Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/07826/2013

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 27 October 2014	**On 4 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MRS MAVIS QUACOE
ANONYMITY DIRECTION NOT MADE

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer.
For the Respondent: Ms F Shaw, Counsel, instructed by Peter Otto & Co, Solicitors

DETERMINATION AND REASONS

Claim History

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing on 6 May 2014. However, for ease of reference, the Appellant and Respondent are hereinafter referred to as they were before the First-tier Tribunal. Therefore Mrs Quacoe is referred to as the Appellant and the Secretary of State is referred to as the Respondent.

2. The Appellant, who is a citizen of Ghana, applied for leave to enter the UK as the spouse of Mr Ransford Quaye, who is present and settled in the UK. As to her immigration history prior to her application for entry clearance, she entered the UK in 2004 following a customary marriage arranged by their families, and she was without lawful status until 2008 when she returned to Ghana to make an application for entry clearance following legal advice [30]. The Appellant and Mr Quaye have two children, Rachel, born on 29 January 2006 and Bright, born on 26 April 2007 who are British nationals and have always resided in the UK [24].

3. A number of issues were raised in the entry clearance officer's notice of refusal, including the submission of a false document (the Ghanaian marriage certificate); failure by the Appellant to meet the English language and maintenance requirements of the Immigration Rules for entry clearance as a spouse; and the failure to establish that she was in a genuine and subsisting relationship and intended to live permanently with her Sponsor. Judge Omotosho found that the Appellant had not submitted a false document [28 – 29], that the relationship between the Appellant and the Sponsor was genuine and subsisting and that they intended to live together permanently [31]. She proceeded to allow the appeal under Article 8 ECHR.

4. The Respondent's grounds for permission to appeal are that the Judge materially misdirected himself in law because

   (i) She failed to consider whether there were compelling circumstances not sufficiently recognised under the Rules as provided in **Nagre v SSHD EWHC 720 (Admin)**; and

   (ii) She appeared to consider that the Appellant's failure by a small margin to meet the English Language and maintenance requirements were to be factored into the proportionality assessment, contrary to he principle set out in **Miah & Ors v SSHD EWCA Civ 261** and **Patel v SSHD [2013] UKSC 72**.

5. Permission was granted because the grounds were arguable.

6. Mr Tarlow relied on the grounds of application, stating that at [44] the Judge had clearly had regard to the margin by which the Appellant failed to meet the Immigration Rules; she had stated that the Appellant was qualified and able to work and had only marginally failed the English Language test. Mr Tarlow added that there was nothing within the determination to indicate that the Judge had considered whether there were compelling reasons to consider the case outside the Rules.

7. Ms Shaw submitted a detailed skeleton argument on which she relied. She submitted that the Judge considered when she was able to consider an appeal under Article 8 outside the Immigration Rules at [33 – 34]. She had considered the case law and applied **Gulshan (Article 8 – new rules – correct approach [2013] UKUT 00025** at [37] and found that exceptional circumstances had been established. This was a case in which the children were British born and aged 7 and 8. The Appellant had lived in the UK until 2008 when she went back to 'do the right thing' and apply for

entry clearance. That was 6 years ago and due to the changes in the Rules, she had not been able to meet the entry clearance requirements. The only means of contact between her and the children had been by telephone; she did not have access to a computer. Her husband was 71 years of age and had arthritis of the knees which was worse in winter. He walked the children to school, which was a mile away, because there was no bus service and he did not have a car. The Judge had before her a psychologist's report in relation to the effects of absence of the Appellant on her children, in particular on Bright. As stated in **Zoumbas v SSHD [2013] UKSC 74**, the best interests of the children had to be at the forefront of a decision-maker's mind and it was clear that the Judge, who had before her a report from an educational psychologist, had had regard to the best interests of the children, and that these had weighed heavily in the balance. With regard to the reliance within the ground on a 'near miss argument', she submitted that it was a 'red herring'.

8. In response, Mr Tarlow submitted that the difficulty with the Article 8 assessment was that the Judge did not follow the guidance in **Gulshan**; she did not establish that there were compelling circumstances for considering the appeal outside the Rules before proceeding to conduct a free standing Article 8 assessment.

9. Following submissions, I reserved my decision, which I give below, together with my reasons.

Analysis and reasons

10. There was no dispute as to the facts found by the Judge; the only issue was whether she could consider the appeal under Article 8 ECHR directly applied and whether she applied a 'near miss' principle in her assessment of proportionality under Article 8.

11. As stated by Lord Carnwath in **Patel and Ors v SSHD [2013] UKSC 72** when considering the near miss argument:

> "44….The most authoritative guidance on the correct approach of the tribunal to article 8 remains that of Lord Bingham in *Huang*. In the passage cited by Burnton LJ Lord Bingham observed that the rules are designed to identify those to whom "on grounds such as kinship and family relationship and dependence" leave to enter should be granted, and that such rules "to be administratively workable, require that a line be drawn somewhere". But that was no more than the starting point for the consideration of article 8. Thus in Mrs Huang's own case, the most relevant rule (rule 317) was not satisfied, since she was not, when the decision was made, aged 65 or over and she was not a widow. He commented at para 6:
>
> > "Such a rule, which does not lack a rational basis, is not to be stigmatised as arbitrary or objectionable. But an applicant's failure to qualify under the rules is for present purposes the point at which to begin, not end, consideration of the claim under

> article 8. The terms of the rules are relevant to that consideration, but they are not determinative""

12. Therefore the context of the Immigration Rules may be relevant to the assessment of proportionality, provided it is not formulated into a 'near miss' or 'sliding scale principle'(para 56 of **Patel**).

13. I find that the Judge was no more than setting out the context of her consideration of Article 8 when she referred to the way in which the Appellant failed to meet the Immigration Rules; she referred to the reasons for the particular provisions with which the Appellant had failed to comply with a view to assessing the impact on the legitimate aims. As confirmed at [45] the real concerns that weighed heavily in the balance were the best interests of the children and the inability of their father to continue to care for them.

14. The submission that the Judge failed to consider the Guidance in **Gulshan** is without merit. She clearly had regard to it [23, 37] and identified good reasons for considering the appeal outside the Immigration Rules; she states

> "…this is especially because I have considered the best interests of the children in this case. I am satisfied as confirmed in the school report and the educational psychologist's report before me that the children especially Bright have been experiencing difficulties in school and at home which can be attributed to the absence of their mother. Also the reports from the Early Intervention Service, Specialist Teachers, Lewisham Common Assessment Framework and NHS Speech and Therapy Assessment also mentions the impact separation has had on the children especially Bright. I have also noted with care the Educational Psychology consultation Record which confirms the difficulties Bright is experiencing. It is clear that the sponsor who is aged 71 is finding it very difficult to cope and care for the children on his own. The children clearly miss their mother and although they speak to their mother regularly by telephone, this cannot be regarded as a substitute for the care and support a mother would provide, physically, mentally, emotionally or psychologically."

15. Read as a whole the determination discloses no material errors of law and the grounds are simply a disagreement with the findings of the Judge.

Decision

16. The determination of Judge Omotosho contains no material errors of law and her decision therefore must stand.

17. The Respondent's appeal is dismissed.

18. There was no application for an anonymity order before the First-tier Tribunal or before us. In the circumstances of this case, we see no reason to direct anonymity.

Signed Date **4 November 2014**
M Robertson
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

In light of my decision, I have considered whether to make a fee award under Rule 9(1)(a)(costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4) (a) of the Tribunals Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the Respondent's appeal has been dismissed, I confirm the fee award of Judge Omotosho.

Signed Dated **4 November 2014**

M Robertson
Sitting as Deputy Judge of the Upper Tribunal