Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/23145/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 10th June 2015	**On 14th July 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MS RUTH DORAH NTENDE
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Nwokiji of OJN Solicitors.
For the Respondent: Mr S Walker, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Uganda, born on 1 October 1975.

2. The respondent on 23 May 2014 decided to remove the appellant under section 10 of the Immigration and Asylum Act 1999, her claim based upon human rights having been refused.

3. Her appeal was heard by First-tier Judge Wyman on 4 February 2015. In a decision promulgated on 23 February 2015 the appeal was dismissed under the immigration rules and under article 8.

4. The appellant claimed she came to the United Kingdom on 16 August 2002.She produced no evidence to confirm this. On 27 September 2012 she applied for leave to remain as a partner as well is on general human rights grounds. This application was refused on the 17 July 2013, with no appeal rights. She was then encountered at a registry office on 19 July 2013. The marriage was allowed to proceed. The groom was a Mr Ebong , a British citizen. He has been living in the United Kingdom for 26 years, having arrived from Uganda as a refugee.

5. The appellant indicated she was bringing a judicial review of the respondent's earlier decision. The respondent reconsidered the application which was refused again on 20 May 2014 but with appeal rights. At that stage the appellant was pregnant and on 2 December 2014 gave birth to a son.

The First tier

6. At the appeal the appellant's representative accepted that the requirements of paragraph 276ADE or appendix FM could not be met. The outstanding issue was a freestanding article 8 claim. Judge Wyman's decision refers to go Gulshan (Article 8- new rules- correct approach) Pakistan [2013] UKUT 640. The judge concluded there were compelling circumstances not sufficiently recognised by the rules to warrant a freestanding article 8 considerations. This is because the couple were married and had a baby.

7. The judge then proceeded to take a sequential approach as advocated in Razgar.It was accepted that family life existed between the appellant and her husband and their child. The judge also accepted a private life was established as the appellant had studied for a Masters degree and have made various friendships. The judge found the consequences of the respondent's decision were sufficiently grave as to engage article 8. The key issue was whether the decision was proportionate.

8. The judge commented that the appellant was 39 years old and had spent approximately 12 to 13 years in the United Kingdom. She had family living in Uganda. She had no health problems. Her husband earned in the region of £44,000 working for the Metropolitan Police. He was originally from Uganda and has visited in recent times. He has a teenage son from a previous relationship who he sees it weekend. The judge concluded there was no reason why he could not return to Uganda with the appellant whiles she reapplied for entry clearance or visit her while she was there. It was suggested he could possibly take a period of leave from work to be with her. The appellant could take her baby with her to Uganda. The conclusion was that it would not be disproportionate to expect the appellant to return to Uganda from where she could reapply for entry clearance. Consequently, her appeal was dismissed.

9. Permission to appeal was sought on the basis that the judge had not given adequate reasons. It was submitted that contact through modern communication means would be inadequate. The judge assumed that her husband would be able

to take a leave of absence from work whilst she applied for entry. The decision of Chickwamba was cited as analogous. Reference was made to the effect upon on her husband of being separated. It was pointed out that the child was entitled to British nationality.

10. Permission was granted on the basis it was arguable the judge failed to give sufficient consideration to the best interests of the appellant's child and overlooked the decision of Hayat [2012]EWCA Civ 1054.It was arguably disproportionate to expect a person to make an application for entry clearance if this was the only factor in the balance.

The Upper Tribunal

11. At hearing the appellant's representative said the appellant's baby was only six months old and had not been inoculated for travel to Uganda. He highlighted the effect of a separation upon the appellant's husband. He believed it might take three months before entry clearance could be achieved. In response, the presenting officer argued that the situation was not one akin to Chickwamba. The appellant's husband had not produced any evidence to indicate he could not obtain leave from his work as a systems data analyst with the Metropolitan Police. Reference was also made to section 117 B.

Consideration

12. The appellant has a six-month-old child. It is well established that the best interests of children should be the primary consideration. The question whether the duties imposed by Section 55 have been duly performed in any given case will be a fact sensitive and contextual one. In considering their best interests the proportionality issue should not be a factor. Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 at paragraph 10 restates a child must not be blamed for matters, such as the conduct of a parent, for which it has no responsibility. It is well established that a child's best interests generally is to be with both parents. However, the best interest of the child is not necessarily determinative. The child is British. The presence of a British child in the factual matrix is not a trump card. In ZH (Tanzania) the countervailing considerations were the claimant's appalling immigration history and the precariousness of her position when family life was created.

