



IAC-FH-AR-V1

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

Appeal Number: OA/16011/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13th April 2016**

**Decision & Reasons  
Promulgated  
On 27<sup>th</sup> April 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HILL QC**

**Between**

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

Appellant

**and**

**NURUDEEN BOATENG  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr N Bramble, Home Office Presenting Officer  
For the Respondent: Mr A Adeolu, Legal Representative, Lonsdale & Mayall  
Solicitors

**DECISION AND REASONS**

1. This is an appeal from the decision of First-tier Tribunal Judge Brown promulgated on 9 October 2015. The respondent to the appeal (to whom I

shall refer as 'the applicant' hereafter so as to avoid confusion) is Ghanaian, born in 1982, and married to a British citizen, Mrs Zainab Boateng. They have one child, a son, who was 19 months old at the time of the determination by the First-tier Tribunal.

2. On 10 September 2014 the applicant applied for entry clearance as the partner of Mrs Boateng. The Entry Clearance Officer refused his application on 26 November 2014 on the grounds that the financial requirements in Appendix FM to the Immigration Rules had not been met. The Entry Clearance Officer gave consideration as to whether the application raised any exceptional circumstances by reference to Article 8 of the European Convention on Human Rights which warranted consideration outside the requirements of the Rules but concluded that it did not.
3. That refusal was reviewed by an Entry Clearance Manager and was maintained in a decision communicated on 13 February 2015. The decision was then appealed to the First-tier Tribunal. The grounds of the appeal were threefold: first, that the decision was not in accordance with the Immigration Rules; second, that the decision was not in accordance with the law; and, third, that the decision was unlawful under section 6 of the Human Rights Act 1998, as being incompatible with Convention rights, specifically Article 8 concerning private and family life.
4. In his closing submissions to the First-tier Tribunal on behalf of the applicant, Mr Adeolu (who again represents the applicant before me) made the unambiguous concession that the applicant did not meet the requirements of Appendix FM due as Mrs Boateng's income during the relevant period was below the minimum required. The Judge considered that concession to have been properly made and Mr Adeolu has repeated it before me.
5. In submissions before me today, the question arose as to whether, were a fresh application for entry clearance to be made, the minimum income threshold could be demonstrated. Mr Adeolu submitted that the financial requirement would clearly be met but that it would be onerous upon the applicant to make a fresh application, even if it were likely to prove successful.
6. In the First-tier Tribunal, the Judge, having dealt with background, proceeded immediately to consider the matter under the Human Rights Act (see paragraphs 29 and following). The Secretary of State pursues this as her principal ground of appeal, on the basis that it amounted to an error of law, being contrary to the approach commended in **SS (Congo) [2015] EWCA Civ 387**. The Judge, it is submitted, did not turn his mind to identifying any compelling circumstances pursuant to which the matter could properly be considered outside the Immigration Rules.

7. Mr Adeolu conceded that nowhere in his determination does the Judge make reference to a compelling or exceptional circumstance. He submits, however, that it is open to a reader of the determination (importing the concept of the 'reasonable man on the Clapham omnibus') to look at the decision holistically. He says that it can be inferred that the Judge turned his mind to the matter, and support for this proposition, he says, may be found in paragraphs 46 and 47 of the determination.
8. I find this submission unconvincing for two reasons. First, these two paragraphs are to be found in a passage of the determination which is preceded by the sub-heading 'Proportionality Consideration'; and, secondly, because nowhere in these two paragraphs (or elsewhere in the determination) is it said by the Judge that a compelling or exceptional circumstance is made out for considering the matter under Article 8. Paragraphs 46 and 47 constitute a balancing exercise in which the Judge is looking at the best interests of the child concerned.
9. In giving the judgment of the court in **SS (Congo)**, Richards LJ discussed the Court of Appeal's earlier decision of **(MM) Lebanon [2014] EWCA Civ 985**, concluding at paragraph 25,

"The practical effect of the Court of Appeal's reasoning ... is that ... there will generally be no or only a relatively small gap between the new [Leave to Enter] Rules as promulgated by the Secretary of State and the requirements of Article 8 in individual cases, including those involving sponsors who are British citizens of refugees located in the United Kingdom. The Court of Appeal .... did not find it necessary to deal in detail with how wide that gap might be, and accordingly did not have to decide exactly what significance the balance struck in the LTE Rules might have for the Article 8 balancing exercise to be conducted by an official or a court or tribunal."
9. Richards LJ, in **SS (Congo)**, continued at paragraph 26 that the Court of Appeal in **MM (Lebanon)** had not said that there could never be cases falling outside the LTE Rules where, on their particular facts, Article 8 might require that LTE be granted outside the Rules. It left that possibility open. Following an exhaustive discussion of both domestic law and Strasbourg jurisprudence in a variety of factual circumstances, he stated at paragraph 51,

"In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general proposition applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with."
10. The rationale for the requirement of compelling circumstances is fully rehearsed by Richards LJ and merits recitation in full.

**[52]** This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.

**[53]** Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the costs of administration within reasonable bounds, application of standard rules is an important means of minimising the risk of arbitrary differences in treatment of cases arising across the wide range of officials, tribunals and courts which administer the system of immigration controls. In this regard, the evidence Rules (like the substantive Rules) serve as a safeguard in relation to rights of applicants and family members under Article 14 to equal treatment within the scope of Article 8. [...] Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the Secretary of State's assessment of the evidential requirements needed to ensure prompt and fair application of the substantive Rules: compare *Stec v United Kingdom*, cited at para. [15] above. Again, if an applicant says that they should be given more preferential treatment with respect to evidence than the Rules allow for, and more individualised consideration of their case, good reason should be put forward to justify that."

11. There is nothing in the Judge's determination (whether expressly articulated or capable of being implied) to suggest that he found a good reason for considering this matter outside the Rules. This error of law is self evident on the face of the determination.
12. The second, somewhat more general, ground of appeal pursued by the Secretary of State is that there is no reference in the determination to the statutory matters to which regard must be had under Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 (as amended). Mr Bramble, on the Secretary of State's behalf, very fairly takes me to paragraph 50 of the determination and particularly to the reference to 'public interest'. This, he says (and it was not disputed by Mr Adeolu) is the only place in the determination where the expression 'public interest' used. But as Mr Bramble submits, and with which I concur, Sections 117A and 117B import a far greater level of detail and specificity than mere 'public interest' and it is unfortunate that the Judge made no reference to them. I noted, however, paragraph 44 of the decision in which the Judge

states, "In assessing proportionality, I must afford great weight to the public interest in securing the economic well-being of the United Kingdom by fair and consistent immigration control, considered on the macro as well as the micro level". Mr Adeolu was not able to direct me to any part of the determination where the Judge expressly turned his mind to Section 117A and/or 117B. Since the error of law which I have found under the first ground is sufficient to be dispositive of this appeal, a fuller discussion of the second ground is somewhat otiose, but for the reasons briefly stated, I am drawn inevitably to the conclusion that the failure expressly to consider Sections 117A and 117B amounts to a further error of law.

13. Accordingly, there are two errors of law on the face of this determination. The first is that the Judge did not find any exceptional or compelling circumstance which warranted consideration of the case outside the Rules and the second is that the Judge failed to consider the statutory public interest considerations prescribed by Sections 117A and 117B.
14. Mr Adeolu argues that in the event that I were to find there to be one or more errors of law, I should not consider them to be material. I cannot accept that proposition. These errors - separately and cumulatively - go to the very heart of the judicial exercise and they clearly affected the way in which the matter was determined. I have no option but to allow this appeal and to set aside the determination of the First-tier Tribunal.
15. Having set aside the determination, how should I proceed? Mr Adeolu submits I should remit the matter for consideration *de novo* by a differently constituted First-tier Tribunal. Mr Bramble, on the other hand, says that I should remake the decision based upon the information available to me, preserving such findings as are proper from the First-tier Tribunal determination.
16. Mr Adeolu stated that there was no fresh evidence which would be adduced by the applicant, but he would prefer a different First-tier Tribunal Judge to consider the matter. He advanced no reason as to why a First-tier Tribunal Judge might be better placed to remake the decision that would one of the Upper Tribunal.
17. There was no rule 24 response filed and it is common ground that there will be no fresh evidence called. All relevant factors militate in favour of this matter remaining in the Upper Tribunal for expeditious redetermination. The interests of justice are best served by the Upper Tribunal determining the matter.
18. In remaking the decision, I give full regard to the Court of Appeal's decision in **SS (Congo)** and address first whether there is any exceptional or compelling circumstance to consider this case outside the Rules. I have considered with care the findings and conclusions to which the Judge came at paragraphs 29 to 53 of his decision. I do not seek to look behind any of those findings of fact which I treat as being preserved. Viewed objectively,

there is nothing in the Judge's analysis – whether taken separately or cumulatively – which can properly amount to compelling circumstances legitimating consideration of the case outside the Rules where (as has been found and is in any event conceded) the requirements of Appendix FM have not been met.

19. A weighty consideration in reaching this conclusion is the fact that the Judge himself did not identify any such compelling circumstance either expressly or by inference. See my analysis above when considering error of law. I must nonetheless go beyond this and consider whether there is anything in the applicant's case which might be capable of amounting to a compelling circumstance notwithstanding that it may not have been positively identified by the Judge. Mr Adeolu did not advance a positive case as to any particular feature which might amount to a compelling circumstance and invited me to consider the matter in the round.
20. One feature of the case is the fact that Mrs Boateng had been on maternity leave for some or all of the six months preceding the date of the applicant's application for entry clearance and, accordingly, this may have served to reduce her level of income. It does not appear to be a feature upon which Mr Adeolu had relied, but even if it were relevant, I do not consider that this fact, whether taken alone or in conjunction with other matters, is a compelling circumstance to justify entertaining a human rights challenge outside the Rules. I do not see any merit in the argument that 'but for' the reduced income level during maternity leave makes this a 'near miss' case which should therefore be favourably determined outside the Rules. It is, at best, a factor to be considered in the proportionality balance, in the event that consideration outside the Rules is justified.
21. I do not consider that the existence of a child of the relationship to be a compelling circumstance. It is far from exceptional. The child, whom the Judge identified as S is now some 2 years of age and is a British citizen. Undoubtedly Mrs Boateng finds it more difficult to cope with raising a child on her own and that burden would be eased were the child's father, the applicant, to be in a position to join her and to help her. Nor is it disputed that it would not be in the child's best interests for him to go and live with the applicant with Ghana: although I do not understand that this has ever been contemplated. But, however distressing the division of a family may be, it is a far from unusual situation and does not get us into the territory of an Article 8 consideration outside the Rules.
22. To the extent that I am wrong, and that there are features which whether individually or when taken together are capable of amounting to a compelling circumstance for considering this case under human rights grounds outside the Rules, I must start with the statutory framework. Part 5A of the Nationality, Immigration and Asylum Act 2002, introduced by section 19 of the Immigration Act 2014 and in force since 25 July 2014,

establishes a new statutory regime applicable when a court is determining immigration cases. Sections 117A and 117B provides as follows:

**117A Article 8 of the ECHR: Public Interest Considerations**

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), “the public interest question” means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

**117B Article 8: Public Interest Considerations Applicable in All Cases**

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom. ”

23. In assessing whether the refusal of entry clearance to the applicant breaches his rights to a private or family life under Article 8, or those of Mrs Boateng and/or their child, I have regard to the public interest considerations articulated in Section 117B. I have particular regard to the fact that the family and private life between the applicant and Mrs Boateng, and - latterly with the child as well - was developed while the applicant had no immigration status at all in the United Kingdom. At best, there was an uncertain hope or expectation that an application for leave to enter might be granted at some future date in the event that one were made.
24. I take fully into account all the features identified by the Judge (which I need not rehearse as there is no evidential challenge to any of the factual matters) but I can find no ground for concluding that the decision of the entry clearance officer amounted to a disproportionate interference with the Article 8 rights of the applicant, Mrs Boateng or their child. The public interest is clear, as are the evidential requirements under Appendix FM. The fact that during the six-month period leading up to the application, the sponsor may have been on maternity leave and thus not in a position to prove attainment of the financial threshold, is not a sufficient consideration to displace the statutory public interest requirement. It may have been a near miss, but it was a miss nonetheless. In paragraph 57 of its judgment, the Court of Appeal in **SS (Congo)** expressly addressed cases where it was said by applicants that:
- “... improvements in the position of their sponsors were on the horizon, so that there appeared to be a reasonable prospect that within a period of weeks or months they would in fact be able to satisfy the requirements of the Rules. They maintained that the Secretary of State should have taken this into account when deciding whether to grant LTE outside the Rules. In our judgment, this affords very weak support for a claim for a grant of LTE outside the Rules. The Secretary of State remains entitled to enforce the Rules in the usual way, to say that the Rules have not been satisfied and that the applicant should apply again when the circumstances have indeed changed.”
25. I need pass no comment on whether a fresh application with current financial information would succeed or not. Mr Adeolu is confident that it will and he is at liberty to pursue it on the applicant's behalf. However, that is irrelevant to the matters currently under appeal. Put shortly, the applicant did not meet the requirements of Appendix FM of the Immigration Rules. There is no compelling circumstance allowing this matter to be considered under human rights grounds outside the Rules. And even if there were such circumstances, any claim under Article 8 (private and family life) would fail for the reasons which I have sought to outline above.



26. In the circumstances, I remake the decision of the First-tier Tribunal by dismissing the underlying appeal and restoring the decision of the Entry Clearance Officer.

**Notice of Decision**

- i. Appeal allowed and determination of First-tier Tribunal set aside.
- ii. Decision re-made dismissing the appeal from the Entry Clearance Officer's refusal and reinstating the Entry Clearance Officer's decision.

No anonymity direction is made.

Signed *Mark Hill*

Date

25 April 2016

Deputy Upper Tribunal Judge Hill QC