Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/45776/2014**

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Decision & Reasons Promulgated**
On 26 August 2015	**On 28 August 2015**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHERNO SOWE

Respondent

Representation:
For the Appellant: Mr McVeety (Senior Home Office Presenting Officer)
For the Respondent: Mr Mohzam (Burton and Burton Solicitors)

DECISION AND REASONS

1. The appellant ('the SSHD') appeals against a decision of First-tier Tribunal Judge PJM Hollingworth dated 15 May 2015 in which he allowed the respondent's appeal on Article 8 grounds.

2. In grounds of appeal the SSHD submitted that Judge Hollingworth misdirected himself when considering the public interest question in a number of ways, set out in more detail below. On 16 July 2015 Judge AD Baker granted permission to appeal on this basis observing that it is arguable that the Judge misdirected himself in concluding that private life outweighed the public interest.

3. The matter now comes before me to consider whether the decision contains an error of law.

4. Mr McVeety relied upon the grounds of appeal as drafted. I indicated to Mr Mohzam that I did not need to hear from him as I would be dismissing the appeal for reasons to follow in writing.

5. As the SSHD relies upon a number of reasons to support the submission that the Judge misdirected himself when considering the public interest question, I deal with each in turn.

6. It is first submitted that the Judge has not considered the appropriate question, i.e. are there unjustifiably harsh consequences emanating from exceptional circumstances? The SSHD relies upon a number of authorities to support this proposition, the most recent being **SSHD v SS (Congo)** [2015] EWCA Civ 387. This decision clearly sets out at [33] that in a case such as this, the correct question is whether there are compelling circumstances and not the higher test set out in the grounds of appeal. When I drew this to Mr McVeety's attention he accepted my analysis. When the decision is read as a whole it is clear that the Judge has identified compelling circumstances and applied the correct test, even if this has not been done explicitly.

7. The SSHD also points out that the Judge has wrongly considered the reasonableness of expecting the appellant's spouse to return with him to the Gambia. Under Strasbourg case-law that is the correct test to be employed when considering whether in relation to Art 8 of the ECHR, a spouse can be expected to leave the UK and the Judge was entitled to reach the factual findings he did on this issue.

8. It is submitted that the Judge employed the wrong test when considering whether or not the appellant's immigration status was precarious. Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) does not directly address the weight to be attached to family life established when a person's immigration status is precarious, as opposed to unlawful. As Mr McVeety accepted **AM (S 117B) Malawi** [2015] UKUT 0260 (IAC) is of limited assistance because it addresses the definition of precarious for the purposes of section 117B in the context of private life. This is a case much more predicated upon family life between the appellant and his spouse who cannot reasonably be expected to leave the UK. This issue has been addressed in Strasbourg authorities. In **Rodrigues da Silva v Netherlands** [2007] 44 EHRR 34 the Court said [39]:

> "Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of

Art.8."

9. Although the Judge has not considered the Strasbourg test expressly it is clear that he has applied it properly. At [31] he found that the appellant and his spouse were entitled to consider that, as he had leave to remain and they should be able to meet the relevant Rules, persistence of family life in those circumstances was not done at a time when his immigration status could be properly described as precarious.

10. The Judge has properly and fully given weight to the fact that the public interest is set out in the Rules [32]. The Judge expressly acknowledged that the fact that the appellant could meet the substantive financial requirements of the Rules was insufficient and no more than a factor to take into account [29].

11. The submission that the Judge failed to consider the circumstances relevant the SSHD's alleged curtailment of the appellant's leave is a mere disagreement with the Judge's factual findings. The case was adjourned to get more evidence on this issue [6]. At the adjourned hearing the SSHD accepted that no curtailment letter had been sent and therefore the appellant's marriage application was made when he had extant leave [13]. In those circumstances the Judge was entitled for the reasons he provided to treat the appellant as having extant leave when he made his marriage application.

Decision

12. The decision of the First-tier Tribunal did not involve the making of a material error of law and I do not set it aside.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date: 26 August 2015