Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24110/2016

THE IMMIGRATION ACTS

Heard at Parliament House, Edinburgh	**Decision & Reasons Promulgated**
On 9 March 2020	**On 16 June 2020**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C. M. G. OCKELTON, VICE PRESIDENT
LORD MATTHEWS

Between

YAMIDA [M]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ballantyne, instructed by Jain Neil Ruddy Solicitors.
For the Respondent: Mr Clark, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

PROCEDURAL HISTORY

1. The appellant is a national of Sierra Leone. She came to the United Kingdom in December 2007, with leave expiring on 10 June 2008. She has had no leave since that. In December 2012 she was discovered in London and detained; she thereupon claimed to be a refugee on the basis that she

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had in 2007 been raped by police in Sierra Leone. She was refused and appealed. In his decision dismissing her appeal (which was affirmed on appeal to the Upper Tribunal) Judge Scobbie concluded that she had not been honest, and had claimed asylum only as a last resort when she was about to be returned to Sierra Leone. He also concluded that it appeared that she had been working illegally, because she had sent significant sums of money to Sierra Leone for her children's school fees.

2. The appellant's appeal rights were exhausted on 23 October 2013, but she was not removed. In December 2013 she made further submissions, which were rejected on 7 August 2015 with no right of appeal, a decision that was not challenged. She made further submissions on 16 October 2015, which were rejected on 10 November 2015: again, there was no challenge to that decision. She was detained with a view to removal on 21 June 2016, and within the next few days made further submissions, now based on her marriage on 14 January 2016. On 2 July she submitted a claim of having been subject to torture, which was rejected on 5 July and her detention was maintained. Her submissions were rejected on 14 July 2016 for lack of evidence of the relationship. She made further submissions on 25 July 2016, which were rejected in a decision dated 24 September 2016 (served on 1 October) that she did not qualify for leave to remain on human rights grounds, and that there were no exceptional reasons why she should nevertheless be granted leave. That decision carried a right of appeal, which she exercised.

3. It is convenient to continue a summary of the procedural history before turning to the merits. The hearing of the appeal was on 16 March 2018 before Judge Ross, who dismissed it in a decision sent out on 26 March 2018. There was an application for permission to appeal, which was refused by the First-tier Tribunal on 6 July and, on renewal out of time, by this Tribunal on 17 October 2018. The appellant then petitioned the Court of Session for reduction of the last decision. The matter was settled by consent, the Interlocutor of the Lord Ordinary based on the Joint Minute being dated 26 September 2019. Permission was then granted by this Tribunal on 13 November 2019.

THE APPEAL BEFORE JUDGE ROSS

4. The appeal to the Upper Tribunal against Judge Ross' decision thus now falls for decision. We observe at this point that, despite Mr Ballantyne's numerous attempts to lead us onto other paths, the only grounds of appeal are those submitted to the Upper Tribunal on 20 July 2018, which have not been amended and which were the subject of the grant of permission: the reduction of the previous refusal meant simply that the application based on those grounds now again awaited a lawful decision. We are not concerned with grounds that were not submitted to the Tribunal; in particular we are not concerned with the grounds supporting the Petition for Judicial review, which were not grounds of appeal and in any event, were directed (and could only be directed) to the Upper

Tribunal's view on arguability. Further, in making our decision, we are not concerned with any view expressed by the Court or in the Joint Minute, those again being concerned only with whether the Upper Tribunal could be shown (or agreed) to have been acting unlawfully in deciding that the grounds disclosed no arguable challenge to Judge Ross' decision.

