



IAC-AH-KRL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/03552/2014

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Birmingham
On 11th August 2015**

**Decision & Reasons Promulgated
On 21st August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**RECHEAL WANJIRU MWAURA
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant Secretary of State: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Mrs H Masih, instructed by BHB Law

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Ferguson, in a determination promulgated on 5th September 2014, to allow the appeal of Recheal Wanjiru Mwaura against the Secretary of State's decision of 20th December 2013 to refuse to vary her leave and to remove her. In the interests of continuity I will refer to Ms Mwaura as "the Appellant", the title by which she was described in the proceedings before the First-tier Tribunal.

2. Her application had been based upon her marriage to Jubert Crosdale, a Jamaican citizen with indefinite leave to remain in this country. The evidence given at the hearing before the First-tier Tribunal was that Mr Crosdale had lived in the United Kingdom since the age of 10 and that he has both children and grandchildren in this country. In particular as at the date of decision he had two minor children and a grandson who suffers from autism with whom he had a close relationship. The Appellant's application was made whilst she had extant leave to remain in this country.
3. The application was refused by the Secretary of State on the basis that Mr Crosdale (who receives employment and support allowance) could not demonstrate an income of at least £18,600 per annum. It was also said that the Appellant had not provided evidence that she had passed the required English language test. The application was said to fail under Appendix FM and FM-SE of the Immigration Rules. The Secretary of State went on, in the refusal letter, to consider paragraph EX.1. The Appellant had no parental relationship with children in this country. With regard to EX.1(b) it was accepted that she had a genuine and subsisting relationship with her husband but it was said that she had not provided any evidence to show that there were insurmountable obstacles to her and her husband continuing family life outside the UK. The letter went on to deal with matters under paragraph 276ADE of the Immigration Rules and finally to state that there were no exceptional circumstances requiring consideration outside the Rules.
4. At the hearing the judge at first instance heard evidence from the Appellant and her husband but also from two of her husband's adult daughters. He was told of regular contact between the husband and two minor children and of the close and supportive relationship he had developed with the grandson who suffered from autism. He was said to be a person who could control the child, who needed a regular routine, and that the child frequently stayed with him. The judge found that the Appellant had established her English language proficiency to the necessary level. He went on to consider paragraph EX.1(b) of paragraph FM to the Rules. It was stated that there was no dispute as to the fact that there was a genuine and subsisting relationship between the Appellant and her husband.
5. Judge Ferguson continued

“As to whether there are insurmountable obstacles to family life continuing outside the United Kingdom this has to be considered in the light of the Court of Appeal's guidance in MF (Nigeria) [2013] EWCA Civ 1192, which rejected at paragraph 49 a literal meaning that only obstacles which were impossible to surmount for the parties to carry on their family life abroad would suffice. The proper approach is to consider the practical possibilities of relocation (Izuazu paragraphs 53 to 59 and Gulshan paragraph 24(c)).”.

He then considered what the situation might be if all the children were adult but he continued (at paragraph 24) “however the evidence at the hearing established that Mr Crosdale is the father of two minor children with whom he has a good relationship even though they live with their mother and have been raised primarily by her.”. He went on to state that it was established that Mr Crosdale had a good

relationship with his grandson who was diagnosed with behavioural difficulties which meant that Mr Crosdale in effect acted as a respite carer for the child's mother who at times struggled to look after him. The evidence established that there had been regular and frequent contact, often overnight when Mr Crosdale cared for the child. At paragraph 25 the judge stated "requiring Mr Crosdale to relocate to Kenya with his wife would mean that the frequent care of his grandson could not continue and it would sever any meaningful relationship with his remaining minor children.". He then referred to Section 55 of the Borders, Citizenship and Immigration Act 2009 and found that it was in the best interests of both Mr Crosdale's minor children and of the grandchild who suffered from autism to continue their relationship with him in a direct way. The judge concluded (at paragraph 26)

"Those facts mean that when considering the practical possibilities of relocation the inability to continue the family life currently enjoyed between Mr Crosdale and his minor children and [the grandchild] is a factor of primary importance: the disruption to that important aspect of family life would be very significant. Accordingly I conclude that there are insurmountable obstacles to Ms Mwaura continuing her family life with Mr Crosdale outside the United Kingdom and the requirements of paragraph EX1 are met".

The appeal was allowed accordingly.

In the application for permission to appeal the Secretary of State argued that the circumstances described did not amount to "insurmountable obstacles". Mr Crosdale was not the primary caregiver to any of the children and his relationships with the children could be continued by modern communicational means and visits and the support he offered to the grandchild could be provided by professional respite services. The matter which the judge had asserted as being insurmountable was in reality a question of choice. The Secretary of State argued that "insurmountable obstacles" constituted serious difficulties which the Appellant and Mr Crosdale would face in continuing their family life outside the UK. Those difficulties would amount to something that could not be overcome even with a degree of hardship for one or more of the individuals concerned. It was not something that was merely unreasonable or undesirable.

