IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001899
First-tier Tribunal No: HU/05195/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

ABISATOU SAYE KANTEH
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K. Pullinger, Counsel, instructed by Law Lane Solicitors
For the Respondent: Ms A. Nolan, Senior Home Office Presenting Officer

Heard at Field House on 3 July 2024

DECISION AND REASONS

1. The Appellant is a national of The Gambia. She appeals against the decision of First-tier Tribunal Judge Kudhail ("the Judge") dated 26 April 2021 whereby he dismissed her appeal against the Respondent's decision dated 27 March 2020 refusing of her human rights claim. By that claim she had sought to remain in the UK on the basis of her Article 8 family and private life rights.

2. The issues for resolution by the Judge were stated at para.2 of the Appellant's Skeleton argument as:

    a. Whether there were very significant obstacles to the Appellant's re-integration to Gambia pursuant to paragraph 276ADE(i)(vi) of the Immigration Rules.
    b. Whether she meets the definition of a partner under Appendix FM, EX.1 (i.e. whether she and her partner have lived together in a relationship akin to marriage for a period exceeding 2 years and there were

insurmountable obstacles to their family life continuing outside the UK); and

c. Whether the Appellant's removal would give rise to unjustifiably harsh consequences rendering it disproportionate under article 8 ECHR.

3. The Judge addressed the second of these issues first, finding, at paras. 29-34, that the Appellant and her partner, Mr Johnson Michael, had lived together for 2 years in a relationship akin to marriage. At paras. 35-45 the Judge then considering the question of whether there were insurmountable obstacles to family life between the Appellant and Mr Michael continuing outside the UK. It is relevant to note that the reasons put forward by the Appellant as to why family life between her and Mr Michael could not continue in the Gambia included reasons relating to her and reasons relating to Mr Michael. As to the reasons why it was said Mr Michael could not relocate to the Gambia to continue family life with the Appellant there, this was summarised by the Judge at para.38: "*Mr Michael states he could not live in Gambia as he has family in the UK, plus businesses and is elderly*." It is not suggested that that is not an accurate summary of the reasons put forward. As to these, the Judge stated:

> "*42. With regards to Mr Michael's age, I accept he is elderly at approximately 81 years and this will make it difficult for him to move to a new country. I also accept he has business in the UK given the evidence, which supports his claim that he manages these businesses. Whilst I completely sympathise with the couple and appreciate this is a difficult and stressful process, what is clear is that both parties were aware of the appellants [sic] immigration status as an overstayer when they entered into their relationship.*
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> *43. Under VW and MO (Article 8 – insurmountable obstacles Uganda [2008] UKAIT 00021, "what must be shown is more than a mere hardship or mere difficulty or mere obstacle. There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience." I do not have evidence before me that Mr Michaels [sic] age, would impact his ability to make such a move, should he choose to. Many elderly couples go to live abroad during the latter stages of their lives; thus, I do not view his age as a fact which makes it insurmountable. With regards to his business interests this I find this [sic] a matter of choice, it is not a very significant difficulty which would entail serious hardship, in fact quite the opposite as the financial security of rental income would assist them in Gambia.*
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> *44. It was also argued Mr Michael has children in the UK, however I note we have no evidence from these children, who by his own evidence are adults. There was no evidence of a dependency beyond normal emotional ties, so I do not see this as a factor which would be insurmountable as modern communication methods are available.*
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> *45. On balance, looking at all the circumstances, I am satisfied that there are not insurmountable obstacles to family life continuing in Gambia. Thus, I find the high threshold set by para EX.1 has not been met in this case.*"

4. The Judge at paras. 46-51 considered whether the Appellant met the requirements of paragraph 276ADE of the Immigration Rules, concluding that she did not. The Judge noted that the Appellant spent her formative years in the

Gambia, and rejected the Appellant's account that she did not have family members remaining and that she had not worked there. In those circumstances, the Judge found that there were no very significant obstacles to her reintegration, as required.

5. At para.53, the Judge turned to what is described as "Article 8 – outside the Rules". The Judge applied the well-known 5-stage *Razgar* approach, finding that the Appellant's removal would engage Article 8 in its family and private life aspects, that her removal was for a lawful purpose. At para. 55, the Judge turned to the fifth stage, the proportionality assessment. As to this, the Judge reminded herself of the threshold set by the Supreme Court in *Agyarko*, namely that where the refusal would result tin unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances." The Judge then adopted a balance sheet approach to weighing up the various factors, as follows:

