Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17816/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 September 2017	**On 27th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

MAYANJA SARAH NABAWANUKA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Farhat of Counsel instructed by Gulbenkian Andonian
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Ross promulgated on 28 November 2016 dismissing the Appellant's appeal against a decision of the Respondent dated 27 April 2015 to refuse leave to remain in the United Kingdom.

2. The Appellant is a national of Uganda born on 9 October 1970. She claims to have entered the United Kingdom on 5 May 2005 with six months leave to enter as a visitor. She thereafter became an overstayer. On 18 January 2012 the Appellant made an application for leave to remain using form FLR(M) on the basis of her marriage to Mr Saturday Mark Okpuru, a national of Nigeria born on 7 April 1953,

who it was said had been living in the United Kingdom for a period in excess of twenty years and had the status of a settled person. There are some references in the materials before me to Mr Okpuru being a British citizen, but the evidence appears to demonstrate that he has never applied for British citizenship by way of naturalisation or otherwise and has retained his citizenship of Nigeria. Be that as it may it seems to me nothing material turns on his nationality so much as the fact that he is a settled person: the Appellant made an application to remain in the United Kingdom as the spouse of a settled person, the couple having married in a church ceremony on 30 June 2010. It is said that they had been dating as a couple since January 2007 and cohabiting from April 2008.

3. In the application form at section 8 it was indicated that neither the Appellant nor her husband were working - albeit they stated outgoings of rent of £700 per month. In the boxes provided at section 8.6 it was indicated that the Appellant's partner was in receipt of public finds by way of disability living allowance.

4. There appears to have been some unexplained delay in the processing of the Appellant's application to such an extent that her advisers initiated judicial review proceedings which were settled by way of a consent order on the basis that the Respondent undertook to make a prompt decision in respect of her application. The Appellant's application was then refused on 27 April 2015 for reasons set out in a 'reasons for refusal' letter ('RFRL') of that date with reference to paragraphs 286, 284(iv), 276ADE of the Immigration Rules, and also by reference to the so called 'partner route' under Appendix FM - in particular paragraph EX1 of Appendix FM.

5. The Appellant appealed to the IAC. The appeal was dismissed for the reasons set out in the Decision of Judge Ross.

6. The Appellant then sought permission to appeal to the Upper Tribunal which was granted on 25 July 2017 by First-tier Tribunal Judge Robertson. The Appellant essentially raised two grounds of challenge. Judge Robertson considered that the second of those grounds had *"some arguable merit"* and that in the circumstances ground one would also need to be considered. The second of those grounds is pleaded under the heading *"Benefits, burden on taxpayer and the section 117 statutory considerations"*. The first ground of challenge is stylised as *"reasoning as to insurmountable obstacles - Shahzad (sufficiency of reasons: set aside) [2013]"*.

7. It is perhaps convenient given the approach of Judge Robertson to turn to the second of the grounds of challenge first.

8. Judge Robertson identified in the grant of permission to appeal that the challenge to the Judge's consideration of the section 117 statutory considerations, and the question of receipt or otherwise of welfare benefits, potentially impacted upon the Judge's consideration of proportionality. The key passages in the Judge's Decision in this regard are paragraphs 24 and 25:

> *"24. In reaching a decision I must take into account section 117B Nationality, Immigration and Asylum Act 2002. This states that the maintenance of effective immigration controls is in the public interest. It is in the public interest and in particular the interest of the economic wellbeing of the UK that persons who seek to remain in the UK are financially independent because such persons are not a burden on taxpayers and are better able to integrate into society. Little weight should be given to private life or a relationship formed with a qualifying partner if it is established by a person at a time when the person is in the UK unlawfully. Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*
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> *25. Conducting the balancing exercise and applying section 117B, although the appellant and her husband have a subsisting relationship this relationship was established at a time when the appellant was not in the UK lawfully, and they must have known when they had entered into the marriage that the appellant was not entitled to live in the UK. I therefore consider that applying the words of the section, I can give little weight to the relationship. In addition the appellant and her husband live on benefits, they are not financially self-supporting, and although they can point to the fact that it would be very difficult for the appellant to go back to Uganda, and that she would have a much better life if she remained in the UK, her remaining in the UK will potentially be a burden to the taxpayer, and she is not entitled to any of the benefits of living in a welfare state, such as free health care, because she is not a British citizen. There are no children under the age of 18 to consider in this case which might have made a difference. I also appreciate that her husband is not of Ugandan ethnicity but was born in Nigeria. He has said that he will not leave the UK, but that is a decision for him. I therefore consider that although the decision clearly interferes with her family and private life, the interference is proportionate and therefore the appeal must fail".*

