**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/05852/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 6 March 2018** | **On 9 March 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

**Between**

**VICTORIA DONKOR**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - SHEFFIELD**

Respondent

**Representation:**
For the Appellant: Mr. V. Aning, Immigration Advisory Service
For the Respondent: Mr. P. Nath, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by Ms Donkor against the decision of First-tier Tribunal Judge Kainth, promulgated on 4 July 2017, in which he dismissed Ms Donkor's appeal against the Entry Clearance Officer's decision to refuse her application for leave to enter the United Kingdom.

2. Permission to appeal was granted as follows:

> "The grounds assert that the Judge erred in that his assessment of proportionality was flawed in that he focused on the refusal under paragraph 320(11) of the Immigration Rules and should have considered whether this justified permanent exclusion.
>
> At paragraph 21 the Judge found that given the passage of time since the behaviours in issue "*the respondent would no longer be able to cite paragraph 320(11)*". Given that this was the only basis for the refusal of entry clearance it is arguable that his assessment of the proportionality of the refusal was flawed."
>
> The grounds disclose arguable errors of law."

3. The Sponsor attended the hearing. I heard submissions from both representatives. I stated that I found that the grounds were made out, and that the decision involved the making of a material error of law. I set the decision aside to be remade.

**Error of law**

4. In what is, as accepted by Mr. Nath, a slightly confusing decision, the Judge found at [21] that:

> "In my assessment of the evidence, and in consequence of the passage of time, the respondent would no longer be able to cite paragraph 320(11)."

5. There was no cross appeal by the Respondent, and consequently it was accepted by Mr. Nath that the finding that the application should not have been refused by reference to paragraph 320(11) stood.

6. It is not in dispute that this was the only basis on which the application was refused. The notice of decision is clear that the suitability, relationship, financial and English-language requirements of Appendix FM of the immigration rules were all met. Having found therefore that the application should not have been refused by reference to paragraph 320(11), the Judge had found that the Appellant met the requirements of the immigration rules for entry clearance as the spouse.

7. At [22] onwards the Judge considers Article 8. At [26] he states:

> "Before I consider proportionality itself, I must examine whether there is justification for the decision appealed. I begin by considering this in light of the public interest considerations set out in Section 117A and Section 117B of the 2002 Act as amended. The maintenance of effective immigration control is in the public interest and therefore refusing entry to a person who albeit meets the requirements of the Immigration Rules has provided no grounds to suggest that Article 8 should be invoked in their favour, is sufficient reason and justification for exclusion."

8. The Judge has given no reasons, nor cited any authority, for his finding that this is the case. There is no indication in the immigration rules or elsewhere that an applicant has to do anything more than meet the requirements of the immigration rules in order to gain entry clearance. An application made under Appendix FM is made on the basis of family life, Article 8.

9. At [29] the Judge turns to consider proportionality. It was submitted in the Rule 24 response that the Judge was entitled to find that the personal circumstances did not outweigh the need for the public interest to be upheld "given the Appellant's previous conduct". The Rule 24 response referred to [29].

10. There is no consideration at [29] of the Appellant's previous conduct. The Judge has dealt with the issue of the Appellant's previous conduct in his consideration of paragraph 320(11). He has found that paragraph 320(11) is not relevant to the Appellant's application. He deals with the circumstances of the Sponsor at [29], not the Appellant's previous conduct. Paragraphs [30] and [31], which contain the remainder of the proportionality assessment, equally do not deal with the Appellant's conduct. The Judge has considered only the Sponsor's situation.

11. At [30] the Judge quotes from the case of Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC), where it states that an Appellant's ability to satisfy the rules "is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control".

12. At [31] the Judge states "The Appellant meets the requirements under the immigration rules as a partner. That is considered by the Respondent within the reasons for refusal letter." Although he has only just quoted from a case which states that this is a weighty factor, he has given no weight at all to the fact that the Appellant meets the requirements of the immigration rules. Immediately he turns again to consideration of the Sponsor's ability to relocate to Ghana.

13. I find that the Judge has erred in failing to give any weight at all in the proportionality assessment to the fact that the Appellant met the requirements of the immigration rules, as conceded by the Respondent. He had found that the Respondent was wrong to apply paragraph 320(11), but he has given no weight to the fact that the Appellant has satisfied of the requirements necessary to be granted entry clearance.

14. The Judge has failed to give any weight to the fact that the Appellant met the requirements of the immigration rules. While he has referred to section 117B, he has not considered section 117B(2) and 117B(3) in relation to the Appellant's English-language skills and financial independence. He has purported to consider section 117B(1), but has not made any reference to the fact that the Appellant meets the requirements of the rules stipulated by the Respondent for entry clearance.

15. I find that the Judge has erred in his consideration of Article 8. I find that this is a material error of law.

**Remaking**

16. I have considered the Appellant's appeal under Article 8 in accordance with the steps set out in Razgar [2004] UKHL 27. It was accepted by the Respondent in the notice of

decision that the Appellant met the relationship requirements of the immigration rules. I find that the Appellant and Sponsor lived as unmarried partners in the United Kingdom about seven years prior to her removal to Ghana. I find that the Sponsor has visited the Appellant in Ghana annually since her return there. I find that the Appellant and Sponsor have a family life sufficient to engage the operation of Article 8. I find that the decision would interfere with that.

17. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

18. In carrying out the proportionality exercise, I adopt the finding of Judge Kainth, which was not opposed by Mr. Nath, that the Appellant's application should not have been refused with reference to paragraph 320(11). The Appellant's application was not refused with reference to the suitability requirements. The Respondent accepted that the Appellant met the requirements of the immigration rules for entry clearance as a spouse.

19. I have also taken into account the factors set out in section 117B of the 2002 Act, insofar as they are relevant. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. Given that the Appellant meets the requirements of the immigration rules, there will be no compromise of the maintenance of effective immigration controls by a grant of entry clearance.

20. The Respondent accepted that the Appellant met the English-language requirements of Appendix FM (117B(2)). The Respondent also accepted that the Appellant met the financial requirements of Appendix FM (117B(3)). Sections 117B(4) to (6) are not relevant.

21. I have taken into account that this is the third time that the Respondent has refused an application made by the Appellant under paragraph 320(11). It has now been found, and accepted, that this paragraph is not relevant to the Appellant's application. Therefore, there being no further requirements under the immigration rules for entry clearance as a spouse, I find that there is no public interest in the continued exclusion of the Appellant.

22. Taking into account all of my findings above, given that the Appellant meets the requirements of the immigration rules, as was accepted by the Respondent in her decision, I find that the balance comes down in favour of the Appellant, and the

decision is not proportionate. I find that the Appellant has shown on the balance of probabilities that the decision is a breach of her rights, and those of the Sponsor, to a family life under Article 8.

23. I do not make an anonymity direction.

**Decision**

24. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.

25. I remake the decision, allowing the Appellant's appeal on human rights grounds, Article 8. The Appellant meets the requirements of Appendix FM for entry clearance as a spouse.

Signed Date 9 March 2018

**Deputy Upper Tribunal Judge Chamberlain**

**TO THE RESPONDENT**
**FEE AWARD**

As I have allowed the appeal, I have considered whether to make a fee award. The Respondent refused the application with reference to paragraph 320(11), as she had done on two previous occasions. She accepted that the requirements of the immigration rules for entry clearance as a spouse were met. The decision quotes from a decision of the Tribunal from 2011, and while stating that "all of the circumstances" of the application have been taken into account, refused the application with reference to the concerns "as previously indicated". The Respondent's decision is dated February 2016, a considerable amount of time after the Tribunal decision. There is not on the face of the Respondent's decision any consideration of these circumstances or these concerns. It was found by Judge Kainth that paragraph 320(11) could not be relied on "in consequence of the passage of time". This has been accepted by the Respondent. In the circumstances I make a fee award for the full amount paid, £140.

Signed Date 9 March 2018

Deputy Upper Tribunal Judge Chamberlain