Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09482/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 29 October and 3 December 2013	**on 16 December 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

BLANDINE NOELLE DAMTSE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms N Loughran, of Loughran & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

A note and further directions, dated 31 October 2013, were issued to parties in terms of paragraphs 1 to 8 below:

1. This case was listed before me for substantive hearing on 29 October 2013. Shortly before that date the appellant changed her

representatives to Loughran & Co, Solicitors, Glasgow, although no written notice of the change, which should be given in accordance with the Procedure Rules, is on the Upper Tribunal file.

2. By letter faxed at 9.34 am on 29 October 2013 the appellant's solicitor sought an adjournment, having been taken ill the previous day. Having heard from the Senior Presenting Officer, Mr Mullen, I allowed the adjournment.

3. The respondent refused the appellant's application for leave to remain as the spouse of a person settled in the UK for lack of evidence of having passed the relevant English language test. First-tier Tribunal Judge McGavin dismissed the appeal under the Rules for the same reason (paragraph 7 of her determination). She dismissed the appeal under the ECHR on the view that it was proportionate to require the return of the appellant and her child (if she had one, which the judge did not accept) to Cameroon.

4. In an inventory of productions (wrongly headed "In the First-tier Tribunal") sent under cover of a letter dated 28 October 2013 the appellant includes an English language certificate. This appears to comply with the Rules, but it was issued after the date of the respondent's decision and after the date of the determination by the First-tier Tribunal. There is no accompanying application for admission of further evidence, for any purpose, and no explanation of how this item might be relevant to the outcome of this appeal.

5. On the evidence available to the First-tier Tribunal, and since, the failure of the appeal under the Rules seems inevitable. It does, however, appear that the appellant might now make an application meeting the requirements of the Rules (and, presumably, she was previously in a position to obtain and produce the necessary language certificate).

6. In respect of Article 8, the properly decisive issue may not have been whether it is reasonable to expect the appellant and her child to remove to Cameroon. In any event, that is unlikely to be the issue if the decision did have to be remade, when the appellant has the option of making an application which meets the requirements of the Rules.

7. Subject to any argument and reference to authority which the appellant may wish to make, it is difficult to see that an appellant can assert a right under article 8 to be granted leave without following a course open to her under the Rules.

8. The appellant (if she elects to continue with this appeal) is directed to file with the Upper Tribunal and to copy to the respondent not less than 7 days prior to the next hearing a note of argument, with reference to any relevant case law, explaining why she says that her appeal should succeed in the UT.

9. The appellant filed a note of argument under cover of a letter dated 2 December 2013. This says firstly that her English language certificate should be admitted "in the interests of fair and proper disposal of the appeal"; that the date for admission of evidence is "the date of the [UT] appeal hearing"; and that the appellant is thus "clearly able to meet the Immigration Rules". There is no reference to authority for those propositions.

10. The second argument is that whether or not she now meets the Rules, and whether or not she has the option of another application, she "still has separate Article 8 grounds" which require to be assessed. There follow lengthy extracts of case law applicable to the issue of removal to Cameroon. The note does not discuss whether and why that is the relevant alternative.

11. At the outset of the hearing, Mr Mullen observed that the SSHD's decision was unlawful to the extent that it included a removal decision, a point so far overlooked all round. He **withdrew** that aspect of the decision.

12. Ms Loughran submitted, without directly referring to the case, that "LS (Gambia)" is authority for the proposition that the Upper Tribunal should consider this case under the Rules on the basis of the appellant's language certificate, although it had not been obtained by the date of the SSHD's decision or by the date of the FtT hearing; and that the FtT judge overlooked the best interests of the child, and the relevance of the child's UK citizenship.

13. Mr Mullen said that the language test certificate was not before the SSHD or the FtT, and whether the appellant can now meet the Rules in that respect is irrelevant. The grounds on which permission to appeal to the UT was granted relate to Article 8 only, not to the decision under the Rules. On Article 8, the judge was entitled to conclude as she did. In any event, as the appellant has the avenue of a further application open to her, and as she is not now faced with a removal decision, there could be no consequences amounting to a disproportionate breach of Article 8 rights.

14. In reply, Ms Loughran accepted that there were no grounds of appeal going to the decision under the Rules, and that it could not be argued that the FtT judge erred in law in relation to the Rules on the case before her. As to Article 8, she raised for the first time, and without specific explanation of the appellant's position, the possibility that she might not now be in a position to apply under the Rules from within the UK.

15. In response to that new point, Mr Mullen said that a further application by the appellant, even if it were out of the time permitted for

applying from within the UK, was likely to be considered on its merits without that being taken against her. He could not give an undertaking to that effect, but he would endorse the case file with a note that if necessary the point should be considered, and he was aware that not all out of time applications are refused on that issue.

16. I indicated that the appeal to the Upper Tribunal would be dismissed.

17. LS Gambia [2005] UKAIT 00085 is no authority for the sweeping submission about admissibility and relevance of evidence which was not provided to the SSHD and which did not exist at the date of the SSHD's decision. The submission ignores the wording of the Rule, which requires an applicant to provide a current certificate with the application, as well as statutory amendments since 2005 (now 2002 Act, s. 85A) and case law following thereon. Even if some argument could have been conjured up about that, there was no relevant ground of appeal to the UT, and no error of law by the FtT on the case before it in relation to the Rules.

18. There is only one matter in relation to Article 8 which might have had any eventual substance. That is whether and when the appellant is or was in a position to apply under the Rules from within the UK, and whether it would be proportionate to require her to apply from outside the UK. There might have been an arguable issue on the basis of Chikwamba [2008] UKHL 40 (although that case was not mentioned). However, (a) that was not put to the FtT; (b) it came very late in the UT; (c) there was no application to amend the grounds of appeal; (d) it came at a stage when removal directions no longer apply; and (e) it seems likely that any application will be considered on its merits without the appellant leaving the UK. At this stage, before any further application or decision is made, nothing emerges which might be held as contrary to Article 8.

19. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law, such as to require it to be set aside, and it **shall stand**. (The respondent's removal decision has been withdrawn.)

20. No order for anonymity has been requested or made.

4 December 2013
Judge of the Upper Tribunal