Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39181/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 15 July 2014	**On 12 August 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JUSTINE TCHOUATE KANDA

Respondent

Representation:

For the Appellant: Mr M Diwnycz, a Senior Home Office Presenting Officer
For the Respondent: Mr G Ajomaning, Alpha Shindara Legal

DETERMINATION AND REASONS

1. The respondent, Justine Tchouate Kanda, was born on 12 March 1981 and is a citizen of Cameroon. I shall hereafter refer to the respondent as the appellant and to the Secretary of State for the Home Department as the respondent (as they were respectively before the First-tier Tribunal). The appellant (who had been in the United Kingdom as a student/post-study worker) applied in July 2012 for a variation of her leave to remain which

the respondent refused in a decision dated 10 September 2013. The appellant appealed to the First-tier Tribunal (Judge Batiste) in which, in a determination promulgated on 11 March 2014, allowed the appeal under Article 8 ECHR. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. Grounds of appeal assert that (in the light of *Gulshan (Article 8-new rules-correct approach) [2013] UKUT 640 (IAC)*) and *MF (Nigeria) [2013] EWCA Civ 1192)* only exceptional cases will succeed under Article 8 ECHR outside the Rules where they have failed by reference to the complete code as regards Article 8 now provided by the Immigration Rules. The Secretary of State also relies on *Nagre [2013] EWHC 720* which, she submits, provides that exceptional circumstances will be "ones where refusal would lead to an unjustifiably harsh outcome". The respondent asserts that the First-tier Tribunal failed to provide adequate reasons "why the appellant's circumstances are either compelling or exceptional". The respondent submits that there is no reason "why the appellant and her partner cannot maintain contact with each other by modern means of communication and by visits while she returns [to Cameroon] to seek entry clearance". In a concise determination, Judge Batiste recorded that the appellant could not satisfy the requirements of Appendix FM or paragraph 276ADE [9]. At [17], he wrote:

> I accept that it is only in exceptional circumstances where someone who has entered into a relationship but knowing that their status is precarious can rely on that relationship to enable them to remain under Article 8. When combined with the [appellant's pregnancy] I find that this is one of those exceptional cases.

The judge went on to examine the public interest concerned with the appellant's removal noting that "her family unit are clearly net contributors to society". The appellant is in a genuine and subsisting relationship with a British citizen by whom she is expecting a child. The judge accepted that emotional support is important for the appellant from her partner during the pregnancy. He considered it unreasonable to expect the appellant to return to apply for entry clearance from Cameroon because of her pregnancy. He found "that the interference in this case is disproportionate to the public end sought".

3. I find that the appeal should be dismissed. I do not accept the submission made in the grounds of appeal that the judge has failed to give reasons for finding the circumstances of this particular case to be exceptional. Significantly, the refusal letter, dismissing the appeal under Rule 276ADE of the Immigration Rules, does nothing more than to record that the appellant (who entered the United Kingdom in January 2009) had not lived continuously in this country for at least twenty years. There is no reference at all to her circumstances (including her relationship and pregnancy) in the context of the Immigration Rules refusal. Further, the letter is entirely silent as to Article 8 outside the Rules where one might have expected those circumstances to have been subjected to analysis. I

consider that it was open to the judge to have regard to circumstances of the Appellant and her partner which lay outside the Immigration Rules subject to which her application had been refused. The appellant's pregnancy and her genuine relationship with her partner entitled the judge to carry out the Article 8 analysis with which the refusal letter did not engage at all. I accept that it is not enough for a judge simply to assert, without explanation, that the circumstances of an appellant are exceptional; in particular, the facts in an appeal must not fall within the matters anticipated by the Immigration Rules. Conversely, once a judge had identified and explained the basis of his or her finding of exceptionality (or lack of it) it may be difficult for a disappointed party to disagree with that judgment. Whilst the Immigration Rules now strive to achieve greater consistency in decision making and remove the need for a "free-wheeling" analysis of Article 8, there remains scope, where appropriate, for the exercise of judicial discretion. In the present appeal, the judge has reached a conclusion which was open to him on the evidence and he has supported his findings with clear and cogent reasons. I see no reason to interfere with his determination.

DECISION

4. This appeal is dismissed.

Signed Date 11 August 2014

Upper Tribunal Judge Clive Lane