



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/01415/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 25<sup>th</sup> August 2017**

**Decision & Reasons  
Promulgated**

**On 11<sup>th</sup> September 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ZUCKER**

**Between**

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

Appellant

**and**

**MS CECILIA AMA DARKO  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer

For the Respondent: Mr P Maku-Kemi

**DECISION AND REASONS**

1. Ms Darko is a citizen of Ghana whose date of birth is recorded as 14<sup>th</sup> June 1961. On 6<sup>th</sup> September 2013, she made application to extend her discretionary leave. On 25<sup>th</sup> March 2014, a decision was made to refuse the application and so she appealed. Her appeal was heard by Judge of the First-tier Tribunal Stewart on 15<sup>th</sup> June 2016 when sitting at Taylor House, London. Judge Stewart allowed the appeal on human rights grounds.
2. Not content with that decision, by Notice dated 5<sup>th</sup> January 2017 the Secretary of State made application for permission to appeal to the Upper

Tribunal. The grounds seeking permission run to some thirteen paragraphs but in essence the grounds amount to the following:

- (1) That there was no sufficient basis for allowing the appeal beyond the Immigration Rules having regard to the wider application of Article 8 ECHR.
  - (2) That the decision was inadequately reasoned.
3. In granting permission on 10<sup>th</sup> July 2017, Judge of the First-tier Tribunal Brunnen having set out the basis of the application stated as follows:

*“In paragraphs 39 and 41 of his decision, when considering Article 8 outside the Immigration Rules, the judge considered the position with reference to the date of the Appellant’s application for leave to remain, made on 6<sup>th</sup> September 2013, whereas arguably he should have considered the position as at the date of the hearing. Had he done so, it is arguable that he might have found that there were no longer family life between the Appellant and her now adult son and that her son was not a qualifying child for the purposes of Section 117B(6) Nationality, Immigration and Asylum Act 2002”.*

4. It is relevant to note that at paragraph 35 of his decision, Judge Stewart said,

*“I am not persuaded that [Ms Darko] has established that there was an error of law within the application of the Immigration Rules to [Ms Darko’s] the Appellant’s application. However, I am satisfied that [Ms Darko] had established a private and family life in the UK such as to engage Article 8”.*

5. The appeal therefore was allowed having regard only to the wider application of Article 8. There has been no cross-appeal, so that the matter which I have to resolve is whether the judge in fact erred in law in his finding that the wider application of Article 8 led to the result being sought by Ms Darko.

### **The Factual Matrix upon which Judge Stewart made his Eventual Findings**

6. It is helpful to set out what I consider to be the material facts relied upon by Ms Darko and adjudicated upon by Judge Stewart in order to provide context to the decision.
7. On 3<sup>rd</sup> December 1993 Ms Darko gave birth to a daughter, Amanda. In 1997 Ms Darko married one Mr Mintah. The marriage was pursuant to Ghanaian customary law. On 3<sup>rd</sup> January 1998 Ms Darko, who was already pregnant by Mr Mintah, gave birth to a son, Kwame. In 2001 Ms Darko came to the United Kingdom and joined Mr Mintah but was not joined by Kwame until 2004 nor by Amanda until 2006.

8. In October 2012 Mr Mintah brought into the household a woman by the name of Margaret whom he purported to marry in the United Kingdom. I say “purported to marry” because it remains open whether the marriage was in fact polygamous (a matter which the Secretary of State may wish to investigate). Be that as it may, Ms Darko remained in the household with Mr Mintah and Margaret until 2013 when Ms Darko was about to renew her leave. At that point Mr Mintah suggested that he and Margaret move out of the family home into Margaret’s home. He suggested also that Kwame, then aged 15, should move with them. There was a dispute. The police called and were persuaded that Ms Darko was responsible for the violence which had ensued. Ms Darko was arrested, and on 23<sup>rd</sup> November 2013 was convicted before the magistrates, of a battery but given a conditional charge for a period of twelve months.
9. It is of note that the application giving rise to this appeal was made prior to the conviction. It had been made on the basis of Ms Darko being a victim of domestic violence, although the form actually used for the application was form FLR(O) which form is used for categories not covered by other forms. Although the form FLR(O) was used, nevertheless, reliance was placed in the application itself on Ms Darko’s contention that she was the victim of domestic violence, notwithstanding the subsequent conviction against her.
10. In considering Ms Darko’s application, the Secretary of State had regard to a letter sent by Mr Mintah dated 16<sup>th</sup> September 2013, advising the Secretary of State that Ms Darko no longer lived in the matrimonial home. In his letter he made mention of what was then a pending court hearing. The letter also asserted that Ms Darko was not responsible for the welfare of Kwame due to her “unacceptable behaviour”.
11. What was clear from the correspondence from Mr Mintah to the Secretary of State was that he was contending that there was no family life being enjoyed between him, Mr Mintah and Ms Darko and that she, Ms Darko, had no contact with Kwame.
12. The judge found that the Secretary of State, for the reasons given in the refusal letter, was entitled to refuse the application under the Immigration Rules but found, notwithstanding that, that the wider application is Article 8 entitled her to remain. It is that which falls for consideration.

