Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04498/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 April 2018	**On 1 May 2018**

Before

UPPER TRIBUNAL JUDGE WARR

Between

FN
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Ms A Childs of Counsel, instructed by Anthony Ogunfeibo & Co Solicitors
For the Respondent:	Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Cameroon born on 2 August 1989. She appeals the decision of the Secretary of State on 28 January 2016 refusing her application on 5 November 2015 to remain on human rights grounds and on the basis of family and private life established in the United Kingdom.

2. The appellant is married and her partner is a national of the Congo with leave to remain as a refugee until 25 June 2018. The parties got married on 14 July 2015 and at the time of the Secretary of State's decision it was accepted that she was pregnant and expecting her first child in March 2016. Although the Secretary of State refused

the appellant's application on the basis of eligibility this issue was resolved in her favour by the First-tier Judge and that finding has not been cross-appealed.

3. The respondent considered that the appellant's child when born would not be a British citizen and paragraph EX.1 did not apply in the appellant's case. She could not make a case under 276ADE on the basis of residency and it was not accepted that there would be very significant obstacles to the appellant's integration into Cameroon. The appellant's husband was free to return with the appellant to the Cameroon and the couple could support each other. There were no exceptional circumstances in the appellant's case and there was no basis for a grant of leave to remain outside the Rules.

4. The appellant appealed the decision and her appeal came before a First-tier Judge on 8 December 2017 by which time the appellant had given birth to her son on 8 March 2016. The judge heard oral evidence from the appellant and her husband. Both expressed concern about the husband's safety in Cameroon due to its proximity to Congo. In paragraphs 15 to 17 of his decision the judge had referred to extracts from **Huang v Secretary of State [2007] UKHL 11**, **MM (Lebanon) [2017] UKSC 10** and **Agyarko v Secretary of State [2017] UKSC 11.** In paragraph 31 of his decision the judge stated as follows:

> "31. I have given very careful consideration to the written and oral evidence of the Appellant and her husband, as well as the submissions of both parties' representatives. I remind myself that the burden of proof is upon the Appellant to establish upon a balance of probabilities that, in the first instance, her application is one which can succeed under the Immigration Rules and if so, as this is a deemed human rights appeal, I can conclude that the decision to refuse the application would be disproportionate to the Respondent's legitimate aim of maintaining effective immigration control and allow the appeal. In the event that I find that the Appellant cannot succeed under the Rules, it remains for her to show that there are circumstances of an exceptional nature which would warrant separate consideration of her Article 8 rights outside the Rules. I am reminded by the Supreme Court in their decision in **MM (Lebanon)**, that this is a two stage approach and that the Appellant's circumstances must first be considered under the Rules."

5. The judge then turned to consider the welfare of the appellant's child and considered that as the appellant had not worked since her child was born she was clearly his primary carer. He attended nursery school for lengthy periods of time from 8am until 6pm on three days each week. Given the child's age the judge found that his best interests lay with being at least with one of his parents and preferably his primary carer, his mother. If the appellant were to be returned to Cameroon taking the child with her he was young enough to adapt (particularly where his mother speaks the language of that country and is entirely familiar with its customs and culture and has family members living there. "For those reasons I find as a primary

conclusion that there would be no adverse consequences for the child if the appellant is to be removed to Cameroon."

6. It was agreed between the parties that the appellant did meet the eligibility requirements for leave to remain despite what had been said in the respondent's decision and the judge then turned to consider whether there were insurmountable obstacles preventing the appellant's partner from joining her in Cameroon. The determination concludes as follows:

> "35. In this respect, the Appellant's partner is a national of Congo, a country which shares a border with Cameroon. The Appellant's husband is a refugee from Congo and contends that he would not be capable of returning with the Appellant to Cameroon because he fears that as his country and Cameroon are co-operative that there is a possibility that he will be abducted and returned to Congo where he is likely to face persecutory ill-treatment. It is for that reason that he has not contemplated moving to Cameroon and has made no enquiry as to whether or not it would be possible for him to join his wife and child in that country and live in the Bamenda area, which is to the north of Cameroon, and many hours away from the border with his country Congo.
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> 36. I have noted the issues raised by the Appellant's husband and why it is he believes he cannot live in Cameroon. The fact remains, however, he has adduced no evidence whatsoever which would inform me that he has any well-founded fear from the Cameroon authorities. It has been open to him, and the Appellant, to adduce evidence which would support this claimed fear, but none has been forthcoming. He agreed with the Respondent's representative in cross examination that he had no evidence of anyone looking for him in Cameroon and that he was not of interest to the Cameroon authorities. Given that information, I find that the reason which he has advanced for not living in Cameroon with the Appellant is one of convenience and does not arise from any genuine or well-founded fear that may arise in Cameroon. In this respect, my findings are reinforced by the significant distance that the Appellant's family reside in the north of Cameroon from the border with Congo in the southeast of that country. I find that the claimed fear is not a feature which I should take into account on a balance of probabilities as sufficient to show that this represents an insurmountable obstacle which would prevent family life continuing in Cameroon.
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> 37. Both the Appellant and her husband have provided evidence of significant qualifications that they already hold. In the case of the Appellant she holds Banking qualifications and, in the case of her husband, he is highly skilled in Computer Networking and Cyber Security, having recently been awarded a Bachelor of Science degree in that capacity. He stated that in the United Kingdom he would expect to receive a salary of at least £32,000 and is hopeful of gaining employment here. He has not contemplated

looking for employment in Cameroon, firstly because he hopes to secure work in the United Kingdom, and secondly because he does not envisage living in Cameroon.

38. I find that both the Appellant and her husband have provided evidence which shows that they have significant life skills and have adapted to a foreign country, the United Kingdom, where they have been able to make their lives together. I find that there is no evidence which would establish, on a balance of probabilities, that the Appellant's husband is at risk or that he would find difficulty in securing employment with the skills that he has acquired in the United Kingdom. I find these are further reasons why there is no insurmountable obstacle preventing the Appellant and her husband joining the Appellant's father in what she described as a house with a large sleeping area which can comfortably accommodate both her, her husband and child. Therefore, for those reasons, I find that the requirements of EX.1 are not met and that the refusal of the application under the ten year partner route of the Appellant's Article 8 rights to respect family life as the decision is entirely in accordance with the Rules.

39. In considering the Appellant's family life outside the Immigration Rules, I find that she and her husband have advanced no matters of an exceptional nature, other than what hey have sought to rely upon as grounds representing insurmountable obstacles to enable the application to succeed under the Rules. It is not necessary for me to repeat the reasons which I have set out above concerning the absence of insurmountable obstacles preventing family life continuing in Cameroon. I find that there is nothing exceptional about the Appellant, her husband and child's family life which cannot transfer to Cameroon where it can continue and develop. As I have already indicated, it is possible for both the Appellant and her husband to settle in that country with the support of the Appellant's family and where they would be able to obtain employment with the skills they have developed both in their own countries of origin and whilst in the United Kingdom. I find, therefore that there is nothing exceptional which would warrant separate consideration of the Appellant's family life outside the Immigration Rules and that the decision to refuse the application is entirely proportionate to this aspect of the Respondent's obligation under Article 8.

40. With regard to the Appellant's private life, this has been considered under the terms of paragraph 276ADE(1) and, in particular, the requirements of sub-paragraph (vi). In this respect, it is for the Appellant to show that there are very significant obstacles which prevent her integration into Cameroon. Having carefully considered the evidence, I find that the Appellant was entirely candid and frank when she explained that she still has her father and other family members living in Cameroon and that it would be possible for her to reside with her father in what she described as accommodation which has a large sleeping area. This was not

something which she said would no longer be available. I therefore find, as a fact that the Appellant will have accommodation and support available to her in Cameroon, the country in which she has spent the vast majority of her life and where she is familiar with the customs, culture and language. Moreover, I find that it is possible for her husband and child to safely relocate to live there with her and that there is nothing, other than choice, which would prevent the Appellant's husband from doing so. I find that the best interests of the Appellant's child will be served by him remaining with his parents and, if his father chooses not to leave the United Kingdom at the present time, there is no reason why the child cannot live in Cameroon with the Appellant and his father visit him there, because he has a travel document which permits him to travel to any country, other than Congo. Based upon those reasons, I find that the Appellant has failed discharge the burden of proof under paragraph 276ADE(1)(vi) and that the refusal of her application on private life grounds under the Rules cannot amount to a breach of her Article 8 rights.

41. In considering whether there are exceptional circumstances relevant to her private life, I would reiterate the reasons which I have set out above both in relation to her private and family life. I have considered the provisions of Section 117A-117B of the 2002 Act and whether or not it is in the public interest for the Appellant to be removed to Cameroon. The evidence discloses that she entered the United Kingdom in October 2014 and that, by April 2015, the course she had been taking had ceased as the college where she had studied had lost its licence. As the Respondent has properly pointed out in the decision letter, the Appellant had made no attempt to find another college, but set about plans to marry in July 2015. It is clear that her focus was upon establishing her family because she soon became pregnant and her child was born in March 2016. Whilst I accept that, at the present time, the Appellant speaks the English language and, to a degree, has integrated into society in this country, it is clear that she and her husband are only able to subsist with recourse to the public funds in the form of Tax Credits and student loans. All of this informs me that the Respondent's decision to refuse the Appellant's application is an entirely reasonable and proportionate response to her circumstances and the decision to refuse her application cannot amount to a breach of her Article 8 rights. It is for these reasons I dismiss her appeal."

7. Grounds of appeal were settled by Counsel, who argued that the judge had misdirected himself in paragraph 38 in stating "I find that the refusal cannot amount to a breach of the appellant's Article 8 rights to respect family life as the decision is entirely in accordance with the Rules." There had not been a proper balancing exercise.

