Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00632/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 November 2017	**On 19 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS ESTHER DWINI KARIUKI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr M. Shilliday, instructed by Rotherham & Co Solicitors
For the Respondent: Mr. N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Kenya, born on 21.6.62. She arrived in the United Kingdom on 11.7.09 as a visitor, with a visa valid to 16.9.09. On 14.9.09 the Claimant applied for further leave to remain on compassionate grounds, outside the Rules, but this application was refused. On 20.9.10 the Claimant applied for a certificate of approval to marry, which application was also refused. On 9.5.12 the Claimant was served with a notice of liability to removal as an overstayer.

2. The Claimant made an application for leave to remain pursuant to

Article 8 and, following an appeal, which was allowed on Article 8 grounds in a decision of FtTJ Scott Baker on 17.7.12, she was granted a form of leave until 15.9.15. On 4.9.15 the Claimant made an (in-time) application for leave to remain outside the Rules on compassionate grounds (FLR)(O). This application was refused in a decision dated 21.12.15. The SSHD considered the application with reference to the Claimant's private and family life in the UK, under the 10 year partner and private life routes contained in Appendix FM and paragraph 276ADE of the Rules. The basis for the refusal was that the Claimant had provided insufficient evidence of cohabitation with her partner ie. that he was living at the same address, thus the application was refused on the basis that that it was not accepted that the relationship was genuine and subsisting.

3. The Claimant appealed this decision and her appeal came before FtTJ Bircher for hearing on 4.1.17. The Judge heard evidence from the Claimant and her partner, Louis Okey Aloma. The Home Office Presenting Office did not cross-examine either witness [15] and in her closing submissions, simply asked that the Judge uphold the SSHD's decision [16]. The Claimant's representative sought to rely upon the decision of FtTJ Scott-Baker, who had held at [23]:

"I find that the appellant and Mr Aloma have been living together since 2009. I find that the relationship is genuine and subsisting. The appellant has therefore been in a genuine relationship for 3 years."

4. At [20] of the decision, FtTJ held as follows:

> *"Judge Scott-Baker therefore found that the appellant and Mr Aloma had a genuine subsisting relationship. 4 years have elapsed since that determination was produced and there is nothing in the papers before me to suggest that the couple are not still in a genuine and subsisting relationship. There are numerous utility bills and correspondence to the appellant and Mr Aloma which continue to demonstrate that they share a home together. The Presenting Office did not seek to cross-examine the appellant and Mr Aloma on any of the documents contained with the bundle. I have found that in accordance with E-LTRP 1.7 the relationship which exists between the appellant and Mr Aloma is genuine and subsisting."*

5. FtTJ Bircher went on to consider the provisions of section 117B of the NIAA 2002 and, in a decision and reasons promulgated on 14.2.17, allowed the appeal [21]-[22].

6. The SSHD sought permission to appeal to the Upper Tribunal on the basis that it was unclear on what basis the appeal had been allowed, the Claimant having won her previous appeal in 2012 and was granted 3 years discretionary leave. It was asserted that the FtTJ failed to give adequate reasons for allowing the appeal, given that the refusal decision

had set out in detail why EX1 required the Claimant to show insurmountable obstacles to the relationship continuing in Kenya. It was asserted that there had to be compelling circumstances that warrant consideration of an appeal outside the Rules and it was not sufficient for the Judge in 2017 to rely on the previous decision of the Judge in 2012.

7. Permission to appeal was granted by UTJ Martin in a decision dated 1.9.17 on the basis that it was arguable that the FtTJ had made errors of law for the reasons set out in the grounds of appeal.