5. We turn therefore first to that decision. The grounds of appeal to the First-tier Tribunal are signed by Mr Terence Ruddy, of Jain, Neil and Ruddy, the solicitors who have represented the appellant for many years: Mr Ruddy appeared for her before Judge Scobbie in 2013. Five grounds are raised in challenge to the decision which, as we have observed, was the response to further submissions on the basis of the appellant's marriage. Ground 1 is that the appellant is a refugee. Ground 2 is that she is entitled to humanitarian protection 'because she has a well-founded fear of persecution as a member of a particular social group'. Grounds 3 and 4 argue that the appellant is at risk of persecution including extra-judicial killing and torture, and that her return to Sierra Leone is therefore unlawful. Ground 5, in full, is as follows:

> "Article 8 of the ECHR – the appellant is in a genuine and subsisting relationship with a British Citizen and is married to said individual. Removal of the appellant to Sierra Leone would breach her Article 8 rights under the ECHR."

6. It does not appear that any reference was made at the hearing to grounds 1-4. Mr Ruddy obviously knew both that those grounds had been rejected previously, and that the present decision had nothing to do with them. They are wholly unspecific and as pleaded simply could not succeed. It is very difficult to know how a solicitor could be justified in wasting time and resources in this way by asserting that protection grounds were to be argued when they were not and in reality could not be. We also note that ground 2 appears to show a remarkable ignorance of the scope of humanitarian protection, which would not be available to a person who has a well-founded fear of persecution for a Convention reason.

7. So far as concerns ground 5, it is also wholly unspecific. Further, it fails to engage either with the extensive reasons given by the Secretary of State for rejecting the submissions, or with the law relating to the application of article 8 to a person who marries after being in the United Kingdom unlawfully for a very long period. In short, the grounds show none of the attention to either law or fact which everybody, including the appellant and the Tribunal, is entitled to expect from a solicitor.

8. The appellant's husband died on 14 February 2017 of mesothelioma, aged 74. That fact clearly made a considerable difference to the impact of ground 5. Mr Ruddy appears to have made no attempt to amend the grounds or even to draw the attention of the First-tier Tribunal to the important change in the factual basis upon which his grounds were based. That was despite the fact that Directions issued by the Tribunal required

the appellant to submit all relevant documentation to the Tribunal no later than 13 September 2017.

9. In breach of those directions the inventory of productions was produced only at the hearing on 16 March 2018 or very shortly before it (it includes statements dated 14 March): item 7 of the inventory is the death certificate. Only at the hearing itself did Mr Ruddy disclose the appellant's husband's death more than a year previously and that "she no longer relied on the fact of her marriage as founding a family life claim". Instead, Mr Ruddy argued that "the appeal ought to be considered in relation to the appellant's private life including the effect that her husband's death has had upon her". The judge appears to have allowed amendment of the grounds to that extent, so that this was now the only effective ground of appeal.

10. The judge heard oral evidence from the appellant and from a friend of hers. There were witness statements, which stood as evidence-in-chief. The appellant's statement was chiefly about the genuineness of her relationship with her husband. She said that she was still grieving for him, often visited places in Glasgow she associated with him, and did "not wish" to be away from such places. She also said that she did "not wish to return to Sierra Leone where I was raped before by police officers" because she would be fearful of the same thing happening again. She said she was receiving medical treatment, which she would have to pay for in Sierra Leone and did not know whether she could get it. In an earlier statement, dated in September 2015, she said she had low moods as a result of her memories of ill-treatment in Sierra Leone and at that time "still" required counselling and medication. She said she had friends in the United Kingdom but did not in the most recent statement mention any relatives. Cross-examination was directed almost entirely to the appellant's relationship with her husband. The appellant gave evidence that she is in touch with her husband's brother but not any of his children; she was vague about her contacts with her family in Sierra Leone and said that she had not spoken to them for a long time. The appellant's friend said that she had known the appellant and her husband as a couple and, as she put it, "was aware" that the appellant visited places in Glasgow associated with her husband, and suffered from depression. There was documentary evidence, and there is now on file a medical report faxed to the Tribunal at 10.20 am on the day when the hearing was listed to begin at 10am.

11. In submissions (according to the judge's note and the decision: there is no evidence countering either) the presenting officer accepted that the appellant had been in the United Kingdom for ten years, but pointed out that she had lived most of her life in Sierra Leone, and that she had now been widowed for over a year. The public interest factors set out in s 117B of the 2002 Act had to be taken into account. There were no exceptional circumstances meriting a grant of leave to remain, and any friendships could be continued by other means. Mr Ruddy's submissions were that

the marriage had been a genuine one: the Home Office had interviewed both parties and not too much should be read into any differences with the children. The appellant had been complying with the conditions of her temporary release, and was still engaging with her GP and her clinical psychologist. She had been deeply affected by her husband's death and regularly visits places with which she associates him.

12. In his decision Judge Ross began by considering the appellant's immigration history. He noted the findings of Judge Scobbie in 2013, that she had done nothing to claim asylum until apprehended, giving an excuse he did not accept, and that she appeared not to be being frank about her activities in the United Kingdom. Judge Ross' own conclusion was that the relationship with her husband was a genuine marriage, but that the appellant was still not being truthful about the circumstances of her own family: he specifically did not accept that she had no contact with her two adult daughters in Sierra Leone or that their father prevented any contact.

13. Judge Ross briefly considered the Immigration Rules and noted that the appellant could not have met the financial requirements for a foreign partner even while her husband was alive: an appeal against the refusal of a spouse visa would not have succeeded. He found that the appellant's private life, even including her grieving for her husband, was not sufficient to outweigh the public interest in her removal: she had no strong ties in the United Kingdom, was not financially independent, and had formed all known relationships while in the United Kingdom unlawfully. Judge Ross did not mention the medical report. He concluded that the appeal on human rights grounds was without merit and that there was no need to conduct a separate proportionality assessment directly under article 8 of the ECHR as the result would be the same. He dismissed the appeal.

THE APPEAL AGAINST JUDGE ROSS' DECISION

14. Three grounds of appeal supported the application to the First-tier Tribunal. (1) The judge had no sufficient basis to make the findings he did in relation to the appellant's not having been truthful about her family. He had not given reasons for his disbelief; it appeared to be based on Judge Scobbie's findings, which were five years old and not specifically concerned with her family; and he was factually in error because the appellant has a son and a daughter, not two adult daughters in Sierra Leone. (2) The judge had given insufficient attention to the article 8 claim, and had not considered the medical report or what were described as the "detailed submissions made at the hearing regarding the appellant's grief and the ongoing difficulties she was having with her health". (3) The judge had erred in failing to conduct a separate assessment under article 8. Submissions had been made that the appeal should be allowed under article 8 "on account of the factual issues and the medical evidence referred to previously" (i.e. the report sent on 16 March). A proportionality assessment "could have led to a different conclusion". We have set out these grounds in detail because they are by implication included in the

grounds of appeal to this Tribunal, which add nothing of substance but lay emphasis on slightly different aspects of the grounds in explaining why the author (Mr Ruddy again) considers that the First-tier Tribunal was wrong to refuse permission. As we have said, those are the grounds that concern us now.

15. In the Court of Session the respondent is on record as agreeing, for no specified reason, that the Upper Tribunal decision erred in law:

> "…by failing to apply anxious scrutiny in its consideration of the appellant's private life in the United Kingdom. As a consequence there was a failure of due process, contrary to natural justice, in the Upper Tribunal's decision."

16. We should say that this conclusion, apparently endorsed specifically by the Lord Ordinary, Lord Pentland, causes us some mystification. Of course the Upper Tribunal's decision might be in error for failing to take account of some relevant material or for irrationality in the light of the material available, or possibly for lack of anxious scrutiny, but we are wholly unable to understand what is said to be the failure of due process or the breach of natural justice of which the Tribunal stands convicted without having been heard. The only procedural issue of which we are aware is that the Tribunal extended time for the appellant's application for permission to appeal, not something of which either party has complained. Mr Ballantyne submitted to us that the Joint Minute casts light on the reasons why an appeal should now succeed. It does not.

17. On the grounds, Mr Ballantyne submitted that Judge Ross ought to have considered whether (in view of the fact that the appellant could not have succeeded under the Immigration Rules even when her husband was alive) EX.1 would have applied. That would have required him to consider whether there were insurmountable obstacles to family life continuing outside the United Kingdom: he evidently had not done so, and that was an error. Secondly, Mr Ballantyne submitted that the judge had not considered the medical report, which said that the appellant was suffering from PTSD and required treatment for it. Even if Mr Ruddy had made no specific reference to relying on it, the judge should have appreciated that it was an important element in an article 8 decision. Thirdly, there had been a breach of natural justice, or in any even an injustice, caused by the delays in this case. The appellant's relationship with her husband had begun in 2013. If the Secretary of State had not delayed in responding to her submissions and perhaps if the Tribunal had heard her appeal earlier, she would have been able to rely on a current relationship with a partner.

18. We did not need to hear submissions from Mr Clark in response.

DISCUSSION AND DECISION

19. This appeal is in our view simply hopeless. Taking the grounds in turn, the first written ground appears to criticise the judge for using the previous determination as a starting point and going no further, but there was little further to go. This was a human rights appeal based on article 8, in which the appellant needed to show that her family and private life was such that despite not merely being unable to meet the rules but having ignored their provisions for many years it would now be unlawful to require her to leave the United Kingdom. Any such appeal has to be based on clear, credible and comprehensive evidence of the appellant's family and personal circumstances. The appellant and her solicitor were fully aware of the observations of Judge Scobbie in 2013, and Mr Ruddy must have been aware of the effect of the decision in Devaseelan. Despite this, no evidence was adduced to counter Judge Scobbie's findings and observations, except for vague assertions that, as Judge Ross observed, did not accord with the evidence taken as a whole (including that supporting the 2013 appeal). Judge Ross was clearly and unarguably entitled to reach the view he did about the evidence of the appellant's family, and, what is more, was entitled to conclude that the evidence as a whole did not displace the general position that a person who does not meet the requirements of the rules will not obtain leave. Further, even if the evidence about the appellant's family in Sierra Leone had been comprehensive and true, it provided no reason for her being allowed to stay in the United Kingdom, where she has no relatives at all except by affinity.

20. The asserted mistake about whether one of the appellant's children is male or female is wholly immaterial: nothing could possibly turn on it in the context of this appeal. But the position is that we have been unable to trace any evidence on the issue, and neither the grounds not Mr Ballantyne's submissions referred to any. What is clear is that in those submissions to the Secretary of State that ought to have been demonstrating the appellant's lack of continuing ties with Sierra Leone, Mr Ruddy on her behalf did not mention her family at all: that is clear from, for example paragraph 46 of the current letter of refusal.

21. As argued by Mr Ballantyne this ground took an entirely different character, which was that despite the total lack of evidence, lack of argument and lack of relevance of the question, the judge erred in law by failing to consider, of his own motion, the application of EX.1. But there simply was no evidence that could have shown that the appellant and her husband could not live together in Sierra Leone, and there was no evidence that the marriage was in any way conditional upon their being able to do so: one would, in the absence of evidence, have supposed that a couple who were so devoted to each other but were living in a country where one of them was not entitled to be, would be anxious to take the steps necessary to be somewhere where they could properly be together. There was evidence about the appellant's husband's health for part of the time of their marriage, but the evidence (which appears to have been the subject of no reference at all at the hearing, and which is therefore more

than a little difficult to analyse for the purposes of an appeal based on an error of law by the judge before whom the hearing took place) appears to have been largely of control by readily-available drugs. His mesothelioma was not, apparently, diagnosed within the period covered by the medical evidence and so far as the evidence is concerned appears for the first time on his death certificate. There was no evidence of his inability to live with his wife in Sierra Leone save for his own assertion to that effect: his statement dated 23 June 2016, in particular the reference to having "strict orders to keep out of the sun" is not supported by the doctor's letter of 29 June 2016, which says "I am unable to tell you whether it would be advisable for [him] to live in Sierra Leone". But, crucially, even if the matter had been properly prepared and argued before Judge Ross, an investigation into the applicability of EX.1 would have been completely pointless, because the appellant appeared before Judge Ross as a widow, not a person with a spouse who could not be expected to live with her in her own country.