> *"56. Factors in favour of the appellants [sic] removal include:*
> *a. The public interest in the maintenance of effective immigration controls (see section 117B(1) of the Nationality, Immigration and Asylum Act 2002);*
> *b. Little weight should be given to family and private life established at a time when a person's immigration status is unlawful or precarious (section 117B(4)(a), (5)). The time the appellant has spent without leave (if accepted) equates to 15 years 10 months, all of this time is unlawful;*
> *c. The appellant is unable to meet any of the requirements of the Immigration Rules;*
> *d. There are no very significant obstacles to the appellant's reintegration in Gambia, in time;*
> *e. There are no insurmountable obstacles*
>
> *57. Factors mitigating against the appellant's removal include:*
> *a. The appellant has no criminal convictions;*
> *b. The appellant does have a relationship with a qualifying partner (Section 117B(4)(b) of the Nationality, Immigration and Asylum Act 2002;*
> *c. The appellant has been financially independent whilst in the United Kingdom (section 117B (3) of the Nationality, Immigration and Asylum Act 2002)*
> *d. The appellant has never accessed any public funds during her residence in the UK and so has not been a burden on taxpayers (see section 117B(2) of the Nationality, Immigration and Asylum Act 2002);*
>
> *58. I consider the reasons in favour of the appellants [sic] removal to outweigh those in favour of permitting her to remain here. The cumulative weight of the matters outlined in paragraph [56] is significant, and has the effect of outweighing the factors in paragraph [57]. The appellant can return to Gambia where she resided for the majority of her life prior to May 2005. The public interest requires that only those who qualify for leave to remain under the immigration rules, or are deserving of international protection, should be granted leave to remain under the rules. Although there is a small class of exceptional cases where the refusal of a grant of leave to remain would have unjustifiably harsh consequences on an appellant such that a*

refusal to grant leave would be disproportionate, I do not consider this appellants [sic] case falls into that category."

6. The Appellant sought permission to appeal against the Judge's decision on numerous ill-defined grounds. As First-tier Tribunal Judge Andrew noted when granting permission to appeal, "Most of the Grounds are merely a disagreement with the Judge's findings, findings which are sustainable on the evidence." However, Judge Andrew was satisfied that there was an arguable error of law in that when considering Article 8 the Judge did not consider the impact of the Appellant's partner if she were removed to Gambia.

7. Before me, Mr Pullinger did not pursue most of the grounds set out in the Grounds of Appeal and relied on the following two grounds:
   a. First (which I will call Ground 1), Mr Pullinger submitted that the Judge failed to consider the appeal through the lens of paragraph GEN 3.2;
   b. Second (Ground 2) Mr Pullinger relied on the failure identified by Judge Andrew in granting permission, that the Judge had arguably omitted in her consideration of proportionality outside the Rules to consider the impact on Mr Michael of the Appellant's removal.

8. As to ground 1, notwithstanding their prolixity I do not consider that this argument is within the scope of the Grounds of Appeal on which permission was granted. There is no reference in them to GEN 3.2 or to anything else that might be construed as suggesting that GEN 3.2 should have been applied. In those circumstances, and in the absence of any application to amend the grounds, I have no jurisdiction to consider this issue. Nonetheless, the ground is, moreover, hopeless. The relevant statutory ground of appeal to the FTT in this case was that "*removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998*". GEN 3.2 requires a decision-maker (i.e. the Respondent) to consider whether "*there are exceptional circumstances which would render refusal of…leave to…remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.*" That is the same test as was laid down by the Supreme Court in *Agyarko* in relation to Article 8 'outside the Rules', which the Judge considered. It is not an error of law not to refer to the test as set out in the Immigration Rules, and in any event, given that that provides the same test in substance as the *Agyarko* 'outside of the Rules' test, any such error is plainly not material.

9. As to Ground 2, it seems to me tolerably clear that the Judge *did* consider the impact on Mr Michael of the Appellant's removal to The Gambia. The Judge had considered whether there were insurmountable obstacles to family life between the Appellant and Mr Michael continuing in The Gambia and concluded that there were not. In para. 56(e), she referred back to this as a feature militating in favour of removal. It is not the case therefore that the impact on Mr Michaels of going with the Appellant to The Gambia was not considered. It is true that the Judge did not consider the impact on Mr Michael of remaining in the UK if the Appellant is removed, but it follows from the conclusion that there are no insurmountable obstacles to family life continuing, that any such impact would not be because of the Appellant's removal but because, notwithstanding the lack of insurmountable obstacles, he had chosen to remain in the UK without the Appellant. It was not therefore in my judgment an error of law not to consider that.

10. Even if that is wrong, I cannot see that it could have properly made any difference to the Judge's ultimate conclusion on Article 8 outside of the Rules. The evidence of the impact that the Appellant's removal would have on Mr Michael was very thin indeed. His evidence was that he could not bear to live without the Appellant (witness statement, para.5) and would be devastated by the Appellant's removal and that he will fall seriously sick (cross-examination, see para.24 of the Judge's decision). There was however no evidence of any real health problems and, as the Judge noted at para 44, no evidence from (or indeed in any significant respect about) Mr Michael's children or how they might be impacted. Given the paucity of the evidence in relation to the impact which the Appellant's removal would have on Mr Michael, any failure by the Judge to consider that was not in my judgment material.

11. Ground 2 therefore falls to be rejected and the appeal dismissed.

Notice of Decision

The decision of FTT Judge Kudhail dismissing the Appellant's appeal did not involve the making of a material error of law and shall stand.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 July 2024