9. The challenge in this regard very much focuses upon the Judge's references to the receipt of benefits. This is both emphasised and undermined by paragraph 22 of the Grounds of Appeal: emphasised because it alleges that the Judge *"refers to the Appellant claiming benefits to which she is not entitled"*; undermined because, in my judgement, it is wrongly premised in so asserting - as will be seen in due course I can identify nothing in the decision that amounts to a finding by the Judge that the Appellant had herself at any point made a claim for benefits whilst in the UK. Otherwise the grounds of challenge essentially focus on the fact that it was the Appellant's husband who was claiming benefits, that those were benefits to which he was entitled, and therefore these were benefits that he received in his own right.

10. It seems to me that that line of challenge essentially misunderstands or misconceives what it is that the Judge was saying in these paragraphs in respect of the public interest considerations under section 117B.

11. It is perhaps helpful to set out in particular the public interest consideration under section 117B(3), which is in these terms:

> *"It is in the public interest and in particular in the interest of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom are financially independent because such persons:*
>
> *(a) are not a burden on taxpayers, and*
>
> *(b) are better able to integrate into society".*

It may be seen that the emphasis here is on an applicant being a financially independent person. The reasons why this is considered to be an important public consideration are then explained – "*because…*". In the context of this particular case, where it might be said that the Appellant had already to some extent integrated into UK society, the particular emphasis was on the potential burden on taxpayers.

12. If the observations of the Judge are considered against this statutory framework, it seems to me clear that there is nothing in what he says that is factually inaccurate, and there is nothing in what he says that offends against the imperative to have regard to the public considerations itemised in section 117B. It is - as Mr Farhat very fairly acknowledged in the course of submissions and discussion - entirely accurate to say that the Appellant and her husband live on benefits: it may well be that they are benefits to which the Appellant's husband is entitled, but nonetheless it is the case that their financial support is essentially that garnered by way of his entitlement to benefits. Neither the Appellant nor her husband can be said to be financially self-supporting. It follows, recalling the wording of section 117B(3), that the Appellant is not a person who is financially impendent. To that extent it is open to the Judge to conclude - in accordance with the reasoning set out in section 117B(3) - that the Appellant, not being financially independent and essentially being supported by way of her husband's benefits, is potentially a burden to taxpayers. If she is not self-supporting then as soon as she seeks to access any public services - for example healthcare services, which it was acknowledged she has already accessed whilst in the UK - as a person who has no history of employment and has not demonstrated a propensity to take employment in the United Kingdom at a rate where she would be a net tax contributor, she becomes a burden on taxpayers. To this extent it seems to me that the Judge has correctly considered the public interest consideration under section 117B(3), and has made unimpugnable observations and comments on it in the context of this particular case.

13. It is to be noted that there is no challenge before me to any other aspect of the proportionality assessment conducted by the First-tier Tribunal Judge. The challenge to the Decision of the First-tier Tribunal accordingly fails in this regard.

14. In respect of the other ground of challenge, it is argued that the First-tier Tribunal Judge has failed to offer any reasons, or any adequate reasons, for his conclusion that there would not be 'insurmountable obstacles' within the meaning of paragraph EX.1 of Appendix FM as defined under paragraph EX2.

15. In this context it is instructive to note what was being advanced by the Appellant and her partner in respect of potential obstacles to relocation. These matters are set out in the Judge's decision in the course of recording the testimony of each the Appellant and her husband, both in respect of their written statements and their oral evidence. For example, in particular the Appellant is recorded as relying on the fact that *"she did not feel good about the idea of going to Nigeria with her husband, she did not understand the language, and she might be tortured"* (paragraph 6). Reference is also made to "*cultural problems*" if a person marries another national: it is asserted *"They are hated"*. Reference is also made to the Appellant's husband's health condition there being evidence before the Judge that he had diabetes, high blood pressure, sinus problems, and a history of cardiac problems. However, Mr Okpuru was asked about his health conditions he essentially indicated that although he had a history of ill health he was currently well: *"He was asked about his health and said that his health was fine and that he was well"* (paragraph 9). Further he was asked about his history of having had a heart attack to which he responded that *"he had been operated on and that he was now well. He takes medication when he feels like it, this is to do with his heart. His diabetes improves if he goes to a gym"* (paragraph 9). Nonetheless the Appellant's husband expressed the view that he could not go and live in Uganda *"because in his culture he could not go to his wife's country. He said that in his culture men marry women, women do not marry men"* (paragraph 9).

16. It seems to me that the Judge took into account the substance of these matters in considering the issue of insurmountable obstacles. In any event it is to be noted that these matters in the main part are essentially unsupported assertions, or expressions of concern, made by the Appellant and her husband. Mr Farhat acknowledges that there was nothing by way of independent supporting evidence to reinforce the substance of the concerns expressed. Specifically there was nothing before the First-tier Tribunal to establish that there was any degree of animosity in Nigeria to Ugandans or to Nigerians who marry people of other nationalities, and there was nothing by way of supporting evidence to indicate any difficulty for Nigerians in Uganda. Nor, significantly, was there anything before the First-tier Tribunal in respect of the availability of healthcare in either Nigeria or Uganda.

17. The Judge addresses the issue of insurmountable obstacles at paragraphs 17-19. At paragraph 17 he says this:

> *"The term insurmountable obstacles is defined in EX2 and means very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship to the applicant or her partner".*

That is in essence an accurate paraphrasing of the definition in EX.2, and to that extent a wholly unobjectionable self-direction as to the applicable test. The Judge continues at paragraph 18 and 19 in these terms:

> *"18. I therefore have to consider the effect on the appellant and her partner in continuing their family life outside the UK. The first point to consider is that the appellant comes from Uganda whereas her husband comes from Nigeria. Both of them have lived in the UK for many years. The Appellant's husband suffers from health problem although he now says that he is fine and the doctors seem to indicate that his condition is not a problem provided he takes his medication. Although there are children in the UK these children are the children of the appellant's husband and according to the appellant she does not see anything of them since they got married in 2014.*
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> *19. I therefore consider that although I accept that there will be considerable difficulties if the Appellant were to return to Uganda either with or without her husband I do not consider the difficulties could be defined as insurmountable obstacles within the definition I have set out above. Her father still lives in Uganda and her children also live there although she has little contact with them. She would obviously have a much more comfortable life if she remained in the UK with all the benefits of a welfare state but she is not British and not entitled to these benefits. I therefore consider that the appellant cannot succeed on the basis of the Rules".*

18. In my judgment the references at paragraph 18 to the different nationalities of the Appellant and her husband and to the Appellant's health problems are a clear and obvious echo of those concerns and matters raised by each of the Appellant and her husband in their oral evidence at paragraphs 6-9 as indicated above. It seems to me that the Judge is in terms turning his mind to those matters advanced as providing potential obstacles to relocation to continue their mutual family life outside the United Kingdom. It also seems to me that the Judge was perfectly entitled to conclude, as he states in terms, that such matters whilst presenting considerable difficulties did not reach the definition of 'insurmountable obstacles' as identified in his paragraph 17. I can see no error of approach on the part of the Judge to the question of insurmountable obstacles. In my judgment he reached an entirely sustainable conclusion adequately reasoned.

19. In those circumstances I find nothing of substance in either of the grounds of challenge upon which permission to appeal was granted.

Notice of Decision

20. The Decision of the First-tier Tribunal contains no error of law and stands.

21. The Appellant's appeal remains dismissed.

22. No anonymity direction is sought or made.

The above represents a corrected transcript of reason given ex tempore at the conclusion of the hearing.

Signed: Date: 27 September 2017

Deputy Upper Tribunal Judge I A Lewis