### **Was there an Error of Law?**

13. In his submissions to me, Mr Wilding submitted that having found that the Immigration Rules were not met, there was no engagement by the judge in the relevant considerations.
14. At paragraph 36 of his Decision and Reasons, Judge Stewart makes mention of the five questions which a judge should consider in an Article 8 case as approved of in the case of **R (Razgar) [2004] UKHL 27**. Judge Stewart found that the first four questions were resolved such that the issue turned on proportionality. He gave three reasons for allowing the appeal:

- (1) The actual offence for which Ms Darko was convicted was a minor offence given the sentence imposed; there were considerable mitigating factors.
  - (2) At the date of the application, Kwame was a child who would have been continuously resident in the United Kingdom for nine years. Had Kwame been making an application, Judge Stewart found that it was unlikely that it would have been found to be reasonable to expect him, Kwame to leave the United Kingdom and consequent upon that, Ms Darko also would have been entitled to remain having regard to paragraph 276ADE(iv) to which I shall return. Judge Stewart was satisfied that Kwame had indefinite leave to remain in the United Kingdom but Ms Darko was unable to produce documents to support that because Kwame was under the influence of his father who was preventing any meaningful contact between Kwame and Ms Darko.
  - (3) That the interference with the rights of Ms Darko was wholly disproportionate to the legitimate public end sought to be achieved because it rewarded behaviour on the part of Mr Mintah that might well have been criminal and would include Mr Mintah having the “uninterrupted enjoyment of a property in which [Ms Darko] has a beneficial interest”.
15. Judge Stewart was fortified in his conclusion by noting that at the date of the application, Kwame was a qualifying child within the meaning of Section 117D(1) of the Nationality, Immigration and Asylum Act 2002 which meant that having regard to Section 117B(6), Ms Darko having a genuine and subsisting parental relationship with a qualifying child in circumstances where it would not be reasonable to expect that child to leave the United Kingdom, Ms Darko should be allowed to succeed. Judge Stewart then went on to consider additional considerations applicable to persons liable to deportation as foreign criminals, though it is of note that no one was suggesting that Ms Darko should be deported.
  16. Mr Wilding submitted that there really was no appreciation shown by Judge Stewart to the weight to be given to the failure on her part of meeting the Immigration Rules.
  17. The wider application of Article 8 was focused, in Mr Wilding’s submissions, on the nature of the relationship between Ms Darko and her son Kwame, yet there was no up-to-date evidence in relation to him. Indeed, Mr Wilding made the point that the judge appears to have made no findings of fact at all in relation to the nature of the relationship with Kwame as at the date of the hearing but focused entirely on the date of the application. Even Ms Darko’s own witness statement was in Mr Wilding’s submission virtually silent on the nature of the relationship which she had with Kwame. There was, he pointed out, no suggestion that Kwame should be removed. This was Ms Darko’s appeal and as to the reference to the beneficial interest in the property, that would not be affected by her removal.

18. Mr Maku-Kemi relied on his document, “Appellant’s Grounds of Resistance against Appeal” [sic] which ought more particularly to have been the *Respondent’s* document but be that as it may. He confirmed in that document that it was not an issue that Ms Darko could not succeed under the Immigration Rules. Not surprisingly, it was his submission that the judge made findings that were open to him in that regard. Emphasis is placed however in support of Ms Darko on the fact that the offence for which Ms Darko was convicted was not serious or at least not serious of its kind with there being no suggestion of repetition.
19. Further, reliance was placed on the case of **SC (Article 8 - in accordance with the law) [2012] UKUT**. ( I observe in that case, however, that the child in question in that case was a child at the date on the hearing of the appeal.) The burden of Mr Maku-Kemi’s submissions was that at the date of the application, Kwame being a child meant that his best interests were to be looked at. He went on to rely on the guidance of the case of **VV (Grounds of Appeal) [2016]** and in particular the head note which provides:

*“(1) An application for permission to appeal on the grounds of inadequacy of reasoning in the decision of the First-tier Tribunal must generally demonstrate by reference to the material and arguments placed before that Tribunal that:*

- (a) the matter involved a substantial issue between the parties at first instance; and*
- (b) that the Tribunal either failed to deal with that matter at all, or gave reasons on that point which are so unclear that they may well conceal and error of law.*

*(2) Given that parties are under a duty to help further the overriding objective and to cooperate with the Upper Tribunal, those drafting Grounds of Appeal:*

- (a) should proceed on the basis that decisions of the First-tier Tribunal are to be read fairly and as a whole and without excessive legalism;*
- (b) should not seek to argue that a particular consideration was not taken into account by the Tribunal when it can be seen from the decision read fairly and as a whole that it was (and the real disagreement is with the Tribunal’s assessment of the evidence or its merits); and*
- (c) should not challenge the adequacy of the reasons given by the First-tier Tribunal without demonstrating how the principles in (1) above have been breached, by reference to the materials placed before that Tribunal and the important or substantial issues which he was asked to determine in that particular case.*

(3) *Where permission to appeal is granted, an Appellant should review whether the Grounds of Appeal are genuinely arguable in the light of any response from the Respondent to the appeal. Whether or not the original grounds are pursued, it is generally inappropriate to seek to raise new Grounds of Appeal close to the date of the hearing if, for example, that would cause unfairness to a Respondent or result in the hearing being adjourned.”.*

20. The burden therefore of Mr Maku-Kemi’s submissions, was that when read as a whole, it was clear that the judge had taken into account all the relevant circumstances and that although at paragraph 37 of the decision, there does not appear to be sufficient findings of fact, the weightiest factor when the decision is read as a whole, was the nature of the relationship between Ms Darko and Kwame.
21. I find that the judge did in fact err in law. In an Article 8 case, unless there is specific statutory provision for it, the relevant date for an in-country appeal, is the date of the hearing, not the date of the application. This is trite law. It is not in issue that the Appellant in the First-tier Tribunal, Ms Darko failed to meet the requirements of the Immigration Rules. At paragraph 39, Judge Stewart speculates as to whether or not Kwame might have met Immigration Rules had he made application but, the relevant consideration of the Immigration Rules in fact led to a conclusion that they were not met, so that what Ms Darko was left with in respect of her relationship with Kwame, was the provision of Section 117B(6). The difficulty pointed to by Judge Brunnen when granting permission was that at the date of the hearing, Kwame was no longer a child. Section 117B(6) was of no relevance at all.
22. What the judge was required to do was begin with Section 117B of the Nationality, Immigration and Asylum Act 2002 and recognise that the maintenance of effective immigration control is in the public interest. He was required then to bear in mind that the Appellant, Ms Darko was unable to meet the requirements of the Immigration Rules and give weight to that factor. It is not clear from the findings of the judge whether he took into account the extent to which, if at all, Ms Darko was financially independent or that any private life was established at a time when her immigration status was precarious.
23. In looking to the individual circumstances, the judge was entitled to have regard to the fact that the Appellant had already spent fifteen years in the United Kingdom but against that, should have recognised that the Immigration Rules would have required twenty years before being entitled to apply for leave to remain in the United Kingdom on the basis of long residence, although even then the conviction was a matter to be taken into account, albeit of minor significance given the sentence attaching to it.
24. Notwithstanding the submissions made by Mr Maku-Kemi, the decision is inadequately reasoned and includes irrelevant considerations. The purpose in Section 117B(6) is clearly not intended for the benefit of the

“person” but for the benefit of the child. The best interests of the child are a primary consideration and Section 117B(6) provides a rule of thumb similar to a derivative right in EEA cases. But it is to be remembered that the “person” is only entitled to discretionary leave. Different considerations apply when the child is no longer a child. It is this entire focus on Kwame as a child when at the date of decision, he was not, taken together with the other factors which I have mentioned, that in my judgment renders the decision made by the judge unsustainable. It is clear to me, reading the decision as a whole that the judge was influenced by historical and irrelevant considerations.

25. Accordingly I set the decision aside.

### **The Re-making**

26. Ms Darko gave evidence before me and adopted her witness statement of 13<sup>th</sup> June 2016. In the witness statement with respect to Kwame she said that she would normally see him at school as his father would not allow her to see him at her home. I observe that there was no witness statement produced above and beyond that witness statement of 13<sup>th</sup> June 2016. The witness statement however also makes reference to Amanda and her relationship with Kwame, although it is not suggested that either Amanda or Kwame were at any immediate risk of removal.
27. Ms Darko was cross-examined. She said that there were no proceedings now in respect of the former matrimonial home and that was because she did not have the money to pursue any claim.
28. As to seeing or contact with Kwame, Ms Darko said that she did go to court but she was told that nothing could be done because by then Kwame was over 16 years of age. She said however that she saw him at school but when pressed upon the circumstances in which that would occur, she said that she would see him in the reception area about two or three times a month, although the school was not aware of the problems. She, Ms Darko would go to school at the end of the school day and spend about ten to fifteen minutes with Kwame. Occasionally Kwame would come to her home but that had only happened she said on four occasions because Kwame’s father had become aware of this and prevented further visits.
29. When asked when the last time was that Kwame had come to her home, she said that it was last Christmas when he stayed about 30 to 45 minutes. The effect of the evidence was that since she and Kwame had stopped living together in 2013, there had been four visits to the home and when pressed upon which Christmas it was that she had actually seen Kwame, it turned out that it was Christmas 2015.
30. Ms Darko did say however that she had had communication from her son and at that point she produced a text message from her phone dated 25<sup>th</sup> July 2016. In fact the text message was not from her son at all but had been forwarded to her by her lawyer. The text message made reference

to a witness statement which was to be obtained but that was a witness statement being the letter of support referred to at paragraph 20 of Judge Stewart's decision which was in fact a letter. There was clearly some reluctance on the part of Kwame to get involved in his Mother's appeal if it would compromise him, making reference, as it did to his wishing to qualify as an accountant.

31. Cross-examination then turned to Amanda with whom Ms Darko said she had been living for three years. It was noted that the statement from Amanda appeared to have been signed with block capitals rather than a regular signature. Ms Darko said that she was not there when the statement was signed. When asked about Amanda's immigration status, she said, "They refused her. Then she stopped working". She said she had no idea when such applications that had been made were refused, although she knew that her daughter was studying.
32. She disputed the suggestion made by Mr Mintah in correspondence to the Home Office that she had never looked after her son Kwame, she said that she had tried to support him.
33. She said that she did have other family in the United Kingdom although, when pressed these were close family friends whom she said helped her financially. However, it was not since Christmas 2016 that she had seen them. She does have a father still alive in Ghana and a stepmother. She said she was still in contact with her father and that was about once a week.
34. As to the text from Kwame, she said that she received that because she wanted his bank details in order to provide him with some money.
35. I observed that neither Kwame nor Amanda, who was not living with Mr Mintah, had come to give evidence. I stood the matter down in order for Mr Maku-Kemi to take instructions as to whether or not he wanted the opportunity to call Amanda. However, after a short adjournment, I was told that the decision had been made not to call her, so that I had the witness statement from her being dated 14<sup>th</sup> June 2016, essentially unsigned, but I had not had the opportunity to hear from her what she had to say about her relationship with her mother, her brother, and indeed her mother's relationship with Kwame.
36. Mr Wilding submitted that the evidence pointed to no real family life existing now between Ms Darko and Kwame. Mr Wilding accepted that broadly speaking, family life did not disappear on reaching majority such that the guidance in the case of **Kugathas** would immediately become pertinent. But the evidence in this case was such that there was hardly any contact between the Appellant and Kwame and as to Amanda, the evidence was unsatisfactory with no real reasons as to why she had not attended to give evidence in the appeal. Still further there was no real explanation as to why Kwame, now 19 years of age, had no real contact with his mother. There was, Mr Wilding submitted, a total lack of corroborating evidence going to Ms Darko's account. There was no



evidence, certainly no sufficient evidence, as to what court proceedings were embarked upon when Kwame was 16 and so Mr Wilding submitted that I was left entirely in the dark as to what all that was about. There were avenues which might have been explored, such that evidence might have been provided including the friends in the United Kingdom, whom I was told were providing help yet, there was no sufficient evidence from them. It is to be observed, that those were friends who apparently were helping with bills and were aware of the substance of the circumstances leading to the situation in which Ms Darko now found herself.