6. At the hearing before me Mrs Masih handed in what was described as a Rule 24 response. I said I would have regard to that as a skeleton argument. Mr Smart handed up a copy of the recent Court of Appeal judgment in **The Queen on the application of Agyarko and Others v SSHD [2015] EWCA Civ 440**. He confirmed that there was no challenge to the genuine nature of the relationship and marriage between the Appellant and Mr Crosdale and also that at the date of decision 20th December 2013 the relevant version of Appendix FM to the Immigration Rules did not include EX.2, which was added in July of 2014. I was not therefore concerned with that addition. Mrs Masih clarified at my request that as at the date of decision the two minor children of Mr Crosdale had been aged 15 and 17.
7. Mr Smart then addressed me on the substance of the appeal. He said that **Agyarko** was binding guidance and he referred to paragraphs 21 to 26. EX.1 was a stringent

test. He submitted that it had not been shown that there were insurmountable obstacles within the correct meaning of that term to the couple continuing their relationship outside the United Kingdom. Mr Crosland's contact with the minor children and grandchild could be continued by other means and that would be meaningful. The Appellant could go to Kenya and make an application to join him from abroad and that might only entail a short time. He submitted that the judge had applied the wrong test and had given inadequate reasoning for his conclusion.

8. Mrs Masih for her part submitted that there was no material error. She said the judge had correctly directed himself as to the meaning of insurmountable obstacles and had made an assessment of the family circumstances. It was not just a matter of the two minor children but also of the grandchild who suffered from autism; the disruption to his care would be significant if Mr Crosland had to leave. The degree and level of contact both with the minor children and with the grandchild could not be maintained by "modern means of communication". There was currently frequent face to face contact, including the grandchild staying with Mr Crosland. The Appellant also helped in this respect. In the light of Mr Crosdale's financial position the Appellant was unlikely to obtain entry clearance to return in a short time. In her submission the judge did sufficient to justify his conclusion. Agyarko could be distinguished as there were no children in that case.
9. Having heard those submissions I reserved my decision which I now give. I have had close regard to the judgment in Agyarko. At paragraph 21 of that judgment Lord Justice Sales stated

"The phrase 'insurmountable obstacles' as used in this paragraph [i.e. paragraph EX.1] of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom."

He continued at paragraph 22

"... the phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see paragraph 117: there were no insurmountable obstacles to the family settling in Suriname even though the applicant and her family would experience hardship if forced to do so)".

And at paragraph 23

"For clarity, two points should be made about the 'insurmountable obstacles' criterion. First, although it involves a stringent test, it is obviously intended in both the case law and the Rules to be interpreted in a sensible and practical rather than a purely literal way ...".

At paragraph 25 he stated

"The statement made in Mrs Agyarko's letter of application of 26th September 2012 that 'she may be separated from' her husband was very weak, and was not supported by any evidence which might lead to the conclusion that insurmountable obstacles existed

to them pursuing their family life together overseas. There was no witness statement from Mr Agyarko or Mr Benette to explain what obstacles might exist. The mere fact that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to relocate to Ghana to continue their family life there – could not constitute insurmountable obstacles to his doing so.”

10. The judge at first instance did not of course have the benefit of the judgment in Agyarko, which was decided long after the First-tier Tribunal hearing, before him. Nonetheless in my view he did direct himself correctly as to the law at paragraph 22 of his decision. He considered the practical elements of the couple relocating and indeed found that were it not for the impact on the children he would have found against the Appellant. It was the impact on the children which made the difference. He was confronted here with the interface between EX.1(b) and Section 55 of the 2009 Act. Lord Justice Sales in Agyarko made a point of stating that in the cases of none of the appellants were children involved. The case of Ms Mwaura is clearly distinguishable on that basis. It is also notably different in that when the couple married and as at the date of application Ms Mwaura had extant leave, whereas the appellants in Agyarko had overstayed their leave and were in the country unlawfully. This appeal is not a case of deportation of somebody with a criminal record when the public interest might well outweigh the interests of children whatever their needs. Ms Mwaura was, as I have said, in the country legally when she married and when the application was made and far from being a criminal she has been training to assist as a volunteer in the Probation Service. In my view the judge did not apply the wrong test; the fact that he found that in the absence of children he would have concluded that Mr Crosdale could be expected to leave the country indicates that the correct test was applied. It is the relationship with the children and their interests which made the difference.
11. As to reasoning the judge set this out at paragraphs 25 and 26 of his decision. That reasoning is not perverse or irrational and is coherent. There were clearly substantial problems or difficulties in the couple relocating to Kenya. Whether those difficulties may properly be described as insurmountable is a matter of reasoned judgment. Whilst another judge might arguably have reached a different conclusion the decision reached, on the evidence, was open to the judge and was in my view adequately reasoned. I accordingly find that no material error of law has been established and the decision stands.

Notice of Decision

There was no material error of law in the decision of the First-tier Tribunal. The decision that the appeal be allowed therefore stands.

No anonymity order was requested and none is made.

Signed

Dated 19 August 2015

Deputy Upper Tribunal Judge French