Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28130/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25th June 2014	**On 26th June 2014**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MS FLORENCE MWABUJE EDOZIE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Nicholson (instructed by Trinity, Solicitors)
For the Respondent: Ms A Holmes (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Respondent with regard to a determination of the First-tier Tribunal (Judge Howard) promulgated on 28th March 2014. For the sake of clarity and continuity however, I shall continue to refer to the Secretary of State as the Respondent and Ms Edozie as the Appellant.

2. In his determination Judge Howard allowed the Appellant's appeal against the Secretary of State's refusal to grant her indefinite leave to remain on Article 8 grounds.

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3. The background to this case is that the Appellant arrived in the United Kingdom on 17th July 2005 with a valid visit visa. She overstayed. Although her visa was apparently a multi-entry visa her leave to enter must have expired in January 2006.

4. In the United Kingdom the Appellant met the man who is now her husband. He is a British citizen. They underwent a customary marriage in Nigeria and now have three children, all of whom are British. They were born in November 2008, June 2010 and more recently April 2014. At the time of the hearing before the First-tier Tribunal the Appellant was heavily pregnant with her third child.

5. In the Letter of Refusal the Secretary of State alleged that the marriage certificate from Nigeria was counterfeit and then considered the application under Appendix FM and paragraph 276ADE of the Immigration Rules. In a decision dated 26th June 2013 the application was rejected.

6. In the determination Judge Howard considered and concluded that the Appellant could not meet the requirements of paragraph 276ADE or Appendix FM and considered Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) . He considered that there were good grounds for granting outside of the Immigration Rules and so considered Article 8 under ECHR.

7. He started by looking at the question of the Appellant's marriage and concluded that the marriage was genuine and gave detailed reasons for doing so. That finding is not challenged by the Secretary of State.

8. What is challenged by the Secretary of State is the Judge's consideration of Article 8 under the ECHR. His consideration starts at paragraph 27 where he works through the five Razgar [2004] UKHL 27 questions reaching proportionality. He did deal with proportionality in fairly brief terms at paragraph 27 (4) where he said the only interest cited by the Respondent was effective immigration control. He went on to note that there was no evidence that the Appellant had in any way been an economic burden on the State. The husband works and always has done and provides for his family from his wages. They live in a rented home and his bank statements indicate that the family lives within its means. Were the Appellant to be removed then her husband and children as British citizens would be entitled to remain and the Judge found that it would then be likely that the State would have to shoulder some responsibility for their support as the husband would then be unable to work full time. Also the Judge considered that requiring the Appellant to leave her children for whom she provides all the love and support reasonably expected of a mother would not be in their best interests. He concluded that the only way which the family life that has now been established could then be maintained would be by the husband and children relocating to Nigeria which was not a realistic option given that they are young children born in the UK to a British citizen father.

9. The Secretary of State in seeking permission to appeal argued firstly that the Judge had misdirected himself by failing to consider whether the Appellant's case raised compelling circumstances not sufficiently recognised in the Immigration Rules giving arguably good grounds for a grant of leave outside the Rules. The second ground was that the judge had failed to properly consider the wider public interest of immigration control in accordance with Shahzad [2014] UKUT 00085 (IAC).

10. What seems to have escaped the notice of the Secretary of State in deciding this application in the first place and the First-tier Tribunal in determining the appeal was that this application was made on 7th July 2012, two days before Appendix FM and paragraph 276ADE were added to the Immigration Rules and therefore fell to be decided under the old Rules. That being the case neither Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) nor Nagre [2013] EWHC 720 (Admin) had any application and therefore the first ground is misconceived.

11. So far as the second ground is concerned Ms Holmes argued that although Shahzad looks at the new Immigration Rules it is still incumbent upon a Judge, when considering Article 8 to conduct a balancing exercise balancing the competing interests of the State with those of the Appellant. In this case the Judge had not done so.

12. I indicated that so far as ground 2 was concerned I agreed that it was incumbent upon a Judge in considering Article 8 to carry out a balancing exercise balancing the points in favour of allowing the appeal against those against which would include the interests of the State. However, when considering any error in failing to carry out a proper balancing exercise in this case I am unable to find it is material. The judge was faced with a situation whereby while it is true that the Appellant had overstayed since January 2006, she was in a genuine relationship with a British citizen and had by the time of the hearing before me, three children with him. All three children are British and on the basis of the case law which was relevant to this appeal, in particular ZH (Tanzania) [2011] UKSC 4, Beoku-Betts [2008] UKHL 38 and Chikwamba [2008] UKHL40 it would be wholly unreasonable to expect this Appellant, who would meet all the requirements of the Immigration Rules save for the fact that she is in the UK as an overstayer, to return to Nigeria to make application as a spouse leaving behind three young children one of whom is a newborn. Her husband and children are British. They are a self-sufficient family unit that have not been a burden on the state. Therefore this was always a case that a Judge, properly applying the jurisprudence, would allow on Article 8 grounds and thus any error in the Judge failing to specifically spell out the weight to be attached to the wider public interest in the maintenance of immigration control, is not material.

13. I uphold the determination of the First-tier Tribunal and the appeal to the Upper Tribunal is dismissed.

Signed Date 25th June 2014

Upper Tribunal Judge Martin