Hearing

8. At the hearing before me, I heard submissions from Mr Shilliday on behalf of the Claimant and Mr Bramble on behalf of the SSHD. Mr Shilliday drew my attention to the Home Office guidance "*Family Members under Part 8 and Appendix FM of the Immigration Rules*" at 3.3.1 which provides that if an applicant was granted leave under the Discretionary Leave policy before 9.7.12 they will continue to be considered under that policy through to settlement, provided they continue to qualify for leave and their circumstances have not changed. He also drew my attention to 6.2.1 of the policy, which provides that where an application is made before 9.7.12 which was refused and the appeal against the refusal allowed on Article 8 grounds on or after 9.7.12 leave to remain of 30 months duration should be granted. It was Mr Shilliday's case that the Claimant had been granted discretionary leave under the old Rules and thus the new Rules were not in issue *cf. Edgehill* and *Singh* [2015] EWCA Civ 74. He submitted that even if there was an error of law in the decision of FtTJ Bircher for not addressing EX1 in terms, it was not a material error in light of the findings of the previous Judge

9. Mr Bramble informed me that there were no GCID notes on the Claimant's Home Office file but simply 4 minutes which were very limited on what they addressed and did not shed light on what was decided and why. He submitted that it was clear that the FtTJ had failed to provide adequate reasons for her decision and had failed to set out why she had allowed the appeal.

My findings

10. Whilst the Claimant was granted a form of leave following the decision of FtTJ Scott-Baker allowing her appeal, the length and type of that leave is unclear. In her refusal decision of 21.12.15 the Respondent omits to make any reference to the previous grant of leave except for a reference to the Claimant's application, which states that she was granted leave to remain in 2013. Mr Bramble informed me that there are no GCID notes on the Claimant's Home Office file and the minutes do not shed any light of the exact nature of the leave granted to the Claimant. There is no copy of the Claimant's BRP.

11. However, I note that section 3, page 13 of the application form has

been written "DLR Grant 2." I further note that the Home Office guidance "*Family Members under Part 8 and Appendix FM of the Immigration Rules*" provides at pages 5-6 that, following the judgment in *Singh* [2015] EWCA Civ 74 "*In non-criminal cases that made a Rules-based application prior to 9 July 2012, with a decision made in the period from 9 July 2012 to 5 September 2012, the transitional provisions allowing specified applicants to continue to rely on the pre-9 July 2012 Rules apply."* Moreover, the SSHD's grounds of appeal to the Upper Tribunal expressly state that the Claimant had been granted 3 years discretionary leave. Thus I conclude 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, she was granted this leave because her appeal was allowed in a decision dated 17.7.12.

12. If I am correct in this deduction, 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. It follows that there is no material error of law in the decision of First tier Tribunal Bircher, who having found that the relationship between the Claimant and her partner was genuine and subsisting, could simply allow the appeal on this basis. I find it was open to the Judge to make this finding, in light of the oral and documentary evidence before her and the Presenting Officer's decision not to cross-examine the Claimant or her partner or make substantive submissions. There was simply no need for the Judge to go on to consider whether the Claimant met the requirements of the current Immigration Rules.

13. In the alternative, if in fact the Claimant was granted 30 months limited leave outside the Rules, on a 10 year route to settlement and was required to meet the requirements of Appendix FM, the only substantive reason put forward by the SSHD for refusing the application for further leave was with reference to E-LTRP 1.7 of Appendix FM *viz* there was insufficient evidence to show that the relationship between the Claimant and her partner was genuine and subsisting. Given that the SSHD expressly accepted that the suitability requirements of the Rules were met, the effect of the finding of Judge Bircher that the relationship between the Claimant and her partner was genuine and subsisting is that the Claimant fulfilled the requirements of R-LTRP 1.1 of Appendix FM of the Rules in that (a) the applicant and their partner must be in the UK; (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and (c)(i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and (ii) the applicant meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner. The requirement that the provisions of EX1 are met is in the alternative and thus it was not simply incumbent upon the First tier Tribunal Judge to consider these.

14. Moreover, in neither case was it necessary for the Judge to go on to consider whether there were compelling circumstances justifying consideration of Article 8 outside the Rules so the challenge to this aspect of her decision is otiose.

15. In light of my reasons above, I find that First tier Tribunal Judge Bircher gave clear and adequate reasons for her findings and conclusions. In light of the *Devaseelan* principle she was further entitled to place reliance on the decision of Judge Scott-Baker as the starting point for her consideration.

Decision

16. I find no material error of law in the decision of First tier Tribunal Judge Bircher and that decision is upheld. It follows that the fee award made by the First tier Tribunal Judge is also upheld.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

18 December 2017