**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/40840/2013

**THE IMMIGRATION ACTS**

| **Heard at Birmingham Sheldon Court** | **Determination Promulgated** |
|---|---|
| **On 11th July 2014** | **On 21st July 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MR ANGELO KWADWO ADJEI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Vokes (Counsel)
For the Respondent: Mr D Mills, (HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge A W Khan, promulgated on 23rd April 2014, following a hearing at Birmingham on 8th April 2014. In the determination, the judge dismissed the appeal of Angelo Kwadwo Adjei. The Appellant applied for, and was granted,

permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## The Appellant

2. The Appellant is a male, a citizen of Ghana, who was born on 14th June 1976. He appealed against the decision of the Respondent Secretary of State dated 27th September 2013 refusing him leave to remain in the UK on the basis of his family and private life rights.

## The Appellant's Claim

3. The Appellant's claim is that he has been married now to a British citizen, Kristen Caruana, and has two children from this relationship, the first child being born on 20th September 2012 and the second child born on 3rd February 2014, but there are also children from a previous relationship who are living with the Appellant and his wife, such that his removal would damage his right to exercise his private life with his family members.

## The Judge's Findings

4. The judge's findings are that on the Appellant's behalf it was accepted that he could not meet the requirements of Appendix FM of the Immigration Rules (paragraph 5) and that as far as Article 8 was concerned, he could not succeed in any event, because, although he has a child from another relationship who was born on 3rd October 2006, "he is not in contact with that child and therefore there is no meaningful family life that has been established". Of his own children, they are young, the oldest being only 2 years of age (paragraph 15).

5. The judge went on to consider the position under Article 8 and repeated the fact that the children were under 2 years of age and therefore no argument could be made that their welfare would be prejudiced by the Appellant having to go back to Ghana (paragraph 17).

6. The judge held that the Appellant "has not supplied any credible evidence" in relation to the matters before the Tribunal (paragraph 18).

## Grounds of Application

7. The grounds of application state broadly that the judge had simply failed to recount the facts and the evidence accurately and that there were a number of inaccuracies in what had been decided.

8. On 22nd May 2014, permission to appeal was granted.

## Submissions

9. At the hearing before me on 11th July 2014, Mr Vokes, appearing as Counsel on behalf of the Appellant, submitted that the judge in this case had made errors both in respect of the facts before him and in respect of

the applicable law. First, as far as the facts were concerned, there were five children of the family.

10. Three of these children were those of the Appellant's wife, Kristen Caruana. They were aged 13, 9, and 5. They all lived together in the same household. For the judge to accept that the children were under 2 years of age and that therefore, there would be no adverse impact on the children by his removal, was simply wrong if he had left out of the equation the existence of these other three children. Yet, the judge had repeatedly referred to only two children (see paragraph 17).

11. Second, this was particularly material given that the judge had also stated (at paragraph 17) that the position may well have been different with respect to the Appellant, if his children had been older. Plainly, however, they were. That being the case, what the judge had to say was a material error. Thirdly, paragraph 5 of the determination was a matter of concern.

12. This is because the judge failed to consider the Immigration Rules on the basis that the Appellant could not avail himself of the Rules given that he had arrived as a visitor and then overstayed. The fact was that Appendix FM was specifically geared for the condition of overstayers.

13. For his part, Mr Mills agreed. He submitted that the judge referred to E-LTRP.2.1. What he should have done was to have referred to E-LTRP.3.1 which deals with the immigration requirements. The judge recorded the fact that the Appellant entered as a visitor and then overstayed, but Appendix FM specifically deals with this situation.

14. All of this was important because the judge could only then proceed to deal with Article 8 ECHR as a freestanding issue, if he had first determined the legal position under the Immigration Rules beforehand. There was a two stage process. The second stage could only be tackled if the first stage had properly been gone through. This had not happened.

15. Finally, the application had been made under the Immigration Rules and the decision had been made under the Immigration Rules, and this being so, even if there had been a concession by the Appellant's representative, this did not absolve the judge from dealing with the position under the Immigration Rules in an accurate manner.

16. Mr Mills submitted that the proper course of action was for this matter to be remitted back to the First-tier Tribunal.

## Error of Law

17. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside this decision. My reasons are quite simply that there is a consensus between what Mr Vokes submits and what Mr Mills submits, on behalf of the Respondent Secretary of State.

18. There is an error both of fact and of law in this determination. The factual errors are that the full family unit, consisting of three children from a previous relationship, together with the two youngest children now, have not been considered. The legal error is that the position under the Immigration Rules, and specifically under E-LTRP.3.1 has not been considered.

19. Yet the application was made on this basis. The decision by the Secretary of State was also on this basis. It was therefore necessary for the judge to consider the position under the Immigration Rules.

**Decision**

20. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. This matter is remitted back to the First-tier Tribunal, to be heard by a judge other than Judge A W Khan, under Practice Statement 7.2, so that the Appellant has the benefit of a First-tier Tribunal hearing again.

21. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 21st July 2014