Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01811/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 April 2014	**On 8 April 2014**
	.....

Before

THE HONOURABLE MR JUSTICE JEREMY BAKER
SITTING AS A DEPUTY JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MRS BINTO SONKO BADGIE

Respondent

Representation:

For the Respondent: Mr C Jacobs of Counsel instructed by Kilby Jones Solicitors
For the Appellant: **Mr G Saunders, a Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. Binto Sonko Badgie is 29 years of age, having been born on 30 October 1984. She is a citizen of Gambia. On 15 July 2009 she met Morrow Badgie in Gambia and commenced a relationship with him. On 18 October 2010 Binto and Morrow Badgie were married, and on 11 March 2011 a son was

born to them called Abdul. The last time that Binto and Morrow Badgie spent time together was on 20 January 2012, following which Morrow Badgie, who has dual Gambian and British citizenship, returned to the United Kingdom whilst Binto Badgie and their son remained in Gambia. Subsequently Binto Badgie applied for entry clearance to the United Kingdom as a partner under Appendix FM of the Immigration Rules.

2. That application was refused by the Entry Clearance Officer on 19 December 2012. An appeal against that decision was refused by the Entry Clearance Manager on 25 September 2013. A further appeal was allowed by the First-tier Tribunal in a decision promulgated on 7 February 2014. The Entry Clearance Officer appeals with permission against the decision of the First-tier Tribunal.

3. The reasons given by the Entry Clearance Officer for refusing the original application included: a failure by Binto Badgie to discharge an invoice from the NHS in relation to the costs which she had incurred when Abdul was born during a visit by her to the United Kingdom; a failure to provide sufficient evidence that she was in a genuine and subsisting relationship with her husband; a failure to provide sufficient evidence that the marriage was valid; a failure to provide sufficient evidence of her husband's income, and in particular she had not provided payslips for Morrow Badgie's earnings for the period of six months prior to the date of the application.

4. When the matter was reconsidered by the Entry Clearance Manager it was noted that despite the reasons for the original decision and a subsequent invitation to Binto Badgie to submit additional evidence, she had failed to do so. On this basis the Entry Clearance Manager not only confirmed the reasons for the original decision, but considered that this was a proportionate decision under Article 8(2) of the ECHR.

5. At the hearing before the First-tier Tribunal Morrow Badgie provided a letter from the NHS confirming that on 29 July 2013 he had discharged the outstanding amount owed to it. This was accepted by the First-tier Tribunal who also found that the marriage was valid and that there was a genuine and subsisting relationship between them, and that they intended to live together permanently in the United Kingdom. Although the First-tier Tribunal accepted that Binto Badgie had failed to provide payslips for Morrow Badgie's earnings for the period of six months prior to date of the application, it found on the basis of other evidence that during the period between December 2010 and November 2013 he had earned substantially in excess of the figure required under the Rules.

6. As the First-tier Tribunal acknowledged that the appeal could not succeed under the Rules, it proceeded to consider those factors relevant to Binto Badgie's Article 8 rights outside the Rules. It found that she had satisfied the "substance" of the Rules and noted that Morrow Badgie not only lived and worked in the United Kingdom, but had two other young children by a previous relationship for whom he made financial contributions and who

he saw on a regular basis. It found Morrow Badgie to be an industrious individual who contributed to the United Kingdom economy, and that since his return to the United Kingdom had maintained in regular electronic communication with his wife and youngest child such that family life existed between them.

7. The First-tier Tribunal considered that the best interests of Abdul would be provided by him living with both parents in the United Kingdom. Accordingly it found that the original decision was a disproportionate "... interference with the right to family life ..." and allowed the appeal.

8. The grounds of appeal to the Upper Tribunal are: firstly, that the First-tier Tribunal failed to direct itself that where an individual fails to obtain leave to remain under the Immigration Rules, it is only if there are compelling circumstances not sufficiently recognised under the Rules that an individual should be granted leave to remain on Article 8 grounds and; that Binto Badgie's remedy lay not in an appeal, but by making further applications which accorded with the Rules such that no compelling circumstances could be said to exist in this case.

9. It is clear that there was no express reference by the First-tier Tribunal to the decisions in *R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC), and Shahzad (Article 8: legitimate aim) [2014] UKUT 85.* However, and more to the point, we cannot detect that the First-tier Tribunal considered the effect of these decisions, namely that the Immigration Rules are designed to be a comprehensive code for the consideration of an individual's Article 8 rights and it is only if there are compelling circumstances beyond those envisaged under the Rules that an individual may be able to succeed on Article 8 grounds outside the Rules. Furthermore, in *Alam and Others v SSHD [2012] EWCA Civ 960,* the Court of Appeal said that the effect of Section 85A of the Nationality, Immigration and Asylum Act 2002 was that a Tribunal is obliged to consider the question of compliance with the points-based system on the basis of the documentation provided by an applicant with his application, and was not entitled to remedy omissions in that documentation with further evidence made available at the hearing.

10. At paragraph 45 of the decision Lord Justice Sullivan said this:

> "... I endorse the view expressed by the Upper Tribunal in *Shahzad* (paragraph 49) that there is no unfairness in the requirement in the PBS, that an applicant must submit with his application all the evidence necessary to demonstrate compliance with the Rule under which he seeks leave. The Immigration Rules and the policy guidance and the prescribed application for form all make it clear that the prescribed documents must be submitted with the application and if they are not the application will be rejected. The price of security, consistency and predictability is a lack of flexibility that may well result in 'hard' decisions in individual cases, but that is not a justification for imposing an obligation on the Secretary of State to

> conduct a preliminary check of all applications to see whether they are accompanied by all of the specified documents to contact applicants where there is not the case and to give them an opportunity to supply missing documents."

11. There is a reflection of those observations in the more recent case of *SSHD v Rodriguez and Others [2014] EWCA Civ 2,* which was considering the extent to which the "evidential flexibility policy" affords flexibility to the Secretary of State and Tribunals in overcoming defects or omissions in documentation provided in support of immigration applications.

12. At paragraph 92 Lord Justice Davies said this:

> "... Taken overall, the evidential flexibility process instruction is demonstrably not designed to given an applicant the opportunity first, to remedy any defect or inadequacy in the application or supporting documentation so as to save the application from refusal after substantial consideration."

13. In the present case although the First-tier Tribunal, no doubt sensitive to decisions such as *Raju [2013] EWCA Civ 754,* expressly disavowed the notion that it was considering the issue of proportionality "..... in terms of a 'near miss' .....", it did consider it on the basis that Binto Badgie had met the "..... substantive financial requirements of the Rules .....". What the First-tier Tribunal did not refer to was the fact, that not only had Binita Badgie failed to provide the appropriate financial documentation with the original application but, after a specific invitation to do so, had failed to provide it subsequently to the Entry Clearance Manager.

14. It is clear that since the inception of the points-based system, it is the provisions of the system which have to be complied with in respect of any applications made under it. The system is strict as are the evidential requirements set out in paragraph EC-P of Appendix 8A. However the fact that it is strict does not in the circumstances of this case permit the First-tier Tribunal to ignore those strictures and deal with the situation on the basis that, as it was satisfied that the substance of the Rules had been met, it could without more turn to a consideration of Article 8 outside the Rules. Instead it should, in line with the decisions to which we have already referred, have considered whether there were any compelling circumstances not sufficiently envisaged under the Rules which justified Binto Badgie succeeding under Article 8(2). If it had done so, although undoubtedly the factors identified by the First-tier Tribunal in relation to her child, were of significance and could in other circumstances have surmounted the hurdle, in the present case the interference to family life could have been remedied by a further Rules compliant application for entry clearance. Indeed the situation might never have arisen had not only Binto Badgie complied with the Rules in the first place, but had provided the requisite evidence when subsequently invited to do so for consideration by the Entry Clearance Manager.

15. In these circumstances the decision of the Entry Clearance Officer cannot be said to have been disproportionate to the Article 8 rights of this family.

16. We have listened with care to the able arguments of Mr Jacobs of Counsel on behalf of Binto Badgie in this case. However we do not accept that where the separation, as in this case is likely to be short, because, as acknowledged by the Secretary of State, a properly evidenced application is likely to succeed, that the present separation does amount to compelling circumstances.

17. Accordingly we find that there was a material error of law in the approach taken by the First-tier Tribunal in this case and that for the reasons that we have given Binto Badgie is not in a position to succeed under Article 8(2). In those circumstances the Entry Clearance Officer's appeal succeeds and we substitute our decision and dismiss Binto Badie's appeal to the Tribunal.

Signed Date

The Honourable Mr Justice Jeremy Baker
Sitting as a Deputy Judge of the Upper Tribunal