Upper Tribunal
(Immigration and Asylum Chamber)
OA/05996/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On August 27, 2014	**On August 29, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ADAMA SERAY BAH

Respondent

Representation:

For the Appellant: Mr Duffy (Home Office Presenting Officer)
For the Respondent: Mr Sowerby, Counsel, instructed by Portway Solicitors

DETERMINATION AND REASONS

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The appellant, born July 10, 1987, is a citizen of Sierra Leone. On November 14, 2012 she applied for entry clearance as the spouse of a person settled in the United Kingdom.

3. The appellant and sponsor, Abdul Rahman Bah, married on June 20, 2005 and they have a son, born May 21, 2009. The child is a British subject and at the date of application was living with the appellant in Sierra Leone.

4. The respondent refused her application on February 7, 2013 as she was not satisfied:

   a. The appellant and sponsor were in a genuine and subsisting relationship.
   b. The appellant and sponsor satisfied the financial requirements of the Immigration Rules.

5. On February 25, 2013 the appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. The respondent reviewed the original decision on October 31, 2013 and upheld the original decision. The entry clearance manager considered the application under article 8 ECHR but was satisfied refusal was not disproportionate.

6. The matter was listed before Judge of the First-tier Tribunal Shamash (hereinafter referred to as "the FtTJ") on March 31, 2014 and in a determination promulgated on May 15, 2014 she refused the appeal under the Immigration Rules but allowed the appeal under article 8 ECHR.

7. The respondent appealed that decision on May 22, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Nicholson on June 25, 2014. He found the FtTJ may have erred for the reasons set out in the grounds namely allowing the appeal on factors that post-dated the date of decision.

8. Mr Sowerby agreed that if there was an error in law that firstly I should retain the matter in the Upper Tribunal and secondly the matter could proceed to conclusion without any further representations from either party.

SUBMISSIONS ON ERROR OF LAW

9. Mr Duffy submitted there was a clear error of law because the FtTJ had materially erred in allowing the appeal under article 8 ECHR for events that occurred after the date of decision. Section 85(5) of the 2002 Act makes it clear that such applications must be

considered at the date of decision. The House of Lords in AS (Somalia) (FC) and another v Secretary of State for the Home Department [2009] UKHL 32 made clear in paragraph [19]

> "Mr Gill's argument, therefore, was that section 85(5) is incompatible with the right to respect for the family under article 8 because the restriction that it imposes is not proportionate. I am willing to recognise that there may be some cases where entry clearance is sought in which it will be necessary to grapple with this issue, but in my opinion this is not one of them. It is the generality of his proposition that leads him into a difficulty, which I regard as insurmountable. He submits that section 85(5) should be read down to enable the adjudicator to look at all the circumstances because it is likely that the restriction will affect a substantial number of other applicants or, if this is not possible, that there should be a declaration of incompatibility. I agree with Sedley LJ that the language of section 85(5) is incapable of being read down in the way Mr Gill suggested. The directions that it contains could not be put more plainly.
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> Subsection (4) "shall not apply". The adjudicator "may consider only" the circumstances appertaining at the time of the decision to refuse. These words are, as Sedley LJ said, unequivocal and unyielding: [2008] EWCA Civ 149, para 16. Reading them down would be to cross the boundary between interpretation and amendment of the statute: *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, para 121, per Lord Rodger of Earlsferry. Even if, as I am willing to assume, there may be cases where a decision to refuse to consider the up-to-date position could lead to an interference with the article 8 right in a way that was not proportionate, the adjudicator must abide by the terms of the statute. It will not be unlawful for him to do so, because the result of its provisions is that it is not open to him to act differently: 1998 Act, section 6(2)(a)."

Mr Duffy argued the fact the child came to live in the United Kingdom (nine months later) was not something the FtTJ should have considered. If the FtTJ had allowed the appeal based on her findings in paragraph [36] then his argument would have no basis but it is clear from paragraph [37] of the determination that this appeal

was allowed because of what had happened after the date of decision.

10. Mr Duffy submitted that the FtTJ also erred because he applied a "near miss" assessment when the courts have made clear that there is no such thing as a near miss in Immigration appeals.

11. Mr Sowerby submitted:

    a. The respondent had neither challenged any of the FtTJ's findings of fact nor the way she dealt with Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 Admin.

    b. The FtTJ clearly had in mind the circumstances that existed before the child came to the United Kingdom because she set out the facts in some detail in paragraph [36] of her determination. She considered the facts and the respondent's decision and found the latter to be inadequate. As there was a child involved she then quite properly considered the position that now faced the family.

    c. Whilst Section 85(5) of the 2002 Act can restrict the facts a Tribunal can take into account there are cases where subsequent events are taken into account. For example, in Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041(IAC) and Naz (subsisting marriage – standard of proof) Pakistan [2012] UKUT 00040(IAC) the Tribunal took into account evidence of devotion after the date of decision. The House of Lords in AS (Somalia) at paragraph [21] stated

> "I cannot leave this case however without expressing concern at the effect that the delay and expense that the rule may give rise to, when compared with the ease of bringing into account up-to-date information, may have on individual cases. In *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, para 68, Lord Hoffmann said that article 9, which was in issue in that case, was concerned with substance, not procedure. What mattered was the result: was the right restricted in a way, which was not justified under article 9(2)? I would apply that reasoning here too. The facts of this case are academic, as the appellants have been given leave to enter and are

> now in the United Kingdom. But there may be other cases, where very young children or vulnerable adults are involved for example, in which respect for family life cries out for urgent attention. The delay resulting from the need to start the procedure again, and to find the money to do so, may be so plainly out of keeping with the needs of the case that the application of the rule in their case may be found to be disproportionate. Situations of that kind can only be dealt with on a case-by-case basis. The effect of the legislation is that domestic law is incapable, even in those cases, of providing a remedy. But the Secretary of State should bear in mind that they may be vulnerable to an adverse decision in Strasbourg, and I would not rule out the possibility of a declaration of incompatibility in an individual case if the circumstances were so clearly focussed as to enable the precise nature of the incompatibility with the applicant's article 8 right to be identified."

12. The House of Lords, he submitted, gave a clear indication that each case should be considered on its own merits and that is what the FtTJ did in this appeal. The FtTJ gave ample reasons for taking the decision she did and the decision was sustainable. In paragraph [30] of AS (Somalia) the House of Lords stated-

> "These children should not have had to wait so long before being reunited with the only real family they have. But the reason that they have had to do so lies as much in the previous approach to article 8 claims as it does in the provisions of section 85(4) and (5). There is some logic in requiring out of country appeals against the refusal of entry clearance to be decided on the evidence as it was presented to the entry clearance officer on the ground at the time. But the restrictions on the powers of appeal tribunals do not mean that other public authorities are exempt from their duty to act compatibly with the convention rights. We have been shown nothing which suggests that they are disabled from taking changes of circumstance into account without requiring a prohibitive fee for a fresh application every time. It is the fee, as

> much as anything else, which may stand in the way of the system operating compatibly with the convention rights. It remains the duty of all concerned to respect those rights insofar as statute law allows them to do so."

13. Mr Sowerby submitted that even if there was an error it was not material because the FtTJ had given plenty of reasons to allow this appeal under article 8 ECHR.

ERROR OF LAW ASSESSMENT

14. This is an appeal by the respondent. The key issue in this appeal is whether the FtTJ was wrong to have regard to matters that occurred after the date of decision.

15. The starting point in considering this point of law is the 2002 Act. Section 85(4) and (5) of that Act state-

> "(4) On an appeal under section 82(1) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.
>
> (5) But in relation to an appeal under section 82(1) against refusal of entry clearance or refusal of a certificate of entitlement under section 10—
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> (a) Subsection (4) shall not apply, and
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> (b) The Tribunal may consider only the circumstances appertaining at the time of the decision to refuse."

16. In SA (Pakistan) 2006 UKAIT 00018 the Tribunal confirmed that section 85(5) of the 2002 Act applies to human rights issues raised in an appeal against refusal of entry clearance.

17. The issue of post decision evidence under section 85(4) and (5) of the 2002 Act was considered by the Tribunal in DR (ECO: post-decision evidence) Morocco * [2005] UKIAT 00038. The Tribunal noted that section 85(4) as it then was - now exception 1 in section 85A - enabled an Adjudicator to consider evidence, which concerns a matter arising after the date of decision. This provision was excluded in refusal of entry clearance cases by section 85(5). Evidence of matters arising post decision could thus not be considered in such cases. However,

the Tribunal noted that this did not mean that any evidence post decision could not be considered. The Tribunal drew a distinction between post decision evidence that "shed light" on the circumstances appertaining at the date of decision, which remains admissible under the 2002 Act, and post decision evidence relating to post decision events, which is not admissible under that Act. The latter usually arises when the issue is whether a particular matter or circumstances is likely at the date of decision. In contrast post decision letters, which shed light on the parties' intentions at the date of decision would still be admissible. That was broadly the view of the Tribunal in CA (Nigeria) 2004 UKIAT 00243 in which the Tribunal said that, in assessing circumstances at any date in the past, it was right to look at evidence subsequent to that date, provided that that evidence was relevant to the assessment of the circumstances at that date. This was also the Tribunal's view in RM (Pakistan) 2004 UKIAT 00244 in which the Tribunal said that post decision evidence was relevant if it cast light on what was reasonably foreseeable at the date of decision. The Adjudicator was entitled to take into account post decision activities and to find that it shed light on a couple's intentions at the date of decision. In Naz the Tribunal held that post decision visits by a sponsor to his spouse are admissible in evidence in appeals to show that the marriage is subsisting.

18. Both parties have made reference to AS (Somalia). I have had regard to this decision as well as the other authorities I have set out above. It should be stated that the facts of AS (Somalia) are different to the facts of this case. That case involved two children who had remained in Somalia and were applying to come to live with their cousin who was a refugee. This case involved an application by the sponsor's wife for entry clearance as a spouse. The sponsor and appellant had a child who lived with the appellant at the time the application was made. Lord Phillips in giving the leading judgement made it clear in paragraph [10] of the decision that "the provisions of Section 85(4) and (5) are neither irrational nor calculated to result in unjustified delay in the consideration, where that is in issue, of the implications of the right to respect for family life." He also noted in paragraph [8] that there was nothing in that case to have prevented the appellants making a fresh application as soon as their circumstances changed for the worse and he concluded that this would have been the appropriate course to take having regard to the provisions of Section 85(5). Both Lord Hope of Craighead and Baroness Hale of Richmond went further

and as set out in paragraphs [10(c) and [11] above suggested there may be some cases when post-decision evidence may be admissible but they both agreed that case was not one of them.

19. This application was an entry clearance application that did not meet the Immigration Rules. At the time the application was made the appellant and her son lived in Sierra Leone. The sponsor went there and brought his son back to the united Kingdom thereby changing the whole matrix that had been considered by the entry clearance officer.

20. This was neither a change as envisaged in Naz nor a change that was relevant to the assessment at the date of decision. It was a fundamental change made and was taken by the sponsor.

21. Having considered the two arguments advanced I accept Mr Duffy's assessment of the law in so far as it applies to this case. In other words there is a material error of law if the article 8 decision was based on the circumstances at the date of hearing.

22. I turn therefore to the determination. The FtTJ set out from paragraph [21] onwards "factors relevant to the article 8 application at the date of hearing". In paragraph [23] she has wrongly considered Section EX.1 of Appendix FM because that section does not apply to entry clearance applications. The case of Sabir (Appendix FM-EX.1 not free standing) [2014] UKUT 00063 does not assist the appellant or the FtTJ.

23. In paragraph [35] the FtTJ considered whether to remit this case for consideration under Section EX.1 but for the reason set out above to do so would have been an error. In paragraph [36] she acknowledged that the application did not meet the Immigration Rules and then went onto consider the case outside of the Rules. Mr Duffy does not challenge this approach and accepts this was a case that could be considered outside of the Rules.

24. However, paragraph [36] includes a further arguable error in approach in that the FtTJ found that the sponsor met the spirit of the legislation. It goes without saying that the decisions in Miah [2012] EWCA Civ 261 and Nasim and others (Raju: reasons not to follow?) [2013] UKUT 00610(IAC) make clear that there is no such things as a near miss when dealing with the Immigration Rules.

25. Instead of allowing the appeal on the facts that existed at the date of decision the FtTJ proceeded in paragraph [37] to go on to set out all the reasons and facts of why the situation was now more extreme and damaging. Great weight is placed on the fact the child is here and the mother is in Sierra Leone. The FtTJ concentrated on the circumstances at the hearing.

26. The FtTJ erred by considering the best interests of the child and carrying out a proportionality assessment in paragraph [37] of her determination She also erred because in paragraph [37] she again places reliance on Section EX.1.

27. Accordingly, I find there has been an error in law and I set aside the decision under article 8 ECHR.

CONSIDERATION OF SUBSTANTIVE APPEAL

28. I agreed with the representatives that if there was an error in law I would remake this decision based on the evidence already before the Tribunal albeit I will confine myself to the circumstances in existence as at the date of decision and not today or any other date. As Lord Phillips made clear in AS (Somalia) if there are new matters then a fresh application should be submitted.

29. The application for entry clearance did not meet the Rules. The FtTJ set out in paragraph [18] what had to be submitted and she noted that what was submitted did not meet the Rules. No cross appeal was made in respect of this finding.

30. The Court of Appeal in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985 examined numerous authorities and stated:

> "128. … In Nagre the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on Article 8 grounds… Nagre does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. That will

> have to be determined by the relevant decision-maker.
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> 134. Where the relevant group of Immigration Rules, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of Immigration Rules is not such a "complete code" then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.
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> 159. … It seems clear from the statement of Lord Dyson MR in MF (Nigeria) and Sales J in Nagre that a court would have to consider first whether the new MIR and the "Exceptional circumstances" created a "complete code" and, if they did, precisely how the "proportionality test" would be applied by reference to that "code".
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> 162. … Firstly, paragraph GEN.1.1 of Appendix FM states that the provision of the family route "takes into account the need to safeguard and promote the welfare of children in the UK", which indicates that the Secretary of State has had regard to the statutory duty. Secondly, there is no legal requirement that the Immigration Rules should provide that the best interests of the child should be determinative. Section 55 is not a "trump card" to be played whenever the interests of a child arise…"

31. I have to consider whether a refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate.

32. The appellant was unable to meet the Immigration Rules. If she had met the Rules then her application would have been granted. However, it is arguable the Rules do not recognise that in this appeal there was a British child living in Sierra Leone and they both intended to come and live in the United Kingdom with the sponsor.

33. I accept that this is a case that can be considered outside of the Rules and following the five stage test set out in Razgar [2004] UKHL 00027 I find there is family life between the appellant and sponsor, the refusal is an interference but the interference is for a legitimate purpose and for the purpose of maintaining immigration control. The issue is therefore one of proportionality.

34. At the date of decision the appellant was living with her son and they were seeking to come together to the United Kingdom. The circumstances alluded to in the evidence and the FtTJ are perhaps no different to the many other entry clearance applications. There was, at the date of decision nothing out of the ordinarily about this application. It was effectively a straightforward application with no compelling factors.

35. In any assessment on proportionality I have to have regard to the best interests of the child but this is not a trump card but merely one of the factors to take into account. The importance of the public interest and immigration control also carry significant weight especially where the Immigration Rules are not met. As stated above "nearly" meeting the Rules is not something these courts recognise.

36. Having considered all of the available evidence and dealing with the appeal on the facts that existed at the date of decision I am not satisfied that refusal of entry was disproportionate.

37. I therefore uphold the refusal under the Immigration Rules (Appendix FM) and dismiss the appeal under article 8 ECHR.

DECISION

38. There is a material error of law and I set aside the original decision in respect of article 8 ECHR.

39. I have remade the article 8 decision and I dismiss the appeal under Article 8 ECHR.

40. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award, as the appeal did not succeed.

Signed: Dated:

Deputy Upper Tribunal Judge Alis