



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/39637/2013

THE IMMIGRATION ACTS

Heard at Field House
On 22 July 2015

Decision and Reasons Promulgated
On 3 August 2015

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ABRA KAFUI GADIANKU STEPHANIE KENWRIGHT
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Buley, counsel, instructed by Stephens Scown Solicitors

For the Respondent: Ms Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes before me by way of a rehearing following the identification of a material error of law by the Upper Tribunal (UT) in the determination of Judge of the First-tier Tribunal Kelly who allowed the appellant's appeal against a decision of the respondent to refuse to vary her leave to remain on the basis of her family life in the UK and to remove her from the United Kingdom under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant is a national of Ghana, date of birth 16 August 1977. She met her husband, Mr Mark Kenwright, a British citizen, in Ghana in 2008. They married in May 2010 and lived in a number of countries including South Africa as a result of the husband's profession as a geologist. Their first son, Mark Joseph, was born in Ghana on 24 June 2009 and their second son, Robert, was born in South Africa on 18 November 2011. By reason of their father's British citizenship both children are British citizens by descent.
3. Following a previous visit in 2011 the appellant and her family entered the UK in November 2012, she as a visitor with a multiple entry visit entry clearance. Her husband obtained employment in the UK. Because of the need to find accommodation and make other arrangements he only commenced his employment in January 2013. Their eldest son was placed in a private nursery. The family returned to South Africa in April 2013, where they had previously lived pursuant to residence permits, with the intention of the appellant making a settlement application. They were however advised that it would take 3 months for the application to be processed. As the appellant had been issued with a multiple entry visitor entry clearance they returned to the UK for the appellant's husband's employment and for her eldest's son's schooling and on advice given to them by staff at the British High Commission (BHC).
4. Having obtained legal advice in the UK the appellant made an application on 28 August 2013 for leave to remain outside of the immigration rules. This was refused on 17 September 2013 on the basis that the appellant did not meet the requirements of Appendix FM, paragraph R-LTRP.1.1(d) and EX.1 (prohibiting her from switching from visitor status to spouse status- the 'no switching' provision).
5. The First-tier Tribunal allowed her appeal on the basis that the decision did not take into account the best interests of the children and, adopting a classic **Razgar/Huang** approach, the Judge concluded that it would be disproportionate to expect the appellant to be separated from her children while she makes an entry clearance application or to expect the children to live outside the UK.
6. In an error of law decision promulgated on 07 October 2014 Upper Tribunal Judge Kekic found that the First-tier Tribunal had materially erred in law. The First-tier Tribunal fell into error in concluding that the best interests of the children had not been considered because GEN.1.1 made specific reference to this duty. The Judge failed to consider the fact that the appellant would not need to make her entry clearance application from South Africa but from Ghana, where she had family. Nor did the Judge consider that the appellant may only be away from her family for a short time. The Judge had not given consideration to the fact that the children were young and had only spent a relatively short period of time in the UK and would not be obliged to live in Ghana permanently. The Judge had not considered whether the appellant's husband would be able to accompany his family for a temporary period. Nor

did the Judge consider that the appellant, at least on the basis of the facts as understood by the UT Judge, appeared to make a deliberate decision to come here to stay knowing that she had no entitlement to remain, and that she deliberately chose not to make an entry clearance application from Ghana because she considered it would take too long. Having identified the above errors the appeal was adjourned for a re-hearing.

