Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13827/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10th June 2014	**On 22nd July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS JOSEPHINE EDITH LINDSAY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Unigwe (Counsel)
For the Respondent: Mr S Whitwell (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Carroll, promulgated on 20th March 2014, following a hearing at Taylor House on 11th March 2014. In the determination, the judge dismissed the appeal of Josephine Edith Lindsay. The Appellant applied for, and was

granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a national of Sierra Leone, who was born on 4th July 1948. She is 66 years of age. She has been in the UK since 18 years of age. She appeals against the decision of the Respondent dated 9th April 2013 to refuse to vary her leave to remain on the basis of Article 8 ECHR rights as a freestanding provision, outside the Immigration Rules.

The Appellant's Claim

3. The Appellant was born in Sierra Leone. However, her father was a British citizen, having travelled from Sierra Leone, and settling in the UK as long ago as 1949, and serving in the British Army. He died as a British national on 10th January 2003. The Appellant herself came to the UK as a student in 1967. She lived with an aunt in Birmingham. She then returned to Sierra Leone when her grandmother died in 1991. She lived in Sierra Leone until 20th January 2003. She returned to the UK following the death of her father.

4. However, before the Appellant had left the UK, she had met and formed a relationship with Mr Daniel Lindsay, a British citizen of Jamaican origin, whom she married on 8th September 2003. Her husband, however, unfortunately died on 25th December 2010. The Appellant was granted discretionary leave to remain in the UK from 10th March 2009 to 9th March 2012.

5. On 24th February 2012, the Appellant made an application for leave to remain outside the Immigration Rules, "given the length of time she has spent in the UK, her family affiliations and established ties ..." (see paragraph 7).

The Judge's Findings

6. The judge recorded how it was not in dispute that the Appellant could not succeed under the Immigration Rules, namely, under Appendix FM and paragraph 276ADE of HC 395, and the case could only be argued under freestanding Article 8 ECHR rights. The judge had regard to **Razgar [2004] UKHL 27** and considered the relevant facts before him. These were that the Appellant arrived in the UK when she was 18 and remained here for 24 years until 1991. She was at the time of the hearing 65 years of age. She has spent a total of 34 years in the UK. However she had then lived in Sierra Leone for more than a decade, and only returned back to the UK in January 2003, after the death of her father here. She now maintained that she had no ties with Sierra Leone and these were not credible.

7. On the other hand, the judge was clear that, "it is indisputably the case that she has spent a very substantial period of time in the United Kingdom

where she has worked and married" (paragraph 12). The judge then went onto consider the Appellant's claim that she enjoyed "a close relationship with her daughter and her grandsons in the United Kingdom" (paragraph 13).

8. He observed that there was, however, "no evidence before me from her daughter or from her grandchildren" and there was no evidence from her two sisters living in and near London (paragraph 13). There was no evidence from any friends or community organisations (paragraph 14). Although the Appellant had established a private life (paragraph 16) she had not been able to demonstrate that there would be any difficulties in her returning back to Sierra Leone, where she had spent a decade living, before returning back to the UK (paragraph 16). The appeal was dismissed.

Grounds of Application

9. The grounds of application leave much to be desired. They simply set out the law in relation to Article 8 and do not in any way whatsoever refer to the essential facts, which the judge had indicated were missing in the evidence before him.

10. Nevertheless, permission to appeal was granted to the Appellant on 1st May 2014 on the basis that,

> "Even in the absence of detailed evidence provided by the Appellant about her private and family life in the United Kingdom... the First-tier Tribunal Judge may have made an arguable material error of law by failing to give sufficient weight to the length of time the Appellant has lived in the United Kingdom in the proportionality exercise ..." (at paragraph 5).

11. On 19th May 2014, a Rule 24 response was entered to the effect that the Appellant had provided insufficient evidence to demonstrate that she had a connection to the UK through family, friends, or community organisations.

The Hearing

12. At the hearing before me on 10th June 2014, Mr Unigwe, appearing as Counsel on behalf of the Appellant, emphasised the core facts that were in the Appellant's favour. He submitted that the Appellant had lived in the UK for 35 years. She was bound to have developed considerable private life rights during that time in any event. Her father was a British citizen, her husband was a British citizen. She had worked all her life. She had a daughter with three children. She had two sisters in the UK. She had other friends and relatives.

13. The balance of proportionality was bound in these circumstances, submitted Mr Unigwe, to fall in favour of the Appellant, given that she had lived an impeccable life in the UK. The judge had failed to give due regard

to these factors because they were set out in the Appellant's witness statement and the judge had indicated early in the determination (see paragraph 1) that he had "taken into account the bundles of the Appellant and the Respondent" in which all the essential facts were set out.

14. Mr Unigwe also pointed to the fact that seated at the back of the courtroom on this occasion, were the Appellant's daughter ("Khama"), her sister (Theresa), and the Pastor at the church where she went. They were ready to give evidence.

15. For his part, Mr Whitwell, appearing on behalf of the Respondent Secretary of State, submitted that the judge had taken into account all the facts, including the facts that Mr Unigwe had now emphasised, and had concluded that the balance of considerations fell against the Appellant.

16. Essentially, what the judge had to do was to undertake a balancing exercise, after following the principles set out in **Razgar** and this the judge had done. Mr Whitwell referred to the latest Article 8 determination of the Tribunal in **Nasim [2014] UKUT 00025**, which enjoined decision-makers, where Article 8 was "to recognise its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra" (paragraph 20).

