



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/28894/2013

THE IMMIGRATION ACTS

Heard at Field House

On 5 December 2014

**Decision &
Promulgated
On 2 January 2015**

Reasons

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MS ELIZABETH STANISLOVE KWARTENG AMANING
(Anonymity direction not made)**

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr A Otchie, Counsel instructed by Gromyko Amedu Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Herbert OBE promulgated on the 17th September 2014, following a hearing at Taylor House on 3rd September 2014, in which the Judge allowed the appeal against the refusal of leave to remain in the United Kingdom, under the provisions of EX.1 of the Immigration Rules and Article 8 ECHR.

2. The Judge started off strongly in terms of the relevant points, ages and dates of birth in the determination. There is even a record at paragraph 10 of the Secretary of States case. The Judge, however then made a mistake with regard to paragraph EX.1 which is a simple misdirection of law the Judge should not have made. The Judge finds that the appellant before him was unable to succeed under the Immigration Rules save for EX.1. This provision is, however, not a freestanding provision. In Sabir (Appendix FM - EX.1 not free standing) [2014] UKUT 63 (IAC) it was held that the architecture of the Rules as regards partners is such that EX.1 is “parasitic” on the relevant Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free- standing element some mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of the leave granting Rule. This is now made plain by the respondent’s guidance dated October 2013.
3. As the eligibility requirements for leave to remain as a parent or those necessary to succeed under the ‘partner’ route could not be met, it was not open to Ms Amaning to rely upon EX.1.
4. Accepting that Ms Amaning could not satisfy the requirements of the Immigration Rules but finding she could succeed under EX.1, the Judge went on to look at Article 8 ECHR outside the Rules. The Judge was required to take into account the position of all parties to the proceedings, but what the Judge seems to have said is that the eldest son has been in the United Kingdom for nine years, not spent time outside the UK, has adapted and settled to life in the UK, weighs up education and language issues, and at paragraph 38 finds the family may or may not have access to accommodation, and engages in a degree of speculation. At paragraph 40 we find a potentially contradictory finding that the eldest child has never attended school and does not speak the language commonly used in Nigeria, yet in paragraph 37 that the language of education is English and the child speaks English. The Judge at paragraph 41 finds this ‘falls short of an ability where that member of the family could reasonably be expected to leave the United Kingdom’. It may be that that is the proper test that the Judge should have been considering but whether it is reasonable or not to do so, or proportionate to the issue, requires the Judge to make (a) a proper analysis of the facts and (b) a properly conducted balancing exercise if the issue is **Razgar** (5) and the case one of proportionality.
5. Mr Otchi handed up the Appendix FM guidance and it has not been suggested this differs materially from that in force at the date of the decision. Section (d) states that the child is likely to be able to reintegrate readily into life in another country and sets out various relevant factors some of which the Judge did look at. This point is in Ms Amaning’s favour but the exercise being conducted was an Article

8 point, **Razgar** (5). Both parties' cases must be considered. The decision of the Supreme Court in **Zoumbas [2013] UKSC 74** is particularly important as is the other case law referred to in the Secretary of States grounds. In **Zoumbas** the children had been here longer than the applicant's family in this appeal. They were Congolese and not British citizens, it was found they have no right to future education and healthcare, they were part of a close-knit family, with no evidence of serious detriment to their wellbeing. These are the type of issues the Judge should have taken into account but failed to do so. I understand why the appellant before the Judge won but I do not understand why the Secretary of State lost. That means we have a proportionality exercise that has not been properly conducted or adequately reasoned.

6. Mr Otchi submitted the error is not material but until a proper proportionality balancing exercise is conducted we cannot say this. I find the error to be material to the decision to dismiss the appeal especially if the Judges' mind was influenced by his finding the requirements of EX.1 could be met. The parties have not had the benefit of a properly conducted Article 8 assessment before the First-tier Tribunal. The determination shall be set aside. The findings in relation to the inability to meet the requirements of the Immigration Rules shall be preserved findings and shall include a finding of an inability to succeed under EX.1 too. The appeal shall be remitted to the First-tier Tribunal sitting at Taylor House for a comprehensive assessment of the positions of both parties in relation to the Article 8 element and the proportionality of the decision.
7. The following directions shall apply to the future conduct of this appeal:
 - i. The appeal in relation to Article 8 ECHR outside the Rules only shall be remitted to the First-tier Tribunal sitting at Taylor House to be heard by a salaried judge of that Tribunal nominated by the Resident Judge on the 9th May 2015. Time estimate 2 hours.
 - iii. The Appellant must file and serve a consolidated indexed and paginated bundle containing all the evidence she intends to rely upon no later than 13th April 2015. Witness statements in the bundle must be signed, dated, and contain a statement of truth and shall stand as the evidence in chief of the maker.
 - iv. No interpreter shall be provided unless specifically requested by the Appellant, with reasons.

Signed

Date 31st December 2014

Upper Tribunal Judge Hanson