



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/50266/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 18 December 2015

Decision & Reasons Promulgated  
On 6 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Ms NGALILO MARIE CLAIRE IYIKIRENGA

Respondent

**Representation:**

For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer

For the Respondent: Mr M C Afzal of International Immigration Advisory Services

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge M J

Gillespie, promulgated on 3<sup>rd</sup> July 2015 which allowed the Appellant's appeal on article 8 ECHR grounds

### Background

3. The Appellant was born on 4 April 1972 and is a national of Rwanda.
4. On 17 December 2014 the Secretary of State refused the Appellant's application for leave to remain in the UK as the spouse of a person present and settled in the UK.

### The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge M J Gillespie ("the Judge") allowed the appeal against the Respondent's decision on article 8 ECHR grounds only.
6. Grounds of appeal were lodged and on 23 September 2015 Designated Judge Garratt gave permission to appeal stating *inter alia*

"The grounds are arguable. It was made clear in Forman (Ss117A-C considerations) [2015] UKUT 00412(IAC) the significance of the factors set out in, e.g. section 117B, is that where they are not present the public interest is fortified. Where they are present that does not enhance the appellant article 8 claim. In paragraph 16 of the decision the Judge refers to factors already considered under the rules as supporting the article 8 claim having, nevertheless, concluded that the appellant could not meet the provisions of the rules. Further, the Judge gives no reasons for concluding that, in the circumstances of this case, it would be wrong to the appellant to apply for entry clearance from outside the United Kingdom."

### The Hearing

7. (a) Ms Fijiwala, for the respondent, drew my attention to the rule 24 response made by the appellant and told me that that contains a concession that the appellant cannot succeed under the rules. The respondent therefore relies on the dicta in SS Congo at paragraph 33. Ms Fijiwala told me that compelling circumstances had to be identified before article 8 ECHR rights case could competently be considered out-with the immigration rules. She told me that the Judge failed to consider whether there were insurmountable obstacles to the appellant's return to Rwanda.
- (b) Ms Fijiwal relied on the case of Agyarko, and took me to [17] of the decision; she said that although the judge considered the cases of Chikwamba v SSHD [2008] UKHL 40 and SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054, the Judge failed to identify the exceptional circumstances spoken of in Agyarko. She argued that there had been inadequate scrutiny of the facts and circumstances of the appellant's case and that the Judge had failed to properly consider s.117 of the 2002 Act. She argued that the decision discloses an inadequate proportionality balancing assessment
- (c) Ms Fijiwala relied on the cases of Forman (Ss117A-C considerations) [2015] UKUT 00412(IAC), AM (Malawi) & Chikwamba v SSHD [2008] UKHL 40, and urged me to set the decision aside.

8. Mr Afzal, for the appellant, adopted the terms of the rule 24 response, and told me that the decision does not contain errors of law, material or otherwise. He told me that the decision contains a careful analysis of the evidence, and that the Judge made findings of fact which were open to him before reaching a sustainable conclusion. He agreed that article 8 ECHR would only be engaged if there were exceptional circumstances and argued that that was a matter entirely for the Judge; that the facts and circumstances of this case were such that the appellant was entitled to succeed on article 8 grounds out with the rules. He urged me to hold the decision to dismiss the appeal.

### Analysis

9. Between [10] and [14] the Judge correctly considers the appellant's case under the immigration rules and focuses on appendix FM and rule 276 ADE. The Judge correctly concludes that the appellant cannot fulfil the requirements of the immigration rules. It is a matter of concession that that finding is correct.

10. At [15] the Judge correctly directs himself in law when he states "... where the immigration rules provide a complete code as to the applicability of article 8 relief, there is no need to address further claim under article 8." The error that the Judge makes is that, in [16] and [17] the Judge goes on to consider article 8 out-with the rules and does not explain why. The Judge did not make a finding that there are factors which require an article 8 assessment out-with the rules.

11. In SS (Congo) and Others [2015] EWCA Civ 387 Lord Justice Richards said at paragraph 33 "*In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ*".

