**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/35226/2014

**THE IMMIGRATION ACTS**

| **Heard at Stoke-on-Trent** | **Decision & Reasons Promulgated** |
|---|---|
| **On 10 April 2015** | **On 9 June 2015** |
| **Prepared 28 April 2015** | |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

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

Appellant

**and**

**MR S M D**
**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**
For the Appellant: Mr A McVeety, Senior Presenting Officer
For the Respondent: Miss U Sood, Counsel, of Trent Chambers

**DECISION AND REASONS**

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred as the Claimant.

2. The Claimant, a national of Ivory Coast, date of birth 8 February 1973, appealed against the Secretary of State's decision dated 21 August 2014 to make removal directions under Section 10 of the Immigration and Asylum Act 1999.

3. His appeal came before First-tier Tribunal Judge Mather (the judge) who, on 25 November 2014, allowed the appeal on Article 8 ECHR grounds. Permission to appeal was given to the Secretary of State. A Rule 24 response was lodged by the Claimant essentially asserting in brief:- first, that the judge had failed in granting permission to follow guidance given by the Upper Tribunal in MR [2015] UKUT 29 and that there had been a proper consideration in the balancing exercise on proportionality by the judge to Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014.

4. The Secretary of State's grounds are long and take a number of points but in a nutshell the complaint is that the judge failed to properly set out and reason the justification for concluding that Article 8 was not only engaged but also the decision of the Secretary of State was disproportionate. The submissions to me have essentially taken differing sides on that issue.

5. The judge in what may be a significant element of formatted decision [D] cited extensively legal issues and guidance [D 4-13] but ultimately it was the analysis of the proportionality issue raised by the fifth question in Razgar [2004] UKHL 27 where the problems arise. It was plain that the judge did not set out any balancing of the interests that form part of the proper consideration of proportionality. Proportionality is of course a matter of judgment. It does not fall upon one party to prove or disprove the proportionality or disproportionality of the Secretary of State's decision.

6. In this case the judge whilst taking account of the Claimant's immigration history gave considerable weight to the unfortunate circumstances of the Claimant's partner suffering from complex PTSD and having mental health problems associated with earlier mistreatment in the Ivory Coast, which was her country of origin.

7. The judge, whilst noting earlier in the decision that neither the Claimant nor his partner nor their child have UK nationality and have no permanent rights to remain, simply embarked upon the exercise of the asserted risks associated to the Claimant's partner were she to have to return. Whilst it might be said the judge must have been taking into account the best interests of their child, the judge never descends into the issues of their immigration status and needs to be in the UK.

8. Ultimately the public interest, including those interests which support proper border controls and enable those who should be in the United Kingdom to remain, gets lost and the exercise unfortunately descended to the issue of proportionality without an assessment of the public interests and those of the Claimant, his partner and his child.

9. In the circumstances I was satisfied that the Original Tribunal made an error of law in the assessment of proportionality. The Original Tribunal's decision cannot stand and will have to be remade.

10. It was accepted by the parties the appeal can be remade in the Upper Tribunal.

11. It has also been accepted that written representations can be made and the appeal determined on the basis that the findings of fact, rather than the conclusions driven from them, should stand. In those circumstances I proposed to remake the case. I gave both parties 14 days to make written representations which should be sent for my attention at Field House, not at Stoke, Bennett House and on that basis I would then remake the decision.

12. I received representations from the Home Office by Mr McVeety, which had been copied to Trent Chambers, the Appellant's representatives, on 20 April 2014 under reference [ ]to the Appellant's representatives, Trent Chambers.

13. The Secretary of State's position was to remind me that as I also noted, the Claimant could not meet the requirements of the Immigration Rules in respect of Appendix FM or paragraph 276ADE and accordingly there was no substantive challenge to the Secretary of State's decisions in relation to those adverse findings made by the Judge.

14. Looking at this matter outside of the Rules, I have applied the case law particularly of MM (Lebanon) [2014] EWCA Civ 985, AJ (Angola) [2014] EWCA Civ 1636, Razgar [2004] UKHL 27, Huang [2007] UKHL 11, and Singh [2015] EWCA Civ 74. The position and standing of the Immigration Rules in relation to individual ECHR Convention rights was clearly presented in SS (Congo) [2015] EWCA Civ 387.

15. I therefore, whilst not applying a threshold or gateway of exceptionality, nevertheless consider whether there are particular, for example special or compelling circumstances which demonstrated the Secretary of State’s decision was disproportionate, and support the claim to remain.

16. I have considered the additional representations made by the Home Office to which I have not received any response within 14 days from the Appellant's representatives.

17. The effect of Sections 117A, 117 B of the Nationality, Immigration and Asylum Act 2002 as amended, show the need to identify public interest remains as clear as ever and the weight to be given to the public interest is a matter of considerable importance.

18. On the face of it there is no evidence that the Claimant and family are not entirely dependent upon public funds: They are not financially independent and are a burden on tax payers. There is as yet no evidence to show the ability of the Claimant to obtain employment in the United Kingdom.

19. It is also correct to say under Section 117B(4) of the 2002 Act that it is relevant in the assessment of private life issues as to whether or not the Claimant can have been involved with his partner as a time when his status was illegal and precarious. It seems to me that in the light of examples such as SS (Nigeria) [2013] EWCA Civ 550, assuming Article 8 private/family life rights are engaged and that the effect of interference is significant, those are the principal issues to be weighed with the public interest. It is plain that the Secretary of State's decision is lawful and made for the purposes of Article 8(2) ECHR reasons.

20. I note the judge's findings concerning the Claimant's mental health and the real risk of its deterioration. The judge had the opportunity to hear evidence on these matters; see [D 24, 27, 32 and 34].

21. The Claimant's partner and her child would best be served by being together with the Claimant but in this case it seems to me that the judgment that has to be made is really the potential impact of the Claimant's removal. I fully take into account in my assessment of proportionality the position in relation to child's interests under Section 55 of the BCIA 2009.

22. Accordingly I do not find the age of the Claimant's partner and their child, or the home circumstances in the UK or the inevitable presence of friends, contacts in the UK, and the extent to which the Claimant's partner has integrated into life in the UK of themselves inevitably leads to the conclusion that removal is disproportionate. I take into account the Claimant's precarious and unlawful status within the United Kingdom since 2001.

23. The Claimant left the Ivory Coast when about 27 years of age. He has not lost linguistic or cultural ties. The standard of living may be different there but that does not establish a right to remain. The Claimant is fit and able to work. The Claimant has never had any legitimate expectation of being

able to reside in the UK save that he may have temporarily have had status (19/2/10) which was removed (11/11/10).

24. The son of the Claimant's partner, Miss O, dob 11/6/2007, is not a UK national. Miss O has discretionary leave to remain. Miss O has mental health problems arisen from ill-treatment and rape in Ivory Coast in about 2006. I note the medical evidence of Professor Katona in 2010 concerning the effect of interference in counselling of Miss O would be much more precarious. I do not have evidence to rebut the Secretary of State's references (RFRL p7/10) to the restrictive availability of mental health. I consider her return as being with the Claimant and her child as a family enjoying family life together. I see the child's best interests being with the family unit in Ivory Coast. I bear in mind the judge's remarks about Dr Pant's evidence of May 2013 [D para 22].

25. However on the evidence before me I do not find there is currently a real risk the return as a family gives rise to a real risk of significant deterioration in Miss O's mental health.

26. In these circumstances I am satisfied therefore that the Secretary of State's decision was proportionate. The Original Tribunal decision cannot stand. It follows from my matters above the following decision is substituted.

27. The appeal by the Claimant under the Immigration Rules is dismissed.

28. The appeal by the Claimant under Article 8 ECHR grounds is dismissed.

29. Given the age of the Claimant's child, I find that an anonymity order is appropriate.

**DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008**

Unless and until a Tribunal or court directs otherwise, the Claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Claimant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 27 May 2015

Deputy Upper Tribunal Judge Davey

**To The Claimant**

**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 27 May 2015

Deputy Upper Tribunal Judge Davey