



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/28492/2012

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 11<sup>th</sup> June 2013**

**Determination**

**Promulgated**

**On 3<sup>rd</sup> July 2013**

**Before  
SENIOR UPPER TRIBUNAL JUDGE J PERKINS AND  
DEPUTY UPPER TRIBUNAL JUDGE G A BLACK**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MISS FATOU SANNEH**

Respondent

**Representation:**

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Ms Quereshi, Counsel instructed by Stuart Karatas  
Solicitors

**DETERMINATION AND REASONS**

1. This is a resumed hearing following a decision on 20.5.2013 by Deputy Upper Tribunal Black who found that there was an error of law in a determination promulgated on 21 February 2013 by First-tier Tribunal Judge Elek (FTJ) in which she allowed the appeal under Article 8 ECHR.

Deputy Judge Black found that there was an error of law for the following reasons. The FTJ erred in law by failing to fully consider the public interest in her assessment of proportionality, and failed to give proper consideration to the reasonableness and /or existence of sensible reasons to justify the return of the appellant to Gambia to make an application for entry clearance. The appellant overstayed for a period of 5 years during which she had developed her private life in her relationship with her partner. The FTJ's decision on the specific facts failed to place sufficient weight on the public interest argument that those persons remaining unlawfully in the UK and in breach of immigration rules ought, even where the interference is so limited as to amount to inconvenience, to be required to return to the country of origin to make an application for entry clearance. She made directions for a resumed hearing for submissions only on the limited issue of the public interest in the reasonableness of requiring return to Gambia.

2. There was no challenge to the findings of fact made by the FTJ. The appeal cannot be allowed with reference to the amended immigration rules which purport, but fail, to encompass all matters relevant to an assessment of the appellant's rights under article 8 of the European Convention of Human Rights (see **MF (Article 8- new rules) Nigeria [2012] UKUT 00393 (IAC).**)

## **Background**

3. The appellant at the First tier was Miss Sanneh. Her date of birth is 26 February 1981 and she is a citizen of Gambia. She arrived in the UK on 20 March 2007 with entry clearance as a domestic worker valid until 1 September 2007. Following the expiry of her leave to enter she remained illegally in the UK and sought to regularise her stay on 18 July 2011. She applied for leave to remain outside of the Immigration Rules. which was refused by the Secretary of State on 26 August 2011. A decision was made on 27 November 2012 for her removal as an illegal entrant. The Secretary of State refused her application with regard to requirements for leave to remain as a partner as set out in Appendix FM of the new Immigration Rules and under Article 8 ECHR. Further consideration was given to paragraph 276CE of the Immigration Rules. She appealed and her appeal was allowed under Article 8.

## **Law**

4. In **SSHD v Hayat (Pakistan); Treebhowan (Mauritius) v SSHD [2012] EWCA Civ 1054** the Court of Appeal held that an application for leave to remain in the United Kingdom which cannot succeed under the Immigration Rules, and is being pursued under Article 8, should not be rejected simply on the procedural ground that the applicant can apply for entry clearance from abroad. On the "one stop" principle, the merits of

the Article 8 claim should be assessed, and the claim should be allowed if the applicant does in fact have an Article 8 right to remain in this country. If the requirement to apply for entry clearance constitutes a disruption sufficient to engage Article 8, there will be a disproportionate interference unless there is a sensible reason for insisting on it. Whether there is a sensible reason will depend on the facts of the case, including such matters as the length and degree of disruption and the effect on other family members. Where Article 8 is engaged and there is no sensible reason for the disruption, the Article 8 claim should be determined on its substantive merits. In the instant cases, neither applicant was in the United Kingdom for more than a temporary purpose, and neither had such a strong claim to make it disproportionate for him to apply for entry clearance from his own country. **Chikwamba** is not confined to settlement cases, but unless the likelihood of being granted entry clearance is very strong, **Chikwamba** does not come into play.

### **The facts**

5. Miss Sanneh is a citizen of Gambia who came to the UK lawfully as a domestic worker and thereafter remained in the UK unlawfully for 5 years and 5 months. She met her partner through her employer and they have been in a relationship and living together since the end of 2007. Her leave expired in September 2007. In 2008 they decided to marry but have not yet done so. The parties have entered into a genuine and subsisting relationship. Mr Allen owns a property in which they live together. He is a business man who owns other properties which are rented out. It was accepted that the maintenance and accommodation requirements of the rules were satisfied and that the appellant met the English language requirements. Miss Sanneh's family (mother and daughter) in Gambia have met and formed a relationship with Mr Allen. Mr Allen visits frequently and sees the appellant's daughter. He is building a house in Gambia for the family to live in and for him and Ms Sanneh to stay in when they visit. He visits Gambia every 2 to 3 months and supervises the building works. He stays in an apartment. He could stay there for a temporary period but ultimately needs to be based in the UK for business reasons. Miss Sanneh would be happy to return to Gambia for a temporary period to apply for entry clearance.

### **The Hearing before us**

6. At the hearing before us Mr Jarvis submitted that the Court of Appeal overturned the Upper Tribunal decision of **Hayat** relied on by the First tier Tribunal. He further relied on **ZS (Jamaica) and Another [2012] EWCA Civ 1639** and **Nagre [2013] EWHC 720 (Admin)**. He emphasised that the appellant had a family life in Gambia and that her partner had connections in Gambia where he travelled regularly and was building a house. The appellant had not lost her ties with Gambia and it was not

unreasonable to expect her to return there to make an application for entry clearance. He further submitted that where there was a sensible reason in support of return **Chikwamba** did not apply. Relevant factors included the length of time the application would take, whether the party had a legitimate expectation to remain beyond the period of leave and if the relationship was established at a time when immigration status was precarious. **ZS (Jamaica)** involved a child, however, the Court held that overstaying could amount to a serious countervailing factor as against the individual's private interests. Mr Jarvis submitted that five years overstaying was a serious factor.

9. Ms Quereshi submitted that the appellant entered with valid leave and established a long term relationship with Mr Allen. Overstaying was the only countervailing factor and this was the only basis justifying her return on grounds of public policy. There was no other reason. The appellant was in a genuine relationship and there were no issues as to finance or accommodation. She cited the judgement of Turner J. in **Shuaizhang 2013 EWHC 891 (Admin)** where the Court concluded that it will be rare indeed that the immigration priorities of the state are such as to give rise to a proportionate answer to Article 8 rights to family life where requirement (h) (i) is engaged.

## **Discussion**

10. We have regard to the judgments in **VW (Uganda) [2009] EWCA**, the House of Lords decision of **Chikwamba** and the Court of Appeal in **Hayat** together with **Nagre**, **ZS (Jamaica)**, **Shuaizhang (cited above)**. These are cases in which the courts have recognised that the application of **Razgar** principles, as seen thorough lens of **Chikwamba**, leads to the conclusion that an article 8 compliant requirement for an applicant to leave the UK before making an application is the exception rather than the rule.
11. Ms Sanneh has established a family and private life in the UK with Mr Allen to whom she is engaged to be married. There would be an interference in the event that she is returned to Gambia and that would be of sufficient gravity to engage Article 8. The interference would be in accordance with the law as she has no lawful leave to remain in the UK and fails to meet the amended immigration rules.
12. In **Hayat** the Upper Tribunal reviewed the House of Lords decision in **Chikwamba** and stated that *"where the only matter for requiring an appellant to return is the public policy of requiring an application to be made under Immigration Rules from abroad, the legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance"*. Thereafter the Court of Appeal held that where the only matter to require return is to apply for entry clearance simply on "procedural grounds", the Courts must look at the substantive Article 8 claim and the appellant be allowed to remain in the country if she has an

Article 8 right to remain in the country. If the requirement to apply for entry clearance constitutes a disruption sufficient to engage Article 8, there will be a disproportionate interference unless there is a “sensible reason” for insisting on it. Whether there is a sensible reason will depend on the facts of the case, including such matters as the length and degree of disruption and the effect on other family members. Where Article 8 is engaged and there is no sensible reason for the disruption, the Article 8 claim should be determined on its substantive merits.

13. We consider whether there is a sensible reason for requiring the appellant to return to Gambia ? We find that the length and degree of disruption of family life is at the very lowest end of the scale given that the appellant’s partner frequently visits Gambia without any difficulty every two to three months. The appellant’s evidence was that he visited her 10 year old daughter who has grown up calling him Dad. He has an apartment where he stays and he has connections with the appellant’s family in Gambia which are being strengthened by his building a property for the family to live in. It would be possible for both of the parties to live in Gambia at least for some of the time in which an application for leave is made and decided. Certainly the appellant adduced no evidence to show that returning to Gambia would create a long or otherwise unacceptable degree of separation. The appellant has family members living in Gambia. There is no evidence of any strong private life in the UK aside from her relationship with her partner. The only child involved is the appellant’s daughter in Gambia with whom Mr Allen has established a relationship. He is able to accompany her to Gambia for a temporary period of time. The parties wish to settle in the UK where Mr Allen owns property and runs his business. It is accepted that this would create significant disruption and interference in the long term if the appellant were not granted entry clearance.
  
14. Where there is family life the Secretary of State must justify the interference and that according to the Court of Appeal in **Hayat** necessitates “a full consideration of the merits”. A proper assessment of the public interest must involve consideration of overstaying and the length of overstaying during which the appellant further established her private life which commenced during precarious immigration status (**ZS (Jamaica)**). This is not simply a case of the appellant “jumping the queue” and gaining advantage over those applying from outside of the UK for procedural reasons only. The significant issue is the public interest in maintaining orderly immigration control. The rules prescribe that a person in the appellant’s circumstances apply for entry clearance as a spouse. It is not fair to people who chose to follow the rules even though that inconveniences them to see other people being given preferential treatment when they have ignored the rules for no good reason. There was no evidence as to why the appellant failed to regularise her stay for some years having come to the UK on a temporary basis only. We must ask ourselves if there is a public interest in the appellant and her partner

being put to expense and inconvenience by returning to Gambia to make an application for entry clearance as a spouse ?

15. We have regard to the change in direction following **Chikwamba**. We find that the disruption to the private and family life of the appellant and her partner is really limited to them. This is not a case, for example, where children are involved. Further, as explained above, the appellant has strong links with Gambia and both the appellant and her partner are able to visit there. The disruption to the appellant's and her partner's private life and family life inherent on removal is at the lowest end of the scale possible in such cases. If removal is not proportionate to the proper purposes of preventing, disorder and protecting the rights and freedoms of others then there will be almost no circumstances where the law can be enforced. We do not accept that requiring a person in the United Kingdom without permission to leave and apply from outside the United Kingdom to regularise her stay is always wrong and it is not wrong here.

### **Decision**

16. We remake the decision and dismiss Miss Saneh's appeal on human rights grounds under Article 8 ECHR.

Signed  
GA Black

Dated 2.7.2013

Deputy Upper Tribunal Judge G A Black

Anonymity - no order was or is made for anonymity.  
Fee award - no award is made for repayment of a fee.

Signed  
GA Black

Dated 2.7.2013

Deputy Upper Tribunal Judge G A Black