Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36106/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 June 2014	**On 31 July 2014**

Before

THE HONOURABLE MRS JUSTICE SIMLER
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

MRS AMINATA JARJU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Y Darboe, Counsel
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal from the determination of First-tier Tribunal comprised of Judge Carroll with permission given by First-tier Tribunal Judge Brunnen on 1 May 2014. The appellant challenges Judge Carroll's decision on the basis that it contained material errors of law which vitiated that determination.

2. The appellant is represented by Mr Darboe who has, in clear and focused submissions, presented her case and said all that could possibly have been said on her behalf. The Home Office is represented by Mr Duffy, and we are grateful to him for his concise submissions.

3. The appellant was born on 27 March 1990 and is a national of Gambia. On 13 August 2010 she married Mr Abdoulie Jarju in Gambia. Mr Jarju first came to the United Kingdom in 2006 on a student visa and in 2008 he joined the British Army. He served in the British Army for three years and his certificate of discharge dated 19 January 2012 shows that he became a naturalised British citizen on 28 March 2011.

4. The appellant was issued with leave to enter the UK as a spouse of a British national citizen valid from 2 February 2011 to 12 September 2012. She arrived in the UK on 27 September 2011 and has remained here living with her husband. In 2012, following Mr Jarju's discharge from the army earlier in that year, the appellant submitted an application for leave to remain which gives rise to the decision subsequently dealt with on appeal by Judge Carroll. That application was dated 7 August 2012 and she sought a variation of her leave on the basis of her husband's status.

5. The Secretary of State refused her application by letter dated 21 August 2013. The Secretary of State indicated that the application had been considered under Appendix FM and under paragraph EX.1 of the new Rules in force from 9 July 2012.

6. So far as the Rules were concerned the appellant did not meet the requirements of paragraphs E-LTRP.1.2 to 1.12 and E-LTRP.2.1 because the earnings requirement was a requirement that the sponsor should be earning a certain amount for a period of six months in the period up to the date of the application, hence consideration under EX.1.

So far as EX.1 is concerned the refusal letter reads as follows:

> "In determining whether there are insurmountable obstacles we have considered the seriousness of the difficulties which you and your partner would face in continuing your family life outside the UK and whether they entail something that you could not or could not reasonably be expected to overcome, even with a degree of hardship for one or more of the individuals concerned. Whilst it is acknowledged that your partner is a British citizen and has served in the British Armed Forces this does not mean that you are unable to live together in Gambia. Your partner was born in Gambia and prior to serving in the British Armed Forces he spent the majority of his life there. Although relocating there together may cause a degree of hardship for your partner the Secretary of State has not seen any evidence to suggest that there are insurmountable obstacles preventing you from continuing your relationship in Gambia.

> You therefore fail to fulfil EX.1(b) of Appendix FM of the Immigration Rules."

7. The refusal letter considered the question of the appellant's private life under Article 8 which fell to be dealt with under paragraph 276ADE of the new Rules and in that regard concluded that having entered with leave as a spouse on 27 September 2011 valid until 1 October 2012 she had not lived continuously in the UK for at least twenty years and so did not meet (iii) of that Rule.

8. The Secretary of State's letter went on to say that at the time of the application she was aged 22 and did not therefore meet the requirement of Rule 276ADE(iv) because she was not under the age of 18. As to paragraph (v) of Rule 276 ADE, the appellant was aged between 18 and 25 at the date of the application but the Secretary of State was not satisfied that she had spent at least half of her life continuously in the UK, having lived in Gambia until she was 21. So far as (vi) was concerned, the Secretary of State said having spent 21 years in Gambia and in the absence of any evidence to the contrary she did not accept that the appellant had lost ties to her home country and found that she did not therefore meet the requirement of that provision.

9. The Secretary of State's refusal letter considered whether the application raised or contained exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8, might warrant consideration by the Secretary of State outside the requirements of the Immigration Rules but concluded that no such circumstances had been identified. On that basis the application was refused.

10. The appellant appealed contending that the decision breached her human rights under Article 8; and that she met the requirements of the relevant Immigration Rules at the time of the application in any event so that the decision was not in accordance with the law and was therefore unlawful.

11. That appeal was dealt with, as we have already indicated, by the First-tier Tribunal on 6 February 2014 with a determination promulgated on 17 February 2014. In that determination Judge Carroll recorded the appellant's case in these terms at paragraph 5.

> "Paragraph 13 read:
>
> "I state that I could not renew my spousal visa as stated above because my husband did not have active employment at the time, thus we could not meet the financial requirement in that category …
>
> "Paragraph 15:
>
> "I state that I have established family life in the United Kingdom with my husband, an ex-army officer, who is a British citizen. Although my

husband was discharged from the British Army he served the Queen and country with an impeccable record …"

"Paragraph 16:

"… My husband and myself are now in active employment and even during our hard times we did not rely on the state handouts to accommodation and maintain ourselves …"

12. Judge Carroll then recorded that the application was considered and refused by reference to the provisions of Appendix FM which of course includes paragraph EX.1.

13. The Judge implicitly accepted on that footing that the application did not meet the requirements of the Immigration Rules and went on to consider the application by reference to Article 8 and in particular to the proportionality assessment required under Article 8, and we shall return to that in a moment.

14. Ultimately the Judge concluded that the appeal should be dismissed because she was satisfied as to the proportionality of the respondent's decision and found that the interference with the appellant's family or private life was not sufficiently serious to give rise to a breach of the rights protected by Article 8.

15. Against that decision Mr Darboe raises three grounds of appeal, albeit that the second and third essentially overlap. The first ground of appeal is a challenge to the decision that the couple failed to meet the requirements of the Immigration Rules as at the date of the hearing. He submitted that the Judge should have considered the up-to-date evidence by reference to the fact that the couple were both working and had between them earnings that would have met the requirement within the Rules so that she should not simply have proceeded on concession made at paragraph 13 of the appellant's witness statement.

16. The difficulty with this argument is that the Rules require that the earnings level must be met for a period of six months up to and including the date of the application. In this case the earnings level required would have had to be demonstrated for the period from January 2012 until August 2012.

17. It is common ground that the couple could not meet that requirement because Mr Jarju was not in employment at that time. In those circumstances Mr Darboe realistically conceded that the Judge was entitled to conclude that the requirement of the Immigration Rules was not met at the date of the refusal decision and nor could it be met at the date of the hearing unless the couple could show that there was actually evidence to show that they met the earnings requirement between January and August 2012, which plainly they could not. Accordingly, so far

as that ground is concerned we cannot find any error of law in the Judge's conclusion or in her approach.

18. Grounds 2 and 3 concern an asserted material misdirection of law by the Judge or, so far as ground 3 is concerned, a failure to give weight to a material matter and concern the proportionality assessment conducted by the Judge under Article 8. Mr Darboe contends that the Judge materially misdirected herself in law because she failed to consider the up-to-date evidence showing that the appellant and her husband were working and earning in excess of the requirements identified in the Rules and that the appellant was at the date of the hearing at a late stage of pregnancy so that any adverse decision would have an extreme impact upon her. There was a failure to consider the fact that any child born to the family would be a British citizen child, the fact that she and her husband had been here lawfully and that they had complied with the Rules. He submits that either there was a material misdirection in failing to consider these matters or the Judge failed to give weight to the wide range of circumstances, both personal and family circumstances, and the likely developments in the future so far as this family was concerned, in making the proportionality assessment that she made.

19. The Judge dealt with the assessment of the appellant's case under Article 8 at paragraphs 7 to 12 of the decision. At paragraph 7 she gave herself a direction in law by reference to **Razgar** and the step by step approach identified as reflecting the Article 8 assessment under the established jurisprudence.

20. The Judge made clear that in carrying out an assessment of whether the interference with family or private life would be proportionate to the aims sought to be achieved by the Secretary of State, a wide range of circumstances must be considered including the appellant's previous family and personal circumstances and likely developments in the future. She also said that she must consider the consequences of the decision upon all members of the appellant's family unit. She clearly recognised therefore, contrary to what was said by Mr Darboe both in writing and before us today, the importance of having regard to a wide range of circumstances and also to likely developments in the future.

21. At paragraph 8 she set out the fact that the appellant had been educated in Gambia and had worked as a secretary there before coming to the United Kingdom. She recorded that both the appellant and her husband had immediate family members consisting of parents and siblings living in Gambia and that following her marriage she had lived with her parents-in-law in Gambia.

22. The Judge recorded the fact that the appellant had accepted in cross-examination that it would not be a problem for her to live and work in Gambia, albeit that she said that now that she was pregnant and expecting a baby in May, returning to Gambia, "could be a problem for the baby". The Judge recorded that the appellant confirmed that she

continued to be in very close contact with her family in Gambia speaking to them on an almost daily basis.

23. So far as Mr Jarju's position was concerned, at paragraph 9 the Judge dealt with this as follows. She recorded that Mr Jarju had been educated and lived in Gambia until he came to the UK in 2006. He had joined the British Army in 2008 and served with the British Army until he was discharged in 2012. His service took him to Afghanistan for seven months from September 2009. That had been an extremely stressful experience and in his witness statement he stated that after his deployment he suffered from post-traumatic stress disorder. The Judge noted that there was no evidence to support that diagnosis of PTSD but fully accepted that service in Afghanistan would have been very stressful. She recorded that Mr Jarju had found it very difficult to adapt to civilian life after his discharge from the army and had returned to Gambia for two months to spend time with friends and family there.

24. At paragraph 10 the Judge recorded the fact that both Mr Jarju and the appellant were by that stage employed in the catering business. So far as that is concerned, Mr Darboe has accepted that they could not even at that stage in February 2014 satisfy the earnings requirements in the Rules because they had not been employed for the six months required by those Rules. Nevertheless we are entirely satisfied that the Judge was aware of the fact that they were employed in the catering business and although not expressly identified, that they were earning as a consequence of that employment.

25. At paragraph 11 the Judge dealt with the fact that the appellant and her husband clearly enjoyed family life together and the appellant had established a private life in the UK in her time here. The Judge went on to say that there was no evidence from friends or community organisations about her private life but was satisfied that there was private life based on the fact that she had lived and worked in the UK since September 2011.

26. Having set out the relevant factual matrix the Judge held as follows

> "She has in reality been in the UK for a very short period and arrived with leave to remain as a spouse until September 2012. And as she says in her witness statement her husband was not employed at the relevant time and she was unable therefore to renew her leave to remain as a spouse. All of the evidence points to the appellant and Mr Jarju continuing to have very close family links with Gambia where they have spent the great majority of their lives and where the appellant has also been employed doing secretarial work. As I have noted above she confirmed in the course of oral evidence that it would not be a problem for her to live and work in Gambia. There is equally no evidence to show that it would be a problem for Mr Jarju or for the child due to be born in May 2014.

> I am satisfied as to the proportionality of the respondent's decision under appeal and find that it does not prejudice the appellant's family or private life in a manner sufficiently serious to give rise to a breach of the fundamental rights protected by Article 8."

It is clear therefore from that decision that the Judge was considering all the evidence up to and including that available at the date of the hearing and was not restricting her assessment to the material that was available to the Secretary of State. We are satisfied that the Judge was well aware, as we have already indicated, of the employment status of the appellant and her husband and of the fact that they were earning at that time and had been for several months prior to the hearing, we are told from September 2012 as referred to at paragraph 11 of the determination.

27. The Judge fully took account of Mr Jarju's status as having served in the British Army and took account of the difficulties he experienced adapting to civilian life after a traumatic period of service in Afghanistan from September 2009. The Judge considered and took account of the family life established by the appellant with her husband in the UK and of the fact that she was pregnant and the baby was due to be born in May 2014. The unborn baby could not be considered as a child but the Judge took account of the pregnancy and of the likely developments in the future.

28. In all these circumstances, although the decision of the First-tier Tribunal Judge in this case may not have been a decision we would necessarily have come to, the fact that we may disagree with that decision is not and cannot amount to an error of law. We are unable to find that the Judge materially misdirected herself in law or that she failed to give weight to a material consideration in reaching her decision. In those circumstances, this appeal must fail because we cannot identify any error of law in the Judge's decision.

29. We note in reaching that conclusion that Mr Duffy has indicated that the appellant will have a 28 day grace period following the expiry of her Section 3C leave so that a fresh application can, and we suggest should, be made in this case, and every indication given by Mr Duffy suggests that such an application would be considered.

30. Our decision accordingly is that there was no error of law and this appeal therefore fails and is dismissed.

Signed Date

Mrs Justice Simler