Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: IA/39637/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on:**
On 2 October 2014	**On 6 October 2014**

Before

Upper Tribunal Judge Kekić

Between

Abra Kafui Gadianku Stephanie Kenwright
(anonymity order not made)

Appellant

and

Secretary of State for the
Home Department

Respondent

Determination and Reasons

Representation
For the Appellant: Ms G Ward, Counsel
For the Respondent: Mr T Wilding, Home Office Presenting Officer

Background

1. This appeal comes before me following the grant of permission to the Secretary of State by First-tier Tribunal Judge Kelly in respect of the determination of First-tier Tribunal Judge Murray who allowed the appeal by way of a determination dated 8 April 2014. For the sake of convenience, I

continue to refer to the Secretary of State as the respond to the applicant as the appellant.

2. The appellant is a citizen of Ghana born on 16 August 1977. She met her husband, Mark Kenwright, a British national, in May 2008 when he was working in Ghana. They married in May 2010 and lived in Mali, South Africa and Mozambique according to Mr Kenwright's employment commitments. They have two children; the first was born in Ghana on 24 June 2009 and the second in South Africa on 18 November 2011. In October 2011 they visited the UK. They then came from Ghana to the UK in November 2012 and Mr Kenwright obtained work here. The appellant travelled on a visit visa. They then travelled to South Africa for the appellant to make an entry clearance application but she was advised to submit the application in her country of nationality; Ghana. The family decided against that course of action as Mr Kenwright had work here and the older child (then aged three) was due to start school and they decided it would take too long to obtain a Ghanaian passport for the younger child. They therefore re-entered the UK on 18 April 2013[1], the appellant still on her visit visa, and an in country application was made on 28 August 2013 for leave outside the rules. This was refused on 17 September 2013 on the basis that she did not meet the requirements of paragraph R-LTRP.1.1 (d) and EX.1 (i.e. she was not allowed to switch from visitor to spouse status) and a decision to remove her was made.

3. The appellant lodged an appeal and the matter came before Judge Murray in Newport. Judge Murray found that the requirements of the rules were not met but went on to find that there were arguably good grounds for granting leave outside the rules as the best interests of the children had not been considered. She then proceeded to undertake a Razgar/Huang balancing exercise and allowed the appeal on the basis that it would be disproportionate to expect the appellant to be separated from her children or for them to have to live outside the UK or to insist the appellant should go to South Africa to make her application.

4. The respondent challenged the decision and as stated above, permission to appeal was granted on 10 April 2014. Although the judge raised an issue of his own in his grant, i.e. the free standing nature of EX.1, that is not pursued by the respondent on the basis that is was an incorrect interpretation of the rules following Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 (IAC). There is no need for me to say any more about that here.

5. Four criticisms were made. First, it was argued that the judge had failed to identify the circumstances which led her to undertake an assessment of

[1] Although the refusal letter refers to an entry date of 11 October 2012, the appellant's passport shows that the last date of entry was April 2013.

Article 8 outside the rules and had therefore failed to follow the approach set down in Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 Admin. Secondly, it is maintained that the judge failed to have regard to specific circumstances of this case and did not engage adequately with the issue of why the appellant could not make an entry clearance application to join her spouse which would have been the proper means of entry. Third, it is argued that as there is relief available under the rules, it was inappropriate to rely on Article 8.

Appeal hearing

6. The grounds were expanded at the hearing and clarified in Mr Wilding's skeleton argument. Mr Wilding put forward two grounds. The first was that the Tribunal failed to follow and apply the Gulshan and Nagre approach and secondly, that it failed to engage with all the material evidence and facts. He submitted that the appellant's inability to meet the requirements of the rules had not played a part in the Article 8 assessment. That was important because the rules reflect the Secretary of State's view on Article 8. As the appellant had entered the UK as a visitor, she was prohibited from switching. It was in the public interest to ensure that visitors did not seek settlement through the back door without any assessment of their ability to meet the language and other requirements. He submitted that in a situation where the rules were not met, other features or arguably good grounds had to be shown if removal was to be disproportionate (paragraphs 24c and 27 of Gulshan); there should be no free-wheeling Article 8 analysis (paragraph 27). Where there were no compelling circumstances not sufficiently recognised by the rules, there was no need to consider Article 8. The fact that the appellant's children were British was not a trump card and the success or otherwise of an entry clearance application was irrelevant for the purposes of proportionality assessment (as per SB Bangladesh [2007] EWCA Civ 28). Although the judge had cited Chikwamba [2008] UKHL 40, that was a fact specific case where the sponsor was a refugee and would be unable to accompany his wife to Zimbabwe where the country situation itself was problematic. The bottom line was that a visitor was not allowed to switch categories and the judge did not take that into account. The Tribunal's comments in Sabir were relevant. In all the circumstances, the proportionality assessment was inadequate.

7. Ms Ward expressed surprise at the challenge, arguing that as the appellant had a genuine and subsisting relationship with two qualifying children, the only possible outcome was that she could not be removed. She relied upon section 10.2.3 of the Home Office guidance which referred to it being unreasonable to expect British children to leave the UK and to section 117 B (6) of the 2014 Act which, she submitted, made it clear that in a non deport case, the public interest did not require removal where the person had a genuine and subsisting relationship with a qualifying child. She submitted

that even if the judge had made errors of law, there was only one possible outcome; that the appeal had to be allowed. She submitted that the appellant had not sought to queue jump. She took advice and followed it.

8. Ms Ward submitted that if EX.1 applied in this case, the appellant would succeed. With regard to Article 8, she submitted that the judge followed the Gulshan and Nagre approach in paragraphs 16 and 17. She found that because the best interests of the children had not been considered, there were grounds for consideration of Article 8 outside the rules. The best interests of the children were to remain with both parents in the UK. It was not reasonable to expect them to relocate. The option of making an entry clearance applicant was considered and the judge acknowledged that the appellant met all the requirements of the rules save for her visitor status. There was primary legislation that made it clear that it was not in the public interest to require the appellant to leave.

9. Mr Wilding then replied. He relied upon Haleemudeen [2014] EWCA Civ 558 (paragraphs 44 – 47) and submitted that section 117B did not dictate that the appeal had to be allowed. It had to be read in conjunction with 117A-D. Whilst it set out the weight to be given to the public interest, it was not a trump card over riding all other factors and had to be considered along with those factors. The Tribunal should also have regard to the rules which continued to express the requirements to be met and the Secretary of State's view. If Ms Ward's submission was accepted, then that would mean that Tribunals could not undertake any other proportionality assessment where children were involved, regardless of other factors. Additionally, as section 117B only applied to courts and Tribunals, it could lead to an inconsistent approach between the Secretary of State's decision making and that undertaken by the Tribunal. If the requirement to grant leave to a parent of a qualifying child was mandatory, the legislation would say so as, for example, under section 32 of the 2007 Act where the Secretary of State must make a deportation order in cases where a person had received a sentence of 12 months or more.

10. Mr Wilding submitted that the public interest factors in this case were at the heart of maintaining immigration control. The appellant had come here on a visit visa knowing it did not entitle her to stay. She had made a choice to do so and despite Ms Ward's submissions, this was a clear and deliberate attempt to queue jump. The requirements of visit visas were wholly different to settlement categories with different maintenance requirements, language requirements and other matters which had not been assessed here. Persons seeking settlement were required to apply in a particular way. That was properly reflected within the rules. Further, it was wrong to suggest that section 55 was not taken into account as those considerations were incorporated in GEN.1.1 of the rules. The appellant had made a choice and

she should not be rewarded for her attempt to evade the rules. There was no question of forcing the children to leave the UK. The judge had only looked at the circumstances from one angle.

11. That completed the submissions. At the conclusion of the hearing I reserved my determination which I now give.

Findings and Conclusions

12. I am grateful to both sides for their helpful written and oral submissions. I have taken these into account along with the other evidence including the determination of the First-tier Tribunal. I have also had regard to the rules and the sections of the 2014 Act referred to.

13. Section 117 of the 2014 Act did not come into force until after the hearing and the determination however it can be argued that it reflects the view of the Secretary of State on the weight to be attached to certain factors when Article 8 is assessed. Section 117B(6) which was specifically relied on is not, in my view, the start and end point of the Article 8 assessment. It is certainly a starting point but for the reasons given in Mr Wilding's submissions, which I have summarised above and shall not repeat, it cannot be the only factor that a Tribunal can consider in an Article 8 case where children are involved. It cannot be right that all other factors are simply to be disregarded by what is presented as a trump card for this and indeed many other appellants. Plainly, more is required than just the fact of qualifying children. Consideration needs to be given to whether it would be reasonable to expect them to leave the UK, sometimes perhaps for a short period and sometimes when they are very young and have not been in the UK for any lengthy period. A more detailed analysis of the impact of this legislation on Article 8 cases shall be given when this and other matters are further considered at a resumed hearing. That makes it plain that I have decided that the determination is flawed and cannot stand. I now give my reasons for that decision.

14. In this case, Judge Murray found that the appellant did not meet the requirements of the rules albeit she wrongly observed that this was only because of her immigration status at the time of the application. The language requirements do not appear to have been taken into account. Nor is it clear that the specified documents with regard to maintenance were submitted. However, whether the appellant was close to meeting the requirements or did not even remotely come close to doing so, is irrelevant in that there is no 'near miss' situation here.

15. The issue is that having found that the appellant could not meet the requirements of the Immigration Rules, the judge then had to decide whether there were arguably good grounds not sufficiently covered by the rules which

warranted consideration of the appeal and a grant of leave outside the rules under Article 8. The only ground put forward by the judge appears in paragraph 17; it is that the best interests of the children had not been considered. In so finding, the judge fell into error as the rules do indeed incorporate section 55 considerations in GEN.1.1 which makes specific reference to this duty. In order to undertake an Article 8 assessment outside the rules the judge was therefore required to identify features of the case that were not covered by the rules and she failed to do so. That is an error of law.

16. It was also argued by Mr Wilding that when assessing whether it was reasonable for the appellant to be removed given that she would either be separated from her two children or that they would have to leave the UK in order to be with her and would therefore be separated from their father, the judge failed to consider several relevant matters. That is indeed so. She assumed the appellant would have to go to South Africa to make an entry clearance but that is clearly not right as the appellant had already been advised she had to make her application in the country of her nationality. She would therefore have to return to Ghana to make it. According to her application form, she has parents, siblings and other relatives there so there would be no problems with accommodation or support.

17. It was maintained by the appellant that her South African born child would need a Ghanaian passport to go there but it is not clear why, as a British national, he would not be entitled to enter as a visitor whilst his mother made her entry clearance application, if it were decided that he should accompany her. The judge did not consider that the appellant may well only be away from the UK for a short time. Nor did she give any thought to the fact that the children were extremely young, had only spent a relatively short period in the UK and would not be obliged to live in Ghana indefinitely (as per paragraph 13 of Azimi-Moayed (decisions affecting children; onward appeals) [2013] UKUT 197). The judge did not consider whether the appellant's husband might also be able to accompany his family for a temporary period.

18. Finally, the judge did not consider that the appellant and indeed her husband, had made the deliberate decision to come here to stay knowing she had no entitlement to remain, that she had used her visit visa to enter when it was unclear that she would leave and that she deliberately chose not to make an entry clearance in Ghana because she considered it would take too long. As Mr Wilding argued, that is clear queue jumping.

19. The public interest factors involve many different considerations. In this case the presence of children is an important factor, as exemplified by section 117B, however it is also important to assess whether in the particular circumstances of the appellant's case, the short period of residence, the young ages of the children and the temporary nature of the absence from this country, the

children could reasonably be expected to go with the appellant to Ghana whilst she made her entry clearance application, if it was decided they would not stay here with their father. The Secretary of State's view that visitors should not be permitted to switch and that those who seek to abuse and evade the rules should not be rewarded for such actions are also important consideration. All these matters should have factored into the judge's assessment but they did not.

20. In Sabir (op cit) the Tribunal set out cogent reasons for requiring an applicant to return to make an entry clearance application. Those are also relevant factors in this case.

21. For all these reasons I conclude that the First-tier Tribunal Judge erred in law and I set aside her determination except as a Record of Proceedings.

Decision

22. The First-tier Tribunal Judge made errors of law such that her decision must be set aside and re-made by a panel of the Upper Tribunal at a future date.

Directions

23. No later than five working days prior to the resumed hearing, the parties are to serve a skeleton argument which must include their views on section 117.

24. The appellant is to notify the Tribunal and the respondent forthwith as to whether it is intended to call oral evidence. If evidence is to be called, full statements of all witnesses must be filed no later than five working days prior to the hearing. Any other documentary evidence relied on and which has not already been submitted must also be filed within the same time frame.

25. It is intended that the resumed hearing shall take place before a panel of the Upper Tribunal so all evidence to the Tribunal must be served in duplicate.

26. A hearing time of 2 ½ hours shall be allocated. If either party considers that additional time is required, the Tribunal must be informed of the amended time estimate (with reasons) within five days of the receipt of this determination.

Signed:

Dr R Kekić
Judge of the Upper Tribunal
2 October 2014