37. Finally, Mr Wilding submitted that Ms Darko's evidence was unimpressive and far removed from "enlightening us" as to what the current circumstances were. I was invited to find that Ms Darko had failed to establish the circumstances upon which she actually moved out of her husband's house and why there was such limited contact with Kwame. What we did know on the basis of the evidence was that Amanda had no lawful status in the United Kingdom and whilst the conviction was minor, some weight was to be given to it even before 117B considerations were applied.
38. For Ms Darko, Mr Maku-Kemi submitted that it was necessary for him to demonstrate compelling, compassionate and exceptional circumstances and as Mr Wilding had suggested that the case was "peculiar and unique", that was established. However, the facts of the case were in themselves extraordinary. To be removed from the matrimonial home in the circumstances in which Ms Darko was removed would have traumatised any human being. She was to be viewed as a victim. Reliance was placed on the written document and on the unfortunate history of Ms Darko whilst in the United Kingdom.

## **Findings**

39. I found Ms Darko as a witness to be wholly unimpressive. Simply to say that she was evasive is not, I appreciate enough. However, when pressed on certain matters, she looked for help from her lawyer before answering the questions and at one point even sought to communicate with him.
40. The evidence at its highest shows very little communication with Kwame and taken together with the text which she produced, suggests that actually he is rather reluctant to support her for reasons which are not at all clear save that he is concerned that there is the possibility that his desire to become an accountant might be adversely affected by what he, Kwame was being asked to do. The text did not suggest to me that he was motivated towards lack of assistance to his mother by concerns about his father but rather more, by a concern that there was something in the nature of the application being made by his mother that might adversely affect his own status in the United Kingdom. Whatever the circumstances, it was clear that the family life as between Ms Darko and her son Kwame was hardly being enjoyed at all. On the evidence she had not even seen her son since Christmas 2015. There was therefore very little contact. As to the daughter Amanda's lack of attendance, and the court documents

which were not provided in relation to any attempt by Ms Darko to have better access or contact with her son, then I am entitled, and do draw adverse inferences guided by the case of **TK (Burundi)**.

41. I see no reason to interfere with the approach of Judge Stewart in the application of **Razgar** save that I do not agree with him in his finding that the second test was made out. I do not find on the basis of the evidence that refusing the application for continued leave to remain in the United Kingdom for Ms Darko would have consequences of such gravity as potentially to engage the operation of Article 8. There was no sufficient evidence of any meaningful or ongoing relationship with Amanda. The Appellant's evidence was that she was continuing to live with her but I did not find sufficient evidence, given the way in which the evidence was presented to enable me to make a favourable finding in that respect nor, did I find any sufficient evidence to satisfy me that there was a sufficiently meaningful relationship with Kwame such as to engage article 8.
42. If I am wrong about that and the case turns on the issue of proportionality then, taking the approach which I have already said should have been taken by Judge Stewart, I have no hesitation whatsoever in finding against Ms Darko. The maintenance of effective immigration control is in the public interest. She falls a long way short from meeting a twenty-year period and whilst only little weight should be given to the conviction, I bear in mind that she had sought to present an application on the basis of domestic violence, when it had been found beyond reasonable doubt, that in fact she was the aggressor. Of course, there is considerable mitigation in that and overall I attach little weight to that conviction but it remains nevertheless, a relevant factor when one considers the extent to which Ms Darko falls short of meeting any Immigration Rule upon which she might have relied. She is clearly not, on her own evidence, financially independent because she is reliant on friends notwithstanding the fact that I heard no evidence from these people. Any private life with them has been established at a time when Ms Darko's immigration status was precarious. There is as I have already observed no parental relationship with a qualifying child as at the date of the hearing.
43. Against that I have to look to the matters which are personal to Ms Darko. I acknowledge that she has two children in the United Kingdom, although one of them may, in the event be removable with her but that is not a matter for me. For present purposes, I proceed on the basis that she has a relationship of sorts with two children in the United Kingdom but there is no sufficient evidence for me to find, on balance of probabilities, that the relationship is more than, "of sorts". I am not able to assess from the limited evidence that I received, precisely the nature of it. In those circumstances, she, who has the burden to the civil standard, has failed to satisfy me of the factual matrix upon which she seeks to rely in this regard with respect to the relationship that she has with the children, if any. There is otherwise very little to put on this side of the equation. She does have family connections in Ghana, so that all in all when one does the balancing exercise, one is left with the only finding in my judgment which

could be made in this case, namely that in the re-making of this appeal, it is to be dismissed.

**Notice of Decision**

The decision of the First-tier Tribunal contained a material error of law and is set aside. The decision is re-made such that the decision in the First-tier Tribunal is that the appeal is dismissed on all grounds.

No anonymity direction is made.

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 8 September 2017

Deputy Upper Tribunal Judge Zucker