THE IMMIGRATION ACTS

Case No: UI-2021-001683

IN THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (IAC)
FIRST-TIER TRIBUNAL JUDGE ATHWAL
Appeal Number: HU/50675/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 June 2022	**On 24 August 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

ESTHER DWINI KARIUKI
Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Presenting Officer
For the Respondent: Ms R Rashmi, instructed by Imperial Visas

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals, with the permission of First-tier Tribunal Judge I D Boyes, against First-tier Tribunal Judge Athwal's decision to allow Ms Kariuki's appeal against the refusal of her human rights claim.

2. To avoid confusion, we will refer to the parties as they were before the FtT: Ms Kariuki as the appellant, the Secretary of State as the respondent.

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Background

3. The appellant is a Kenyan national who was born on 21 June 1962. She entered the United Kingdom on 11 July 2009. She held a visit visa which expired on 16 September 2009. On 5 October 2009, and therefore after the expiry of her leave, she applied for leave to remain outside the Immigration Rules on compassionate grounds. That application was refused without a right of appeal.

4. The appellant remained without leave, although she did seek a certificate of approval to marry. On 9 May 2012, a decision was made to remove the appellant from the United Kingdom under section 10 of the Immigration and Asylum Act 1999. An appeal against that decision was allowed by First-tier Tribunal Judge Scott-Baker on 17 July 2012. The respondent decided not to appeal against that decision. The appellant was duly granted leave to remain which was valid until 15 September 2015.

5. On 4 September 2015, the appellant applied for further leave to remain. The application was refused on 21 December 2015 but the appellant's appeal against that decision (reference HU/00632/2016) was allowed by First-tier Tribunal Judge Bircher. The respondent sought and was granted permission to appeal against the FtT's decision.

6. The appeal was heard by Deputy Upper Tribunal Judge Chapman on 6 November 2017. Ms Kariuki was represented by counsel, the Secretary of State by a Senior Presenting Officer, Mr Bramble.

7. The point at issue before Judge Chapman may be stated quite shortly. The Secretary of State contended in her grounds of appeal that the First-tier Tribunal had given inadequate reasons for allowing the appeal on Article 8 ECHR grounds. She submitted that Appendix FM of the Immigration Rules applied to the appellant's case and that the judge should have considered all of the relevant provisions of that appendix, rather than confining himself to a consideration of whether Ms Kariuiki's relationship was still genuine and subsisting.

8. Judge Chapman did not accept the Secretary of State's submissions. In her reserved decision, which was issued on 19 December 2017, she concluded that 'the Claimant was granted 3 years discretionary leave under the policy in force prior to 9 July 2012 and by virtue of the transitional provisions and the judgment in Singh[1], she was granted this leave because her appeal was allowed in a decision dated 17.7.12': [11]. At [12], she stated that 'the new Rules and Appendix FM had no part to play in the SSHD's consideration of the Claimant's application for further leave to remain' and held that the FtT had not erred in failing to consider Appendix FM as a result.

9. In the alternative, the judge held that Ms Kariuki would have succeeded under Appendix FM in any event, and that it would not have been

[1] The reference is to the decision of the Court of Appeal in Singh & Khalid v SSHD [2015] EWCA Civ 74; [2015] Imm AR 70

necessary for the First-tier Tribunal to consider whether there were insurmountable obstacles to the continuation of family life in Kenya: [13]. Nor was it necessary for the judge to consider whether there were circumstances which warranted a grant of leave to remain outside the Immigration Rules, since the judge had found for proper reason that Ms Kariuiki satisfied the requirements of the Rules: [14].

10. The Secretary of State did not seek permission to appeal to the Court of Appeal against Judge Chapman's decision and the appellant was granted further leave to remain until 22 July 2020.

11. On 17 July 2020, the appellant applied for further leave to remain. She stated that she continued to be in a genuine and subsisting relationship with her partner and that she met the requirements of the Immigration Rules. Evidence of cohabitation was provided, as was evidence of income.

12. On 1 December 2020, the appellant's representatives sent an email to the respondent, stating that the applicant and her partner had separated.

13. On 19 January 2021, the respondent refused the application. She stated that the applicant was not eligible for leave as a partner because her relationship had come to an end. She considered that the appellant would not encounter very significant obstacles to reintegration to Kenya and that there were no circumstances outwith the Immigration Rules which warranted a grant of leave to remain on Article 8 ECHR grounds.

The Appeal to the First-tier Tribunal

14. The appellant appealed to the First-tier Tribunal ("FtT") and on 30 June 2021, her solicitors filed and served an appeal skeleton argument ("ASA") in compliance with the FtT Rules. The principal submission made in that skeleton was that the respondent had erred in law in applying the 'new' Immigration Rules (ie those which came into force after 9 July 2012). In light of Judge Chapman's decision, it was submitted that the appellant's application should have been considered under the law in force prior to that date and that, having accrued more than six years leave in that category, the appellant should have been granted settlement.

15. The respondent reviewed her decision in light of the ASA. In response to the principal submission made in the ASA, the respondent submitted that even if the applicant had continued to be considered under the law in force prior to 9 July 2012, she would not have been eligible for settlement because her relationship to her partner had ended between the date of her application and the respondent's decision. The 'crucial fact', submitted the respondent, was that 'the applicant's circumstances did change, her relationship to her spouse ended.'

16. The matter then came before Judge Athwal, sitting in Birmingham on 2 September 2021. The appellant was represented by counsel (not Ms Rashmi), the respondent was unrepresented. Counsel for the appellant

adopted the ASA. He took the judge through the history of the matter, including the decisions of Judge Scott-Baker and Judge Chapman. He submitted that the appellant had accrued six years leave as a spouse under the Immigration Rules in place before 9 July 2012 and that she was entitled to Indefinite Leave to Remain under the respondent's policy, as contained in the *Immigration Directorate Instruction Family Migration: Chapter 8 Transitional Provisions Family members under Part 8 and Appendix FM of the Immigration Rules*, published in August 2015.

17. Having set out the material part of the respondent's policy, the judge concluded that the appellant had 'accrued 6 years of discretionary leave in March 2019', at which stage 'she had not separated from her partner'. It followed, the judge found, that the appellant 'qualified for settlement in March 2019'. The judge considered that this was a matter which weighed in the appellant's favour: [34]. At [35]-[36], the judge concluded that the respondent had failed to establish that the maintenance of effective immigration control did not render the appellant's removal proportionate and she allowed the appeal on human rights grounds.

The Appeal to the Upper Tribunal

18. In her grounds of appeal to the Upper Tribunal, the respondent submitted that the judge had erred in law in concluding that the appellant had qualified for settlement and that she had misapplied the guidance she had cited. The respondent submitted that the appellant could not fall under the Rules in force prior to 9 July 2012 because she had only applied for leave on 7 August 2012. On the basis of the law in force after 9 July 2012, the appellant would only have been eligible for settlement after ten years. The appellant was granted leave on 13 March 2013, which was 'outside the 9 July 2012 – 5 September 2012 window stipulated in Singh'. In any event, the application which had resulted in the appeal before Judge Scott-Baker in 2012 was made outside the Rules, as a result of which the transitional provisions did not apply. The applicant had been granted 30 months' leave on each occasion, and not the three years' Discretionary Leave which would have followed under the previous Rules. Finally, the respondent submitted that the applicant had not met the previous Immigration Rules at the date of decision (since her relationship had come to an end) and she was therefore ineligible for settlement.

19. The hearing before us took an unusual turn. We heard brief submissions from Ms Cunha on behalf of the respondent. She submitted that the judge had erred in failing to understand the transitional provisions correctly. She made reference to [44] of Singh & Khalid v SSHD and to the effect of the changes to the Immigration Rules which were wrought by HC194. The FtT had been under a duty, she submitted, to understand the respondent's position as she had been 'dealing with the integrity of the immigration system'. She recognised that the respondent had not appealed against Judge Chapman's decision and that she had been unrepresented before the FtT but she submitted that the judge was under an obligation to find the relevant guidance and to consider whether there were arguments

which the respondent might properly have made, had she been represented.

20. We then heard a partial submission from Ms Rashmi, who adopted a skeleton argument which she had filed very late. She submitted that what the respondent sought to do was to challenge the finding of the Upper Tribunal (Judge Chapman) which she had not sought to challenge in the Court of Appeal. The chronology had been misunderstood by the respondent and the appellant's appeal before Judge Scott-Baker had been against a decision made prior to July 2012.

