Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42736/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 September 2014	**On 02 October 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Rene Jones
[No anonymity direction made]

Claimant

Representation:

For the claimant: Ms S Naik
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Rene Jones, date of birth 14.10.80, is a citizen of Gambia.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Newberry, who allowed the claimant's appeal against the decision of the respondent to refuse his application for leave to remain in the UK as the spouse of a British citizen. The Judge heard the appeal on 24.2.14.

3. First-tier Tribunal Judge Ford granted permission to appeal on 16.5.14.

4. Thus the matter came before me on 3.7.14 as an appeal in the Upper Tribunal.

5. In my decision promulgated on 9.7.14, I found that there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Newberry should be set aside in relation to the findings and conclusion on article 8. As there was no cross appeal against the decision in respect of the findings dismissing the appeal on immigration grounds, that part of the decision must stand. I adjourned the re-making of the decision in the appeal to allow the opportunity for written submissions by either party and excused attendance, on the basis that both parties agreed that there was no need to adduce further evidence.

6. Both parties were represented when the resumed hearing was listed before me on 11.9.14 and made further submissions. Having heard submissions I reserved my decision, which I now give.

7. It is unnecessary to repeat here the reasons for which I found an error of law in relation to the article 8 part of the decision of the First-tier Tribunal, but have annexed that decision to this determination.

8. The relevant background can be summarised as follows. The claimant came to the UK as a student in 2000. His leave was extended to 2003 but thereafter he remained in the UK without any valid leave, i.e. as an overstayer. In 2009 he was convicted of possession of a false instrument with intent (a false birth certificate) and given a suspended sentence of imprisonment, but there was no attempt to remove him. A number of subsequent applications for leave to remain, on grounds of long residence and article 8 ECHR, were refused. In December 2012 he made an application for leave to remain as the spouse of a British citizen, which was refused in March 2013. He pursued judicial review of that refusal and the Secretary of State was invited to make a further decision, effectively giving the claimant a right of appeal. That further decision, made on 1.10.13, was to refuse his application and it was the appeal against that decision which came before Judge Newberry on 24.2.14.

9. The claimant is now the father of a British citizen child, born on 21.8.14. I therefore must have regard to the welfare and best interests of the child under section 55 and bear in mind that neither the child nor the mother can be required to leave the UK. As this is an in-country application, if I proceed to consider article 8 ECHR outside the Rules, I must also take the best interests of the child as a primary, though not necessary paramount, consideration.

10. At the First-tier Tribunal the claimant's represented apparently conceded that the appellant could not meet the requirements of the Immigration Rules.

11. As the finding of the First-tier Tribunal that the claimant did not meet the requirements of the Immigration Rules has not been appealed I must proceed on the basis that for one reason or another, either as conceded or found at the First-tier Tribunal that the claimant does not meet either Appendix FM or paragraph 276ADE.

12. In any event, there has been no issue in any event in relation to 276ADE, as it is pretty obvious that the claimant cannot demonstrate that he has no ties to his home country, including social, cultural and family.

13. In relation to Appendix FM, the Secretary of State considered that the claimant does not meet the suitability requirements of S-LTR 1.6 because of his criminal conviction and his presence is not conducive to the public good because his conduct (including his conviction), character, associations, or other reasons make it undesirable to allow him to remain in the UK. There were other reasons given for not meeting the requirements of Appendix FM for leave to remain as a partner, including that as he was in the UK with no lawful leave then he did not meet the immigration requirements of E-LTRP 2.2 and EX1 did not apply as there were not insurmountable obstacles to continuing family life with that partner outside the UK.

14. Ms Naik did not argue that I should now consider whether the claimant meets either S-LTR or E-LTRP, even though EX1(a) might be argued in relation to the appellant's child.

15. For completeness, I indicate that I am satisfied that the refusal under the suitability requirements was entirely justified. The matter for which he was convicted was a serious offence, possession of a false birth certificate, used as identification in order to illegally obtain employment, and which offence seriously undermines immigration control. On the other hand, I take into account that he received a suspended sentence and no action was taken at the time to remove him from the UK on the basis that his presence was not conducive to public good. I take into account the finding of Judge Newberry at §24 of the determination that the claimant was genuinely sorry for his actions and whilst the birth certificate falsely suggested birth in the UK, the identity and date of birth were, apparently, correct. I'm not satisfied that amounts to any significant mitigation at all. I take into account that his conviction would now be regarded as spent and how long ago he was sentence, in 2009, and the length of the sentence at 40 weeks, suspended. It is also relevant to this consideration under this heading that the claimant was unlawfully present in the UK. He should have left in 2003 but did not do so. A series of applications, all of which were refused, demonstrates that he is determined to remain in the UK.

16. The first question I have to answer is the same as that raised in the Secretary of State's grounds of appeal to the First-tier Tribunal, whether there is any justification for considering article 8 ECHR private and family life outside the Immigration Rules, on the basis that there are compelling circumstances insufficiently recognised in the Rules and which may render the decision of the Secretary of State unjustifiably harsh.

17. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the article 8 general law was described as a sterile question, as either way the result should be the same; what matters is that

proportionality balancing exercise is required to be carried out. The Court of Appeal observed that it was inclined to the view that insurmountable obstacles (the test under exception EX1) did not literally mean obstacles which it is impossible to surmount, but implied a reasonableness test. In other words, a proportionality test is required whether under the new rules or article 8. MF (Nigeria) was followed in Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC).

18. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) the Upper Tribunal set out, inter alia, that on the current state of the authorities:

> (b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);
>
> (c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

19. It is illustrative that in Gulshan the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Pakistan with his wife who was seeking leave to remain as his spouse. The panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan.

20. In Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal also held:

(i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.

(ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.

(iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

(iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.

(v) It follows from this that any other rule which has a similar provision will also constitute a complete code;

(vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

21. These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. That is an approach consistent with the Court of Appeal in MF (Nigeria) and Huang. Where an area of the Rules does not have an express mechanism, such as found in deportation appeals, the approach should be that after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

22. I further note that the suitability requirement of Appendix FM is itself an assessment of proportionality. It is also arguable that 276ADE is such a complete code, since at formulated for application to this case it requires an assessment as to whether if the claimant has not completed at least 20 years lawful residence he has lost all ties with his home country, including social, cultural and family. This is in effect an exceptional circumstances or proportionality assessment, making provision for leave to remain where a person does not meet the long residence requirements but has no remaining ties with his home country, including social, cultural and family. However, the crucial issue in this case is not any stand alone private life claim, but the claimant's family life circumstances.

23. I found in my error of law decision that the First-tier Tribunal was in error to go on to consider the claimant's circumstances outside the Immigration Rules under article 8 ECHR, without having identified any compelling circumstances to justify doing so.

24. I have however considered afresh whether there are such compelling circumstances in this case insufficiently recognised under the Immigration Rules. It is appropriate to do so not least because the claimant is now the father of the recently born child. In doing so, I have taken into account all those factors urged upon me by Ms Naik and as are disclosed in the papers before me.

25. I take into account factors referenced in the First-tier Tribunal decision, including that all of the claimant's family are now in the UK, including his mother and he has no remaining family in the Gambia. His wife and child are British citizens and his wife was born, raised and educated in the UK. She has no connection with the Gambia She is close to her family, leaving nearby. She is in the process of qualifying

as a lawyer and is in full-time employment. She relies on the claimant to care for their child whilst she pursues her career.

26. I am also required to take account of section 117B of the 2002 Act that:

> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

27. In the circumstances, I accord little weight to the claimant's relationship formed at a time when he was in the UK unlawfully and his immigration status was precarious.

28. Without having to repeat them, I also have to take account of those matter set out above relating to the claimant's suitability, including his conduct and criminal conviction. He remained in the UK unlawfully for a number of years. He has no legitimate expectation to be able to remain simply because that is his desire or because of his relationship and child.

29. I do not accept Ms Naik's submission that had the claimant been able to reach consideration of EX1 he would have been able to demonstrate that there were insurmountable obstacles to continuing family life outside the UK, or that it would be a disproportionate, unjustifiably harsh and perverse outcome. Insurmountable involves an assessment of all the circumstances. In Gulshan it was held that the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount; they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh. There may be difficulties and some hardship in relocating, but if they are such that can be overcome, the obstacles are not insurmountable. Whilst the partner has never visited the Gambia and is established with work and family in the UK, and all the other attendant circumstances as referenced elsewhere in this determination, I am not satisfied that there is sufficient evidence to demonstrate that there are insurmountable obstacles. Should they choose to accompany the claimant, and that is a matter for them, their child is young and will not appreciate any change of circumstances. The sponsor will have the support of the claimant returning to his

own country. She will be able to use the qualifications obtained in the UK and her legal training will no doubt put her in a more favourable position than many others in such circumstances.

30. I have taken into account the claimant's marriage to a British citizen and that he is the father of a British citizen child. However, both that relationship and the conception and birth of that child took place at a time when he had no lawful status in the UK and his immigration status was precarious. He does not become entitled to remain in the UK simply because he has fathered a child here.

31. I bear in mind that the best interests of a child are generally considered to be raised by both parents, but best interests is not a trump card and has to be considered in the context of the facts of the case and in the evidential round.

32. I also bear in mind 117B(6) that in a non-deport case the public interest does not require removal of the claimant where he has a genuine and subsisting parental relationship with a child and it would be unreasonable to expect the child to leave the UK. In effect, this is identical to that under EX1(a), with a qualifying child meaning either a British citizen or a child who has lived in the UK for 7 years.

33. However, I have to consider whether the public interest requires the claimant's removal where, as I accept, he has a genuine and subsisting relationship with his child. This involves an assessment as to whether it would be reasonable to expect the child to leave the UK. In making such an assessment it cannot be the case that it is never reasonable to expect a British citizen child to leave the UK, otherwise that would have been provided for in the statute. Instead, what is required is an assessment of all the circumstances.

34. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197, the Upper Tribunal gave guidance on decisions affecting children, highlighting that very young children are focused on parents and that 7 years from age 4 is likely to be more significant than the first 7 years of life:

> "Decisions affecting children
>
> "(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:
>
> i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
>
> ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be

> inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
>
> iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
>
> v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases."

35. For the reasons set out herein, I am not satisfied that any of the circumstances of the claimant, his partner and child could properly be described as compelling or in any way exceptional. Neither do I find the decision of the Secretary of State unjustifiably harsh.

36. As stated the claimant had no right to be in the UK. He should have left a long time ago. I place no store on his many attempts to seek to remain as evidence of a desire to regularise his status; I regard such as a determined attempt to delay removal and prolong his stay. He has now formed a relationship with a British citizen and has a British child. Does that mean that he should now be allowed to stay? Are his circumstances compelling and insufficiently recognised in the Immigration Rules so that removal would be unjustifiably harsh? Clearly each case must be determined on its own facts and I have given anxious scrutiny and consideration to the facts of this case. It is relevant that the claimant has not been able to meet the requirements of the Immigration Rules for leave to remain. Article 8 is not intended to be a shortcut to compliance with the Rules. There is no entitlement to remain in the UK just because the claimant and his partner wish to settle together here. Appendix FM and paragraph 276ADE are the Secretary of State's response to article 8 private and family life claims and are intended to be a complete code. It seems to be that the Immigration Rules recognise such situations as that of the claimant, notwithstanding that he has no legal basis for remaining and no legitimate expectation of being able to do so. The Rules provide a route to remain which involves an assessment of the circumstances of such a person. There is provision for consideration of the claimant's particular circumstances within those Rules. However, he has a criminal conviction for a serious offence and taken with his illegal presence in the UK, makes it undesirable to allow him to remain in the UK. He thus failed at the suitability hurdle and does not meet the requirements of the Rules.

37. The public interest in the claimant's removal is stronger in this case because of the criminal conviction and the nature of the offence, together with his long illegal stay in the UK. By section 117B, the countervailing interests of the claimant in respect of his relationship with his partner and any private life are reduced and carry little weight when he has no legal status and his immigration status is precarious. I have

however taken account herein of the reasonableness of expecting his child to leave the UK to accompany him to the Gambia, and have found that in all the circumstances, and for the reasons given, that it would not be unreasonable.

38. On the facts of this case and assessing the factors set out above, taking the whole matter in the round as a whole, I find that there are here no compelling circumstances insufficiently recognised in the Immigration Rules that would justify granting leave to remain outside the Rules under article 8 ECHR on the basis that the decision of the Secretary of State is unjustifiably harsh.

39. Even if I found that there were compelling circumstances and went on to consider the claimant's article 8 rights to respect for private and family life under article 8 ECHR outside the Rules, applying the five Razgar steps, I would have reached the conclusion that the decision of the Secretary of State is not disproportionate.

40. Whilst there is family life that would be interfered with by the claimant's removal such as to engage article 8, the crucial issue, of course, is the proportionality balancing exercise between the rights of the claimant and his family on the one hand and on the other the legitimate and necessary aim of protecting the economic well-being of the UK through the application of Immigration controls. I have taken into account all those factors set out above, including placing little weight on the relationship formed by the claimant with his partner when he had no lawful status in the UK and his immigration status was at best precarious. I take into account that he has a genuine and subsisting relationship with his child, a British citizen, and take into account all those factors that relate to the British nationality and residence of that child and the mother. However, there are very significant factors weighing in the balance against the claimant and in favour of the public interest in ensuring his removal, not least of which is his criminal record and the particular offence which tends to undermine immigration control.

41. Whilst it would obviously be desirable for the child to be raised by the claimant and his partner, on the facts of this case I do not consider it to be unreasonable to expect that family relationship and for the child to leave the UK and accompany the claimant to the Gambia.

42. It is of course a matter for the child's mother and the claimant to decide as to whether she and the child will follow. However, that they cannot be required to leave is not the same thing as a finding that it would be unreasonable to expect the child to leave the UK. As stated, I have found that it would not be unreasonable to expect a small child with no conception of life outside the family home to accompany the claimant and his spouse, should they choose to do so.

Conclusion & Decision

43. For the reasons set out above, I find that the claimant has failed to demonstrate that removal from the UK would infringe his article 8 rights to respect for private and family life. As stated above, there was no cross-appeal against the decision

dismissing the appeal on immigration grounds and that part of the decision of the First-tier Tribunal must also stand.

The appeal is dismissed on immigration grounds.

The appeal is dismissed on human rights grounds.

Signed: Date: 29 September 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: the appeal has been dismissed.

Signed: Date: 29 September 2014

Deputy Upper Tribunal Judge Pickup