The re-hearing

7. The appellant and her husband each produced a further statement. At the hearing I received a letter from Margaret Lynes, the husband's mother, in support of the application. The appellant produced a full bundle of documents running to 245 pages. The respondent provided a number of authorities, copies of the relevant immigration rules, and a skeleton argument. I heard oral evidence from the appellant and her husband. They both gave their evidence in English. I maintained a full Record of Proceedings which is attached to the Tribunal file. The following is a summary of the material evidence given at the hearing and the submissions made on behalf of the parties.
8. The appellant was the main carer for her children. They had no nanny or paid carer. The youngest child was due to start nursery in September. Her children have never been away from her and she could not even imagine this. The appellant's mother-in-law lived 5 hours drive away. The children had never stayed with their grandparents alone. There was no-one else who could look after the children and the appellant had no other family in the UK. The appellant's husband frequently went on international trips as part of his employment. The appellant's father-in-law has not been well and the appellant could not see how her mother-in-law would be able to cope looking after the children and her husband. The children would be unable to attend school if they stayed with their grandparents.
9. The appellant's parents lived in Ghana, and her father would be 70 in August. The appellant's mother recently moved to a smaller house and was now looking after her own mother. There was no accommodation available from her family in Ghana. Should she have to return to Ghana the appellant would have to stay in a hotel or Bed & Breakfast accommodation. She did not know how long it would take to process a settlement application from Ghana, but believed it may take at least 3 months.
10. In cross-examination the appellant reiterated that her mother-in-law could not take care of the children because she was caring for her husband. When she last visited Ghana in 2012 the appellant stayed in a hotel. The appellant explained that when she entered the UK in April 2013 she still intended to return to South Africa and, to this end, even had tickets booked for August 2013. She and her family had entered the UK in order to obtain legal advice on her options. She explained that, when informed that it may take 3 months to process an application when she was in South Africa, she had not wanted to be separated

from her family because she was still breast-feeding her youngest son and she could not stay in Bed & Breakfast accommodation with young children for 3 months.

11. In re-examination the appellant explained that there was no need for her to be in Bed & Breakfast accommodation as her husband had property in the UK. The staff at the British High Commission in South Africa told her that she could seek legal advice once she returned to the UK. The only reason she went to see a solicitor on re-entering the UK was to find out what her options were in order to make a settlement application. The appellant reiterated that she had tickets to return to South Africa in August 2013.
12. I asked the appellant how she believed her children would feel if she had to return to Ghana to make an entry clearance application. At this point the appellant became very emotional. She said she could not leave her family and was then unable to give further evidence. I gave her some minutes to compose herself and indicated I had no further questions to ask.
13. In his oral evidence the appellant's husband indicated that he worked full-time and that he regularly travelled abroad, usually for a week to ten days at a time. There was no-one else in the UK who could look after the children. He could not work at home because he was the Associate Director with a team and had four other people working beneath him. He had to be in the office. His salary had now increased to £69,500 gross per annum. There was no way that his employers would be able to release him to enable him to look after his children. His mother and step-father were both retired and were not in good health. His step-father recently underwent a neck and knee operation. His parents also had pedigree cats who were not in good health. His parents could only visit their grandchildren one at a time as someone had to stay and look after the cats. The children would be unable to attend school if they stayed with their grandparents. It was not possible for his parents to stay in his home to look after the children given their own health issues.
14. The husband indicated that he spoke to officials at the BHC in South Africa who informed him that processing times for settlement application can take between 3 to 6 months. The official suggested the appellant and her husband seek legal advice in the UK. This is what they did. When asked about the impact on their children if the appellant had to return to Ghana the husband said they would be devastated. They had never been away from their mother. This would impact on their whole lives. The children would not understand and would be bewildered.
15. In response to questions put in cross-examination the husband said that he did not know of any nanny who, were he to travel abroad for business, would be able to look after the children for 24hour periods. The husband reiterated that he went abroad often. His company had no contracts in Ghana.

16. In submissions Ms Fijiwala indicated the need to identify the evidence to support a claim for a grant of leave outside the rules (**The Secretary of State for the Home Department v SS (Congo) & Ors [2015] EWCA Civ 387**). I had to look at the public interest factors through the lens of the immigration rules. It was therefore in the public interest that visitors were not allowed to switch categories. It was submitted that there were no other compelling factors in the factual matrix presented by the appellant. I was referred to the public interest considerations in section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). With respect to the authority of **R(on the application of Chen) V SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 189** (IAC), paragraph 39, the appellant had not shown that the entry clearance requirements from abroad would have been met because the husband did not have 6 months worth of pay slips. Nor would there be a significant interference as a result of the temporary removal. It was submitted that the appellant's parents in Ghana could support her during any application and there was no reason why the grandparents could not look after the appellant's children while she made her application abroad.
17. Mr Buley submitted, in respect of the appropriate legal approach, that the effect of E-LTRP.2.1 was to cut off the balancing exercise from consideration. It was pointed out that the provisions led to the odd situation where someone who entered the UK illegally and using deception could be in a better position than someone who entered lawfully but who, as a result of a change in circumstances, wanted to switch category. With respect to the respondent's skeleton argument it was clear the only justification advanced for the no-switching rule related to situations where individuals used deception to enter the UK, but that was not the position in the present appeal. It was submitted the requirements of E-LTRP.1.1 were not consistent with the case of **Chikwamba (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2008] UKHL 40**. It was submitted that section 117B(6) of the 2002 Act provided a structured approach on how to answer the public interest question. It did not matter for how long a child had to leave the UK. If the child could not reasonably be expected to leave the UK the section did not contemplate separation as a possibility. It was submitted that the Secretary of State's guidance was not consistent with section 117B(6) as the latter only merited separation of a child from their parent in the context of a deportation decision. It was nevertheless submitted that the appellant complied with the requirements of the guidance. It was submitted there was no basis for doubting the evidence from the appellant and her husband as to the circumstances in which they came to make their application. The couple returned to the UK in 2013 with a view to working out what to do in the long term and to discuss their position with solicitors. Their application was made in good faith. I had to consider the public interest in this context. Mr Buley reminded me of the practical consequences of the appellant's separation from her children and the impact on the children if they were required to return to Ghana with their mother.

18. I reserved my decision.

Factual Findings

19. There were no significant factual disputes in this appeal. I found that the appellant and her husband gave their evidence in a clear and forthright manner. Their evidence was given in detail and was devoid of any inconsistency. While the provision of detailed and consistent evidence is not determinative of credibility, they are factors I am entitled to take into account as being indicative of credibility. There was perceivable attempt at any exaggeration or embellishment in their evidence.
20. I find that the appellant and her husband did approach the BHC in South Africa with a view to making a settlement entry clearance application. I accept their evidence, consistently given, that staff at the BHC indicated that an application could take up to 3 months to process, and possibly more, and that they were advised, given that the appellant held a multiple-entry visit entry clearance, that she could re-enter the UK in order to obtain professional legal advice. Both gave a detailed account of the circumstances in which this advice was given and the account was not challenged by Ms Fijiwala. I also accept that this option would have been reasonably attractive to the appellant given that her husband was in employment in the UK, her oldest son at nursery, and her desire not to be separated from her family while breast-feeding her youngest son. I am satisfied that the appellant re-entered the UK as a genuine visitor still with the intention of returning to South Africa to make an entry clearance application if required to do so, even though she harboured the hoped that she would be able to remain here depending on the legal advice she obtained. I accept the appellant's evidence that her mother has moved to a smaller property in Ghana to look after her own mother and that, if removed, the appellant would have to reside in a hotel or Bed & Breakfast accommodation, as she did when she returned to Ghana in 2012, for the duration of any entry clearance application.
21. I find that the appellant's husband is still in the same employment, that he currently earns a gross salary of £69,500 per annum, and that he is required, as part of his job, to make frequent trips abroad for periods ranging from one week to ten days. This evidence was not challenged by Ms Fijiwala. I am also satisfied, having considered the evidence from both the appellant and her husband 'in the round', that the husband's parents would not be able to care for the children for any length of time as a result of their age, their own health issues, and their other commitments including their rearing of pedigree cats. This would also prevent the grandparents from looking after the children in the appellant's family home given that they are separated by a 5 hour drive. Having considered the oral evidence from the appellant and her husband I am entirely satisfied that even a temporary separation between her and her children would adversely impact on the well-being of the children and that the children are likely to be very distressed by any such separation. I am satisfied

that the appellant does meet the English language requirements of Appendix FM, a point conceded by Ms Fijiwala at the hearing.

