



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/03522/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3 October 2018**

**Decision & Reasons Promulgated  
On 19 October 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR KEMO JALLOW  
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

**Representation:**

For the Appellant: Mr L Tarlow, Home Office Presenting Officer  
For the Respondent: Mr S A Salam, Salam & Co Solicitors

**DECISION AND REASONS**

1. This is an appeal against the decision of Judge Cohen in which he allowed the appeal of the Claimant against the decision of the Secretary of State to refuse his application for leave to remain in the United Kingdom.
2. The application under appeal was refused on 7 February 2017. The Claimant exercised his right of appeal to the First-tier Tribunal. The appeal came before Judge Cohen on 24 April 2018 and was allowed on human

rights grounds. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Andrew on 14 August 2018 in the following terms

I am satisfied that there are arguable errors of law in the decision. The Judge allowed the appeal under EX1 but accepted the Appellant had used deception. He did not consider suitability. Further he failed to make any findings on the Appellant's claimed relationship with his partner. He also failed to consider whether alternative treatment for the Appellant's HIV would be available in the Gambia.

## **Background**

3. The history of this appeal is detailed above. The Claimant (the Appellant in the appeal to the First-tier Tribunal) is a citizen of Gambia born on 16 July 1965. He claims to have arrived in the United Kingdom in December 1998 with a visitor's visa valid for 6 months. He remained in the United Kingdom unlawfully and on 14 May 2007 attempted to claim indefinite leave to remain using forged papers. Having been arrested as an overstayer the Appellant claimed asylum. His claim was refused. Thereafter applications were made for leave to remain on family and private life grounds and these applications were also refused. The application now under appeal was made on 7 December 2016.
4. The basis of the refusal was, essentially, two-fold. Firstly, the Secretary of State considered that the Claimant had submitted fraudulent documents in connection with a previous application and had an outstanding debt to the NHS and therefore failed to meet the suitability requirements of the Immigration Rules. Secondly the Secretary of State considered that the Claimant had failed to show that his relationship with his claimed British citizen partner was genuine and subsisting and therefore failed to meet the eligibility requirements of the Immigration Rules. The Secretary of State considered exceptional circumstances outside the terms of the Immigration Rules but considered that the Claimant had not shown that medical treatment for his health conditions would not be available to him in Gambia.
5. The appeal came before Judge Cohen and was allowed. The Judge found firstly that there were insurmountable obstacles preventing the Claimant and his wife from enjoying family life together in Gambia and therefore that the Appellant met the requirements of paragraph EX of Appendix FM and secondly that in view of the ill health of the Appellant and his wife there were exceptional circumstances and as a result that the appeal should succeed on Article 8 grounds.

## **Submissions**

6. At the hearing before me Mr Tarlow appeared on behalf of the Secretary of State and Mr Salam represented the Claimant. No rule 24 response was filed.
7. Mr Tarlow relied on the grounds. It was quite clear that the Judge had purported to allow the appeal under paragraph EX.1 of Appendix FM even though the Appellant did not meet the suitability requirements of the Immigration Rules. He made no findings on the relationship between the Appellant and his wife even though this was clearly in dispute. He did not consider the availability of suitable alternative treatment in Gambia. These were clear errors of law and the appeal needed to be dealt with again by the First-tier Tribunal.
8. For the Claimant Mr Salam said that the suitability requirements of paragraph S-LTR of Appendix FM recognised three different classes of suitability. The first refers to “will be refused”, the second “will normally be refused” and the third “may be refused”. The Claimant came within the third category so refusal under the suitability requirements was not mandatory. In any event the Judge had allowed the appeal on human rights grounds. He found at paragraph 9 that the Claimant and his wife had a strong relationship. The Claimant’s bundle contained evidence of their relationship by way of a marriage certificate and other documents showing cohabitation since 2007. The Judge satisfied himself that treatment would not be available in Gambia.
9. I said that I was satisfied that the Judge had materially erred in law and I gave an extempore decision allowing the Secretary of State’s appeal and remitting the matter to the First-tier Tribunal.

## **Decision**

10. I am satisfied that the decision of the First-tier Tribunal contains material errors of law. In particular I am satisfied that the First-tier Tribunal Judge, when allowing the appeal on human rights grounds, because he was satisfied that the Appellant met the requirements of paragraph EX1 of Appendix FM of the Immigration Rules, overlooked the fact that the Claimant failed to meet the suitability requirements of paragraph S-LTR 4.2. Indeed, the Judge finds, at paragraph 18 that the Appellant does not meet the suitability requirements. Paragraph EX contains exceptions to eligibility requirements but not to suitability requirements. Mr Salam’s submission that the Claimant fell into a “may be refused” category rather than a “will be refused” category given that the Judge made the finding that the Claimant did not meet the suitability requirements cannot be sustained.
11. I am also satisfied that the Judge erred when he allowed the appeal on human rights grounds on the basis of the difficulties which the Claimant’s

partner would face if she had to live in Gambia. It is clear that the relationship between the Claimant and his partner was not accepted by the Secretary of State. This is a matter which the Judge does not deal with at all in his decision. He makes the decision as if the relationship was accepted. He refers to the relationship in accordance with the Claimant's witness statement. He overlooks the fact that there was no witness statement from the Claimant's partner. He overlooks the fact that the Claimant's partner was not in attendance in court. If it was implicit in his decision that he made a finding that the relationship between the Claimant and his wife was genuine and subsisting then he still erred in law because he failed to give any reasons whatsoever for reaching such a decision, whether expressed or implicit.

12. I also find that the Judge erred in law by deciding that treatment for the Appellant's condition was not available in Gambia when there was no expert evidence of any kind on the Appellant's behalf to show the lack of availability of a suitable alternative treatment for his condition in the Gambia.
13. So, for all those reasons I find that the decision of the First-tier Tribunal Judge is unsafe, and the appeal of the Secretary of State is allowed. I agree with Mr Tarlow that this is a matter which should properly be remitted to the First-tier Tribunal for rehearing afresh because it is important that, from the Claimant's point of view and from the Secretary of State's point of view, that the situation is clear and if the matter goes back to the First-tier Tribunal then full evidence can be put forward if appropriate from the Claimant's wife, from medical experts and of course whatever other evidence that the Claimant and the representatives think appropriate.
14. No anonymity direction is made.

**Summary of decision**

15. The appeal of the Secretary of State is allowed. I set aside the decision of the First-tier Tribunal and remit this matter to the First-tier Tribunal to be reheard with no findings preserved.

Signed

Date: 16 October 2018

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J F W Phillips  
Deputy Judge of the Upper Tribunal