Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/06972/2014**

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Decision and Reasons Promulgated**
On 8 October 2015	**On 9 October 2015**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

PAPA ABDOULAYE GUEYE

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mrs Gueye, the Sponsor
For the Respondent: Mr McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a decision of First-tier Tribunal Judge Place dated 25 September 2014 in which she dismissed the appellant's appeal against a decision to refuse him entry clearance as a spouse under the Immigration Rules.

2. Judge Place accepted that the position of the appellant's spouse (the sponsor) aroused considerable sympathy. This was a reference to the

sponsor having contracted a serious infection when she visited the sponsor in Senegal, which has required surgery and on-going medical treatment. Having considered the evidence before her the judge accepted that the marriage between the appellant and sponsor is genuine and subsisting. There is considerable detailed cogent evidence available to support this finding. The judge however noted that the financial requirements were not met and the appellant did not have a certificate to show that he had passed the relevant English language test. The judge also found that the SSHD was correct to make the decision she did under paragraph 320(11) of the Immigration Rules. The judge dismissed the appeal, and although she did not say so, it appears clear that the appeal was dismissed under the Immigration Rules.

Error of law

3. At the hearing before me the sponsor agreed that the judge was entitled to dismiss the appeal under the Rules. The sponsor however relied upon the observations made by Judge Zucker when granting permission to appeal. He said: *"the issues raised in the grounds are capable of going to Art 8 ECHR, which arguably the Judge did not adequately address"*.

4. Mr McVeety agreed with me that the Judge did not address Art 8 in her decision at all. This is curious because the Judge expressly said at [7] that there was an argument based upon Art 8 before her. The sponsor prepared the grounds of appeal to the First-tier Tribunal. These went into considerable detail as to why the appeal should be allowed outside of the Rules in light of compassionate factors. Whilst Art 8 was not expressly raised I am satisfied that the issue was clearly before the judge and she was obliged to address it. First, the judge herself noted the argument based upon Art 8 had been made. Second, given that the appellant was unrepresented, the grounds of appeal prepared by the sponsor could properly be interpreted as a submission that the appellant relied upon Art 8 outside the Rules. The Court of Appeal recognised in R (Zenovics) v SSHD [2002] EWCA Civ 273, [2002] INLR 219 that elementary fairness requires the Tribunal to give more latitude to grounds that have been drafted without legal representation.

5. It follows that in failing to address Art 8 the judge has committed an error of law.

Re-making the decision

6. Both Mr McVeety and the sponsor were content for me to remake the decision on Art 8. By paragraph 7.2 of the relevant practice statement for appeals on or after 25 September 2012, I must be satisfied that:

> ”the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 it is appropriate to remit the case to the First-tier Tribunal.”

7. I was satisfied that any further fact finding was likely to be minimal and decided that it was proportionate to remake the decision myself. Both Mr McVeety and the sponsor also agreed that the judge’s findings in relation to the Rules should be preserved.

8. As the appellant was not legally represented I explained the relevant legal framework to the sponsor and heard evidence from her. Mr McVeety accepted the credibility of the evidence and did not wish to cross-examine the sponsor. After hearing from both Mr McVeety and the sponsor I indicated that I would be dismissing the appeal on Art 8 grounds.

Legal framework

9. Section 85(5) of the Nationality, Immigration and Asylum Act 2002 provides that where, as here, the appeal is against a refusal of entry clearance the Tribunal may consider only the circumstances appertaining at the time of the decision (albeit this can be done by way of post-decision evidence). This is important for this appeal. The decision to refuse entry clearance was taken some time ago and is dated 29 April 2014. The sponsor sought to emphasise that her medical condition has significantly worsened since then such that it will be very difficult for her to return to Senegal to live there, although she has visited and intends to visit again. I can only consider post-decision evidence to the extent that it is relevant to circumstances appertaining to 29 April 2015.

10. The correct approach to whether or not entry clearance should be granted outside the Rules is set out in SSHD v SS (Congo) and others [2015] EWCA Civ 387 and I have approached this case with that guidance in mind. The appellant could not meet the Rules as at the date of decision for the reasons set out by Judge Place. It is still necessary to give individualised consideration of the case to determine whether the interests of the individuals (both the appellant and sponsor) are of a particularly pressing nature. The appropriate general formulation for this category is that such cases will arise where an applicant for entry clearance can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require such a grant (see Richards LJ at [40 and 53] of SS (Congo)). This is a fairly demanding test (see Richards LJ at [41]).

11. I have considered all the relevant considerations including the factors set out at section 117B of the Nationality, Immigration and Asylum Act 2002. I acknowledge that it is in the public interest that persons who seek to enter the UK are financially independent. I accept that

on the judge's findings the relevant financial threshold may not have been met but it is likely as at the date of decision that the couple would be financially independent. I am prepared to assume in the appellant's favour that he can speak English although he did not have the relevant certificate at the date of decision. However as pointed out in AM (S 117B) Malawi [2015] UKUT 0260 (IAC) an applicant can obtain no positive right to remain or enter from sections 117B (2) or (3), whatever the degree of his fluency in English or the strength of her financial resources. Little weight should be given to a relationship formed that is established when the person is in the UK unlawfully – section 117B(4)). All the relevant circumstances must be viewed in the round – Dube (ss117A-D) [2015] UKUT 90 (IAC). Having considered all the relevant evidence I make the findings set out below.

12. The appellant and the sponsor have a genuine and subsisting relationship that began in June 2012 in the UK. They cohabited until the appellant returned to Senegal in early 2014, where they got married. They have a family life together and wish to develop that family life in the UK. The UK must act in a manner to allow ties between close family members to develop normally.

13. The relevant family life was established with knowledge that the appellant was unlawfully in the UK as an overstayer and was therefore precarious. Whilst section 117B(4) makes it clear that little weight should be given to such a relationship, it is to the appellant's credit that rather than make an in-country application he returned to Senegal to make an application for entry clearance.

14. Judge Place considered the respondent's decision under 320(11) to be correct. The appellant was granted a work permit in 2007 but overstayed his leave. He was 'encountered' by the authorities on two occasions regarding his immigration status. He was required to leave in November 2011 but did not comply and absconded. He was again encountered in October 2012 but only chose to leave the UK in early 2014. It has been explained that the appellant stayed in the UK because he had met the sponsor and they wished to be together. This does not properly address why he absconded in November 2011 before he met the sponsor and why, after meeting the sponsor he did not seek to regularise his immigration status without delay. Judge Place found that the appellant contrived in a significant way to frustrate the intentions of the Immigration Rules by accepting the respondent's reliance on 320(11) as appropriate. Whilst I accept that the appellant left the UK in 2014 in order to seek to regularise his immigration status and respect the Immigration Rules, he spent a lengthy period of time before this acting in complete disregard of the Immigration Rules.

15. The sponsor's illness as at the date of decision is a compassionate factor that evokes sympathy for her (as noted by both the duty judge

who ordered expedition and Judge Place [8]). The sponsor has explained with great passion and clarity how much she would be assisted by having her husband to help and support her through that illness. Unfortunately there is little clear medical evidence regarding the appellant's illness at the relevant time but I am prepared to accept that she contracted a parasitical infection in Senegal in early 2014, which necessitated surgery and on-going medical treatment. I note that the sponsor has loving family and friends in the UK to turn to for support. There is no cogent evidence to establish that at the relevant time family life could not be developed in Senegal. The sponsor has been content to travel to Senegal. Whilst she would miss her family and friends and would need time to recover from her illness, as at the date of decision the couple could reasonably reside in Senegal once the sponsor had recovered from her illness. As at the date of decision it was not foreseeable that the sponsor could not reside in Senegal (beyond a period of recovery) because of any medical condition or otherwise.

16. Having considered all relevant factors I do not accept the compassionate circumstances are sufficiently compelling to outweigh the public interest in this case. As at the date of decision the appellant could not meet the requirements of the Rules in a number of important respects. Importantly 320(11) applied (which of course does not require mandatory refusal). The appellant contrived in a significant way to frustrate the intentions of the Rules over a lengthy period. He met the sponsor when he was an overstayer. They cohabited and developed family life in the UK in the knowledge that he was an overstayer. I accept that at the date of decision the sponsor was ill and as such there were compassionate circumstances. I am however not satisfied that the circumstances are compelling when viewed in the round and together with the public interest.

17. The situation might be different now as the circumstances may be more compelling but it is not for me to speculate and as Mr McVeety indicated, any change of circumstances said to support a grant of entry clearance outside of the Rules can be set out in a fresh application with accompanying medical evidence.

18. I have carried out the relevant balancing exercise and I am satisfied that the public interest in maintaining effective immigration control and the economic well-being of the UK and are not outweighed by all the relevant factors in this case, where as here there is an absence of sufficiently compelling circumstances as at the date of decision. I do not accept that the respondent's decision will breach Article 8 for the reasons set out above.

Decision

19. The decision of the First-tier Tribunal involved the making of a material error of law in relation to Art 8 only.

20. I have remade the decision and I dismiss the appeal under Art 8 of the ECHR.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
9 October 2015