IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18731/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 April 2015	**22 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

RACHEL NYAMBURA NEUMUNN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Collins, Counsel instructed by Springfield Solicitors
For the Respondent: Miss A Everett, Home Office Presenting Officer

DECISION AND REASONS

The Appellant and the Decision

1. The Appellant, Rachel Nyambura Neumunn, was born on 29 June 1965, so that she is now aged 49, and is a citizen of Kenya.

2. The Sponsor, Mr Danny Neumunn, was born on 1 July 1953, so that he is now aged 61, and is a British citizen. He is the husband of the Appellant.

3. The Appellant applied for further leave to remain in the UK under Article 8 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, which is her qualified right to respect for her private and family life. She appeals against a decision of the Respondent of 8 April 2014, explained in a Refusal Letter of 4 April 2014, refusing her application by reference to the provisions of the Immigration Rules addressing private and family life.

The Legal Background

4. Section 86 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provides that I must allow the appeal insofar as I think that the decision against which it is brought was not in accordance with the law (including Immigration Rules) or that a discretion exercised in making the decision should have been exercised differently. I may consider evidence about any matter which I consider relevant to the substance of the decision, including evidence concerning a matter arising after the date of the decision.

5. The onus of proof in establishing these matters lies upon the Appellant. The standard of proof is that of the balance of probabilities, as it is also for any related human rights issues, save in relation to issues of removal, where it is that of reasonable likelihood or real risk: **Box** [2002] UKIAT 02212.

The History of the Appeal

6. The appeal of the Appellant was heard by Judge Matthews sitting at Stoke-on-Trent on 28 July 2014. In a determination of 5 August 2014, promulgated two days later, the appeal was dismissed on immigration and human rights grounds. Following the grant of permission to appeal I set the determination aside on the basis of material errors of law and directed a full rehearing, which took place before me on 13 April 2015.

7. The Appellant and her husband attended the rehearing. So also did two of the five people who have made witness statements in their support, although they were not invited to give evidence. The Appellant gave evidence on oath in English in chief, in which she adopted her two statements, cross-examination and re-examination. Her husband, who had remained outside the hearing room until this point, then gave evidence on oath in English in chief, in which he adopted his two statements, and cross-examination. Submissions followed, which I have taken into account, together with the most helpful skeleton argument prepared on behalf of the Appellant by Mr Collins. I reserved my determination.

8. Mr Collins accepted at the outset, with which Miss Everett concurred, that the Appellant could not satisfy the requirements of the Immigration Rules relating to private and family life. The issue was therefore whether as a matter of law the Appellant was entitled to a freestanding Article 8 proportionality assessment. Miss Everett submitted that she was not and Mr Collins that she was. If she was, Miss Everett submitted that it should be determined against her and Mr Collins in her favour. I reserved my determination.

The Evidence

9. As stated the evidence comprises the documentary and oral evidence of the Appellant and her husband and the documentary evidence of five people who know them. In evidence are household accounts, bank statements and payslips of the Appellant's husband. The evidence of the Appellant and of her husband is broadly consistent, internally and with that of each other. There was no challenge to the evidence, which is not contentious. I accept the evidence of the Appellant and her husband, and summarise the evidence compendiously.

10. Born on 29 June 1965 in Kenya, of which she is a citizen, the Appellant arrived in the UK, at the age of 35, on 21 May 2001. On the basis directed by an agent she claimed political asylum in a false identity and nationality. Conscious that she was doing so, she did not attend and was not represented at the hearing of her appeal on 25 September 2002. In a determination of the same date, promulgated two days later, Judge Clements dismissed her appeal on political asylum and human rights grounds.

11. The Appellant remained in the UK, without any lawful basis of stay, overstaying in the event for at least eight years.

12. In June 2010 the Appellant met Danny Neumunn in a pub in Coventry. They started seeing each other, entered a relationship and in August 2010 began living together. On 30 June 2012 they married in a church.

13. It seems that the Appellant brought herself to the notice of the Home Office during 2010. Her case was initially considered under the legacy programme. On 8 November 2012 she applied for leave to remain in the UK as the wife of her husband. Her application was refused without a right of appeal. She sought judicial review of the decision, which resulted in the further decision of 4 April 2014, accompanied by a right of appeal, giving rise to the present appeal.

14. The Appellant told her husband about her lack of immigration status soon after they started living together, but did not explain to him that she might not be able to remain in the UK. Her husband did not understand immigration law and hoped that she would be able to remain (oral evidence, questions 23-25, 57-59 of my record ("oral 23-25, 57-59")). The Appellant is not allowed to work in the UK and does not do so.

15. In Kenya there live the Appellant's brother, sister and two children. They used to be more regularly in contact but now, as a result of the inheritance following the death of the Appellant's mother, they are in contact only from time to time. The Appellant would like to be able to take her husband to meet them.

