Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05455/2014

THE IMMIGRATION ACTS

Heard at: **Columbus House, Newport** **Determination Promulgated**
On: **22 October 2014** **On 30 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GIDOM BAH
(anonymity direction not made)

Respondent

Representation

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms E Rutherford, Counsel instructed by Premier Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Britton in which he allowed the appeal of Mr Bah, a citizen of Gambia, against the Secretary of State's decision to refuse to grant leave to remain on the basis of his family and private life and to remove the him from the United Kingdom. I shall refer to Mr Bah as the Applicant, although he was the Appellant in the proceedings below.

2. The decision under appeal was made on 13 January 2014 by reference to paragraph 276ADE and Appendix FM of the Immigration Rules (HC395) and Article 8 ECHR. The Applicant exercised his right of appeal to the First-tier Tribunal. His appeal included additional grounds claiming that his removal would be in breach of his rights protected by the Refugee Convention. This is the appeal which came before Judge Britton on 24 July 2014 and was dismissed by virtue of the Refugee Convention and the Immigration Rules but allowed by reference to Article 8 of the Human Rights Convention. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Fisher on 28 August 2014 and on 5 September 2014 the Applicant submitted a rule 24 response.

3. At the hearing before me Mr Richards appeared to represent the Secretary of State and Ms Rutherford represented the Applicant and submitted an indexed bundle including a written skeleton argument.

Background

4. The facts, not challenged, are that the Applicant was born in Gambia on 1 January 1962. He came to the United Kingdom with leave to enter as a visitor on 23 November 2003 and following the expiration of his leave remained here unlawfully. The Applicant met his partner Susan Gillum in 2006 and after deciding that their relationship was to be lasting they moved in together. Ms Gillum has four adult children, five grandchildren and three step-grandchildren. None live with the Applicant and Ms Gillum but they have a close relationship with all of them particularly their grandchildren Mason who has cerebral palsy and his brother Leo. The Applicant applied for leave to remain on the basis of his relationship with Ms Gillum on 22 December 2011 and after this application was refused on 21 May 2012 further representations were made which were rejected by the decision made on 13 January 2014.

5. In allowing the Applicant's appeal by virtue of Article 8 ECHR the Judge found that he did not meet the requirements of the Immigration Rules (paragraph 44) and dismissed his claim for asylum and humanitarian protection finding (paragraph 43) *"… he had no intention of returning to Gambia. He has no regard for the immigration laws of this country, has deceived the immigration authorities on entry to the country, and told a pack of lies with regard to his asylum claim."*

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6. The Applicant does not challenge the First-tier Tribunal's decision to dismiss his appeal by virtue of the Immigration Rules and the Refugee Convention.

Submissions

7. On behalf the Secretary of State Mr Richards relied on the grounds of appeal to the Upper Tribunal and referred to the decisions in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) and Nagre v SSHD [2013] EWHC 720 (Admin). He said that despite MM (Lebanon) [2014] EWCA Civ 985 both remained good law. The Judge found that this was an exceptional case. Seen in the light of paragraph 43 of the decision this conclusion is irrational. There is nothing exceptional or compelling about the Applicant being in a genuine and subsisting relationship. The Judge has conducted no meaningful balancing exercise. He has not weighed the public interest into the equation. Indeed the only exceptional factor identified in the decision is the extent of the Applicant's abuse of the immigration system. The error is clear.

8. For the Applicant Ms Rutherford said that the decision needs to be looked at as a whole. The positive factors referred to in paragraph 41 and 42 of the decision need to be weighed against the negative factors contained in paragraph 43. Although the Judge does not expressly say that he is doing this it is clear that this is how he has reached his decision. This is not irrational. Referring to her skeleton argument Ms Rutherford said that whilst the findings are short they address the pertinent issues and were findings that it was open to the judge to make. In particular the judge found that Ms Gillum could not be expected to relocate to Gambia.

9. I reserved my decision. In the event that an error of law was found both representatives agreed that I should remake the decision taking into account the evidence submitted to the First-tier Tribunal and that in these circumstances there would be no need to call further evidence.

Error of law

10. In my judgment the decision of the First-tier Tribunal discloses clear and material errors of law. Having found that the Applicant was not a refugee (paragraph 38), that the Applicant did not qualify for humanitarian protection (paragraph 39), that the Applicant did not qualify for Article 3 protection (paragraph 40) and that the Applicant did not meet the requirements of the Immigration Rules (paragraph 44) the Judge reaches a conclusion that the removal of the Applicant would not be proportionate (paragraph 42).

11. The determination does not examine the Immigration Rules despite the refusal letter accepting that the Applicant met the suitability and relationship requirements. The finding that the Applicant does not meet the requirements of the Immigration Rules (paragraph 44) is made without

a reference to those rules. The determination fails to give any reasoned consideration of why it was necessary to go outside the family and private life provisions of the Immigration Rules. Despite the word 'exceptional' being used, there is no explanation of what makes this an exceptional case. Despite the finding that it would not be proportionate to return the applicant to Gambia there is no indication of the factors taken into consideration in the proportionality balance. Indeed to the extent that any rationality can be extracted from the single sentence of paragraph 42 it is the Applicant's partner's (referred to as the sponsor) situation rather than that of the Applicant that appears to be considered exceptional. The final sentence of paragraph 41, being a finding that it would be unreasonable to expect the 'sponsor' to go and live in Gambia appears to be a reference to paragraph Ex.1 of Appendix FM whereas the last words of paragraph 42 finding as they do that it would not be proportionate to return the Applicant to Gambia for him to make an application to return to the United Kingdom appears to be a conclusion based on the Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 principles.

12. Looking at the determination as a whole, as Ms Rutherford invited me to do the inconsistency of approach between paragraphs 42 and 43 is immediately apparent. Whereas paragraph 42 finds this to be an exceptional case where it would not be proportionate to return the Applicant to Gambia paragraph 43 finds that the Applicant had no intention of returning to the Gambia, has no regard for the immigration laws of this country, has deceived the immigration authorities and has told a pack of lies with regard to his asylum claim. In this respect it is essential when weighing matters in the proportionality balance to consider the positive and negative factors in that balance and to explain why the one outweighs the other. The public interest will normally be manifested by factors on negative side of the balance whilst the extent of family and private life established will be on the positive side. In this case the Judge raises what appear to be highly relevant issues to the public interest and is condemnatory of the Applicant's conduct yet then goes on to find his removal to Gambia simply to make an application to return disproportionate. The inadequacy of reasoning in this respect is manifest and without such reasoning the rationality of the decision is impugned. I set aside the decision of the First-tier Tribunal.

Remaking the decision

13. In remaking the decision the first aspect to consider is whether there are sufficient reasons to conduct an Article 8 exercise. The refusal letter does not help greatly in this respect in that it is not immediately clear how the Secretary of State has arrived at her decision. Matters need to be inferred. After reciting the Applicant's immigration history the Secretary of State

goes on to consider the suitability requirements (paragraph 8 – 9) and concludes that the Applicant meets those requirements. The partner relationship aspects of the eligibility requirements are then considered (paragraphs 10 -12) and the conclusion reached that the Applicant satisfies the eligibility criteria. For some reason the letter goes on to consider the parental relationship eligibility requirements (paragraphs 13 – 14) and reaches the obvious but seemingly irrelevant conclusion that those requirements are not satisfied. The financial requirements are not mentioned, presumably because it is accepted that with the Applicant's partner earning around £23,000 per year these are met. The immigration requirements are not mentioned and it must be implicit here, and this is not challenged by the Applicant, that these are not met. The Applicant accepts that he is not lawfully present in the United Kingdom. The Secretary of State goes on to consider Ex.1 and decides that there are no insurmountable obstacles to the Applicant's partner joining him in Gambia.

14. The evidence before the First-tier Tribunal shows that the Applicant's partner is 46 years old and in full time employment. She has grown up children in the United Kingdom and infant grandchildren one of whom has a significant disability. She has never left the United Kingdom. On the one hand it is easy to see reasons why she would not wish to leave the United Kingdom but on the other having voluntarily entered into a relationship with a person from another country who had no lawful basis to live in the United Kingdom it is difficult to see why it would be unreasonable to expect her to do so should her partner not be able to stay in the United Kingdom. The Applicant's partner is neither elderly nor infirm. Her lack of previous travel experience does not make it unreasonable for her to travel to live with the person she has chosen to spend her future with. None of her children live at home. Her grandchildren can visit her in the Gambia and she can visit them in the United Kingdom. Her grandchild who has cerebral palsy lives with and is cared for on a day to day basis by his parents.

15. There is in my judgement little if any arguable reason to look at the Applicant's status outside the terms of the Immigration Rules particularly as the rules appear to provide a complete code in that, it being accepted that he meets the suitability and relationship requirements the only outstanding factor is the immigration requirement and he can, in effect, satisfy this, by making an entry clearance application from Gambia. There is absolutely nothing in the evidence before the First-tier Tribunal to suggest that a short term separation to enable the Applicant to travel to Gambia would cause hardship to anyone. The Chikwamba principles do not apply unless and until Article 8 is separately considered.

16. In the alternative and, if it were necessary to turn to Article 8, then the issue at the time of the decision and, on the evidence before more still pertaining, is only whether it is reasonable to expect the Applicant to return to make an entry clearance application In this respect the balance to be struck is the Chikwamba principles against the Applicant's immigration history. Here it is necessary to return to the findings the First-tier Tribunal. The Applicant had no intention of returning to Gambia. He has no regard for the immigration laws of this country, has deceived the immigration authorities on entry to the country, and told a pack of lies with regard to his asylum claim. He stands on the proportionality scales with a heavy weight against him on the public interest side of the balance. It is not in the public interest for those who seek to circumvent the Immigration Rules to be allowed to remain simply because they have found a partner in this country whom they can return to join after a brief absence to make a proper entry clearance application. There can be little doubt that the weight to be given to the public interest has moved since Chikwamba and MA (Pakistan) [2009] EWCA Civ 953. This is not to say that those principles have ceased to have effect but where the failure to meet the requirements of the Immigration Rules is easily remediable for an applicant who meets all the requirements of the Immigration Rules save the one requiring him to return to make an entry clearance application, where there are no children involved, where there is a partner who could if she wished travel with him and where that person has a poor immigration history it is difficult to see that it is disproportionate to expect that applicant to return to make that application.

Summary

17. The decision of the First-tier Tribunal involved the making of a material error of law. I set aside that decision.

18. I remake the decision by dismissing the Applicant's appeal both by virtue of the Immigration Rules and Article 8 of the Human Rights Convention.

Signed: **Date: 22 October 2014**

J F W Phillips
Deputy Judge of the Upper Tribunal