8. The judge had only relied on the issue of public funds in paragraph 41 of his decision as tax credits and student loans were not public funds as defined at paragraph 6 of

the Immigration Rules. In relation to child tax credits and child benefits, paragraph 6A of the Rules provided:

> "For the purpose of these Rules, a person (P) is not to be regarded as having (or potentially having) recourse to public funds merely because P is (or will be) reliant in whole or in part on public funds provided to P's sponsor unless, as a result of P's presence in the United Kingdom, the sponsor is (or would be) entitled to increased or additional public funds (save where such entitlement to increased or additional public funds is by virtue of P and the sponsor's joint entitlement to benefits under the Regulations referred to in paragraph 6B)."

9. The judge had not considered the disruption caused to the appellant's family if she were removed from UK. In considering the best interests of the child it was plain that the judge had erred in finding there would be no adverse consequences for the child – there must be some adverse consequences, not least because the child would be separated from his father. It was wrong to state that no evidence had been produced about the appellant's husband's fears on return – the parties had been consistent in their evidence about their fears and the appellant's partner had been accepted to be a credible witness at his asylum hearing. There was an issue about the subjective fear of living in Cameroon. The appellant's husband would be fearful in Cameroon because of the good relationship with Congo and the proximity of the two countries. Permission to appeal was granted by the First-tier Tribunal on 28 February 2018.

10. Counsel submitted that the judge had erred in paragraph 31 in finding that there was a need to show that there were circumstances "of an exceptional nature which would warrant separate consideration of the appellant's Article 8 rights outside the Rules" and paragraph 38 wrongly stated: "I find that the refusal cannot amount to a breach of the appellant's Article 8 rights to respect family life as the decision is entirely in accordance with the Rules." The Rules were not a complete code. A balance sheet approach should be adopted – Counsel referred to **Hesham Ali v Secretary of State [2016] UKSC 60**.

11. Counsel also relied on her point regarding the appellant's finances not amounting to public funds, given what was said in paragraph 5 of the appellant's husband's witness statement where he had said:

> "As it happens the school lost its licence and my spouse eventually had to stop schooling given that she was unable to change schools and obtain a Confirmation of Acceptance for Studies (CAS) number from another school. This devastated my spouse but as it happens we were so involved in our relationship that before she knew it she was expecting our baby and had something else to concentrate on."

12. Counsel referred to the determination of the appellant's husband's asylum appeal – the judge had found the core of his claim to be credible in paragraph 62 of the determination. He had been trying to help by telling the truth. His fear was based on persecution on account of his religion – the appellant's claim is summarised in

paragraphs 11 and 12 of the determination in the asylum appeal. Paragraphs 35 and 36 had given inadequate consideration to the issues.

13. Mr Nath submitted in relation to the first ground that the judge was setting the scene in paragraph 31 of the decision and had not been considering exceptional circumstances prematurely. The case of **MM (Lebanon)** advocated a two stage approach and what was said in paragraph 38 needed to be seen in the light of paragraph 31. The judge had already dealt with the Article 8 issues and if there was an error in the calculation of public funds in paragraph 41 it was not material in the circumstances. It was open to the judge to find in paragraph 40 that the family could live in Cameroon safely.

14. He had dealt with the question of the appellant's husband's fears on return properly in paragraphs 35 and 36 of the decision.

15. Counsel reiterated her complaint about paragraph 38 – the judge had not factored in at all the private and family life of the parties in the United Kingdom. The sponsor was on a route to settlement. There had been an error in relation to public funds. The appeal should be remitted for a fresh hearing.

16. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the judge's decision if there was an error of law in it.

17. As I have mentioned, the judge set out extracts and summaries of the relevant authorities in paragraph 15 of his decision. He refers to a two stage approach in paragraph 31. I agree with Mr Nath that what is said in paragraph 38 needs to be seen in the context of what the judge had set out in paragraph 31. The last sentence of paragraph 38 might have been infelicitously worded but I am not satisfied that the judge erred in his overall approach to the consideration of the appellant's case outside the Rules. The judge had considered the issue of insurmountable obstacles and had not found it necessary to repeat them in paragraph 39 of his decision. In relation to the appellant's husband's fears on return, in my view, the judge dealt with this properly in paragraphs 35 and 36 of the decision, which I have set out above. As he puts it, the reason advanced was "one of convenience" and I do not find it arguable that the judge overlooked the issue of a subjective fear arising in Cameroon. The use of the word "genuine" clearly indicated that the judge was not satisfied that the appellant's husband had a subjective fear of return to Cameroon. I do not find the judge's acceptance in paragraph 41 of what the respondent had said in the decision letter demonstrates a failure properly to take into account the totality of the evidence before him.

18. The central conclusions of the judge in relation to Article 8 inside and outside the Rules were reached prior to the judge taking into account Section 117A – 117B in paragraph 41 of his decision. If the judge was referring to public funds as defined it may be that his comments were otiose but I am not satisfied that in the overall context of the determination there was any material flaw in his approach.

Notice of Decision

For the reasons I had given this appeal is dismissed and the decision of the First-tier Judge stands.

Anonymity Direction

The First-tier Judge made an anonymity order, which continues.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 30 April 2018

G Warr, Judge of the Upper Tribunal