16. The Appellant and her husband both say that they are emotionally dependent upon each other. Her husband said that she had become his best friend, partner and soulmate and that he could not imagine life without her (oral 42, 57). He never thought that he would find love again, as he has done with her.

17. Her husband would not go and live with her permanently in Kenya. He is aged 61, has lived his whole life in the UK and has never lived elsewhere. He would lose his employment, salary and state pension in the UK. In the UK he has his own children, who include a daughter aged 28 with a child of her own, who visit him and his wife.

In Kenya he would stand out and could not blend in. Other than English he does not speak any of the local languages. He would not be able to get employment and so would become financially destitute. Kenya is a dangerous place in which to live. In the UK he works as a lorry driver, earning more than £20,000 per annum. He also holds a publican's licence, has managed pubs, and has a qualification in electronics, which he does as a hobby.

Article 8 of the 1950 Convention

18. As stated, it is common ground that the Appellant cannot satisfy the requirements of Appendix FM and of paragraph 276ADE of the Immigration Rules, which relate respectively to family and private life. The issue is therefore whether as a matter of law she is entitled to a freestanding Article 8 proportionality assessment. If she is not, the appeal must be dismissed.

19. **MM (Lebanon) v SSHD** [2014] EWCA Civ 985 at paragraph 128 per Aikens L.J., **R v SSHD on the application of Aliyu** [2014] EWHC 3191 (Admin) at paragraph 59 per Deputy High Court Judge Grubb and **Singh v SSHD** [2015] EWCA Civ 74 at paragraph 64 per Underhill L.J. concur in holding that where all the issues in an appeal have been addressed in consideration under the Immigration Rules there is no need for a full separate Article 8 examination, which is needed only where there are arguable good grounds that the Immigration Rules do not adequately deal with an individual's circumstances relevant to an Article 8 assessment. **PG (USA) v SSHD** [2015] EWCA Civ 118 held at paragraphs 16 and 17 per Fulford L.J. that because the Immigration Rules do not provide a "complete code" the proportionality test will be more at large, albeit guided by the **Huang** tests and by UK and Strasbourg case law.

20. The five **Razgar** [2004] UKHL 27 tests are:

> "(1) Is the decision an interference by a public authority with the right to respect for private life (which includes the right to physical and moral integrity) or family life?
>
> (2) If so, will that interference have consequences of such gravity as potentially to attain the minimum level of severity required to engage Article 8?
>
> (3) If so, is that interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, or the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others?
>
> (5) If so, is the interference proportionate in a democratic society to the legitimate aim to be achieved, which is the preservation of effective immigration control (or, as subsequently developed in relation to deportation cases, the prevention of crime and disorder)?"

21. It seems to me that a way of summarising the recent jurisprudence is effectively to restate the second **Razgar** question. Will the interference with an Appellant's right to

respect for his private or family life have consequences of such gravity as potentially to engage the operation of Article 8?

22. In this as in so many cases this question could be answered in either way. I have ultimately concluded that it should be answered affirmatively. The Appellant is happily married at the age of 49 to and in an emotionally interdependent relationship with a British citizen of 61 whose entire life has been anchored in the UK and who cannot as a British and an EU citizen be required to accompany her to live in Kenya and says that he would not do so. The dismissal of her appeal would therefore entail the termination of her marriage.

23. If the Immigration Rules engage with her situation, they do not entirely engage with the consequences. They are not a complete code and the contemporary jurisprudence leads me to conclude that the Appellant is entitled to the benefit of an Article 8 proportionality assessment.

Proportionality Assessment

24. The Appellant's husband is a British and an EU citizen, who cannot therefore be required to leave the UK: **Sanade and Others (British children – Zambrano – Dereci)** [2012] UKUT 00048 (IAC). Nor can he reasonably be expected to contemplate doing so. Aged 61, he is financially tied to the UK, and would lose his employment, salary and state pension in Kenya, where he says that it would be very difficult for him to find employment so that he would be financially destitute. His own children and grandchild live in the UK and visit him. He fears not blending into Kenyan society. He also fears for his safety in Kenya, although there is no background evidence to substantiate this fear. Kenya has suffered two major terrorist atrocities in recent times, but that does not establish that it is generally an unsafe country in which to live.

25. The Appellant lived in Kenya for the first 35 years of her life. Her brother, sister and two children live there, and she is in contact with them, even if not regularly. She is keen for her husband to visit them and so does not have a bad relationship with them.

26. The Appellant has a culpable immigration history. She sought political asylum in a false identity and nationality and when it was refused overstayed for at least eight years. Her culpability is mitigated only by her having drawn back from perjuring herself by deciding not to attend the hearing of her political asylum appeal. She brought herself to official notice perhaps initially to seek eligibility under the legacy programme and then in the light of her relationship with her husband.