21. We asked Ms Rashmi whether the applicant had been granted leave under the Immigration Rules in force prior to July 2012 or whether she had been granted Discretionary Leave under the Rules in force after that date. Ms Rashmi was unable to direct us to anything within the papers in answer to that question.

22. It was at this early stage of Ms Rashmi's submissions that Ms Cunha intervened. She stated that she had managed to locate a note from the Senior Presenting Officer who had reviewed Judge Scott-Baker's decision in 2012 with a view to deciding whether or not to seek permission to appeal to the Upper Tribunal. She read the note to us and stated that it represented an acceptance on the part of the respondent that Judge Scott-Baker's decision was correct insofar as she had decided that this was a case to which the pre-July 2012 Rules applied. Ms Cunha indicated helpfully that she was consequently unable to say anything more in pursuit of the respondent's appeal. It was as a result of that indication that we informed Ms Rashmi that we did not need to hear further from her.

Analysis

23. Given Ms Cunha's pragmatic stance, we can set out our conclusions quite succinctly.

24. As will be apparent from [18] above, the respondent submitted in her grounds of appeal that the judge had misdirected herself in two respects. She was said, *firstly*, to have erred in finding that this was a case which fell to be considered under the law and policy in force prior to 9 July 2012. She was said, *secondly*, to have erred in concluding that the appellant had been eligible for ILR after accruing six years' discretionary leave. We will consider those points in turn.

25. As Ms Cunha recognised, the fundamental difficulty with the first submission is that it was considered and resolved (adversely to the respondent) by the Upper Tribunal in 2017. As we have sought to explain above, the point at issue before Judge Chapman was exactly the same point as the respondent sought to argue before us. Judge Chapman received submissions on the point. She was directed to the decision of the Court of Appeal in Singh & Khalid and she concluded that the appellant fell to be considered under the law as it stood before 9 July 2012.

26. It has long been recognised that *res judicata* and cause of action estoppel are not applicable in immigration appeals. That was the holding of the Upper Tribunal in Mubu & others (immigration appeals – res judicata) [2012] UKUT 00398 (IAC), which was cited with approval in BK (Afghanistan) v SSHD [2019] EWCA Civ 1358; [2019] 4 WLR 111. It is also recognised in the authorities, however, that importance (albeit not determinative importance) is properly to be attached to finality in litigation in public law cases: SSHD v TB (Jamaica) [2008] EWCA Civ 977; [2009] INLR 221, for example. More recently, in R (Abidoye) v SSHD [2020] EWCA Civ 1425; [2021] Imm AR 312, Andrews LJ (with whom Newey and King LJJ agreed) stated that, in principle, 'the requirement that there be finality in litigation is as desirable in the context of immigration disputes as in any other type of case' and that 'the earlier decision will be treated as final and binding on the parties to it unless there is some legal justification for departing from it': [44] and [45].

27. The respondent was unrepresented before the judge in this appeal. She adduced no evidence which had not been before Judge Chapman. There were no departmental minutes casting doubt on her conclusions and there were not even copies of the vignettes or biometric residence permits which the appellant had been granted in 2013 and 2018. The 2015 policy remained in force, as it had been at the time of Judge Chapman's decision. The jurisprudence had not changed, and the only relevant authority was Singh & Khalid. What the respondent must establish before us, of course, is that the First-tier Tribunal judge erred in law, in these specific circumstances, in following the earlier decision of the Upper Tribunal. Leaving to one side the possibly difficult question of whether the FtT was entitled as a matter of precedent to depart from that decision, we come to the clear conclusion that the FtT was given no proper legal justification for departing from what had been held by Judge Chapman. To put it simply, there were no new facts and no new law which justified that course.

28. We are reinforced in that conclusion by the information which Ms Cunha very properly communicated when she interrupted Ms Rashmi's submissions. The departmental minute from which she read was a note prepared by a Senior Presenting Officer tasked with deciding whether or not to seek permission to appeal against the decision of Judge Scott-Baker in 2012. There is a copy of Judge Scott-Baker's decision before us, contained in the respondent's bundle before the FtT. It is apparent that Judge Scott-Baker made no reference to Appendix FM or to any of the changes which were made to the Immigration Rules in July 2012. The Senior Presenting Officer did not seek to challenge that decision and was content that it contained no legal error. The Senior Presenting Officer concluded that the appellant should be granted three years' leave to remain, rather than the two and a half years which would follow under the post-July 2012 framework.

29. We suspect that Ms Rashmi is correct in her submission that the respondent has proceeded on a misunderstanding of the chronology since Judge Scott-Baker's decision. Judge Scott-Baker recorded at the start of her decision that she had heard the appeal on 12 July 2012 and

that it was an appeal against a decision which had been reached by the respondent on 9 May 2012. On the front page of the respondent's bundle for this appeal, however, the appellant's immigration history is said to include an application for leave to remain which was made on 7 August 2012, and there is no reference to Judge Scott-Baker's decision, which was issued on that date. Much of the difficulty in this case stems from the fact that the respondent proceeded on the assumption that the appellant had made an application for leave after 9 July 2012, whereas it was the decision of the FtT which was made after that date. We have no reason to think that the appellant ever made an application for leave to remain on 7 August 2012. Any such application would in any event have been rejected as invalid whilst an appeal was pending as a result of the respondent's long-standing approach to section 3C(4) of the Immigration Act 1971.

30. In sum, we conclude that the FtT in this appeal was provided with no lawful justification for departing from the conclusion of the Upper Tribunal in 2017 that the appellant was to be treated as a person to whom the pre-9 July 2012 law applied.

31. Ms Cunha developed no oral submissions on the judge's conclusion that the appellant had been eligible for ILR after accruing six years' leave.

32. At [33]-[34], the judge set out the relevant section of the respondent's policy and noted that the appellant had accrued six years leave by March 2019, by which stage she had not separated from her partner. At that point, the judge concluded, the appellant had 'qualified for settlement'.

33. It was said in the grounds of appeal that the judge had failed to focus on the date of the respondent's decision. By that stage, the relationship had failed and the appellant had separated from her partner. The respondent submitted that the judge could not have concluded, in light of those facts, that the appellant met the terms of the policy and was entitled to ILR.

34. In our judgment, this part of the grounds of appeal is based on a misunderstanding of the judge's conclusion. The judge did not conclude that the appellant was eligible for ILR under the terms of the policy. Had she reached that conclusion, she would have erred, since the policy clearly requires that an applicant should continue to qualify for leave and that 'their circumstances have not changed'.

35. The judge's conclusion was, instead, that there was a point at which the appellant qualified for ILR and that this was a relevant matter in the proportionality assessment under Article 8(2) ECHR. We regard that conclusion as being in line with authority including Akinyemi v SSHD [2019] EWCA Civ 2098 [2020] 1 WLR 1843, in which the Court of Appeal accepted that the appellant's past entitlement to British citizenship was a relevant matter (amongst other considerations) in an assessment of proportionality. What the judge did not decide, on the face of her decision, was that the appellant satisfied the terms of the policy and that the appeal should be allowed simpliciter as a result. On

the judge's findings, therefore, this was not a case akin to TZ (Pakistan) v SSHD [2018] EWCA Civ 1109; [2018] Imm AR 1301, in which the satisfaction of the terms of a published policy is determinative of the human rights appeal.

36. Having taken account of the fact that the appellant qualified for settlement in 2019, the judge turned to consider whether the public interest nevertheless, sufficed to justify her removal. The judge's consideration of that question was brief but it is not said by the respondent to be legally deficient. The judge made specific reference to the public interest in maintaining immigration control at [35] and [36]. She balanced the public interest against the appellant's rights and she concluded that the appellant's removal would not be proportionate. That might not have been the conclusion that we would have reached but it was open to the judge and cannot be said to be wrong in principle. Having reminded ourselves of what was said by Carnwath LJ (as he then was) at [40]-[41] of Mukarkar v SSHD [2006] EWCA Civ 1045, we would not have concluded that the judge had erred in law in this respect had the point been pressed by Ms Cunha.

37. We should, however, make one point very clear. The FtT did not decide that the appellant is entitled to ILR and that is not our conclusion either. The jurisdiction of the FtT was to consider whether the refusal of the appellant's human rights claim was unlawful under section 6 of the Human Rights Act 1998. It answered that question in the affirmative for the reasons we have considered above. What leave the appellant is granted as a result of that conclusion is a matter for the Secretary of State, who will take account of all that was said by the FtT and by this Tribunal. She will take account, in particular, of what we have said at [34] above in deciding what leave the appellant should be granted.

Notice of Decision

The Secretary of State's appeal is dismissed. The decision of the FtT to allow the appeal on human rights grounds shall stand.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 July 2022