17. In his reply, Mr Unigwe submitted that the Appellant had given comprehensive evidence about her Article 8 rights in the UK and she had been cross-examined on these matters, and there was no reason for the judge to make a finding that the balance of considerations fell against her.

Error of Law

18. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section 12(2) of TCEA 2007). My reasons are as follows.

19. This is a case where the fundamental facts are not in dispute. The judge has set them out. The Appellant came to the UK when she was 18 years old. She remained for 24 years until 1991. She returned to Sierra Leone and lived there until 2003. She came back to the UK and has been here ever since. In total, she had lived in the UK for 34 years. During that time, the judge has found as a fact that "she has worked and married" the judge does not give consideration to the fact that both her husband and her father were British citizens, in his assessment of the Appellant's case, although, these are matters that were earlier set out by the judge in the heading "immigration history".

20. It is a perhaps unfortunate feature of this case that the judge has not set out the evidence of the Appellant at the hearing before him. The judge has simply said that, "the Appellant adopted the contents of her witness

statement. All of the evidence given is contained in the Record of Proceedings" (paragraph 9). In the circumstances, I have had to look at the "Record of Proceedings".

21. These are fairly substantial, running into some five pages, and these do set out the evidence that the Appellant gave orally at the hearing before the Tribunal Judge. For example, it is clear, that the judge heard evidence from the Appellant that, when asked, "what have you been doing in the UK?", she had gone on to say, "working all my life" (see page 1). The evidence shows that the Appellant did work continuously during the time that she was in the UK.

22. It is unfortunate equally, that the skeleton argument, prepared by the solicitors, so I am told, does not in terms grapple with the essential facts that were relevant to this case. The Appellant's witness statement, which appears at the end of the bundle, does, however, refer to the fact that the Appellant has spent more than half her life in the UK, that the Appellant had enjoyed a fruitful relationship with her British citizen husband, who died of kidney failure in December 2010, but made provision with his previous employers for her to enjoy the benefits of his pension, before he died (see paragraph 6).

23. This witness statement, however, does not refer to the Appellant's gainful employment. This is, on the other hand, clear from the P60 for 2011 which appears in the Appellant's bundle (see page 67). What is important, however, is that the Appellant's core relatives are in the UK. She makes it clear in her witness statement, that, "my only daughter and her three children were all born in this country and my father served this country as a military officer" (paragraph 7). Her two sisters are in this country. There is no evidence that her nearest and dearest relatives are in Sierra Leone.

24. It is true that the daughter and the sisters were not present at the hearing to give evidence. However, that in itself was no reason for the judge to disbelieve the existence of these ties. Indeed, the judge does not disbelieve them. The judge is clear that the Appellant has acquired Article 8 rights in the UK. What the judge was looking for, however, was evidence from the daughter and the near relatives. He held that, "there is, however, no evidence before me from her daughter or from her grandchildren" (paragraph 13).

25. Having such evidence was no doubt, desirable. Its absence, however, did not mean that no credence could be attached to such evidence. The failure to give such evidence credence was an error of law. The failure to recognise that the existence of a daughter and grandchildren, together with two sisters, in a life spent substantially in this country over 34 years, was an error of law.

Remaking the Decision

26. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions I have heard today. I am allowing this appeal for the following reasons. This is a case where the Appellant arrived in the UK when aged 18. She remained for 24 years thereafter. She returned back to Sierra Leone, only because of the death of a relative. Both her mother and father were British citizens. She returned back to the UK in 2003. She has lived in the UK for a total of 34 years. During that time, she has worked in this country. She gave evidence to say that she has worked during her entire life in the UK.

27. Her only daughter lives in the UK. She has close ties with her daughter. She has close ties with her grandchildren. She also has two sisters living in the UK. The Appellant is now in the twilight years of her life. She clearly has a substantial private life in this country. Indeed, insofar as she has a daughter and grandchildren, she also enjoys a family life with them. The daughter was in court and was clearly distraught on behalf of her mother at the hearing. She has an active church life, and this was evidenced by the fact that a Pastor attended the last time and a different Pastor attended again today. She is in receipt of a government pension as well as a widow's pension. Ultimately, as the judge found the last time, this was a case that turned upon "proportionality" after the application of the **Razgar** principles.

28. There is clearly an interference by a public authority with her family and private life rights. The interference has consequences of such gravity as to engage the operation of Article 8. The interference is in accordance with the law because the Appellant cannot succeed under the Immigration Rules. However, it is not necessary in a democratic society and it is not an interference that is proportionate to the legitimate public end that is sought to be achieved.

29. This is because the Appellant has had discretionary leave to remain in the UK precisely on the basis of the British nationality of her husband, and the nationality of her parents is also a matter that cannot be ignored, in the evaluation of the balance of considerations that fall in her favour.

30. It is well-established that Article 8 considerations must also take into account the rights of third parties because, as Lady Hale has made clear in the Supreme Court, the whole is greater than the individual component of rights. The Appellant's daughter is settled in the UK and is a British citizen. Her children are British citizens. As against all these facts, the interest of the state in immigration control has to be weighed in, and I conclude that these balance of considerations do not outweigh the balance of considerations in favour of the Appellant.

31. The Appellant's Article 8 rights cannot be enjoyed in Sierra Leone away from her daughter and three grandchildren. They cannot be enjoyed away from her two sisters settled in the UK. Indeed, the rights to pension and state benefits which she enjoys, on account both of her working in this

country over many years and on account of her husband's status in this country, go in her favour.

Decision

32. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

33. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 21st July 2014