Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07792/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 January 2019	**On 14 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ROSE NJUGUINI MWANGI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Coleman of Counsel instructed by Nandy & Co
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Cameron promulgated on 4 July 2018 dismissing the Appellant's human rights appeal against a decision of the Respondent dated 28 June 2017 refusing leave to remain in the United Kingdom.

2. The Appellant is a citizen of Kenya born on 30 September 1962. She is married to Mr Benson Gitonga. The couple were married in Kenya on 15 May 1983. They have had four children who are all now grown up and, as far as I am aware, continue to reside in Kenya - they do not reside in the United Kingdom.

3. Mr Gitonga arrived in the United Kingdom in November 1995 and made a claim for asylum. Nothing is said in any of the materials before me as to the outcome of that application for asylum, but nonetheless it is not disputed that he was subsequently granted indefinite leave to remain in the United Kingdom on 28 January 2003. He is now a British citizen.

4. The Appellant arrived in the United Kingdom on 14 March 2003 and on the following day claimed asylum. The application for asylum was refused on 23 March 2003 and a subsequent appeal dismissed in May 2003. The Appellant became 'appeal rights exhausted' on 4 June 2003. It was not until November 2011 that the Appellant made further submissions in respect of her status in the United Kingdom. These submissions were rejected on 5 September 2014. The Appellant again made further submissions, treated as a human rights claim, on 8 December 2014, culminating in the decision that is the subject of these proceedings.

5. The Appellant's human rights claim was refused for reasons set out in the Respondent's 'reasons for refusal' letter ('RFRL') dated 28 June 2017.

6. The Appellant appealed to the IAC.

7. The appeal was dismissed for the reasons out in the Decision of First-tier Tribunal Judge Cameron promulgated on 4 July 2018.

8. The Appellant sought permission to appeal to the Upper Tribunal. The application was refused in the first instance by First-tier Tribunal Judge Buchanan on 27 September 2018. However, permission to appeal was then granted by Upper Tribunal Judge McWilliam on 3 December 2018.

9. The grant of permission to appeal was on a relatively narrow ground. In material part the grant of permission is in these terms:

> *"It is not arguable that there is contradiction in the Judge having accepted that the Appellant and husband were credible and that the evidence did not establish insurmountable obstacles.*
>
> *It may be that the judge was not assisted by the representative, however, it arguable that the judge accepted that the appellant met the substantive maintenance requirements of the rules at the date of the hearing and it is arguable that the judge did not factor this into the assessment of proportionality. Permission is granted on this ground only".*

10. In this context I note the grounds of appeal which in material part are in the following terms:

> *"The Judge found the witnesses truthful. The Appellant's husband gave evidence of earnings over £2,000 per month (see paragraph 30). This was supported by bank statements. Whilst evidence of this level of earning was for the 3 months prior to the hearing the Judge was not bound by consideration of specified evidence. This was an appeal outside the Rules and as such it was open to the Judge to consider whether the Appellant's husband earned over £18,600 from the available evidence and not from required to satisfy Appendix FM. Having accepted the Appellant's evidence of his earnings as truthful it was not open to the Judge to conclude that the claim as to the level of earnings was not made out. Simply put the Appellant's husband said he earned enough to satisfy the financial requirement. The Judge believed him and this should have been enough.*
>
> *This error has arguably had a material effect in relation to the* ***Agyarko*** *and* ***Chikwamba*** *submission. Having found that the couple were in a subsisting relationship, lawfully married and able to satisfy the financial Rules the Judge may have gone on to allow the appeal"* (Grounds at paragraph 3).

11. The First-tier Tribunal Judge heard evidence from the Appellant, her husband and a further witness who had known the Appellant and the husband for fifteen years. In what in my judgment is a manifestly careful and thorough decision, the Judge fully reviewed the materials before him, and made findings of primary fact which were in large part favourable to the Appellant's case. Indeed there is no specific challenge to any of the Judge's primary findings, and there is no suggestion in the grounds of appeal to the effect that the Judge omitted any material evidence.

12. It may be seen that the Judge was satisfied in respect of the couple's relationship and the financial support that Mr Gitonga provided:

> *"Taking into account all of the evidence available to me I am satisfied on the balance of probabilities that the Appellant and Mr Gitonga are married and that they are in a genuine and subsisting relationship. I accept his evidence that he fully supports his wife"* (paragraph 43).

