



IAC-AH-DN/SC-V1

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

Appeal Number: IA/00135/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10 February 2016**

**Decision & Reasons Promulgated  
On 01 March 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**MR OUMAR BAH  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr M Adophy, Solicitor, Rana & Co Solicitors

For the Respondent: Ms A Fijiwala, Specialist Appeals Team

**DECISION AND REASONS**

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Bart-Stewart sitting at Hendon Magistrates' Court on 1 July 2015) dismissing his appeal against the decision to remove him under Section 10 of the Immigration Act 1999, his human rights claim having been refused. The First-tier Tribunal did not make an anonymity direction, and I did not consider that the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

## **Relevant Background**

2. The appellant is a national of Ivory Coast, whose date of birth is 26 February 1983. He claims to have arrived in the United Kingdom on 27 January 2003 using a passport in someone else's name. He claimed asylum on 28 January 2003, and his asylum claim was refused on 11 March 2003. At the same time he was issued with an IS15A document notifying him of his liability to removal. His appeal against the refusal of his asylum claim was eventually dismissed in a decision promulgated on 7 June 2006, and his appeal rights became exhausted on 16 June 2006.
3. The appellant submitted an application for leave to remain outside the Rules on 14 January 2010, and his application was refused on 17 March 2010. On 30 March 2010 he submitted an application for leave to remain on Article 8 grounds, and this was refused on 1 July 2010 with no right of appeal. On 28 August 2011 the Home Office agreed to reconsider the decision of 1 July 2010.
4. According to the eventual reconsideration letter dated 10 December 2010, between 1 July 2010 and 28 November 2014 the appellant and his legal representatives made repeated representations in correspondence claiming that his removal from the United Kingdom would breach his rights under Articles 3 and 8 of the ECHR.
5. On 10 December 2014 the respondent gave her reasons for refusing the appellant's human rights claim on reconsideration. In respect to his claim under Article 3, the respondent rehearsed the findings made by a panel of Immigration Judges when dismissing his appeal on 8 June 2006. They found that he did not have a well-founded fear of persecution for a Convention reason on return to Ivory Coast, and also that the refusal of asylum would not constitute a breach of Article 3 ECHR. They also found that no other Article of the Human Rights Convention was engaged.
6. Consideration had been given as to whether he qualified for a grant of leave under Appendix FM on account of his relationship with his partner Mariama Dalada Bah. She was a national of Sierra Leone, who had been granted ILR in 2006 and had become a naturalised British citizen in 2007. He had provided a marriage certificate dated 20 November 2009 showing that he was married to Mrs Bah. It was accepted that he met the relationship requirements of Appendix FM. He was on a reporting regime with temporary admission, however E-LTRP.2.2 allowed him to take advantage of paragraph EX.1(b). Although he and his partner were in a genuine and subsisting relationship, and his partner was settled in the United Kingdom, this did not mean that both of them were unable to live together in Ivory Coast in order to continue their family life there. Although his wife had been granted leave to remain, it was not for a protection reason. He stated that the official national language of Ivory Coast was French, whereas his wife did not speak French. This was not considered to be an insurmountable obstacle to his wife joining him "as a family unit" in Ivory Coast.

7. A decision had been made on exceptional circumstances, applying paragraph 353B of the Immigration Rules. They had been trying for a child. The evidence showed that IVF treatment was available in Ivory Coast, and therefore the fertility treatment that his wife had been seeking in the UK was not considered to be a compelling circumstance or reason as to why he should be provided with a grant of leave.
8. It had been considered whether his claimed length of residence in the United Kingdom had been accrued for reasons outside his control. The answer was in the negative. He could have left the country after his asylum claim was refused in March 2003. But he chose to appeal against the decision. Following his appeal rights becoming exhausted in June 2006, he should have left the country at that point. Instead, he had chosen to remain in the United Kingdom illegally, and there was a very significant period of time when he was not in contact with the Home Office. It was considered his residence in the United Kingdom had been by no means beyond his control, and accordingly his removal from the United Kingdom was appropriate.

### **The Hearing Before, the Decision of, the First-tier Tribunal**

9. Both parties were legally represented before Judge Bart-Stewart. The judge received oral evidence from the appellant and his wife. The appellant's bundle compiled for the hearing contained some background evidence relating to Ivory Coast, and a small amount of NHS correspondence relating to Mrs Bah.
10. The Ivory Coast 2015 Crime and Safety Report said that although the government needed to make considerable progress in restoring peace and security, serious security challenges remained as the 2015 presidential elections approached. The government had made economic and commercial development its top priority and achieved significant growth rates in 2013 and 2014. Nevertheless, the average have already not yet benefited from this growth or from the renewed investor confidence in the economy. The Ivory Coast ranked 168 out of 186 for the UN's Human Development Index in 2013, and nearly half the population (46%) lived below the international poverty line of 2 US dollars per day.
11. At page 12 of the bundle there was travel advice downloaded from the gov.uk website. Under the heading of security, it said that the security situation at Abidjan could deteriorate at short notice. While the risk of return to the levels of conflict experienced between December 2010 and May 2011 was low, travellers staying longer in the Ivory Coast should continually review personal security arrangements and take professional security advice. Travellers were advised to avoid all large public gatherings and public rallies and to adopt a low profile, particularly at night.
12. On the topic of local travel to various specified western regions, in particular the area to the west of Duekoue up to the border with Liberia,

this was not advisable, owing to the risk of serious violence by local militias. A fatal clash between militias and security forces had taken place in this area as recently as February 2015. Travellers were advised to seek professional local advice before embarking on any travel to these areas.

13. The NHS documentation in the appellant's bundle related to fertility treatment undertaken by the appellant's partner at the beginning of 2011.
14. In his oral evidence, the appellant said he did not believe it was reasonable and proportionate to expect him and his wife to relocate to Ivory Coast, given the respondent's warning to British nationals not to travel to Ivory Coast save for essential reasons. She had applied to come to the UK during the civil war in Sierra Leone, and it was not reasonable to expect her to place herself at risk in a country where security could not be guaranteed.
15. In cross-examination, the appellant confirmed that both he and his wife spoke the Fula dialect which was spoken both in Ivory Coast and Sierra Leone. His wife still had her Sierra Leone passport. He said that she could not live in Sierra Leone as she was a student, and she was on medication for infertility and diabetes. He agreed that his wife was aware of his immigration status as soon as they met.
16. In her evidence, Mrs Bah said that the situation in Ivory Coast reminded her of Sierra Leone, and she did not want to go through a similar experience. She was receiving treatment from her GP, a consultant and a gynaecologist and it was unlikely that the treatment she was receiving here would be readily available or affordable abroad, as her husband was not from any of the major cities. In cross-examination, she initially said that her Sierra Leonean passport had expired. She then said she given up her Sierra Leonean nationality, and then changed her mind and said she had not given up her nationality, and her passport was at home. She could not live in Sierra Leone because of the war. She had run away from the war in 2002. She also could not live there because of her health. She saw a doctor every three months. She had looked into treatment in Sierra Leone, but there was "no way". She took insulin twice a week. It was very tough in Sierra Leone with regards to medication.
17. In his closing submissions on behalf of the respondent, Mr Lowton said that the appellant had to show insurmountable obstacles to family life being carried on abroad. He and his wife had a choice whether to return to Sierra Leone or Ivory Coast. There was no language difficulty. The appellant had entered the United Kingdom illegally and had made a false asylum claim. He had entered into the relationship when he had no leave. He relied on **Agyarko [2015] EWCA Civ 440**. He submitted there was nothing exceptional, and also referred to Section 117B of the 2002 Act, noting that family life had been established while the appellant was in the UK illegally.

18. Mr Adophy, who appeared on behalf of the appellant, relied on his skeleton argument and the documentary evidence relating to Ivory Coast. He submitted that the case was distinguishable from **Agyarko**. The appellant had been granted a certificate of approval to marry and had been on reporting conditions since 2010. He submitted the old Rules should apply because the Article 8 application was made in 2010. He submitted there was a legitimate expectation of leave being granted and he also referred to the delay on the respondent's part in making a decision. He stated the appellant's private and family life had been enhanced by the tardy response of the respondent.

19. In a subsequent decision, the judge set out her findings and reasons at paragraphs [15] to [20]. The judge continued as follows in paragraph [21]:

(Note: judge to insert paragraph with regards to Section 117B).

### **The Application for Permission to Appeal**

20. The appellant applied for permission to appeal, contending that the judge had erred in law by not engaging with any of the issues raised by way of appeal. The judge had also erred in holding at paragraph [18] that there was no medical evidence before her with regards to Mrs Bah's medical history.

### **The Grant of Permission to Appeal**

21. On 17 December 2015 First-tier Tribunal Judge Fisher granted permission to appeal, noting that the decision appeared to be incomplete, in the light of the contents of paragraph [21]. There was little, if any, evidence that the judge had engaged with the original grounds of appeal and no firm conclusions were reached by her. In the circumstances, it was clearly arguable that the judge had erred in law.

### **The Hearing in the Upper Tribunal**

22. At the hearing before me, Ms Fijiwala said she was resiling from the position taken by her colleague in a Rule 24 response dated 4 January 2016. In the Rule 24 response, Ms Powell of the Specialist Appeals Team stated that the respondent did not oppose the appellant's application for permission to appeal, and invited the Tribunal to determine the appeal in a fresh oral (continuance) hearing. The reason for withdrawing the apparent concession made by Ms Powell was that on analysis there was no material error of law, having regard, among other things, to the case of **Agyarko** which the judge had discussed at paragraph [19] of her decision.

### **Reasons for Finding an Error of Law**

23. It is essential that the losing party is informed as to the reasons why he or she has lost. The findings and reasons given by Judge Bart-Stewart are incomplete. Not only has she not addressed Section 117B of the 2002 Act, but more generally she has not made some essential findings. She has

not expressed a conclusion on the following issues raised by Mr Adophy or by the respondent in the refusal decision:

- (a) whether the respondent was wrong to consider the Article 8 claim through the prism of Appendix FM, given that the application was originally made before the introduction of the new Rules;
- (b) whether the appellant qualified for leave to remain under EX.1(b) of Appendix FM; or
- (c) if not, whether there were compelling circumstances (such as legitimate expectation and/or delay on the part of the respondent) such as to justify the appellant being granted Article 8 relief outside the Rules.

24. Justice must not only be done, but must be seen to be done. Even though there is a strong argument that the judge's answers to the above questions can be inferred from her reasoning in paragraphs [15] to [20], I do not consider that it would be proper to dispose of the appeal on this basis. Accordingly, I find the decision is vitiated by a material error of law such that it must be set aside and remade.

### **The Remaking of the Decision**

25. The parties were in agreement that I should remake the decision on the evidence that was before the First-tier Tribunal, taking account of Mr Adophy's development before me of the case which he had advanced before the First-tier Tribunal.
26. In his skeleton argument prepared for the First-tier Tribunal, the first point taken by Mr Adophy is that the Secretary of State had been wrong to decide the application by reference to the post July 2012 Rules. He relied on the decision of the Court of Appeal in **Edgehill v SSHD [2014] EWCA Civ 402**, and submitted that the decision in **Edgehill** was not affected by the later decision in **Singh v Secretary of State for the Home Department [2015] EWCA Civ 74**.
27. I explored this proposition with Mr Adophy in oral argument, and he conceded that he had taken a bad point. He accepted that the Court of Appeal decision in **Singh** established that the Secretary of State was right to consider the application through the prism of Appendix FM.
28. It is convenient at this stage to address a subsidiary point raised by Mr Adophy in the skeleton argument when relying on **Edgehill**. He said that, but for the respondent's delay, the appellant would have had the benefit of relying upon the now defunct paragraph 395 of the Immigration Rules. I find that the appellant has not been materially disadvantaged by losing the benefit of relying upon paragraph 395 of the Rules. Broadly the same matters which arose for consideration under paragraph 395 of the Rules now arise for consideration under paragraph 353B of the Rules, which the Secretary of State considered at some length in the decision under appeal.

29. Mr Adophy did not advance a case in his skeleton argument for that there are insurmountable obstacles to family life between the appellant and his partner being carried on in Ivory Coast. The way he put it was that the current security situation in the Ivory Coast coupled with the medical history of the partner was sufficient to find that it was not *reasonable* to expect family life to continue outside the UK. In support of this proposition, he cited **Sanade** and **VW (Uganda) [2009] EWCA Civ 5**. As was held in **Agyarko** at paragraph [21], the phrase “insurmountable obstacles” as used in EX.1 clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom. I find that the appellant has not discharged the burden of proving that he meets the requirements of EX.1(b), and in reality Mr Adophy does not contend otherwise. By invoking the concept of reasonableness, he is contending that this is a case where the appellant should be accorded Article 8 relief outside the Rules, in circumstances where the high threshold of EX.1(b) is not met.
30. For the sake of completeness, I also find that it is not shown that there are insurmountable obstacles to family life being carried on in Sierra Leone as an alternative to Ivory Coast. Although Mrs Bah claimed that she could not access medical treatment for infertility or diabetes in Sierra Leone, this claim was not supported by any background evidence in the appellant’s bundle. The limited background evidence in the appellant’s bundle was solely directed towards the security situation in the Ivory Coast.
31. The appellant did not bring forward any background evidence to counter the evidence referred to in the refusal decision, which is to the effect that treatment for infertility is available in Ivory Coast.
32. Turning to an Article 8 claim outside the Rules, I accept that questions 1 and 2 of the **Razgar** test should be answered in the appellant’s favour. Questions 3 and 4 of the **Razgar** test must be answered in favour of the respondent. On the crucial question of proportionality, Mr Adophy relies on the fact that the appellant was given a certificate of approval to marry in 2009 when the then Secretary of State was fully aware that the appellant had no leave to remain. Therefore, he submits it is unreasonable for the Home Office to seek to remove the appellant six years later. He also submits the appellant has not contributed to the delay in any manner whatsoever.
33. I do not consider that there is any merit in these submissions. The fact that the appellant obtained a certificate of approval to marry Mrs Bah did not give rise to a legitimate expectation that he would be able to carry on family life here, as opposed to family life elsewhere. In refusing his initial application to remain in the United Kingdom on the basis of his relationship to Mrs Bah, the Secretary of State informed the appellant in a letter dated 1 July 2010 (pages 27 to 28 of the appellant’s bundle) that it was open to the appellant’s spouse to return with him to Ivory Coast while

he applied for entry clearance to return to the United Kingdom on the basis of his marriage. Alternatively, she might remain in the United Kingdom to support an application which he made from abroad for entry clearance on the basis of his marriage. In considering this application, the Entry Clearance Officer would, in addition to the requirements of the Rules, take into account the right to a family and private life under Article 8. The appellant was informed that the application had been considered in line with the recent decision of **Chikwamba v Secretary of State for the Home Department**. The Secretary of State was satisfied it was proportionate to interfere with his family life for a short period. As the appellant had used deception to enter the United Kingdom and had remained in the full knowledge that he had no legal immigration status, the Secretary of State was satisfied that his removal was conducive to the public good and was therefore proportionate.

34. It has always been open to the appellant to follow the course of conduct recommended in the letter of 1 July 2010. The delay in the respondent making a decision on reconsideration does not avail the appellant, as he had no legitimate expectation of achieving a different outcome from previous outcomes. He has never been absolved of the responsibility of regularising his status by returning to Ivory Coast to seek entry clearance, instead of seeking to remain in the United Kingdom through protracted representations.
35. Following **AM (S117B) Malawi [2015] UKUT 260 (IAC)**, there is nothing in Section 117B of the 2002 Act which materially assists the appellant's case on proportionality. What is firmly against him is the consideration that he has established family life with Mrs Bah when, to the knowledge of both of them, his status here was unlawful. Little weight can be attached to such family life in the proportionality assessment. The couple face a reasonable choice. The choice is between either settling in Sierra Leone or Ivory Coast, or the appellant returning to Ivory Coast on his own with a view to seeking entry clearance as the spouse of a settled person. I find that the interference consequential upon the decision to remove the appellant strikes a fair balance between, on the one hand, the rights and interests of the appellant and Mrs Bah, and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought be achieved, namely the maintenance of firm and effective immigration controls.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal against removal is dismissed under the Rules and also outside the Rules under Article 8 ECHR.

I make no anonymity direction.



Signed

Date

Deputy Upper Tribunal Judge Monson