Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33195/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd September 2017	**On 27th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MOHAMED MOMOH CONTEH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Rashid, Counsel
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sierra Leone born on 11th March 1962. The Appellant's immigration history is that on 18th July 2001 he was issued with a multivisit visa valid until 18th January 2002 although the Appellant claims to have entered the UK clandestinely on 1st September 2000 but the Secretary of State had no trace of lawful entry to the UK at that time. On 10th October 2001 the Appellant claimed asylum and that claim was refused. The Appellant's appeal process was concluded in March 2003 when the Appellant was refused further permission to appeal and on 7th

December 2007 he was removed from the UK on an emergency travel document.

2. On 20th May 2010 the Appellant was issued with entry clearance in the category of a visa settlement spouse valid until 20th August 2012. On 11th September 2012 the Appellant made an out of time application for leave to remain as the spouse of a settled person but this was rejected on 17th October 2012. A fresh application based on similar grounds was lodged on 20th October 2012 but this application was refused with no right of appeal on 1st March 2013. On 21st January 2015 the Appellant was served with notice IS.151A as an overstayer.

3. It was against that basis that on 26th March 2015 the Appellant made an out of time application for indefinite leave to remain as the spouse of a settled person. That application was refused by Notice of Refusal dated 8th October 2015.

4. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Maciel sitting at Taylor House on 24th November 2016. In a decision and reasons promulgated on 19th December 2016 the Appellant's appeal was dismissed both on immigration grounds and on human rights grounds.

5. On 4th January 2017 Grounds of Appeal were lodged to the Upper Tribunal. Those grounds contended that the Immigration Judge erred in dismissing the appeal outside the Rules under Article 8 and that the judge's assessment of proportionality under the *Razgar* approach was wholly inadequate. They contended that the judge's conclusion that there was no interference with family life when the Appellant was given lawful permission to join and reside with his British wife in the UK (and which relationship is genuine and subsisting) and for them to now go and reside in Sierra Leone would be unlawful.

6. Secondly, the grounds contended there had been no assessment of proportionality and that the judge was required as a matter of law when considering Article 8 outside the Rules to undertake the proportionality exercise, and that it was arguable that an eight year old genuine and subsisting marriage with a non-UK partner who had been specifically granted entry clearance to join and reside with his British spouse, was a material and weighty matter in the *Razgar* balancing exercise which the Immigration Judge had failed to undertake.

7. On 10th July 2017 Judge of the First-tier Tribunal Brunnen granted permission to appeal. On 25th July 2017 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Rule 24 response submits that the Judge of the First-tier Tribunal directed herself appropriately, pointing out that the application was submitted out of time and was considered therefore under Appendix FM and 276ADE, and that the judge found that the Appellant did not satisfy EX.1(b) as set out at paragraphs 22 and 23 of her decision. Further, the Rule 24 response submits that the

judge had properly considered Article 8 outside the Rules as set out at paragraphs 26 to 30.

8. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructed Counsel, Mr Rashid. Mr Rashid is familiar with this matter, having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer, Mr Nath.

Submissions/Discussion

9. Mr Rashid starts by reminding me that the Appellant came here as a spouse in 2010 with a visa valid until August 2012. All that was necessary for the Appellant to do in order to apply for indefinite leave to remain was to undertake the Knowledge of Life test. However, instead, the Appellant made application for further leave to remain. It was not until the Appellant's leave had expired by some three weeks that it was noted by his current representatives that the wrong form had been filled in in seeking an extension of his leave. Mr Rashid points out that the judge has accepted this at paragraph 20 of her decision. He submits there would be insurmountable obstacles which would prevent the couple living together in Sierra Leone.

10. Mr Nath in response points out that the application made by the Appellant was late and that the Appellant could not meet the Immigration Rules.

11. Mr Rashid points out that the Appellant's application, whilst accepting that it was out of time, was not made at a time when he was ever an overstayer and consequently the public interest issue is not one for due consideration and that apart from being out of time the Appellant meets the Rules. He submits that the Rules interfere with the justice of this matter. He takes me to paragraph 29 of the decision and submits that analysis as to how Article 8 outside the Rules should be made constitutes an error of law. He contends that the Appellant's spouse will not go to live in Sierra Leone and that the judge accepted that there is family life and that there has to be an interference with it if the Appellant's spouse will not go to Sierra Leone. He submits that the judge has not carried out the five step test under *Razgar* and undertaken an appropriate balancing exercise. He asked me to find there is therefore a material error of law and to set aside the decision of the First-tier Tribunal.

12. Mr Nath disagrees with this analysis, pointing out to me that if I read the judgment carefully that the judge has carried out a full analysis of the Appellant's appeal under Article 8 outside the Rules and that the decision amounts effectively to little more than mere disagreement.

The Law

13. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

15. I start by reminding myself that the purpose of this hearing is solely to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. It is not my role to analyse or comment on the history of this matter and the apparent failings of the Appellant to take the proper and appropriate steps that were necessary to regularise his status within the UK.

16. It is the role of this Tribunal to scrutinise whether or not there is a material error of law in the approach that has been adopted by the First-tier Tribunal Judge. Whether I agree or disagree with the findings of that judge is not a relevant factor providing I am satisfied that the judge carried out a proper and reasoned analysis of the evidence and made findings that she was entitled to.

17. Whilst it will come as a substantial disappointment to the Appellant and to his spouse, I find that the decision of the First-tier Judge discloses no material error of law. The judge has thoroughly considered the issues in this matter. The earlier paragraphs set out the history and notes that the Appellant seeks to pass the blame for not having completed his Knowledge of Life test onto his previous solicitors. The judge finds quite properly that the Appellant cannot succeed under the Rules, and then goes on to set out the basis of that conclusion. Thereafter, the judge analyses in paragraphs 26 to 30 the Appellant's human rights appeal and at paragraph 28, having

considered the evidence at paragraph 27, found there were no compelling reasons for the grant of leave outside the Rules.

18. What is important is that the judge has gone on to consider the proper approach set out in *Razgar [2004] UKHL 27*. The judge acknowledges that the Appellant has established a family life with his British wife in the UK. The judge has made a reasoned finding that the decision does not interfere with the Appellant's rights to family and private life, noting that the Appellant and his wife have chosen to live in the UK and that there is nothing preventing them from living as a family in Sierra Leone. The judge has noted that the Appellant has previously lived in Sierra Leone and worked there and that there is nothing to prevent him from working and living there where he has an adult daughter. Consequently, I am satisfied that the analysis carried out by the judge is proper and does not disclose any material error of law.

19. Having said this, it is difficult not to have considerable sympathy for the position in which the Appellant finds himself. The allegation is that the failure to make appropriate application was due to the Appellant's previous solicitors. I know of no reason why the Appellant did not take his Knowledge of Life test and regularise his status at that time. This is one of those cases where if a proper and further consideration of a proper application were to be made, it may well be that the Secretary of State may view this matter differently, albeit I emphasise that it is not for this Tribunal to pre-judge any subsequent assessment that might be made on the Appellant's behalf by the appropriate authorities.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and the appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris