them she did not wish to withdraw her appeal, but requested for the hearing to proceed on the papers.

21. Ms Fijiwala on behalf of the respondent took me through each of the grounds of appeal, and submitted that they did not stand up to scrutiny.

Discussion

22. Ground 1 is that it was not open to the judge to reject the evidence of the appellant being in a durable relationship with Mr Kaddu, as none of the witnesses were cross-examined by the Presenting Officer, "thereby accepting the evidence without any challenge".

23. As he made clear at the hearing, in choosing not to cross-examine the witnesses the Presenting Officer was not thereby conceding that their evidence should be accepted by the judge. He made it clear that he was adhering to the position taken by the Secretary of State in the refusal letter, which was that the appellant's relationship with Mr Kaddu (such as it was) was not a relationship akin to marriage for the purposes of Appendix FM, and in particular that it was not shown that the parties had cohabited in a relationship akin to marriage for at least two years prior to the date of application.

24. There was no procedural unfairness in the Presenting Officer not formally putting to each of the witnesses the case advanced in the refusal letter. The appellant knew from the refusal letter the case that she had to meet at the appeal hearing, and the burden of proof always rested with her to bring forward evidence by way of appeal that was of sufficient cogency to carry the day. There was no obligation on the Presenting Officer to cross-examine any of the witnesses so as to give them the opportunity to improve the appellant's case by the provision of additional information. In not cross-examining the witnesses, the Presenting Officer took the calculated risk that the judge might decide that the evidence in the witness statements, taken in conjunction with the documentary evidence, was sufficient to discharge the burden of proof.

25. It is not suggested that the judge has failed to give adequate reasons for disbelieving the core claim that Mr Kaddu is a partner of the appellant for the purposes of Appendix FM. In particular, despite having allegedly cohabited with Mr Kaddu since 2009, it was only in February 2014 that the appellant's solicitors made this claim, despite having asserted the contrary (on instructions from the appellant) only a few months earlier. The judge alluded to this crucial discrepancy at paragraph [29] of his decision.

26. In short, the judge gave adequate reasons for finding that the appellant had not shown that she was in a durable relationship with Mr Kaddu akin to marriage, such as to meet the eligibility requirements of Appendix FM.

27. The premise which underlies ground 2 is that the judge ought to have found that the appellant was in a genuine and subsisting relationship with a partner who is settled in the UK, which is the first limb of paragraph EX.1(b) of the Rules. Since the judge gave adequate reasons for finding that the appellant did not meet the eligibility requirements such as to bring the exemption criteria in EX.1 of the Rules into focus, ground 2 falls away.

28. Ground 2 is also of no merit for another, quite separate reason. It was not argued on behalf of the appellant that there were insurmountable

obstacles to family life with Mr Kaddu continuing in Uganda. The way the case was put was that it was unreasonable to expect Mr Kaddu to relocate to Uganda with the appellant. Mr Turner did not submit that there were insurmountable obstacles to him doing so, having regard to the definition of insurmountable obstacles in EX.2.

29. It is convenient at this stage to address the criticism made at paragraph 31(n) of the permission application (albeit that the criticism is advanced in the context of ground 3). The criticism is that the judge failed to consider the asylum grounds raised by the appellant when assessing the case on proportionality. For if there is any merit in this argument, it is potentially also relevant to the question of whether the evidence disclosed insurmountable obstacles.

30. The judge did not ignore the fact that both the appellant and her partner had raised in their witness statements what he described as "asylum issues". This was noted by him at paragraphs [17] and [18] of his decision. At paragraph 9 of her witness statement the appellant said she feared returning to Uganda, and regretted not making an asylum application at the time she came to the UK. In his witness statement, Mr Kaddu said that the appellant had told her that she was scared of going back to Uganda due to reasons connected with war and unrest. Her family members had been killed as they were seen as opposing the government.

31. At paragraph [26] of his decision, the judge said that he was not taking this aspect of the claim into consideration in addressing the proportionality issue, because there had been no asylum claim and, "this was not addressed on the appellant's behalf by Mr Turner".

32. Mr Turner did not seek to argue before the First-tier Tribunal that the "asylum issues" presented an obstacle to the appellant's return to Uganda, or an obstacle to Mr Kaddu relocating to Uganda with the appellant. It is also not argued by way of appeal to the Upper Tribunal. In the permission application, the reasons advanced as to why it is not reasonable to expect Mr Kaddu to leave the UK are:

    (i) it cannot be reasonable to expect Mr Kaddu to leave the UK where he has rights provided for by his grant of ILR;

    (ii) it is not reasonable to require Mr Kaddu to lose those rights which will happen if he is resident outside the UK for more than two years;

    (iii) it is not reasonable to require Mr Kaddu to give up his position of employment and the rights afforded, such as pension contribution etc.

33. Since the "asylum issues" did not form a part of the appellant's case before the First-tier Tribunal, it was open to the judge not to take them into account when assessing proportionality. By the same token, the raising of the "asylum issues" in the witness statements did not trigger an

obligation on the part of the judge to consider whether there were insurmountable obstacles to family life between the appellant and Mr Kaddu continuing in Uganda.

34. Moreover, no reasonable Tribunal properly directed could have taken the "asylum issues" into account as the appellant did not purport to discharge the evidential obligations which arise in the context of a putative asylum claim. On analysis, the appellant was not asserting a *well-founded* fear of persecution on return to Uganda, but merely asserting that she had a genuine fear. Mr Kaddu in his witness statement also did not assert a well-founded fear of persecution in Uganda, which was apparently the country of his birth. At paragraph 7 of his witness statement, he says he cannot see himself returning to Uganda and living there because he does not agree with the present government in Uganda as it is a corrupt dictatorship that oppresses any opposition. However, he does not claim that he would actively oppose the government if he returned to Uganda after an eleven year absence.

35. Ground 3 is that the judge failed to carry out a lawful assessment under Article 8, following the required two stage process; and that the finding that it was lawful to remove the appellant simply for her to make an application from abroad to return to the United Kingdom is perverse, having regard to **Chikwamba [2008] UKHL 40** and **Hayat v Secretary of State for the Home Department [2012] EWCA Civ 1054**.

36. There was no merit in ground 3. The judge followed a two stage process. It was accepted by Mr Turner that the appellant did not qualify under the Rules (Appendix FM or Rule 276ADE) and therefore the judge needed to say no more with regard to stage one.. If he had been minded to allow the appeal at stage two, it would have been an error of law for him not to take into account the reasons why the appellant did not succeed at stage one. But as he was not minded to allow the appeal at stage two, he did not need to rehearse the reasons why the appellant failed under stage one.

37. It was not perverse for the judge to find that it was reasonable to expect the appellant to leave the UK and apply for entry clearance from Uganda if that was her wish. The judge gave adequate reasons for this finding, and no error of law is disclosed either by reference to the authorities cited in the grounds of appeal, or by reference to **R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC).**

38. It is also argued in ground 3 that the judge misdirected himself as to the burden of proof at paragraph [22]. In that paragraph, he began by saying the burden of proof was on the appellant and the standard of proof in relation to the Rules was on the balance of probabilities. He then went on to say that the standard of proof in relation to Article 8 of ECHR is of "a real risk of the relevant violation".

39. When granting permission to appeal, Judge Frankish said that the phrase "real risk" lacked jurisprudential attribution ("real risk of serious harm" being in asylum test, not an Article 8 test).

40. The correct standard of proof for both the Rules and Article 8 is the balance of probabilities. The one exception to the general rule is where what is apprehended in the country of return is a *flagrant violation* of the applicant's Article 8 rights, such as an applicant having her son taken away from her. The judge misdirected himself as to the correct standard of proof, but he did not thereby prejudice the appellant. On the contrary, the appellant potentially benefited from having the lower standard of proof applicable to asylum claims being applied to all aspects of her Article 8 claim.

Conclusion

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson