



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

Appeal Number: IA/35717/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 December 2014**

**Determination  
Promulgated  
On 16 December 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**BEATRICE BAFFOUR GYIMAH  
(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr P Duffy of the Specialist Appeals Team

For the Respondent: Ms E Aryee of Immigration Practitioners Service LLP

**DECISION AND REASONS**

**The Respondent**

1. The Respondent to whom I shall refer as “the applicant” is a citizen of Ghana, born on 16 February 1984. In August 2009 she arrived with entry clearance as spouse. She was the victim of domestic violence and on 14 March 2012 the marriage was dissolved by a certificate issued in the Ghanaian courts. Her partner, Napoleon Darkwah became a naturalised British citizen in 2010. His marriage to Georgina was dissolved by a

certificate issued on 3 March 2011 in the Ghanaian courts. He has two children by that marriage born in 2006 and 2007. They are British citizens and they live with him and the applicant. The applicant and her partner have a child born in 2011. They met subsequent to the applicant's divorce. In addition, their family household includes two children born 1998 and 2002 to Mr Darkwah's brother who is a soldier serving abroad in the British Army.

2. On 6 July 2012 the applicant applied for leave to remain on the basis of her relationship with her partner and their child. On 13 August 2013 the Appellant (the SSHD) refused the application and decided to make directions under Section 47 of the Immigration, Asylum and Nationality Act 2006 for the removal of the applicant to Ghana.
3. The SSHD referred to Appendix FM of the Immigration Rules and found the applicant did not meet the requirements of the Rules and Appendix FM and in particular paragraph EX1 which it was accepted was relevant to the applicant. Additionally, the SSHD refused the application under paragraph 276ADE of the Immigration Rules because the applicant could not satisfy the requirements as to length of residence and had not shown she had lost all ties to her home country.
4. On 29 August 2013 the applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are general, referring to the British nationality of her partner and their child; that she and her partner had been together in a durable relationship for over two years; that she is responsible not only for her child but also her partner's two children by his previous marriage and his two nephews.

### **The First-tier Tribunal's Determination**

5. By a determination promulgated on 4 September 2014 Judge of the First-tier Tribunal Buckwell allowed the appeal of the applicant on human rights grounds. He noted Mr Darkwah's brother was serving in the British Army and that the applicant looked after his two children as well as her partner's two children by his previous marriage.
6. The Judge noted the application had the benefit of the Transitional Provisions affecting the coming into force of Appendix FM referred to in paragraphs A277 and following. He also referred to Section 55 of the Borders, Citizenship and Immigration Act 2009 and the judgment in *Edgehill and Bhoyroo v SSHD [2014] EWCA Civ 402* as well as other case law relating to Article 8 of the European Convention.
7. He found both the applicant and her partner "to be very straightforward witnesses"; that they enjoyed "a devoted and loving relationship" and that they both played a positive role in the upbringing of her partner's three children as well as her partner's two nephews.

8. The appeal before the Judge turned entirely on the applicant's claim under Article 8 of the European Convention outside the Rules and he found in her favour.
9. The SSHD sought permission to appeal on the ground that the Judge had misconstrued jurisprudence in *Edgehill* and that he also misconstrued the application of Sections 117A-D of the 2002 Act affecting determinations determined on or after 28 July 2014.
10. On 22 October 2014 Judge of the First-tier Tribunal P J G White granted the SSHD permission to appeal he found the Judge had arguably erred in law because he had "allowed the appeal on Article 8 grounds"; that he had not had regard to the fact of the changes to the Immigration Rules which came into effect on 9 July 2012 and that he should have taken account of Sections 117A-D of the 2002 Act because although the appeal was heard on 9 July the determination was signed off on 28 July and promulgated on 4 September 2014.