12. The judge's error is compounded when his proportionality assessment amounts to little more than a superficial examination of section 117B of the 2002 Act. Section 117B(1) dictates that effective immigration control is in the public interest. The Judge states at 16 "*I consider that there is no public interest of substance in her removal*", but he does not adequately explain why the presumption enshrined in statute has no effect in the particular facts and circumstances of this case.

13. I therefore have to find that the decision is tainted by material errors of law because it races to a conclusion without sufficient explanation. As the decision contains material errors of law, I set it aside. There is sufficient evidence before me to enable me to remake the decision.

### Findings of Fact

14. The appellant is a national of Rwanda, born on 4 April 1972. On 6 September 2006 the appellant entered the UK as a visitor with entry clearance valid until the 3 January 2007. The appellant has remained in the UK since September 2006. On 12 July 2007 the appellant applied for asylum; that application was refused by the respondent on 23 August 2007

15. On 10 June 2011 the appellant applied for leave to remain in the UK as the unmarried partner of a British citizen. The respondent granted leave until 28 September 2014. On 31 March 2013 the appellant's British citizen partner died.

16. In March 2014 the appellant met her current partner, who is a British citizen. The appellant and her partner maintain their own separate households, but visit each other when time allows. The appellant lives in a flat in London and works as a carer. She earns a maximum of £1500 per month. The appellant's partner is an HGV driver and maintains his own house in Chelmsford. His income is marginally higher than that of the appellant.

17. The appellant has two adult children who continue to live in Rwanda. The appellant has travelled to Rwanda and visited her children there.

18. On 23 September 2014 the appellant applied for further leave to remain in the UK. On 2 December 2014 the respondent refused that application. It is against that decision that the appellant appeals. The appellant cannot succeed under the Immigration rules. Her appeal relates to consideration of article 8 ECHR rights out-with the Immigration Rules.

### The Immigration Rules

19. The rule 24 note for the appellant candidly accepts that at [12] of the decision the Judge correctly finds that the appellant cannot fulfil the requirements of appendix FM. The relationship requirements set out at E-LTRP1.10 & E-LTRP1.12 cannot be satisfied, because the appellant does not live in her partner and because the appellant has never had entry clearance as a Fiancée.

20. The rule 24 submission accepts that paragraph 276 ADE (vi) was correctly considered by the Judge at [13] & [14], when he found that there were not very significant obstacles to the applicant's re-integration in Rwanda. It is common ground that the appellant's adult children continue to live in Rwanda, and that the appellant has visited them there. The appellant cannot fulfil the requirements of the immigration rules. The real focus in this case is on article 8 ECHR.

### Article 8 out-with the Immigration Rules.

21. At paragraph 5 of the rule 24 submission, it is argued that "... *the appellant's case is of most compelling and compassionate circumstances.*" What is argued for the appellant is that during her time in the UK she has been widowed and then bereaved (for a second time) by the sudden death of her partner in 2013. Since then she has established a relationship with her new partner. In the UK she has a home & a job. She has lived in the UK for more than

nine years now. It is argued that in Rwanda the appellant does not have a network of support, and only has two adult children there.

22. In R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) it was held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

23. Section 117 of the 2002 Act is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within Razgar.

24. I must ask the following questions

- (i) Does family life, private life, home or correspondence exist within the meaning of Article 8
- (ii) If so, has the right to respect for this been interfered with
- (iii) If so, was the interference in accordance with the law
- (iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
- (v) If so, is the interference proportionate to the pursuit of the legitimate aim?

25. The appellant does not have any family members in the UK. Her adult children live in Rwanda. The appellant's application was submitted on 22 September 2014. That application does not identify her current partner as a fiancé or cohabitee. The weight of reliable evidence indicates that the appellant and her partner enjoy a romantic relationship, but do not live together. They maintain separate households in separate towns. The notice and grounds of appeal lodged to challenge the appellant's decision do not identify the appellant's current partner, and place no reliance on her relationship with him.

26. The respondent's decision will either separate the appellant from her partner, or force her partner to leave the UK to avoid separation. R (on the application of Agyarko) [2015] EWCA Civ 440 considered the phrase "*insurmountable obstacles*" as used in paragraph EX.1 of the Rules. At paragraph 26 of that decision "*The mere facts that Mr Bennette 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 re-locate to Ghana to continue their family life there – could not constitute insurmountable obstacles to his doing so.*"

27. If family life is established (for the appellant) in the UK, the problem for the appellant is that the case of Agyarko is directly against her. The circumstances of the appellant and her partner are similar to that of Mr Bennette in the case of Agyarko. It has already been judicially determined that the facts and circumstances pled by the appellant do not amount to "*insurmountable obstacles*".

28. But the appellant and her partner are not members of the same family. The appellant's original application was not for leave to remain on the basis that family life is established, but was made as an application for "*Further discretionary leave to remain following the completion of 3 years discretionary leave to remain*". The appellant may intend to marry her partner, but she has not yet done so. Family life within the meaning of article 8 ECHR does not exist for the appellant in the UK.

29. This case really turns on consideration of the appellant's private life. Section 117B of the 2002 Act tells me that immigration control is in the public interest. The appellant has not always been lawfully in the UK. The appellant has had leave to remain in the UK since 2011, but any private life the appellant has developed has been whilst her immigration status was precarious. The appellant speaks fluent English and is financially independent.

30. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held a person's immigration status is "*precarious*" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave; in some circumstances it may also be that even a person with indefinite leave to remain. In Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC) the Tribunal held that the adjective "*precarious*" in section 117B(5) of the 2002 Act does not contemplate only, and is not restricted to, temporary admission to the United Kingdom or a grant of leave to remain in a category which permits no expectation of a further grant.

31. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

32. Even though there are factors set out in s.117B which weigh in the appellant's favour, their effect in the consideration of the appellant's appeal are neutral.

33. I must balance the appellant's home in the UK, her employment here, and her intention to marry a British citizen against the respondent's interest in preserving fair and effective immigration control to protect this country's fragile economy. In Nasim and others (Article 8) [2014] UKUT 25 (IAC) it was held that the judgments of the Supreme Court in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 serve to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity.

34. The respondent's decision places the appellant and her partner in a difficult position. Section 117 the 2002 Act declares that immigration control is in the public interest. The respondent's decision is made to preserve fair and effective immigration control. The appellant and her partner will have to decide where their future lies. The appellant's partner will have to decide if he is able to leave his home, & his work and follow the appellant to Rwanda, or if he will wait for the appellant to make an application for entry clearance from Rwanda.

35. In F & ANR v Secretary of State for the Home Department [2013] EWCA Civ 76 one of the arguments was that the principle in Zambrano applied so far as the Appellant's British citizen husband was concerned. It was held that Zambrano was not applicable to that case as the Claimant's husband was an adult British citizen who would be both entitled and able to remain and to reside in the UK without his wife. He was not dependent upon the Claimant: Zambrano distinguished. It was also said that if that Claimant were to be removed, her husband might follow her to Pakistan if he chose to do so, but his rights in the UK and in the EU were not impaired by her removal (paras 10 - 11)

36. In SS (Congo) and Others [2015] EWCA Civ 387 in relation to one of the appeals, (Richards LJ) the sponsor had arrived in the UK aged 7 from Somalia; he became a British citizen in 2010. He and the Appellant entered the marriage knowing, in effect, she would have to comply with the Immigration Rules. Richards LJ said that the fact that he would lose his job in the United Kingdom if he had to leave to enjoy family life elsewhere and hence would prefer to establish family life here does not constitute compelling circumstances to require the grant of Leave to remain outside the Rules: as the authorities make clear, Article 8 does not create a right for married couples to choose to live in a Contracting State.

37. Immigration control is in the public interest. Both the case-law and section 117B of the 2002 Act indicate that that public interest outweighs the interests of the appellant and her partner. I therefore have to find that, in so far as I am able to consider the appellant's article 8 ECHR rights out-with the immigration rules, the respondent's decision is a proportionate interference with the appellant's article 8 rights.

## **Conclusion**

38. I therefore find that the Judge's decision is tainted by a material error of law. **I set aside the decision of the First-tier Tribunal because it contains a material error of law. I substitute the following decision.**

**Decision**

**I dismiss the appeal under the Immigration Rules.**

**I dismiss the Appeal on Articles 8 ECHR grounds.**

Signed  
Deputy Upper Tribunal Judge Doyle

Date 24th December 2015