Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/07597/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 September 2014	**On 30 September 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Modou Bojang
[No anonymity direction made]

Appellant

and

The Entry Clearance Officer Accra

Respondent

Representation:

For the appellant: Mr D Sills, instructed by Islington Law Centre
For the respondent: Mr P Naith, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Modou Bojang, date of birth 1.2.79, is a citizen of the Gambia.

2. This is his appeal against the determination of First-tier Tribunal Judge Hodgkinson, who dismissed his appeal against the decision of the respondent, dated 21.2.13, to refuse his application for entry clearance to the United Kingdom as the unmarried partner of Mariama Cessay, a person granted refugee status in the UK, pursuant to paragraph 352AA of the Immigration Rules. The Judge heard the appeal on 17.4.14.

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3. Upper Tribunal Judge Reeds granted permission to appeal on 6.8.14.

4. Thus the matter came before me on 23.9.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Hodgkinson should be set aside.

6. There is an unusual background to the appeal. The appellant and the sponsor had a long-standing romantic relationship in the Gambia, dating back to 1996. Had they had the opportunity, they would have married. However, they were prevented from doing so by the forced marriage of the sponsor with another man, Alieu. Asserting she was the victim of an abusive relationship, the sponsor fled to the UK in October 2010, where the First-tier Tribunal upheld her asylum appeal on the basis of the risk of FGM to her two daughters born in the UK, if returned to the Gambia. The judge hearing the asylum appeal made no findings of fact with regard to the strength of the sponsor's relationship with the appellant, but accepted the claimed history of the relationship.

7. The application the subject of this appeal was refused because at no time has the appellant lived together with Ms Ceesay as a couple and thus they do not meet the unmarried partner requirements of paragraph 352AA. The Entry Clearance Manager review pointed out that there is a requirement that the couple have been living together in a relationship akin to marriage for two years or more and that such relationship must have existed before the refugee left the country of his former residence, but there was no evidence that the appellant was part of the sponsor's household prior to the departure of the sponsor from the Gambia.

8. As made, the application under the Rules was doomed to failure. At the First-tier Tribunal hearing, the appellant's representative conceded that he could not meet the requirements of paragraph 352AA or of Appendix FM of the Immigration Rules. In granting permission to appeal on other grounds, Judge Reeds specificallyrefused permission to appeal this part of the decision on the submitted basis that 352AA was an unduly restrictive implementation of EU Directive 2004/83/EC, an issue not raised at the First-tier Tribunal appeal. It follows that the finding that the appellant does not meet the requirements of the Immigration Rules, either in relation to 352AA or Appendix FM, must stand.

9. Judge Hodgkinson proceeded to determine the appeal on the basis of the uncontested and conceded factual history of the relationship. The appellant's case was that had they not been prevented from doing so by the sponsor's forced marriage, they would have married and lived together as a couple in the Gambia. At §27 the judge accepted this contention. Judge Hodgkinson noted that the Entry Clearance Manager conceded that the appellant and the sponsor enjoy family life within the context of article 8 and that the decision interferes with such family life.

10. The judge adopted the Gulshan approach and found that there were at least arguable grounds for granted entry clearance outside the Rules under article 8 ECHR on the basis of compelling circumstances insufficiently recognised in the Rules which might render the decision of the Secretary of State disproportionate. The judge thus proceeded to consider article 8 outside the Rules, following the Razgar five steps. However, the judge found the decision was not disproportionate.

11. In granting permission to appeal, Judge Reed found that there were a number of relevant arguable issues relating to article 8, however the grounds at §20-22 have no arguable merit in the light of MM & Ors R(on the application of) v SSHD [2014] EWCA Civ 985, where the Court of Appeal found that it could not be said that the financial requirement threshold of Appendix FM was of itself disproportionate.

12. For the reasons set out herein, and aving considered the grounds of appeal, the determination of the First-tier Tribunal and the submissions of the parties, I find there is no error in the determination of the First-tier Tribunal such that it should be set aside.

13. I reject the submission that there is a flaw in the judge's finding of an inconsistency in the evidence in §23-25 of the determination. It was common ground at the First-tier Tribunal that the sponsor had never worked in the UK, although she claimed that she wanted to and would have done so but for the emotional set back of the refusal of the appellant's entry clearance application. That was inconsistent with the evidence that in December 2013 the appellant had been seeking employment at the sponsor's place of work. That made no sense at all. If the sponsor had never worked in the UK she could not have had any place of work. The judge went on to find that as the sponsor able and willing to work, removing a potential obstacle to seeking entry clearance through an alternative immigration route. I do not accept the submission that the judge was engaging on speculation. It was no more speculation that the contention that if free to do so the sponsor and the appellant would marry and life together. It was relevant that the sponsor wanted to work, was evidently capable of work, and would have worked but for an "emotional setback" thus choosing not to work. Her inconsistent evidence referred to above rather suggested that she may well have already worked, despite her assurances to the contrary. I find that the judge was entitled to take into account in the balancing exercise to the limited extent that it was relevant that there was a potential for the sponsor to work so as to enable an application under the Immigration Rules.

14. I do not accept the contention in grounds 3 and 4 that the judge was wrong to take into account at §34 that the sponsor was capable of undertaking employment but, as found by the judge, in reality has chosen not to do so. The judge accepts that until she does work the appellant will be unable to meet the financial requirement of alternative routes under the Immigration Rules. Mr Sills submits that the judge failed to take into account that neither under family reunion rules nor EX1 of Appendix FM, there is no financial requirement. That ignores the fact that the appellant does not and never could qualify under the family reunion rules of 352AA. EX1 does not apply to out of country applicants under section EC-P of Appendix FM. Further,

article 8 is not a shortcut to compliance with the Rules for those who could never meet them. I reject the submission that the significance of the financial requirements is only of limited relevance when they can be waived for in country applicants, or that the judge was wrong to note that the available third party support of £1,000 falls far short of what would be the relevant financial threshold under Appendix FM. The judge was doing no more than considering all the relevant factors when assessing the balance between the public interest in protecting the economic well-being of the UK through the application of immigration control on the one hand and on the other the family life rights of the appellant and the sponsor, which on the accepted facts of this case includes the right to develop their intended relationship to living together as partners. In that assessment it is only correct to point out that the appellant is not an in-country applicant and there is no reason to consider his position as being akin to such. Failure to meet the requirements of the Rules is a highly relevant factor when considering the proportionality of the decision. Similarly, that there may be an alternative route for entry is also relevant. That in certain in country situations of an existing partnership relationship when there are insurmountable obstacles to continuing that relationship outside the UK the financial requirements may be relaxed, is a far cry from the circumstances of this case involving a couple who have never lived together as partners but only seek to do so in the future by the appellant coming to settle in the UK. Mr Sills submissions have the appearance of a near miss argument, when case law has long established that there is no such principle in immigration law.

15. I do not accept that the judge has taken into account irrelevant factors at §36 of the determination. Whilst the judge accepts that they cannot for obvious reasons live together in the Gambia, there was no evidence that they have explored alternative possibilities of marrying in a third country. It is clear that the judge is merely considering alternative routes of entry, including at §36 whether they could marry in a third country and thus make a partners/spouse application, on the basis of the findings that the sponsor was capable of working in the UK.

16. Mr Sills' remaining arguments fail to take account of the limited nature of the family life between the appellant and the sponsor. This is not the case of a husband and wife torn apart by circumstances beyond their control where the mischief can be cured by family reunion. There never has been family union in this case at all. They have had a long-standing relationship but they have never lived together as partners or spouses. The nature of the family life in this case is therefore rather limited to the desire and potential to cement their long-standing romantic relationship by living together in the UK. As the Rule 24 response of the Secretary of State pointed out, such a relationship was factually well below that envisaged in the Rules. It is clear from §35 that the First-tier Tribunal took this into account when weighing the proportionality balance.

17. Taking an overall view of the evidence, the determination and the findings of the First-tier Tribunal, I find that the judge has fairly taken into account all relevant factors in a careful assessment of the proportionality of the decision. Many of the findings and the decision to consider the matter under article 8 ECHR outside the

Rules are in the appellant's favour. Much of Mr Sills' argument is a disagreement with the findings of the judge and a more philosophical disagreement with the Immigration Rules themselves. I find that there is nothing within the determination that suggests the decision was perverse or that the conclusions were ones that the judge was not entitled to reach on the evidence and agreed facts. I find it difficult to conceive that any other judge could have reached a different conclusion on the facts of this case. In any event, I find that the judge has given a fair and balanced assessment to the appellant's case, both under the Immigration Rules and outside the Rules on the basis of family life under article 8, to the limited extent that there is family life in the unusual facts of this case it has been fully taken into account.

Conclusion & Decision

18. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

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