13. At paragraphs 44 and 45 the Judge discounted the possibility that the Appellant had benefited from public funds by reference to NHS treatment or otherwise.

> *"On the evidence available to me I cannot make a finding that she has received public benefits when she was not entitled to them"* (paragraph 45).

(In this context see the Appellant's assertion that she had not received benefits recorded at paragraph 37.)

14. Notwithstanding these favourable findings of primary fact, the Judge did not accept the contention that there were insurmountable obstacles to family life together in Kenya, and did not accept the contention that there were significant obstacles to the Appellant's reintegration to Kenya: see paragraphs 54 and 57. As noted in the grant of permission to appeal, there is no inconsistency between the Judge accepting the credibility of the Appellant and her husband in respect of their relationship and circumstances, but not finding in their favour in respect of insurmountable obstacles to family life or significant obstacles to reintegration.

15. The Judge, having considered these matters in respect of the Rules, then directed himself to an evaluation pursuant to the five **Razgar** questions: see paragraph 58. The Judge then made the following observations:

> *"59. The public interest is in general in the removal of those here who have no lawful right to remain. Although the Appellant has been in this country for over 15 years she came to this country using a false passport and after her asylum application was refused she did not seek to regularise her status until 2010. The Appellant's position is therefore precarious in the terms of section 117B.*
>
> *60. The Appellant's partner was aware of her precarious position when she came to this country".*

16. I pause to note that although it was no part of the basis of the grant of permission to appeal, there was nonetheless a brief discussion before me in respect of the relevance of 'precariousness' in light of the particular wording of section 117B(4) and section 117B(5) of the Nationality, Immigration and Asylum Act 2002. In particular, my attention was directed to the wording of section 117B(4)(b) - *"Little weight should be given to ... 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"*. In this regard Mr Coleman questioned whether or not it could be said that the relationship between the Appellant and her husband was 'formed' at a time when the Appellant was in the United Kingdom unlawfully in circumstances where the marriage had taken place a considerable number of years prior to the Appellant's entry to the United Kingdom. Mr Tufan directed my attention to the observations of the Tribunal in respect of these provisions in the case of **Rajendran [2016] UKUT 138 (IAC)**, to the effect that precariousness is an established part of Article 8 jurisprudence; accordingly, the fact that any particular relationship does not come within the express ambit of the provisions under section 117B would not negate the relevance of considering the 'precarious' or unlawful status of a party to a relationship. On that basis, and in any event, in my judgement even if it might be said that the Appellant's relationship is not within the ambit of the wording of section 117B(4), the precarious nature of her status is still relevant to a consideration of proportionality, and is anyway within the ambit of section 117B(1) – the public interest in the maintenance of effective

immigration control weighs against advantage being secured pursuant to precarious or unlawful presence absent very particular reasons or circumstances.

17. In the alternative I would have been minded to accept Mr Tufan's submission that the reference to the 'establishment' of the relationship in the United Kingdom – "*a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom*" - would cover the Appellant's circumstances where she had been apart from her husband at least for the period from November 1995 until March 2003. There had been a significant fracture in the relationship in terms of being in each other's presence until after the Appellant's arrival in the UK; thereafter mutual family life was established in the UK, but at a time when the Appellant's status at the very least precarious, if not unlawful. However, ultimately this diverting discussion forms no part of my overall conclusion herein because it is not within the ambit of the grant of permission to appeal.

18. The First-tier Tribunal Judge, having made reference to such matters at paragraphs 59 and 60 (as quoted above), went on to give further consideration to the Appellant's case under Article 8 as a freestanding provision, before reaching the following conclusions:

> "*67. After taking into account all of the factors put forward on behalf of the Appellant and also taking into account the references in support from friends but taking into account the fact that the Appellant spent her formative years in Kenya including a period of some seven or eight years after her husband came to this country and that both she and her husband were aware of her precarious immigration status when she came to this country using a false passport, together with the fact that I do not accept that there would be insurmountable obstacles to them being able to continue their family life in Kenya should that be his wish, I am not satisfied that the Appellant has shown that there are compelling circumstances which would warrant a grant of leave outside of the Rules.*
>
> *68. I am satisfied that the Respondent's decision is itself a lawful one and that when the factors in favour of the Appellant are balanced against the Respondent's legitimate aim that the balance falls in favour of the Respondent and that the decision to refuse the Appellant's application is proportionate to their legitimate aim of the maintenance of an effective immigration policy".*

