Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/17585/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower Birmingham	**Determination Promulgated**
On 23 March 2015	**On 24 March 2015**

Before

UPPER TRIBUNAL JUDGE PITT

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DORAH KWEBETA RUBAIRO

Respondent

Representation:

For the Appellant: Mr Mills, Senior Presenting Officer
For the Respondent: Mr C Lane, instructed by Rotherham & Co

DECISION AND REASONS

The Appeal

1. This is an appeal by the Secretary of State for the Home Department against a determination promulgated on 21 August 2014 of First-tier Tribunal Judge V A Osborne which allowed the Article 8 ECHR appeal of Ms Rubairo.

2. For the purposes of this determination, I refer to Ms Rubairo as appellant and to the Secretary of State as the respondent, reflecting their positions as they were before the First-tier Tribunal.

Background

3. The claimant is a Tanzanian citizen born on 1 June 1975. She came to the UK as a student in July 2005. She married a German national on 25 February 2008. She was issued with a residence card recognising her as the family member of an EEA national exercising Treaty rights until 12 April 2013. The couple separated in July 2010 and the appellant started divorce proceedings in 2012. The divorce was made absolute on 10 January 2014. On 3 February 2014 she applied to be recognised as someone with a retained right of residence. The respondent refused that application on 24 March 2014.

4. The appeal against that refusal came before Judge Osborne on 14 August 2014. The appeal against refusal to recognise the appellant had a right of residence as the former spouse of an EEA national was refused by Judge Osborne and there was no cross appeal against that decision.

5. Judge Osborne went on to allow the appeal under Article 8 ECHR on the basis of the appellant's private life. As I understood it, the respondent's challenge to that decision is twofold. Firstly, the First-tier Tribunal Judge misdirected itself in law in failing to follow the correct legal approach in the proportionality assessment. Secondly, there was insufficient evidence justifying the finding that the appellant's private life was of such weight that her return to Tanzania was disproportionate such that the decision of the First-tier Tribunal was irrational or perverse.

6. I found that both grounds had merit.

7. Judge Osborne found at [37] that the appellant could not meet the private life requirements of the Immigration Rules contained in Appendix 276ADE. She had not been in the UK for 20 years and retained links to Tanzania. The failure to meet the Immigration Rules does not feature anywhere in Judge Obsorne's proportionality assessment, however. The failure to meet the Immigration Rules fell to be considered as a starting and central factor in any proportionality assessment. In Haleemudeen v SSHD [2014] EWCA Civ 558 at [42], the Court of Appeal confirms that:

> "The authorities make it clear that the focus of any assessment of whether an interference with private life pursuant to the requirements of immigration control is proportionate should be whether the Secretary of State's decision is in accordance with those provisions."

and at [47]:

> "The passages from the judgments in the cases of *Nagre* and *MF (Nigeria)* appear to give the Rules greater weight than as merely a starting point for

> the consideration of the proportionality of an interference with Article 8 rights."

8. An additional error arises in the application of section 117B of the Nationality, Immigration and Asylum Act 2002. At [45] and [47], the First-tier Tribunal judge weighs positively (and correctly) the factors stated to be in the appellant's favour, her employment history and her level of English.

9. At [44], however, the First-tier Tribunal weighs in the appellant's favour that her private life was established whilst she was here lawfully. That is not how the wording of s.117B (4) indicates that this factor should be applied. The factors identified, family or private life formed whilst the person concerned was in the UK illegally or precariously, attract little weight in the proportionality assessment. The section does not indicate that where a family or private life is established whilst the person concerned is here lawfully or otherwise than in precarious circumstances, that a positive factor arises to be weighed in the person's favour.

10. Further, nowhere does the proportionality consideration show that the factor contained in s.117B (1), that the "maintenance of effective immigration control is in the public interest", was addressed by the judge beyond being set out at [42].

11. The second ground of appeal has merit as the appellant's evidence on her private life before the First-tier Tribunal was very limited and, in my view, was simply not capable of supporting the judge's finding that it could outweigh the public interest in effective immigration control. The appellant's evidence went no further than that contained at [12] of her witness statement dated 26 June 2014 which stated:

> "I have lived in the UK for nearly nine years and I have lots of friends here. I go to church twice a week – on Friday and Saturday. I do house-to-house calling with the church and we also do charity work for people overseas. My church is Seventh Day Adventist."

12. Indeed, the First-tier Tribunal comments at [40] that "any other details of the specifics of the Appellant's private life are entirely unknown to me" and at [46] that, other than the s.117B factors referred to above:

> "Although the Appellant has not given much detail of any other aspects of her private life I am satisfied that she has integrated into society here to the extent that she wishes to remain here – she told me she has a circle of friends and that her church community was of particular significance to her."

13. I must exercise caution in substituting my view where the decision reached was legitimately open to Judge Osborne. Given the undisputedly sparse evidence of the appellant's limited private life, however, it was my conclusion that it could be said to have been reasonably open to him to find a disproportionate interference arose here.

14. Further, nowhere does the First-tier Tribunal consider that the appellant would be able to enjoy a private life of at least the same level in Tanzania, the country where she has lived for the large majority of her life, and where she has a child and other relatives.

15. For all of these reasons I found that the decision of the First-tier Tribunal disclosed an error on a point of law in the Article 8 proportionality assessment such that it must be set aside and remade.

16. I proceeded to remake that part of the decision. As above, the appellant cannot meet the provisions of the Immigration Rules. Her length of residence comes nowhere near that deemed by the Secretary of State to be sufficient to found an Article 8 private life claim. She also has ties of some note in Tanzania where she grew up, lived half her adult life, married and had a child and where her other relatives still live.

17. What, then, can bring her case into the limited category that can succeed where the Immigration Rules are not met? As required by s.117B, I weigh in her favour her fluent English and that she has not been a burden on the taxpayer since coming to the UK.

18. It was not my view that her genuine belief that she would remain in the UK permanently when she married an EEA national as found by the First-tier Tribunal at [40] was something that could carry very much weight in the proportionality assessment. I do not dispute that it was a genuine belief but it was not one that she was entitled to hold and then place reliance on when her circumstances changed such that she had no legal right to remain longer.

19. It was my conclusion that even after weighing anything of relevance in favour of the appellant at its highest, it could not be said that on these facts a disproportionate interference arose in relation to her private life. I therefore refused the Article 8 claim.

Decision

16. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.

17. I re-make the appeal, refusing it under Article 8 of the ECHR.

Signed:  Date: 23 March 2015

Upper Tribunal Judge Pitt