Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/23965/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 February 2014	**On 13 February 2014**
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Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

ENTRY CLEARANCE OFFICER ACCRA

Appellant

and

MRS AMINATA MANSARAY
(No anonymity direction made)

Respondent

Representation:

For the Appellant: Ms A Everett a Senior Home Office Presenting Office
For the Respondent: The sponsor attended to represent his wife.

DETERMINATION AND REASONS

1. The appellant is the Entry Clearance Officer in Accra ("the ECO"). The respondent is a citizen of Sierra Leone who was born on 17 October 1983 ("the claimant"). The ECO has been given permission to appeal the determination of First-Tier Tribunal Judge Scott-Baker ("the FTTJ") who allowed, on Article 8 human rights grounds only, the claimant's appealed against the ECO's

decision of 23 October 2012 to refuse to grant her entry clearance for settlement in the UK as the spouse of her husband and sponsor.

2. The ECO refused the claimant's application because she had not shown that the sponsor was earning the minimum of £18,600 per annum required by the Immigration Rules. The claimant appealed and the FTTJ heard her appeal on for October 2013. The sponsor attended, made representations for his wife, and gave evidence. The respondent was represented.

3. The FTTJ recorded that the ECO refused the application and the refusal was confirmed by the Entry Clearance Manager because the sponsor's contract of employment stated that he earned £17,939 per annum. His P60 showed an annual income of £14,528.53. Despite the inconsistency both amounts were below the required figure of £18,600 per annum.

4. The FTTJ concluded that the claimant had to show that the sponsor was earning the required amount at the date of the decision. She had failed to do so with the result that the appeal had to be dismissed under the Immigration Rules. However, she said that there was post decision documentary evidence in the form of a letter from the sponsor's employers dated 6 November 2012 showing that at the date of the decision the sponsor was earning 14,153 pa plus an allowance of £4036 making a total of 18,189 and that this could be increased by overtime payments. There was some evidence of overtime payments and his P60 issued in April 2013 showed that the sponsor had earned £3305.19 more than his basic salary.

5. Having dismissed the appeal under the Immigration Rules the FTTJ went on to consider the Article 8 human rights grounds. In paragraphs 14, 15 and 16 of the determination she said;

> "14. However in considering the appeal under Article 8 of the ECHR, I note that there was no issue raised by the respondent that the appellant and sponsor were in a genuine relationship of husband-and-wife. Family life exists between the appellant and the sponsor and the sponsor works in the United Kingdom and is a British citizen and wishes his wife to join him so that they can start a family. The appellant cannot satisfy the requirements of the immigration rules as at the date hereof as she has not produced specified documents.
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> 15. There is an issue here in that the evidence has been misconstrued by the respondent and the appellant, bar for the submission of specified documents, could have satisfied the rules.
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> 16. In all in considering the evidence in the round it is considered that the decision is disproportionate."

6. The ECO applied for and was granted permission to appeal. It is submitted that the FTTJ erred in law. The claimant had failed to show that her

circumstances were exceptional or that refusal would result in an unjustifiably harsh outcome. If the claimant could now show that the sponsor's income was sufficient to meet the requirements of the Immigration Rules they would have a remedy, by making a fresh application. It is also argued that the FTTJ should not have considered evidence submitted after the ECO's decision and failed to give adequate reasons for her findings.

7. The sponsor attended to represent the claimant. She was not legally represented. I explained that my task was to decide whether the FTTJ erred in law, if so whether her decision should be set aside and if it was set aside how it should be remade. I explained what was meant by an error of law and said that I would assist him as best I could whilst maintaining a fair balance between the parties.

8. I heard submissions from Ms Everett and from the sponsor. I also took evidence from the sponsor in relation to remaking the decision, should that become necessary. I asked him questions, gave him the opportunity to say anything he wished and he was cross-examined. His evidence is set out in my record of proceedings and summarised in my findings.

9. There is no cross appeal against the FTTJ's decision to dismiss the appeal under the Immigration Rules. I am concerned with the ECO's appeal against the FTTJ's decision to allow the appeal on Article 8 human rights grounds.

10. I find that the FTTJ erred in law. There are few findings as to the relevant facts and little or no reasoning as to why the appeal should be allowed on Article 8 human rights grounds. All that the FTTJ said is contained in paragraphs 14, 15 and 16 which I have set out above. Although not stated in terms what is said appears to be based on a view that the claimant suffered a "near miss" under the Immigration Rules. There is no assessment of whether the claimant can succeed on Article 8 grounds as these are contained in the Immigration Rules or, if she cannot, whether she can succeed under the jurisprudence outside the Immigration Rules applying Razgar principles. It was also an error of law to fail to take into account that, in the light of the FTTJ's own findings, the claimant was likely to succeed if she made a fresh application.

11. Having found that the FTTJ erred in law I set aside her decision. I have all the documents which were before the FTTJ and I have heard further evidence from the sponsor. The sponsor and Ms Everett have made submissions. In the circumstances I can re-determine the appeal without an adjournment.

12. It is accepted that the claimant and the sponsor are married and in a genuine and subsisting relationship. The application for settlement only failed under the Immigration Rules because, at the date of decision, the sponsor had not produced sufficient evidence in the required form to show that he was earning at least £18,600 pa. Both are citizens of Sierra Leone. He was born in September 1979 and she in October 1983. He first came to the UK in May 2000 and has always been here legally. He works in the NHS and has never claimed

benefits. His current salary is 21,484 pa which he believes is sufficient for a fresh application to succeed. They married in December 2011 in Sierra Leone. The claimant has a son, now aged nine, who lives with her. The sponsor is his stepfather. They have no children together, but wish to start a family. The claimant and her son live with the sponsor's mother. The sponsor said that if the claimant came to this country her son would remain in Sierra Leone with his mother. The reason the sponsor gave is that they cannot show sufficient earnings to enable them to make an application for him to come as well as the claimant. The sponsor last saw the claimant in Sierra Leone in July 2013. He visits her as often as he can but is constrained by the cost and the 27 days leave he can take from his work each year. He sends her money each month to support her and to pay for his stepson's education. He said that their continuing separation was causing both of them a great deal of stress and strain which was beginning to affect his job.

13. For the reasons already given the claimant does not meet the requirements of Appendix FM of the Immigration Rules and cannot succeed on Article 8 human rights grounds under those rules unless she can bring herself within Section EX1. The only question as to whether she does so depends on whether "there are insurmountable obstacles to family life with that partner continuing outside the UK". This is a test with a very high threshold. I find that the claimant has not established that there are insurmountable obstacles to family life with the sponsor continuing outside the UK, specifically in Sierra Leone. Both are citizens of that country and the claimant is living there with the sponsor's mother and her son. There is no suggestion that the claimant or the sponsor do not enjoy good health. He is familiar with that country. On the other hand I accept that if he had to leave the UK he would lose his private life here and a good job.

14. As the claimant does not succeed on Article 8 human rights grounds under the Immigration Rules I must consider whether she succeeds under what I will refer to as the Strasbourg jurisprudence outside the Immigration Rules. In that context the test is not whether there are insurmountable obstacles to family life with the sponsor continuing outside the UK. I must follow the principles set out by Lord Bingham in R v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27 namely;

    (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

    (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

    (3) If so, is such interference in accordance with the law?

    (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the ECOnomic well-being of

the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

15. I find that there is a family life between the claimant and the sponsor. I answer the first four of the Razgar questions in the affirmative. In relation to the claimant's son I find the position more difficult. Whilst I accept that there is a family life between the claimant the sponsor and the claimant's son and that the sponsor has come to treat him as his own son, the refusal of leave for the claimant to enter and settle will not be the decision which interferes with family life with the son. The reason is the decision taken by the claimant and the sponsor that their son should remain in Sierra Leone with the sponsor's mother. In the circumstances that decision, although no doubt taken for sound reasons, would inevitably interfere with his family life with his mother if she is granted leave to come to the UK. Whilst his best interests are a paramount consideration there is a dearth of evidence enabling me to consider this. In any event it is not the respondent's current decision which interferes with his family life although I accept that at some time in the future, if the claimant is able to come here, there may be an application for her son to join her and the sponsor.

16. There is a public interest in upholding the Immigration Rules and for this to be seen to be done. The claimant and the sponsor now believe that the sponsor's financial position is such that a fresh application would be likely to succeed. On the evidence he has put forward and under the Immigration Rules as they stand this is likely to be correct. There would be no need for the sponsor to leave the country for the claimant to make a fresh application and if this was done it would not jeopardise his employment or status in this country although I accept that there would be delay, an extended separation and additional expense. The alternative, although I accept this is not likely to be their first choice, would be for the sponsor to join the claimant and live with her in Sierra Leone. As matters stand this would have the advantage that the claimant and the sponsor would be able to live with their son. I find that, if they decided not to pursue a fresh application, it would be reasonable to expect them to live together in Sierra Leone.

17. I find that on the balance of probabilities the ECO has established that it would be a proportionate interference with the claimant's right to respect for her private and family life and that of her husband and son to refuse her entry clearance for settlement under the current application.

18. The FTTJ dismissed the appeal under the Immigration Rules. I uphold that decision. Having set aside her decision to allow the appeal on Article 8 human rights grounds I substitute my decision and dismiss the appeal on Article 8 human rights grounds.

19. I have not been asked to make an anonymity direction and can see no good reason to do so. The appeal is dismissed.

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Signed Date 7 February 2014
Upper Tribunal Judge Moulden