Legal conclusions

22. It is not disputed that the appellant cannot succeed under the immigration rules. Appendix FM, R-LTRP.1.2.1 requires that the appellant must not be present in the UK as, *inter alia*, a visitor. EX.1 only applies if the appellant is not in the UK as a visitor (R-LTRP.1.1(d)).
23. Following a long line of authorities, including **R (Nagre) v Secretary of State for the Home Department** [2013] EWHC 720 (Admin), **Singh v Secretary of State for the Home Department** [2015] EWCA Civ 74 and **SSHD v SS (Congo)** [2015] EWCA Civ 387, in order for the appellant to succeed in her application for leave to remain outside the immigration rules I must be satisfied there are compelling circumstances not sufficiently recognised under those rules. As was stated in paragraph 44 of **SS (Congo)**, *"If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf Nagre, para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8."* This is a fairly demanding test, reflecting the reasonable relationship between the rules themselves and the proper outcome of the application of Article 8 in the usual run of cases (para 44 of **SS (Congo)**).
24. I am additionally obliged to take into account Section 55 of the Borders, Citizens and Immigration Act 2009 which requires me to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. In **ZH (Tanzania) v SSHD** [2011] UKSC 4 the Supreme Court held that, *"In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first."* What is required by consideration of the best interests of the child is an "overall assessment" and it follows that its nature and outcome must be reflected in the wider Article 8(2) proportionality assessment (**MK (best interests of child) India** [2011] UKUT 00475). **E-A (Article 8 - best interests of child) Nigeria** [2011] UKUT 315 (IAC) indicated that the correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents. I take into account that GEN.1.1 of Appendix FM indicates that the Appendix takes into account the need to safeguard and promote the welfare of children in the UK in line with section 55, but I also note that in **JO and Others (section 55 duty) Nigeria** [2014] UKUT 00517 (IAC) it was stated that the duty imposed by section 55 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration etc function, that the decision-maker must conduct a careful examination of all relevant information

and factors, and that the question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one.

25. Having given careful consideration to the totality of the evidence before me I am satisfied, for the following reasons, that there is a reasonably arguable case under Article 8 that has not already been sufficiently dealt with by consideration under the immigration rules, and that there are, on the particular facts of this case, compelling circumstances sufficient to render the appellant's removal disproportionate under Article 8.
26. It is possible for a range of different factual circumstances, either individually or cumulatively, to meet the demanding 'compelling' threshold and therefore justify a grant of leave outside the immigration rules. In the present appeal I identify the following factors, which, when considered holistically, constitute compelling circumstances.
27. In **MS v SSHD [2013] CSIH 52** Lord Drummond Young indicated, at [30], that the purpose of those provisions of the immigration rules giving expression to Article 8 was to set out the factors which normally apply to the Article 8 assessment in an immigration context; "... consequently both the terms of those provisions and the underlying policy that can be discerned from those terms are of importance. They must, of course, be weighed against the other special considerations that apply in the particular case."
28. The justification, and therefore the underlying policy, proffered by the Respondent for the 'no switching' rule in the context of Appendix FM is that it aims to prevent abusive applications. As was recognised in the UT error of law determination, "*The Secretary of State's view that visitors should not be permitted to switch and that those who seek to abuse and evade the rules should not be rewarded for such actions are also important considerations.*" The respondent's skeleton argument, served at the commencement of the re-hearing, explained that the tough approach taken in respect of visitors is due to the specific nature of the visitor visa, which is time limited and is for a specific purpose only. The respondent's skeleton argument stated that the UK needs to guard against those abusive applications who deliberately seek to circumvent the minimum income threshold and gain entry on the basis of 'deception'. It was claimed in the skeleton argument that those granted visitor visas on the basis that they satisfied the ECO that their intention was to visit the UK only and return at the end, would have used deception in their applications for a visitor visa.
29. This may well be true of a large number of visitor applications where a person never intended to enter or remain as a visitor. But it is not true of the present appellant. I have found, for the reasons given above, that she genuinely entered, and re-entered the UK as a visitor. I find that she always intended to comply with the conditions attached to her enter clearance and that she did not, at any stage, exercise any deception. On my factual findings the appellant re-entered

the UK in April 2013 pursuant to a valid visitor entry clearance following advice given to her by staff at the BHC in South Africa and with the intention of seeking professional legal advice in the UK as to the options available to her. She still intended to return to South Africa if so advised and had purchased return tickets to this end. Her application was not an abusive application but one made in good faith after the provision of legal advice. In this regard I accept Mr Buley's submission that if there is no deception in an individual case, then the public interest underling the 'no switching' rule is not present. I find this to be one factor that can amount to an exceptional or compelling circumstance on the particular facts before me. In so doing I have specifically considered the public interest in the no switching rule through the lens of the immigration rules and note that her inability to satisfy R-LTRP.1.2.1 remains a matter of substantial significance.

30. A further factor that I consider amounts, on the particular facts of the present case, to a compelling circumstance, is the actual impact on the children if the appellant is separated from her family. To this end I have considered the possibility that the appellant may only be away from her family for a short period of time.
31. There was no evidence before me in respect of the processing times for settlement applications from Ghana. However, even on the basis that the period of separation from her family would only be a matter of weeks, I find this would nevertheless have a considerable impact on all the family members, and in particular on her two young children. Having observed the appellant and her husband giving evidence, and in particular their response when asked about the impact that separation would have on the children, I am satisfied that even a brief separation between the appellant and her children would have a significant adverse consequences. The children, aged 3 and 6, have never been separated from their mother. As one would naturally expect they have a very strong bond with her. The appellant became extremely distressed when asked about the impact on her children if she had to return to Ghana to make an entry clearance application and it took her several minutes to compose herself before she was able to continue. She indicated that she could not even imagine being separated from her children. Her husband indicated that the impact on the children of even a short separation of some weeks would be devastating, that they would be bewildered and that they would not understand why their mother was not with them. This evidence was not challenged and, in the context of the ages of the children, was inherently plausible. In these circumstances I find that the separation of the appellant from her children, even for a temporary period of time, would have a detrimental impact on them sufficient to cause them real distress.
32. In his evidence the appellant's husband stated that he needed to work in his office and that his employer would not be able to release him from work to enable him to look after his children. This evidence was not challenged and was, in any event, inherently plausible. The appellant's husband indicated that

his employment frequently required him to travel to other countries for between a week and 10 days at a time. The husband indicated his belief that nannies or au pairs would not be available to look after his two young children for this period of time, and that even if this was the case the cost would be prohibitive. There was no challenge by Ms Fijiwala to this evidence. I therefore accept that the appellant's husband does frequently travel abroad for relatively long periods of time. When he does go abroad it is the appellant who looks after the children. I accept the evidence given by both the appellant and her husband that his parents would be unable to look after the children as they are themselves elderly, have health problems, and have other obligations that are inconsistent with the level of child-care they would reasonably be expected to provide. The appellant's parents-in-law rear pedigree cats in their home and would be unable to leave them to remain, for example, with the children in the appellant's family home. The husband's step-father was recovering from an operation and this was putting a strain on the appellant's mother-in-law. I accept the appellant's evidence that her elderly mother-in-law would have difficulty coping with the two young children and tending to her husband. I also accept that requiring the appellant's children to live with their grandparents, some 5 hours drive from the family home, would involve removing Mark Joseph, their eldest son, from his school, which would have repercussions both on his education, and the appellant and her husband's legal responsibility to ensure their son attends school. There was no challenge to the oral evidence that there is no-one else who could look after the children or that the appellant has no other family in the UK.

33. I have considered the possibility of the children accompanying their mother to Ghana for a temporary period of time in order for her to make her entry clearance application. I note first that paragraph 117B(6) indicates that the public interest does not require a parent's removal where, *inter alia*, it would not be reasonable to expect the British citizen child to leave the UK. This section does not specify whether the determination of reasonableness depends on whether the child leaves for only a temporary period or a permanent period. I find the clear wording of the section makes no distinction between a temporary and permanent departure.
34. Having regard to the particular facts of the appeal, I am, in any event, satisfied that it would not be reasonable for these particular children to leave the UK even for a temporary period. Any departure by the children would inevitably separate them from their father, who would have to remain in the UK as a result of his employment. Such a separation, even temporarily, is clearly detrimental to the relationship between the children and their father, and the possibility of maintaining communication remotely is a poor substitute, especially for children of their young age. I accept Mr. Buley's submission that it is highly likely that the oldest child would have to be taken out of school in order to join his mother, even if efforts were made to make best use of school holidays. This is likely to have a negative impact on his education, although I do bear in mind the early stage of his education.