### **The Upper Tribunal Hearing**

11. The applicant and her partner attended. For the SSHD Mr Duffy submitted the Judge had not engaged with the Immigration Rules. In his assessment of the claim under Article 8 outside the Rules, the Judge should have referred to Appendix FM as reflecting the SSHD's views about Article 8 and had given insufficient weight to those views. His determination had been promulgated after Sections 117A-D had come into effect and therefore they should have been referred to in the Judge's proportionality assessment.
12. Ms Aryee relied on the applicant's response filed under Procedure Rule 24. This asserts the Judge correctly applied the Transitional Provisions of paragraph A277 and following of the Rules and was right to use the older version of the Rules in his assessment of the claim under Article 8 of the European Convention outside the Rules which also correctly reflected what the Court of Appeal had said in *Edgehill*.
13. In any event, there were insurmountable obstacles to the applicant's return to Ghana because she and her partner were responsible for five children, all of whom were British citizens and in school in the United Kingdom. It would be unreasonable to expect her to return to Ghana to seek entry clearance.
14. The appeal was heard on 9 July 2014 which was before Sections 117A-D of the 2002 Act had come into effect. Even if they had been in force, they would have had little, if any, adverse effect on the applicant's case because she positively satisfied a number of the requirements imposed by Section 117B of the 2002 Act. Throughout her time in the United Kingdom she had had leave and had not been in breach of immigration control. Her private and family life had been established at a time when her status was not precarious. She speaks English and is financially independent as she

has worked throughout her stay in the United Kingdom. The First-tier Tribunal's determination did not contain an error of law and should be upheld.

15. At the hearing she went on to refer again to the Transitional Provisions in paragraph A277 and following and the judgment in *Edgehill*. If Appendix FM was applicable, the applicant met the requirements of paragraph EX1. She was responsible for five children, all of whom were British citizens. The Judge had been right to allow the appeal. Mr Duffy had no further submissions to make.

### **Consideration**

16. At paragraphs 22-33 of its judgment in *Edgehill* the Court of Appeal rejected an argument bearing considerable similarity to that advanced for the SSHD in this appeal, namely that even if the new Rules were not applicable for a consideration of a claim under Article 8 of the European Convention under the Rules because they were not in force at the date of the decision under appeal, the new Rules should inform the assessment of the proportionality of any claim under Article 8 outside the Rules.
17. While the argument that the First-tier Tribunal's determination is not settled until promulgated which was an issue referred to in the consideration whether the Tribunal could accept post-hearing evidence discussed in *E and R v SSHD [2004] EWCA Civ 49* at paragraph 27, I do not find the cut-off point for the consideration of late evidence to be applicable by analogy to the last moment for consideration of what might be the relevant law in the event of new law coming into force between the date of the hearing and the date of promulgation of a determination. The practical consequences of having to consider each appeal heard before a change of the law and whose decision is promulgated after the change is impracticable, if not impossible and the system of being able to appeal such decisions which is in place offers some remedy. Additionally as a matter of public policy, there must be a sufficient degree of certainty and finality in litigation. I am not persuaded by the SSHD's argument that Sections 117A-D were properly applicable in this appeal.
18. On this basis, the SSHD's grounds for appeal do not disclose an error of law. Turning to the grounds upon which permission to appeal was granted, I do not understand how it can be an arguable error of law for a judge to have allowed an appeal on Article 8 grounds: not all appeals which are allowed on Article 8 grounds outside the Rules by that virtue of that reason alone arguably contain an error of law. The Judge dealt expressly with the matter of the Transitional Provisions for the introduction of Appendix FM at paragraph 30 in which he also referred to the judgment in *Edgehill*. The Judge signed his determination on 28 July 2014 and it is reasonable to assume that he had in fact drawn it up some time before it was typed and signed. In any event for the reasons given I do not find that it was an error of law for the Judge not to have addressed Sections 117A-D of the 2002 Act in respect of an appeal heard on 9 July 2014.

19. For these reasons the SSHD has not shown that there is a material error of law in the Judge's determination which therefore shall stand.

**Anonymity**

20. The Judge did not make an anonymity direction and there was no request for an anonymity order or direction by the Upper Tribunal and having considered the appeal I find that none is warranted.

**DECISION**

**The determination of the First-tier Tribunal did not contain an error of law and shall stand.**

**The effect is that the applicant's appeal is allowed and the appeal of the SSHD is dismissed.**

**No anonymity order or direction.**

Signed/Official Crest

Date 15. xii. 2014

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal