



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18546/2014

THE IMMIGRATION ACTS

Heard at Field House
On 20 July 2015

Decision and Reasons Promulgated
On 28 July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Ms AWUSI De-MEDEIROS
(Anonymity Direction Not Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Garrod (counsel), instructed by Leslie & Co, solicitors
For the Respondent: Mr E Tufan, 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. This is an appeal by the appellant against a decision of First Tier Tribunal Judge E B Grant promulgated on 7 November 2014 which dismissed the appellant's appeal against

the respondent's decision to refuse to grant leave to remain on the basis of established family and private life in the UK.

Background

3. The appellant is a Ghanaian citizen, born on 4 May 1964. The appellant entered the UK on 4 April 2003 in possession of a visit visa valid until 3 June 2003. The appellant has remained in the UK since then. The appellant made two applications to remain outside the Immigration Rules, both of which were refused by the respondent. Neither of those decisions by the respondent carried a right of appeal.

4. On 12 February 2014, the appellant submitted an application for leave to remain in the UK. On 4 April 2014, the respondent refused that application after considering Appendix FM of the Immigration Rules. The respondent decided that the appellant did not fulfil the requirements of Paragraph S-LTRP1.7 nor E-LTRP1.2(a) of the Immigration Rules, nor E-LTRP2.2 of the Immigration Rules.

The Judge's Decision

5. The appellant appealed to the First Tier Tribunal. First Tier Tribunal Judge E B Grant ("the judge") dismissed the appeal against the respondent's decision. The judge found that the appellant did not fulfil the suitability criteria set out in Appendix FM and in particular that the appellant's immigration history prevented her from meeting the suitability criteria and placed emphasis on S-LTR1.6. The judge found that there was nothing in the facts and circumstances of the appellant's case which merited considering proportionality under Article 8 outside of the Immigration Rules.

6. Grounds of appeal were lodged and on 5 January 2015, First Tier Tribunal Judge P J G White granted permission to appeal to the Upper Tribunal stating that it was arguable that an incorrect approach to Article 8 had been taken and that it was arguable that the judge's findings in relation to the suitability criteria of S-LTR1.6 might not have been open to the judge.

The Hearing

7. Mr Garrod submitted that the judge had made an error in law by finding at paragraphs 11 and 12 that S-LTR1.6 was engaged because:

- (i) The decision by the respondent was made on the basis of Paragraph S-LTR1.7 and not S-LTR1.6;
- (ii) In any event, the judge's decision that the appellant could not meet the suitability requirements was based entirely on the appellant's poor immigration history as a person who had remained in the UK with leave to remain since 2003.

He argued that the appellant meets the requirements of S-LTR1.7 which was the fulcrum of the respondent's decision, that EX.1 should have been considered and that, in any

event, that the particular facts and circumstances of the appellant's case means that she would succeed if Article 8 is considered outside the Immigration Rules.

8. Mr Tufan, for the respondent, agreed that there was no reason for the judge to consider S-LTR1.6 and that S-LTR1.6 had not influenced the respondent's decision, however he argued that if that amounts to an error of law, it is not a material error of law and that there is no need to set the decision aside.

Analysis

9. The Home Office bundle in this case does not just contain the decision of 3 April 2014 (which is the subject matter of this appeal). It also (confusingly) contains a decision from an earlier application dated 4 April 2013. I specifically asked parties' agents to identify the decision under consideration. I drew parties' agents' attention to the decision of 4 April 2013 and both parties' agents confirmed that that is not the decision which is the subject matter of this appeal; that earlier decision did not carry a right of appeal.

10. The decision of 4 April 2013 is a decision where S-LTRP1.7 was relied on by the respondent. Submissions made by parties' agents in relation to S-LTRP1.7 are therefore entirely irrelevant because they do not relate to the decision of 3 April 2014. The decision of 3 April 2014 narrates the respondent's view that the appellant failed to comply in a number of ways with the conditions of entry clearance granted in 2003 and that the appellant has spent 11 years unlawfully in the UK and only a two month period lawfully. The decision related to an application dated 12 February 2014. Neither S-LTRP1.6 nor S-LTRP1.7 are relied on by the respondent in that decision.

11. The judge's decision promulgated on 7 November 2014 turns on findings that the appellant's immigration history engages S-LTR1.6. S-LTR1.6 is a matter which was not considered by the respondent. It is competent for the judge to consider the Immigration Rules in their entirety but he should only do so once he has given parties and their agents the opportunity to comment on the Rule which he, independently, found determinative. The opportunity to lead evidence and make submissions on S-LTR1.6 was not given to either the appellant or the respondent. The judge found that S-LTR1.6 was engaged solely because of the appellant's immigration history. At [12], the judge narrates that the appellant remained in the UK unlawfully for 11 years and, solely on that basis, finds that the appellant's presence in the UK is not conducive to the public good.

12. The judge does not make adequate findings in fact in relation to the engagement of S-LTR1.6 nor the character associations or other reasons why it might be undesirable to allow the appellant to remain in the UK. I therefore find that the decision is tainted by a material error of law and must be set aside.

13. I was asked by both parties' agents that if I find a material error of law and set aside the decision, that I should arrange for a second stage reconsideration of this case. Mr Tufan asked that the second stage hearing be conducted in the Upper Tribunal. Mr Garrod for the appellant asked that the case be remitted to the First Tier Tribunal. I consider the wealth of documentary evidence produced in this case and find that it is not necessary to

remit this case. It is in the interests of both parties that this case is finally determined. There is enough evidence placed before me to enable me to make my own findings in fact.

Findings in Fact

- 14 (a) The appellant was granted entry clearance as a visitor on 3 December 2002. Her entry clearance expired on 3 June 2003. The appellant entered the UK on 4 April 2003. She has remained in the UK since then.
- (b) On 7 July 2012, the appellant submitted an application for leave to remain outwith the Immigration Rules. That application was refused on 4 April 2013. The respondent relied on S-LTRP1.7 of the Immigration Rules and argued that the appellant had failed to provide documentation requested by the respondent. That decision did not carry a right of appeal.
- (c) The appellant submitted a further application for leave to remain in the UK which was refused on 12 February 2014. On 3 March 2014, the appellant was served with Form IS151A informing the appellant of her immigration status together with a "one stop warning" under Section 120 of the Nationality, Immigration and Asylum Act 2002. On 3 April 2014, the respondent considered the appellant's further representations and adhered to the decision made on 12 February 2014. On 7 April 2014, the respondent served a decision of notice to remove the appellant (which is a notice of an immigration decision) dated 3 April 2014. It is against that decision that the appellant appeals.
- (d) In 2008, the appellant met Frank Odame-Ayam, a British citizen originally from Ghana. Mr Odame-Ayam entered the UK in 1987. On 25 November 2011, the appellant and Mr Odame-Ayam started co-habitation. On 21 January 2014, the appellant made an application for leave to remain as the unmarried partner of the sponsor which led to the respondent's decision of 3 April 2014. The respondent refused the appellant's application on 12 February 2014.
- (e) The appellant's parents have passed away. The appellant has a brother who now lives in Liberia and she has a sister who lives in Togo. The appellant's nephew is an adult who lives in the UK and who has a good relationship with the appellant. The appellant has three adult daughters from her first marriage in Ghana. Her first husband died in 1998.
- (f) The appellant remarried in 2000. Her husband remained in Ghana when the appellant came to the UK in 2003. The appellant's second marriage was dissolved by decree of divorce in Ghana on 15 August 2013.
- (g) Between 2007 and 2009, the appellant worked in the UK even though she was not entitled to do so.
- (h) Since the hearing of the First Tier Tribunal in October which led to the decision promulgated on 7 November 2014, the appellant has married Mr Odame-Ayam. The appellant's new husband works as a security guard. He earns approximately £1,500

gross per month. Mr Odame-Ayam has three daughters from a previous relationship, all of whom are adults. His youngest daughter is a student.

(i) Both the appellant and Mr Odame-Ayam are active in their Christian church. The appellant volunteers for charities.

(j) Since 2002, the appellant's new husband, Mr Odame-Ayam has visited Ghana on three occasions.

The Immigration Rules

15. The appellant's application made on 21 January 2014 was for leave to remain in the UK on the basis of her family life as an unmarried partner of a British citizen. That application requires consideration of Section E-LTRP of Appendix FM of the Immigration Rules. That section of the Immigration Rules includes "*immigration status requirements*". E-LTRP2.2 provides that the appellant must not be in the UK in breach of immigration laws unless Paragraph EX.1 applies. It is beyond dispute that the appellant's presence in the UK is a breach of the immigration rules.

16. Although the wording of the respondent's decision dated 3 April 2014 and the reasons for refusal letter of same date makes no reference to any specific paragraph of appendix FM, the detail given in the reasons for refusal letter makes it clear that the respondent believes that E-LTRP2.2 operates against the appellant and that the focus in the appellant's case moves on to Paragraph EX1. The appellant has to show that she is the partner of a British/settled person in the UK and that there are "*insurmountable obstacles*" to their family life continuing outside the UK.

17. The difficulty for the appellant is that the evidence demonstrates that there are no insurmountable obstacles to family life with her partner (now her husband) continuing outside the UK. Although the appellant and her new husband speak of the disruption that would be caused to their routines and relationships by return to Ghana, both the appellant and her husband can return to Ghana. Although the appellant's husband claims that he has a fear of life in Ghana, that fear was not sufficient to stop him returning to Ghana three times since 2002 and attending funerals of his friends.

18. The appellant's children are adults and are not in the UK. The appellant's new husband's children are all adults, even though his youngest daughter is still a full time student. In committing themselves to marriage, the appellant and her new husband embarked on a course which must have indicated to them that there would be significant changes to their existing family dynamics. There is no reliable evidence to indicate that the family relationship between adults would break down nor that the appellant's husband would be prevented from returning to the UK to visit his adult children, nor that his adult children could not visit him in Ghana.

19. I remind myself of the case of **Agyarko and others v SSHD 2015 WLR (D) 205**. At paragraph 25, it was stated that the mere fact that a British citizen had lived all of his life in the UK, had a job here and might find it difficult, and might be reluctant, to relocate to

another country, could not constitute insurmountable obstacles. EX.1 is against the appellant.

20. The eligibility for indefinite leave to remain as a partner contains financial requirements. The weight of evidence before me indicates that the appellant's new husband cannot meet the financial requirements. He does not have a gross annual income of at least £18,600. There is no reliable evidence before me of additional savings.

21. I have to draw the conclusion that the appellant cannot fulfil the requirements of appendix FM to the Immigration Rules.

22. The appellant argues that private life is established by her relationships and friendships in the UK, by her employment in the UK, by her home, her church membership and her relationship with the man who is now her husband.

23. The appellant has lived in the UK for less than 20 years so she cannot fulfil the requirements of Paragraph 276ADE(iii). The appellant is over 18 years of age so she cannot fulfil the requirements of Paragraph 276ADE(iv). The appellant is over 25 years of age so she cannot fulfil the requirements of Paragraph 276ADE(v) and because the appellant has lived in the UK for less than 20 years, she cannot fulfil the requirements of Paragraph 276ADE(vi).

24. The appellant cannot satisfy the requirements of Paragraph 276ADE of the Immigration Rules.

Article 8 Outside the Immigration Rules

25 (a) The appellant cannot satisfy the requirements of either Appendix FM or Paragraph 276ADE of the Immigration Rules. The appellant's argument is that the respondent's decision amounts to a disproportionate breach of the right to respect for private life.

(b) In **MS v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2013] CSIH 52** it was held that before considering a case outwith the immigration rules, the application for leave to enter or remain must demonstrate a good arguable case that leave should be granted outside the rules: that a distinct assessment of proportionality should be made to determine whether removal would infringe the applicant's Article 8 rights. If that is not demonstrated, it can be assumed that the applicant's Article 8 rights will be adequately dealt with by applying the new rules.

(c) In **Meera Muhiadeen Haleemudeen [2014] EWCA Civ 558** Lord Justice Beatson confirmed it is necessary to find "*compelling circumstances*" for going outside the Rules. He confirmed that "*the passages from the judgments in the cases of Nagre and MF (Nigeria) appear to give the Rules greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights*". He did not consider that it is necessary to use the terms "exceptional" or "compelling" to describe the circumstances, and it will suffice if that can be said to be the substance of the tribunal's decision.

(d) In **MM (Lebanon) and others 2014 EWCA Civ 985** it was suggested that where a particular set of the immigration rules are not a complete code, then the issue of proportionality under Article 8 will be more at large. In this respect in **R (on the application of Ganesabalan [2014] EWHC 2712 (Admin)** it was held that unlike other Rules which have a built-in discretion based on exceptional circumstances, Appendix FM and Rule 276ADE are not a "complete code" so far as Article 8 compatibility is concerned because Appendix FM and Rule 276ADE have no equivalent "exceptional circumstances" provision.

(e) If I find such compelling circumstances, I then have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8

(ii) If so, has the right to respect for this been interfered with

(iii) If so, was the interference in accordance with the law

(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

(f) Section 117 of the 2002 Act is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise.

(g) Because of the operation of Section 117B of the 2002 Act, I have to find that the maintenance of effective immigration controls is in the public interest.

26. Family life exists because the appellant is married. The respondent's decision does not bring an end to that family life, it just means that family life has to be conducted elsewhere. I have already found that there are no insurmountable obstacles to the appellant's husband returning to Ghana with the appellant. I take account of the fact that the appellant and her husband committed themselves to one another at a time when they knew the appellant's immigration status was precarious.

27. I must take account of Section 117B of the Nationality, Immigration and Asylum Act 2002 when assessing proportionality. It weighs in the appellant's favour that she can speak English. It is not clear if she is financially independent. Although she has worked, she has done so illegally. Although the appellant's husband works, his income is not sufficient to meet the financial requirements set out in Appendix FM. What weighs heavily against the appellant is that Section 117B(4) requires me to place little weight on either a private life or

a relationship with a qualifying partner that is established when the appellant is in the UK unlawfully. Section 117B(5) requires me to place little weight on a private life established when a person's immigration status is precarious. (Section 117B(6) is not engaged).

28. The effect of the respondent's decision is that the appellant can return to Ghana, her husband can return to Ghana with her (or soon after) and then married life can continue in Ghana. The appellant can maintain contact with the friends that she has gathered around her throughout her 12 years in the UK. The appellant can maintain contact with nephews and her stepdaughters by means of instantaneous communications and by visits. If the appellant wants to return to the UK, she can make an application to return as the spouse of her British citizen husband from Ghana. In reality, there is no breach to the right to respect for either family or private life.

29. If there is a breach, then it is not disproportionate. The appellant cannot fulfil the requirements of the Immigration Rules. Section 117B of the 2002 Act indicates that the public interest outweighs the appellant's interest. Quite apart from those considerations, the effect of the respondent's decision does not bring an end to family life. It might change the nature of the family life which has been established but it does not bring that private life to an end; that private life must always be viewed as precarious because the appellant has known since July 2003 that she has no right to be in the UK. She cannot realistically have viewed the private life that she has created as something which carried the promise of permanence.

Decision

30. I therefore set aside the decision of First Tier Tribunal Judge E B Grant because it contains a material error of law.

31. I substitute the following decision.

32. The appeal is dismissed.

Signed

Date 25 July 2015

Deputy Upper Tribunal Judge Doyle