Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10365/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16th January 2015	**On 19th January 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MRS DORCUS NABAGASERA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Hawkin (instructed by Arlington Crown Solicitors)
For the Respondent: Ms A Everett (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Appellant with regard to a determination of the First-tier Tribunal (Judge McDade) promulgated on 6th October 2014 by which he dismissed the Appellant's appeal against the Secretary of State's decision to refuse her leave to remain in the UK on the basis of her family life.

2. The Appellant entered the UK with leave as a student valid until 31st March 2009. Some six weeks prior to the expiry of her visa she travelled to Uganda and married her husband, a man of Rwandan origin who came to the UK as a refugee in 2000 and who became a British citizen in 2005.

3. Due, I was told, to a delay in obtaining the marriage certificate the Appellant's leave expired before she could submit an application for leave to remain as a spouse. That was refused in August 2009 without a right of appeal. She made further representations and the refusal was maintained in November 2010. The Appellant made another spouse application in July 2011 and the Secretary of State issued another refusal in September 2012, again with no right of appeal. In February 2013 the Appellant requested a removal decision be made which it was in December 2013. That decision gave the Appellant, for the first time, a right of appeal.

4. The Judge heard the case in September 2014 and dismissed it.

5. The grounds seeking permission to appeal assert that the Judge erred in, having found that, as the application was made on 10th July 2011 which predated Appendix FM and paragraph 276ADE being added to the Immigration Rules, they had no application and the appeal should be considered under Article 8 of the ECHR. However the Judge then considered EX.1, contrary to his decision that Appendix FM had no application.

6. The grounds also assert that the Judge erred in failing to take s.117B of the Nationality, Immigration and Asylum Act 2002 into account as s.117 was inserted into the Act by s.19 of the Immigration Act 2014 on 28th July 2014.

7. Finally the grounds assert that the Judge erred in his approach to Article 8.

8. While the Judge undoubtedly erred in taking Ex.1 into account, I find that error was immaterial to the outcome. Indeed Ex.1 provides an exception to the requirement that an Appellant meet the Rules and so is more generous than the older Rules. However the Judge found that the Appellant did not come within it. The error of law could only operate in the Appellant's favour.

9. Similarly while the Judge undoubtedly erred in failing to consider s.117 that could not have assisted the Appellant. I will deal with that below.

10. Regarding the Judge's approach to Article 8, there is a wealth of case law regarding Article 8 – the starting point being Razgar [2004] UKHL 27 and the five steps contained in Lord Bingham's judgment as to the way to approach Article 8. The answers to the first four questions in this appeal are undisputed and uncontroversial and this case is clearly about proportionality. So much was noted by the Judge at paragraph 6 of the determination.

11. Since s117 was inserted into the Nationality, Immigration and Asylum Act 2002 by s19 of the Immigration Act 2014, a Judge is required to take into account certain matters which legislation tells us are or are not in the public interest. An assessment of proportionality involves conducting a balancing exercise with the public interest in maintaining immigration control on the one side and the family and private life of the applicant on the other.

12. The relevant parts of s.117 in this case are:-

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8,
and
(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—
(a) in all cases, to the considerations listed in section 117B, and
(b) in cases concerning the deportation of foreign criminals, to the considerations
listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an
interference with a person's right to respect for private and family life is justified under
Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being
of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being
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.

(4) Little weight should be given to—

(a) a private life, or
(b) 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.

(5) Little weight should be given to a private life established by a person at a time when
the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not
require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying
child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

117D Interpretation of this Part

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who-

(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

13. The words in s.117A (2) "in particular" make clear that while a Judge is required to take the specified matters into account it is not an exhaustive list. A poor immigration history is not referred to but clearly relevant for example.

14. S.117B(1) is self evident and refers back to Article 8 of the ECHR itself.

15. This Appellant speaks English. The Appellant works as a nurse and her husband works as a Pharmacist earning well in excess of the income requirement and she is thus financially independent.

16. S.117B(4) is relevant. The husband is British and although there is no doubt that the couple are in a genuine and subsisting relationship and have been for many years, they became involved and commenced their relationship when the Appellant's situation was precarious and they got married when she had only six weeks leave to remain left. The husband knew this. They could not be certain that leave to remain would be granted and thus could not be certain that they could enjoy their married life in the UK. Indeed that is what transpired as her leave to remain expired and thus she could not possibly succeed under the Immigration Rules.

17. Mr Hawkin argued that she was not very late with her application and should thus not be penalised as it was caused by a delay in getting the marriage certificate. However it was her choice to leave it so late before getting married and it was her choice to continue to remain in the UK making repeated applications while she was an overstayer. By that time it was her fault. She had been, quite properly, refused under the Immigration Rules. She could and should have returned to Uganda then and made an application. Instead she remained in the UK illegally for several more years.

18. The Appellant does not come within the exception at s.117B(6) as there are no children.

19. Accordingly while the Appellant speaks English and is financially independent this is a neutral point. it is clear that the absence of these are factors that weigh against an Appellant but they cannot be reasons to allow an appeal.

20. On the Secretary of State's side of the balance is that the Appellant knowingly overstayed her visa and remained in the UK illegally. Although not prosecuted, that is a criminal offence. Her husband knew that at all times. While it was argued that she did so unwittingly, that is not the case. She may have not intended that her application would be late but it was her choice to remain and submit an application from within the UK when she had no right to be here and to continue to do so several times. The fact that the Secretary of State did not issue a removal decision does not assist the Appellant. The Secretary of State was not obliged to do so; whereas the Appellant was obliged to leave but failed to do so.

21. While there is a right to marry there is not a right to choose in which country a couple will live unless they meet the requirements of the Immigration Rules. The fact that the husband is a British citizen does not afford him the right to have his wife here with him if she cannot meet the Immigration Rules and she does not.

22. It was argued by Mr Hawkin that it would be unduly harsh to require the Appellant to return to Uganda and make application from there. It is not.

She is of Ugandan nationality. The husband has family there, a daughter who he visits annually and the Appellant herself has family there.

23. Mr Hawkin relied upon Chikwamba [2008] UKHL40, MA (Pakistan) [2009] EWCA Civ 953 and AB (Jamaica) [2007] EWCA Civ 1302 arguing that when the Appellant would inevitably succeed in an application for entry clearance from Uganda she should not be required to leave solely for that purpose. The facts of this case are very different from the cases relied upon, particularly as the husband is a frequent visitor to Uganda. Furthermore s.117, which is primary legislation, restricts the application of Chikwamba.

24. It can never be said that an application for entry clearance will inevitably succeed as the First-tier Tribunal Judge said. Things may change. If however the Appellant is right and they will succeed in her application then her stay in Uganda will be temporary.

25. Accordingly the Judge took all relevant matters into account; correctly distinguished Chikwamba and although he erred in the law he applied the end result was inevitable and no other result could have ensued on the facts of this case.

26. The appeal to the Upper Tribunal is dismissed.

Signed Date 16th January 2015

Upper Tribunal Judge Martin