22. The second ground relates to the medical evidence. There must be considerable doubt whether the report dated 15 March 2018 was seen by the judge, because it was tendered so late, but we must for present purposes assume that it was amongst the material before him when he made his decision (it was delivered to the Tribunal at a time when the judge certainly had the file, and we do not know when it made its way onto the file). As we have said, the decision does not refer to it. It is, however, clear that despite what is asserted in the grounds, Mr Ruddy did not refer to it either. We do not know whether he had seen and read it, but the submission he made on the medical evidence was directly contrary to what it says. He did not make "detailed submissions … regarding … the ongoing difficulties she was having with her health": he said she was engaging with her GP and her clinical psychologist. But the report is from the clinical psychologist. It says, among other things, that the appellant has been discharged from Glasgow Psychological Trauma Service, and that the psychologist herself has had no recent contact with the appellant because of her own "extended unplanned sick leave". We do not know how it came about that in his submissions to the judge Mr Ruddy was able to misstate the effect of a document that in his grounds he regards as important.

23. The report does not in reality assist the appellant at all. In summary, it indicated that the appellant has received some counselling for her PTSD and low mood. Further counselling may or may not be helpful. She needs to spend some time coming to terms with the death of her husband. There is nothing indicating that she needs to be in the United Kingdom, or that any treatment from the author of the report is current.

24. In these circumstances the omission of the report from Judge Ross' decision is, even if erroneous, entirely immaterial. He would have made a material error if he had based anything on what Mr Ruddy said about the report. The only other factor is the appellant's grief itself, which the judge

did take into account. The combined factors simply did not have, and could not have had, the effect attributed to them by the grounds; and it is clear that what was argued at the hearing was, so far as accurate at all, not what is presented in the grounds.

25. Ground 3 is a general ground asserting that there was something that might have assisted the appellant, without any real identification of what it was or how it was presented at the hearing. We are confident that it is without merit. The judge needed to decide whether the appellant met the requirements of the rules, because if she did, that would have an impact on whether the refusal of her claim was lawful. He made that assessment. She did not meet the requirements of the rules at the date of the hearing. She did not meet the requirements of the rules during her marriage. The judge went on to consider factors outside the rules in order to see whether the circumstances were such that she should nevertheless have not been refused the leave she sought, and concluded that they were not. That was the assessment under and outside the rules that was required. Whatever Judge Ross meant by saying that no separate proportionality assessment was required, there was nothing more to be done. For the reasons we have given, what was done was done lawfully and gives no reason to set the decision aside.

26. As we have indicated above, Mr Ballantyne sought to argue before us a ground based on delay by public authorities. The evidence of that is very sparse, not surprisingly because it has not previously been argued. The only relevant factor clearly emerging from the evidence is that as late as July 2016 the appellant, assisted as she was by Mr Ruddy, had failed to provide evidence establishing the genuineness of her relationship with her husband. The legal position is that a point based on delay simply was not taken below and the judge made no error by not constructing for himself an argument unsupported by evidence and not advanced by the appellant's professional representatives.

27. The conduct of these proceedings raises concerns at a number of levels. For the reasons we have given, however, there is no ground for intervention in the decision. Our conclusion is that Judge Ross completed his task without error of law; and that any or all of the errors asserted in the grounds would even if established not have been material. We therefore dismiss this appeal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 8 June 2020