27. Sections 117A-117D of the 2002 Act, inserted by Section 19 of the 2014 Act, are essentially a further elaboration of the fifth **Razgar** question about proportionality: **Dube (ss. 117A-117D)** [2015] UKUT 00090 (IAC). The maintenance of effective immigration controls is in the public interest. The Appellant is able to speak English fluently. Through her husband, who earns more than £20,000 per annum, she is financially independent. Both factors are in the public interest. Her husband is a British citizen and thus a qualifying partner. Little weight is to be given to a private life or a relationship formed with a qualifying partner that is established by a person

at a time when the person is in the United Kingdom unlawfully. Little weight is also to be given to a private life established by a person at a time when that person's immigration status is precarious. The Appellant's immigration status has been precarious since the dismissal of her political asylum appeal in September 2002, and her relationship with her husband was formed at a time when she was in the United Kingdom unlawfully. She appears to be integrated into British life. Her separation from her husband would involve great distress to both of them, and on the balance of probabilities the effective end of their marriage, which could hardly be maintained through the oft quoted medium of modern methods of communication.

28. Both parties made submissions about the reasonableness of requiring the Appellant to return to Kenya in order to make an entry clearance application. There was discussion about how long the entry clearance process might take in Kenya, about which the Appellant submitted evidence after the hearing. As identified in **SSHD v Hayat (Pakistan)** [2012] EWCA Civ 1054 at paragraph 29, the test stated at paragraph 9 of **Chikwamba v SSHD** [2008] UKHL 40 is:

> "The real question was not whether there were 'insurmountable obstacles' to the applicant returning to Pakistan in order to make an application for entry clearance from there, but whether there was any sensible reason as to why he should be required to do so."

29. **Hayat** was further considered in **Thakral v SSHD** [2015] UKUT 00096 (IAC), holding that the **Chikwamba** principle is only engaged if the Respondent has refused the application "on the procedural ground that the policy requires that the applicant should have made the application from his home state"; see especially paragraphs 11, 12. The Refusal Letter in the present appeal does not address this issue. So it may be that, on the authority of **Thakral**, the issue does not arise at all. In any event, though, it does not seem to me to be significant. Miss Everett submitted that this was far from a case in which it was clear that an application for entry clearance made from abroad would succeed. Mr Collins accepted at the outset that the present appeal could not succeed under the Immigration Rules. An application made from abroad would involve if not identical then very similar considerations, which so far as I can judge would probably result in the refusal of the application. So the issue seems to me on any basis to be peripheral.

30. I summarise. The maintenance of effective immigration control is in the public interest: ss.117A-117D of the 2002 Act. In the proportionality balancing exercise the scales do not start at an even balance. In normal circumstances interference with family life will be justified by the requirements of fair and consistent immigration control. The starting point is the need to maintain that control, and it will be difficult for an appellant who has no claim to remain under the Immigration Rules to outweigh its impact by establishing an entitlement to remain under Article 8: **LK (Serbia)** [2007] EWCA Civ 1554. An even handed application of the proportionality test was likely in most cases to result in the finding that removal was proportionate: **KR (Iraq)** [2007] EWCA Civ 514; **WB (Pakistan)** [2009] EWCA Civ 215.

31. Little weight is to be given to the Appellant's private life and relationship formed when she was in the United Kingdom unlawfully and her immigration status was precarious. She has a poor and deceptive, even if slightly mitigated, immigration

history. She overstayed in the UK, waiting at least eight years before bringing herself to official attention when she had reason to hope that this would result in her being granted leave to remain.

32. The Appellant's claim is based upon her marriage to her husband. She is now aged 49 and he 61. They are economically self-sufficient and she speaks English fluently. Her husband cannot be required to accompany her to Kenya, and there are many reasons why he considers that he cannot do so.

33. In short the Appellant seeks to preserve a marriage entered into at a time when she was in the United Kingdom unlawfully and her immigration status was precarious. This was based upon an adverse immigration history involving deception and overstaying for at least eight years. Neither she or her husband had any legitimate expectation that she would become entitled to remain.

34. In short the public interest is weighty whilst the private life and relationship of the Appellant, aggravated by a culpable immigration history, bears little weight. The other factors in the Appellant's favour do not displace that balance. Recognising the distress which this will cause to the Appellant and her husband, I conclude that their qualified right to respect for their private and family life is outweighed by the public interest in the maintenance of effective immigration control.

35. I accordingly dismiss the appeal, under the Immigration Rules and on Article 8 human rights grounds.

Notice of Decision

36. The appeal is dismissed under the Immigration Rules.

37. The appeal is dismissed on Article 8 human rights grounds.

38. No anonymity direction is made.

39. I have dismissed the appeal and therefore there can be no fee award.

Signed Dated: 20 April 2015

Deputy Upper Tribunal Judge J M Lewis