



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

**Appeal Number  
VA/01380/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 31 October 2014**

**Determination Promulgated  
On 3 November 2014**

**Before**

**Deputy Judge of the Upper Tribunal I. A. Lewis**

**Between**

**NaCeesay Janha**  
(Anonymity direction not made)

**Appellant**

**and**

**Entry Clearance Officer,  
Accra**

**Respondent**

**Representation**

For the Appellant: Mr. S. Conteh, nominated sponsor.  
For the Respondent: Ms. J. Isherwood, Home Office Presenting Officer.

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Birrell promulgated on 20 August 2014, dismissing the Appellant's appeal against the Respondent's decision dated 5 March 2014 to refuse to grant entry clearance to visit the UK to see her husband Mr Swaib Conteh ('the sponsor').

## **Background**

2. The Appellant is a national of Gambia born on 3 June 1990. She made an application for entry clearance as a family visitor using an on-line application form completed on 20 February 2014, indicating she wished to visit the sponsor and intended to stay in the UK for 6 months. The application was refused on 5 March 2014 for reasons set out in a Notice of Immigration Decision with particular reference to paragraph 41(i), (ii), (vi), and (vii) of the Immigration Rules.

3. The Appellant appealed to the IAC. On her Notice of Appeal the Appellant indicated that she wished the appeal to be considered without an oral hearing 'on the papers'. Her appeal was listed accordingly, and was dismissed for reasons set out in the First-tier Tribunal Judge's determination.

4. The Appellant sought permission to appeal to the Upper Tribunal which was granted on 26 September 2014 by First-tier Tribunal Judge Scott-Baker.

5. A Rule 24 reply has been filed on behalf of the Respondent dated 3 October 2014.

## **Consideration**

6. The Notice of Immigration Decision alerted the Appellant to the limited nature of the grounds of appeal available to her in the event that she wished to exercise her right of appeal against the Respondent's decision: "*Your right of appeal is limited to the grounds referred to in section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002*" - followed by a web address where the relevant legislation could be found. The limitation is that the Appellant could only appeal on the ground that the decision was unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the Appellant's rights under the European Convention on Human Rights.

7. The First-tier Tribunal Judge recognised this limitation in her determination: see paragraph 3.

8. The Appellant's grounds set out in her Notice of Appeal focus only on the substance of the refusal under the Immigration Rules

and do not address human rights issues. Similarly, the supporting documents referred to in the Notice of Appeal only go to the issues under the Rules.

9. There is a note on the Tribunal file indicating that the validity of the appeal was considered on 30 April 2014 by Judge Monro, who commented "*Visit to husband working in UK. Arguable HR grounds. Appeal to proceed*". Judge Birrell refers to this at paragraph 11 of her determination: "*This is a case that carries a limited right of appeal. Although not specifically argued by the Appellant the case was permitted to proceed on the basis that there was arguably a breach of Article 8 as the Appellant was seeking to visit her husband*".

10. The failure of the Appellant's Notice of Appeal to address relevant matters was identified in the Respondent's Entry Clearance Manager's review of 28 May 2014: "*I note that the application does not attract a full right of appeal therefore any consideration for an appeal should be restricted to Human Rights only. I also highlight the fact that they have not made this appeal under Human Rights grounds, but raise concerns which amount to a disagreement over the ECO's assessment of the sponsor's ability to meet the expenses of the appellant's proposed visit as well as the evidence provided by the appellant regarding her personal financial circumstances in Gambia*".

11. Judge Birrell considered the Appellant's unformulated Article 8 case with reference to the guidance in **Razgar [2004] UKHL 27**, and concluded that the Appellant's case failed at the second of the five **Razgar** questions: see determination at paragraph 13.

12. The Appellant has pleaded two matters in her grounds in support of the application for permission to appeal. First, it is noted that the Judge referred to the Appellant as being a Ghanaian national rather than a Gambian national, and it is submitted that this demonstrates the Judge had not paid sufficient attention to the details of the case. Second, it is said that the Judge failed to refer to an appeal bundle submitted on behalf of the Appellant. In this latter regard Judge Scott-Baker noted that the Tribunal had received a bundle on 9 June 2014, and that "*Arguably there is an error of law in that the Judge appears to have overlooked this evidence*".

13. No specific criticism of the Judge's approach with reference to **Razgar** was made in the application for permission to appeal, and in

this regard. I find that judge Birrell's approach and conclusion were entirely sustainable on the basis of the evidence before her.

14. However, I have noted that Judge Birrell repeatedly and erroneously referred to the Appellant as being a citizen of Ghana (determination at paragraphs 1, 4, 10, 13). I have reminded myself of what is said in **ML (Nigeria) [2013] EWCA Civ 844** in the context of factual errors when detailing the nature of an appellant's case in a determination potentially demonstrating an absence of a fair hearing, and thereby an error of law. However, I also recognise that there is scope for a determination to contain slips and errors without it inevitably constituting a material error of law.

15. In the circumstances of this particular case it is not evident that the Judge has otherwise misunderstood any of the relevant facts of the appeal. In my judgement the mistake as to nationality is most likely a mere slip, bearing in mind that the Respondent was based in Ghana (Accra). It has not been alleged that the attribution of the wrong nationality to the Appellant is indicative of any discriminatory approach by the Judge. In all the circumstances I am not satisfied that this circumstance is demonstrative of a lack of attention or consideration such as to deprive the Appellant of a fair hearing: in my judgement the mistake as to nationality was immaterial to the Judge's consideration of human rights grounds.