19. The challenge that is before the Upper Tribunal pursuant to the limited basis of the grant of permission to appeal is focused on paragraphs 65 and 66 of the Decision of the First-tier Tribunal, which are in these terms:

> "*65. I have taken into account the factors set out in relation to exceptional circumstances by the court in **Agyarko** from paragraphs 54 of the decision. It is stated that her husband's earnings are in excess of the financial requirements and*

Mr Coleman has referred me to entries in the husband's recent bank statements. Unfortunately, there is not with the bundle before me wage slips to support the current earnings and the P60 provided within the bundle for tax year to 5 April 2018 shows his earnings at £9,096 which is clearly well below the financial limits.

66. *I am not satisfied that I have been given sufficient information which would enable me to make a finding that the principles set out in* ***Chikwamba*** *[2008] UKHL 40 would apply. If the husband's position is now such that he can meet the requirements of the Rules this is something which he can show on an application made by the Appellant from Kenya. I am not satisfied that the evidence before me indicates that it would be unreasonable to expect the Appellant to return to Kenya to make such an application notwithstanding the disruption that this would cause to their current lifestyle".*

20. Further to this, it may be helpful if I make some brief reference to what is said in respect of **Chikwamba** in the case of **Agyarko [2017] UKSC 11**, bearing in mind that the grounds of appeal argue any error on the part of the Judge may be material "*in relation to the* ***Agyarko*** *and* ***Chikwamba*** *submission*".

(i) Per Lord Justice Sales, giving the judgment of the Court of Appeal in **Agyarko [2015] EWCA Civ 440**:

"In ***Chikwamba****, the House of Lords found that there would be a violation of Article 8 if the applicant for leave to remain in that case were removed from the United Kingdom and forced to make an out-of-country application for leave to enter which would clearly be successful, in circumstances where the interference with her family life with her husband associated with the removal could not be said to serve any good purpose. It is possible to envisage a* ***Chikwamba*** *type case arising in which Article 8 might require that leave to remain be granted outside the Rules, even though it could not be said that there were insurmountable obstacles to the applicant and their spouse or partner continuing their family life overseas. But in a case involving precarious family life, it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion".* (paragraph 31)

(ii) Per Lord Reed, giving the unanimous decision of the Supreme Court:

"Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest

in his or her removal. The point is illustrated by the decision in ***Chikwamba v Secretary of State for the Home Department****".* (paragraph 51).

(iii) 'Exceptional circumstances' are otherwise considered by the Supreme Court at paragraph 54 *et seq.*.

21. I have considerable reservations as to the form of the pleading at paragraph 3 of the Grounds (quoted above). The ground is seemingly premised on an assertion that the Judge accepted that Mr Gitonga's earnings met the required level: "*Having accepted the appellant's evidence of his [Mr Gitonga's] earnings as truthful…*". I do not accept that a careful reading of the Decision bears out such a premise: it seems to me that the favourable reference to the credibility of the witnesses at paragraph 41 of the Decision appears primarily to be in the context of the nature and history of the relationship between the Appellant and her husband; it does not follow that the Judge was obliged to accept without more what was being advanced in respect of the Appellant's husband's income; moreover, the contents of paragraph 65 read as if the Judge felt he was unable to be satisfied in respect of the claimed level of earnings in the absence of documentary evidence; this is reinforced by the observations at paragraph 66 to the effect that the Judge was not satisfied he had been given sufficient information in respect of the essential point relied upon under.

22. Be that as it may, it seems to me that this is not really the point. What the Judge was embarked upon at paragraphs 65 and 66 was a consideration of whether or not it could be said that an application for leave to enter by the Appellant would "*clearly be successful*", or she would be "*certain to be granted leave to enter*" - to borrow the wording respectively of the Court of Appeal and the Supreme Court in **Agyarko**. The materials relied upon before the First-tier Tribunal in this regard did not establish the requisite premise for the clear reasons identified by the First-tier Tribunal Judge at paragraph 65.