35. Although the appellant would be returning to Ghana to make her entry clearance application I have accepted her evidence that she and her children would have to stay in hotels or Bed & Breakfast accommodation for the duration of their stay as her family does not have sufficient accommodation to house the appellant and her two children. I do not find it reasonable to expect a woman with two young children to live in such accommodation for an indeterminate period of time. This would clearly not be in the children's best interests.

36. I have additionally considered the respondent's own policy in respect of a child's best interests under the family rules and in respect of requiring the parent of a British citizen child to leave the UK. The "Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes, April 2015", at paragraph 11.2.3, sets out the circumstances in which a British citizen child could be reasonably expected to leave the UK in a non-deportation context. The policy reads, in material part:

'Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

- criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation.'

37. The appellant has not engaged in any criminality. Nor am I satisfied that she has 'a very poor immigration history'. I have found as a fact that she had not breached any of the conditions attached to her leave to enter the UK as a visitor, and that she has not broken any of the requirements of the immigration rules. I have specifically found that she has not used deception when entering the UK or made an abusive application. I find the policy expresses the respondent's view of the best interests of the children and the relevant weight to attach to the

public interest considerations. The policy indicates, in the view of the Secretary of State, where the public interest lies in circumstances where, in order to remain as a family unit, a parent, such as the appellant, of a British citizen child is required to return to their own country. In relation to the factual matrix of the present appeal the policy tends towards a conclusion that there are no considerations of such weight as to justify separation between the appellant and her children.

38. In assessing the existence of compelling circumstances sufficient to render the appellant's removal disproportionate I have additionally consider the factors identified in section 117B of the 2002 Act. I accord significant weight to the fact that the maintenance of effective immigration control is in the public interest. Effective immigration control in the present appeal includes the prevention of abusive applications by those posing as visitors. I take account of the decision in AM (S 117B) Malawi [2015] UKUT 0260 (IAC) to the effect that the appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of her fluency in English, or the strength of her financial resources. I further take into account the fact that the appellant has not met the formal evidential requirements contained in Appendix FM-SE in respect of her husband's employment and income (although there were 6 months worth of bank account statements from September 2014 to February 2014, and a letter from his employer setting out his employment details, the appellant's bundle only contained 3 months worth of wage slips). There has never been any challenge to the husband's claim that his gross annual salary was £68,000, and is now higher. The bank account statements and wage slips support this assertion, as do his employer's letters. The husband confirmed at the hearing that he continues to be in the same employment and that he has in fact received an increase in his wages. I have found the husband to be a credible witness. When the husband offered to provide further evidence of his wage slips and bank account details Ms Fijiwala did not challenge this evidence. I am satisfied, having considered the evidence before me 'in the round', that the appellant's husband does earn over £68,000 gross per annum. This is relevant in respect of the section 117B(3) consideration as, although the appellant gains no positive right to a grant of leave to remain, it is not a matter that can be held against her. Mr Fijiwala accepted at the hearing that the appellant had obtained an Entry Level Certificate in ESOL International from Trinity College London and indicated that this met the language requirements of Appendix FM.
39. With respect to section 117B(4) I note that the appellant's relationship with her husband was not established when she was in the UK unlawfully, and I further note that she has never been in the UK unlawfully. Section 117B(5) indicates that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. The appellant's immigration status when in the UK has always been precarious, but she is not relying on her private life to resist the decision to remove her but upon her family life relationship with her children and her husband, relationships which were established when none of them were in the United Kingdom.

40. In relation to section 117B(6) Mr Buley submits that the section overrides the provisions of the immigration rules. I do not accept that submission. I accept the respondent's written submission that section 117B(6) is not a trump card overriding all other considerations. It is one of a number of considerations that must be considered in the overall proportionality assessment. Approaching section 117B(6) on this basis, I am nevertheless satisfied, for the reasons I have already given, that it would not be reasonable to expect the appellant's children to leave the United Kingdom.
41. I have given very careful consideration to the totality of the evidence before me. I find this is a rare case where the appellant's removal, even for a temporary period, would, for the exceptional and compelling reasons I have already given, amount to a disproportionate interference with Article 8.

Decision:

The appeal is allowed



Signed:
Upper Tribunal Judge Blum

31 July 2015
Date: