Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: IA/34408/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 3 December 2014	**On 9 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

MONINCA FRIMPONG

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Blundell counsel instructed by Malik and Malik solicitors

For the Respondent: Mr C Avery Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Steer promulgated on 27 July 2014 which allowed the Appellant's appeal 'as the decision was not in accordance with the law.'

Background

3. The Appellant was born on 7 July 1962 and is a citizen of Ghana.
4. On 25 November 2008 the Appellant applied for leave to remain under Article 8 ECHR. On 15 May 2009 that application was refused without a right of appeal. The decision was the subject of a Judicial Review and on 26 July 2010 the Respondent consented to reconsider the Article 8 claim and if the claim was refused to issue an in country right of appeal.
5. On 14 August 2013 the Secretary of State reconsidered the application and refused it. The refusal letter gave a number of reasons: the Respondent considered the application by reference to Appendix FM and paragraph 276ADE of the Immigration Rules HC 395 as amended ('The Rules'); there were no insurmountable obstacles to family life with her partner continuing in Ghana who was of Ghanaian origin; the Appellant's partner has an adult daughter but there are no special elements of dependency over and above normal emotional ties; in relation to the private life requirements the Appellant had not lived in the United Kingdom for more than 20 years; the Appellant had social .cultural and family ties to Ghana; there were no exceptional circumstances that warranted a grant of discretionary leave outside the Rules.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Steer ("the Judge") allowed the appeal finding that the decision was not in accordance with the law. He relied on Edgehill & Another v SSHD [2014] EWCA Civ 40 and found that reliance by the Respondent on the new Rules materially affected the decision and it was therefore invalid and not in accordance with the law.

7. Grounds of appeal were lodged on the basis that there had been a wrong application of Edgehill because in order to benefit from that the Appellant would have had to have been able to utilise the old 10 and 14 year rules in place of the 20 years that applied under 276ADE of the Rules which she was unable to do. On 4 November 2014 First-tier Tribunal Judge Frankish gave permission to appeal stating that '*with no express finding as to the length of residence and entitlement thereby arising, an arguable error of law arises in the application of Edgehill.'*

8. At the hearing I heard submissions from Mr Avery on behalf of the Appellant that he relied on the grounds of appeal. He had discussed the matter with Mr Blundell who confirmed that the Appellant had also sought permission to appeal this decision on the basis that the Judge had misapplied the decision in Edgehill and they both agreed that what should have happened in this case was an assessment of the Appellant's case under Article 8.

9. On behalf of the Respondent Mr Blundell submitted that ;

(a) It was conceded that the Judge had failed to apply Edgehill properly.

(b) Both he and Mr Avery were in agreement that the Judge should have carried out an assessment under Article 8 ECHR as it was conceded that the Appellant could not succeed under the long residence Rules either before or after 9 July 2012 and therefore the application of the new Rules did not have a material effect on the decision .

Finding on Material Error

10. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.

11. The Appellant in this case made an application for leave to remain on 25 November 2008 under Article 8 and that application was refused on 15 May 2009 without a right of appeal as she had no extant leave. The decision was made the subject of a Judicial Review and the case was settled on 26 July 2010 in a Consent order in which the Respondent agreed to reconsider the Article 8 claim. The Respondent refused the application in a decision dated 14 August 2013 and

considered the Appellant's private and family life claims by reference to the Article 8 provisions found in the current Rules in Appendix FM and paragraph 276ADE.

12. The Appellant appealed that decision. The Judge heard evidence from the Appellant and her unmarried partner and had a letter before her from the Appellant's partner's daughter. The Judge was referred to Edgehill . The Judge set out the ratio of that decision in paragraph 27 that 'the decision only becomes unlawful if the decision maker relies upon rule 276ADE (iii) as a consideration materially affecting the decision.' She then went on to state in paragraph 28 that:

"*In the decision that is the basis of this appeal , the Respondent expressly stated under the heading "Private Life-Rules consideration.", "the Home Office is satisfied that your client has only been in the United Kingdom since 2003 and therefore does not qualify for leave on the basis of 20 years continuous residence at i) above." The reliance on the new rules invalidated the decision making it not in accordance with the law."*

13. Both Mr Avery and Mr Blundell rightly conceded in my view that this represents a misunderstanding of the ratio of Edgehill. It was clear from the evidence before the Judge that the Appellant could not satisfy the long residence Rules that applied prior to July 2012, 10 years lawful residence or 14 years continuous residence, and therefore the Judge failed to assess whether the application of the 20 year Rule in paragraph 276ADE was material to the decision as required in Edgehill .I remind myself that this was precisely the same conclusion reached by the Court of Appeal in paragraph 38 of Edgehill in relation to the appeal of HB. I am satisfied that what was then required was an assessment of the Appellant's claim under Article 8.

14. The failure of the First-tier Tribunal to address and determine whether the application of the new Rules was material to the outcome of the decision and then whether the Appellant's claim could succeed under Article 8 constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view

is the correct test to apply. I therefore set aside the Judges decision for the case to be reheard.

15. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

16. In this case I have determined that the case should be remitted because the Appellant did not have a fair hearing due to the failure of the Judge to engage with the relevant issues in the case namely whether the Appellant's claim should succeed under Article 8. Given that no findings were made by the Judge this will be a rehearing as there are no findings to preserve.

17. I consequently remit the matter back to the First-tier Tribunal sitting at Hatton Cross to be heard on the 20 May 2015, before any First-tier Immigration Judge other than Judge Steer or Mr Blundell who sits as a fee paid judge in Hatton Cross. A Twi interpreter is required.

Signed Date 5.12.2014

Deputy Upper Tribunal Judge Birrell