23. Mr Coleman has taken me to the same materials during the course of the hearing.

(i) My attention was directed in the first instance to the witness statement of the Appellant's husband signed on 24 May 2018 at paragraph 6 (Appellant's bundle before the First-tier Tribunal at pages 108–110). It is stated that the Appellant's husband is currently employed as a security officer for a named company and is "*in receipt of a substantial salary*". However, the salary is not specified.

(ii) A letter from the employer dated 13 March 2017 (page 113) whilst confirming the fact of employment is silent on the rate of pay.

(iii) I was also taken to the bank statements that were before the First-tier Tribunal. These are in two sections: there is a set of statements covering the period from 3 December 2016 to 3 March 2017 (pages 118-126); a second set of bank statements for the same bank account covers the period from 3 March 2018 to 22 May 2018 (pages 127-132).

(iv) It may be seen that there is a gap of one year in the bank statements.

(v) My attention was directed to credits to the Appellant's husband's account on 6 January, 16 February and 3 March 2017, seemingly from the Appellant's husband's employer. Necessarily in circumstances where there is a substantial gap in the bank statements and that employment is of some relative history, those matters are not directly pertinent and indeed it is not these particular payments but the ones shown in the second set of bank statements to which Mr Coleman directed the attention of the First-tier Tribunal Judge.

(vi) The latter statements show credits on 5 March 2018 in the sum of £2,436, on 29 March 2018 for £200, on 6 April 2018 for £1,532, on 19 April 2018 for £450, on 4 May 2018 for £1,133, and 11 May 2018 for £547. This shows an apparent income between 5 March 2018 and 11 May 2018 of approximately £7,000.

(vii) However, the First-tier Tribunal Judge noted the P60 for the tax year ending April 2018 (page 114) that confirms income from employment in the period to 5 April 2018 of £9,096. Bearing in mind the payment that appears in the bank statements on 5 March 2018 was £2,436, this would suggest that the Appellant's husband only earned something of the order of £6,500 in the preceding eleven months (a period for which no bank statements were produced).

(viii) It may also be seen that there is no obvious regularity to the amounts being paid, or the dates of payment for the Appellant's husband's employment. This suggests casual rather than steady employment.

24. Mr Coleman acknowledged that were the Appellant to make an application for entry clearance from abroad it would be necessary not only to meet the Rules in respect of specified evidence but also to provide evidence of her sponsor's income for a period of at least six months. The materials before the First-tier Tribunal did not - irrespective of the specified evidence requirement - establish that the Appellant's husband had been earning over a period of six months at a rate commensurate with the £18,600 threshold under the Immigration Rules. In the circumstances it seems to me entirely unobjectionable for the Judge to have stated that he considered that he had not *"been given sufficient information which would enable him to make a finding that the principles set out in **Chikwamba** would apply"*.

25. Further to the above, and for the avoidance of any doubt, the Appellant's husband's particular level of income at or about the date of the hearing was seemingly relied upon in the context of an 'exceptional circumstances' **Agyarko**/**Chikwamba** submission - as is reinforced by the pleading in the grounds of appeal. The Judge otherwise accepted that the couple were essentially self-supporting, that the Appellant's husband was able to support her without additional recourse to public funds, and that there had been no recourse to public funds. Accordingly, in the context of the overall Article 8 evaluation to the Judge did not consider it an adverse feature that the Appellant's husband's income had not been demonstrated to be at a level and in a manner required to satisfy the entry clearance Rules. The specific level of income was only relevant to the 'exceptional circumstances' consideration, and in my judgment the First-tier Tribunal Judge dealt with the matter entirely adequately.

26. In the circumstances, and bearing in mind the narrow basis of the grant of permission to appeal, I can identify no error of law and I reject the challenge to the decision of the First-tier Tribunal.

Notice of Decision

27. The decision of the First-tier Tribunal contained no material error of law and stands.

28. The Appellant's appeal remains dismissed.

29. No anonymity direction is sought or made.

Signed: Date: 11 March 2019

Deputy Upper Tribunal Judge I A Lewis