13. The appeal has been presented on the basis any separation will be of a temporary nature. This is because an application for entry clearance, presumably under appendix FM, could be made. The appellant's representative has indicated a likely timescale of three months.

14. If the appellant has to go to Uganda there is the possibility she would take the baby with her. A six-month-old child will have little awareness of its surroundings. It has been suggested the child's father could take a leave of absence and spend time with his child in Uganda whilst an application is made for entry clearance.

15. The child's father has not presented any evidence about the possibility of a period of leave. In R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) it was said it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children.It was indicated the appellant's husband is in well-paid employment with the Metropolitan police. Whilst I cannot make assumptions, in general a large public employer should be able to afford some flexibility towards its employees.

16. The parents say the child has not been inoculated. However, I cannot see how this should present a difficulty.

17. It has been argued on behalf of the appellant it would be unreasonable in the circumstances to expect her to return to her home country in order to complete the formalities of seeking entry clearance. It was suggested the situation was akin to that in Chikwamba.In SSHD v Hayat (Pakistan); Treebhowan (Mauritius) v SSHD [2012] EWCA Civ 1054 the Court of Appeal held that if to apply for entry clearance constitutes a disruption sufficient to engage Article 8 there will be a disproportionate interference unless there is a sensible reason for insisting on it. Whether there is a sensible reason will depend on the facts of the case, including such matters as the length and degree of disruption and the effect on other family members. Where Article 8 is engaged and there is no sensible reason for the disruption, the Article 8 claim should be determined on its substantive merits.

18. I do not see the present situation is akin to Chikwamba.In that case requiring the appellant to return to Zimbabwe in order to apply for entry clearance was directed towards formal compliance. It was anticipated that entry clearance would be granted. Against that were inconvenience; cost; delay and disruption. Conditions at the time in Zimbabwe were described as harsh and unpalatable. The appellant's partner had been an asylum seeker from Zimbabwe and so there were difficulties with him joining her. In the present case these factors are not present and it is not being obtuse to expect the appellant to return and seek entry clearance. If an application is made under appendix FM she will need to demonstrate the requirements are met. If her husband is employed as stated then finance should not be a difficulty but nevertheless it must be demonstrated. The immigration judge found she had an appalling immigration history. The prospect of a return to Uganda was not the same as someone facing the harsh conditions in Zimbabwe. The appellant and her husband have only recently married and in the full knowledge of the likely difficulties over her immigration status. Their child as a baby. In the circumstances it is not disproportionate to expect the appellant to return and seek re-entry.

19. From 28 July 2014, Section 19 of the Immigration Act 2014 came into force. It amends the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A.This contains Sections 117A, 117B, 117C and 117D which apply to all appeals where article 8(2) is considered directly from 28 July 2014, irrespective of when the application or immigration decision was made. Judge Wyman did not refer to this new provision dealing with the public interest. The judge did set out the factors taken into account in the proportionality exercise from paragraph 75 onwards. At paragraph 82 and 84 there is reference to how the child would be affected.

20. There is an obligation to take the statutory considerations into account .These state that little weight should be given to a private life or a relationship formed with a qualifying partner established as here when the person is in the United Kingdom unlawfully. The new provisions provide that the public interest does not require the person's removal where they have a genuine and subsisting parental relationship with a qualifying child as here. However, this is conditional upon it being unreasonable to expect the child to leave the United Kingdom.

21. In Dube (ss.117A-117D) [2015] UKUT 90 (IAC) it was held judges are duty-bound to have regard to the specified considerations. It is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form. The appellant and her husband married in the full knowledge immigration officials were taking action because of her lack of status. The factual scenario does not suggest it would be unreasonable particularly as a temporary period is contemplated. Judge Whyman referred to the appellant at paragraph 77 as having a very poor immigration history and that she met her husband at the time when she knew she had no status. The judge referred to the possibility of the appellant taking her child with her to Uganda. Thus, although the statutory provisions are not specifically referred to I do not see any error of law here. In any event, the lack of specific reference is not material because the appeal was dismissed on proportionality grounds.

22. In conclusion, I do not find it established that there is a material error of law in the decision of Judge Wyman. There was no reference to section 117. However, it is substance which matters rather than form and section 117 only serves to support the dismissal of the appeal

Decision

No material error of law has been established in the decision of Judge Wyman dismissing the appellant's appeal. Consequently, the appeal is dismissed.

Deputy Upper Tribunal Judge Farrelly