Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/53489/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8th October 2014	**On 14th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRANCES

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HAJA FATMATA BAH

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr D T Popoola, Community Legal Centre

DETERMINATION AND REASONS

1. I shall refer to the parties as in the First-tier Tribunal. The Appellant is a national of Sierra Leone born on 25th February 1936. Her appeal against the Respondent's refusal of indefinite leave to remain was allowed by the First-tier Tribunal on 11th June 2014 on Article 8 grounds. The Secretary of State appealed.

2. The Appellant entered the UK as a visitor on 2nd February 2012. Her visa expired on 2nd June 2012. On 29th September 2012 she made an application for indefinite leave to remain. This was rejected twice for non-payment of fee. A further application made on 14th March 2013 was considered substantively and refused on 20th November 2013 under paragraph 322(1), Appendix FM, paragraph 276ADE of the Immigration Rules and under Article 8.

3. First-tier Tribunal Judge Wilsher applied the five stage test set out in Razgar v SSHD [2004] UKHL 27 and concluded, at paragraph 9: "This family history is quite unique and the place of this Appellant in her family is something that is worthy of protection and that the interests of immigration control do not outweigh that in these very specific circumstances."

4. Permission to appeal was sought on the grounds that the Judge failed to properly direct himself following R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin). It was submitted that there were not compelling circumstances not sufficiently recognised under the Immigration Rules.

5. Permission to appeal was granted by First-tier Tribunal Judge P.J.M. Hollingworth on 28th July 2014 on the grounds that insufficient weight had been attributed to the policy and rationale of the Secretary of State as reflected in the Immigration Rules.

6. At the hearing before me, Mr Tarlow relied on the grounds of appeal and submitted that the Appellant came to the United Kingdom as a visitor and overstayed. The Appellant was an elderly lady and had family here. She suffered from hypertension, which was controlled by medication. The Appellant could not satisfy the Immigration Rules and would have to show compelling and compassionate circumstances outside the Rules. There was nothing in paragraph 9 of the Judge's determination that showed exceptional or compelling circumstances. The Appellant had lived in Sierra Leone without her family since 2005. The Judge had failed to adopt the correct approach following Nagre and Gulshan, and Article 8 should not be used to circumvent the Immigration Rules. The Appellant had made her way here and could return and make an application as an adult dependant. The failure to refer to Nagre or indeed Gulshan was material to the decision and there were no compelling or compassionate circumstances identified at paragraph 9 which would outweigh the public interest.

7. Mr Popoola submitted that there was no error of law which was material to the decision. He relied on R (on the application of) Zhang v Secretary of State for the Home Department [2013] EWHC 891 (Admin) at paragraph 69 onwards where the principle set out in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 was summarised. Mr Popoola

pointed out that a case requiring an Appellant to return for two months was considered disproportionate. Mr Popoola submitted that the Judge had properly considered proportionality and there was no material error in his decision.

8. Having considered all the documentary evidence and the submissions, I come to the following conclusions: The Appellant is 78 years old. Her application was refused under Appendix FM because she did not have leave to enter as a dependent relative when she made her application in the UK. Having had some discussion with Mr Tarlow during his submissions, I am of the view that paragraph 322(1) of the Immigration Rules is not applicable in this case because the Appellant was seeking leave to remain as a dependent relative which was a purpose covered by the Immigration Rules.

9. Unfortunately, the Appellant cannot succeed under the Immigration Rules because she entered the UK as a visitor, not as a dependent relative. The application was refused on that basis. The Appellant was not refused indefinite leave to remain because she could not satisfy the maintenance requirements or the suitability requirements.

10. I find that First-tier Tribunal Judge Wilsher failed to direct himself following Nagre and he failed to make a finding that there were compelling circumstances not recognised under the Rules. However, I find that this error was not material in this case. The Judge clearly identified compelling circumstances at paragraphs 5 to 9 of the determination and I find that there were arguably good grounds to carry out an Article 8 assessment following Razgar.

11. The Judge found that the Appellant had established family life in the UK and gave cogent reasons for that conclusion at paragraph 9. In fact, this point was conceded by the Presenting Officer at the hearing. The issue, which was therefore before the Judge, was whether it was proportionate to require the Appellant to return to Sierra Leone to obtain entry clearance as a dependent relative. The Judge found, at paragraph 9, that it was not proportionate to do so. He considered the effect on the whole family and took into account the particular family history. The Appellant had no family in Sierra Leone and her neighbour could no longer look after her. The Judge found that the Appellant would not be able to live alone in Sierra Leone given her dependency on her family members for everyday tasks. He found that the Appellant provided emotional and other support and the family unit was extremely strong. He found that any subsequent recourse to public funds was unlikely to be sufficiently large so as to outweigh the compelling compassionate factors in this case. The Judge's finding that the Appellant's right to family life outweighed the public interest was open to him on the evidence.

12. Accordingly, I find that there was no material error of law in the determination and the Respondent's appeal to the Upper Tribunal is dismissed. The determination dated 11th June 2014 shall stand.

Deputy Upper Tribunal Judge Frances
13th October 2014