16. In respect of the Appellant's appeal bundle, I acknowledge that it is indeed the case that the Judge appears to have determined the appeal without consideration of this bundle. Although the bundle is now on the Tribunal file it is not apparent when it was linked to the file, and accordingly I am inclined to infer that it had not been so linked prior to the file being passed to the Judge. Nonetheless, even though it appears likely that the circumstance of the bundle not being considered by the Judge arose for administrative reasons, it is still capable of amounting to an error of law notwithstanding that it does not arise by reason of judicial error. It was a breach of natural justice to determine the appeal in the absence of materials upon which the Appellant wished to rely.

17. The question really becomes one of materiality.

18. I have carefully considered the contents of the un-paginated and un-indexed bundle that is on file and stamped as having been received by the Arnhem Support Centre on 9 June 2014. It is clear to me that the contents of the bundle have been prepared in an

attempt to address the substance of the decision under the Rules, and do not in any way address any potential human rights grounds. Moreover, there is nothing by way of a covering letter or a statement from either the Appellant or the sponsor as to the impact upon them of the Respondent's decision. Accordingly, in my judgement had the bundle been before Judge Birrell, it could not have made any difference to the outcome of the case considered by the Judge under Article 8.

19. Mr Conteh has attempted to formulate an Article 8 case before me today.

20. One matter that he was able to clarify, which did not emerge clearly from any of the documents already on file, was that he and the Appellant had never actually met. In this context I note that the invitation letter of 23 December 2013 is couched in ambiguous terms: "*[The Appellant] and I got married in a religious ceremony on 6/08/13, but have not had the chance to meet in person since then. Before our marriage, we had been in a relationship conducted mainly via the internet after having been introduced to each by mutual friends in the Gambia. ... I am earnestly appealing to you to give her any assistance needed to secure a visa so that we can have our first chance of living together as a married couple*". It seems to me that this passage at least implies that the Appellant and the sponsor have met. Be that as it may, the sponsor now clarifies that he has not met the Appellant, and that the marriage registered on 22 August 2013 following a religious ceremony on 6 August 2013 was a marriage by proxy. Indeed, the sponsor stated that one of the obstacles to applying for his spouse to join him in the UK for settlement was that they had not met.

21. Accordingly, it may be seen that the ability to meet is significant both in terms of developing a mutual family life, and in providing a factual premise in order to be able to establish a permanent home together in the UK. No doubt mindful of the observations of Judge Birrell at paragraph 13 of her determination, the sponsor also stated that because he has been active in Gambian politics from about 2011 - whilst studying in the UK - he fears that it may not be safe for him to return to Gambia to visit the Appellant. (The sponsor confirmed that he had obtained his indefinite leave to remain on the basis of the length of time he had been in the UK as a student and not pursuant to an asylum application.)

22. The Article 8 case as now articulated was not raised in the grounds of appeal before the First-tier Tribunal, and was not

otherwise identified in any of the materials sent to the Tribunal. Nor was such a case formulated or supported by materials in the application for permission to appeal. Yet further, no such case was advanced by way of statements, or materials pursuant to the Directions issued by the Upper Tribunal accompanying the Notice of Hearing issued on 3 October 2014. Moreover, the sponsor did not bring with him today any materials that might support his contentions – for example, in respect of his political activism and any possible risk in visiting the Gambia. (In any event, in this latter regard I can see no reason, and the sponsor did not advance any reason, why the Appellant and the sponsor might not meet in some third country to which they both could travel.)

23. The formulation of an Article 8 claim at this late stage does not in any way impugn the approach taken by Judge Birrell. I have taken into account that both the Appellant and the sponsor are lay-people and cannot be assumed to know all of the details of the law. Nonetheless, the scope of the appeal has been made apparent from the date of the Respondent's decision and throughout the appeal process. The case as put to Judge Birrell – even with the benefit of the appeal bundle that did not reach her – could not have succeeded. In my judgement it is too late for the Appellant and the sponsor to seek to advance in these proceedings the Article 8 argument now formulated.

24. I note that this does not condemn Appellant and the sponsor to living apart. It is open to the Appellant to reapply for a visit visa making good all of the matters that were considered deficient under the Rules – and perhaps more fully explaining her circumstances and the reasons underlying the proposed visit. As regards the requirements of the Rules, there has been no adverse finding by the Tribunal on the additional materials presented in support of the appeal. Moreover, it is open to the Appellant and the sponsor to meet in a third country, with a view to making an application for the Appellant to join the sponsor as a spouse in the UK thereafter. The merits of any such applications will fall to be determined on all of the circumstances at the time – and nothing herein, should be taken as an indication either of merit or lack of merit in such potential applications. I refer to them only to indicate that the decision to dismiss the appeal herein is not finally determinative of the Appellant's and sponsor's hopes to be able to establish a family life together.

25. In all such circumstances whilst I accept that there was an error of law in that the Judge proceeded without the Appellant's bundle, such an error was not material. Further in circumstances

where no Article 8 argument had been formulated or advanced, the Judge is not to be impugned for determining the appeal in the way that she did. In the circumstances I decline to set aside the decision of the First-tier Tribunal, and in consequence I do not permit the Appellant to pursue further in these proceedings the Article 8 submissions only now formulated by the sponsor.

**Notice of Decision**

26. The decision of the First-tier Tribunal Judge contained an error of law. However, in all of the circumstances I do not exercise the discretion to set aside the decision of the First-tier Tribunal, pursuant to section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007. The decision of the First-tier Tribunal stands.

27. The appeal is dismissed.

**Deputy Judge of the Upper Tribunal I. A. Lewis 31 October 2014**