



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/40411/2013**

APPEAL NUMBER:

THE IMMIGRATION ACTS

**Heard at: Field House
On: 29 January 2015**

**Determination Promulgated
On 19 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR GEORGE OWUSU-AMPONG
NO ANONYMITY DIRECTION MADE**

Respondent

Representation

**For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr L Doyle, Legal Representative, Maliks and
Khan Solicitors**

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as the secretary of state and the respondent as "the claimant."
2. The claimant is a national of Ghana, born on 5 May 1963. His appeal against the decision of the secretary of state to remove him from the UK was allowed by First-tier Tribunal Judge Abebrese in a determination

promulgated on 4 August 2014. The claimant entered the UK on 4 June 1996 as a visitor. In May 2002 he married Theresa Abjei-Yeboah. On 3 September 2004, his eldest son, Kevin, was born. On 16 January 2004 he married Rose Dankwa. His application for an EEA Residence card as her spouse was refused in June 2004. That decision was maintained on 31 August 2005.

3. On 12 March 2006, he applied for leave to remain as the unmarried partner of Theresa Abjei-Yeboah. His second child was born. His application was refused on 4 October 2007.
4. In May 2001 he was served with an IS151A Notice as an illegal entrant. In June 2001 he then applied for leave to remain on human rights grounds and he withdrew his earlier appeal in July 2011.
5. His application was considered by the secretary of state. He failed under the suitability requirements of S-LTR of the Immigration Rules as well as the eligibility requirements under E-LTRPT. It was not considered that he and his spouse, Theresa Abjei-Yeboah, were in a genuine and subsisting relationship. No evidence was submitted that he was not still legally married in the UK to Rose Dankwa or that he had divorced her. Polygamous marriages are not recognised here. There was thus no evidence showing that the relationship had permanently broken down.
6. Nor had he met the requirements under E-LTRPT 2.4(b) as he had not shown that he is currently taking or intends to continue taking an active role in the children's lives.
7. The respondent considered the exceptions to the rules outlined in EX.1. He was not in a genuine and subsisting relationship with the children. He had failed to provide evidence suggesting that it is unreasonable for the children to leave the UK. He therefore did not benefit from EX.1(a).
8. He also failed to show that he is in a genuine and subsisting relationship with Theresa Abjei-Yeboah. Nor were there insurmountable obstacles preventing family life being enjoyed elsewhere.
9. He did not satisfy the requirements under paragraph 276ADE.
10. It was also decided with respect to private and family life that his circumstances are not such that his removal would breach Article 8. Nor was the length of time he had spent here sufficient to warrant a grant of leave when balanced with the circumstances of his case. There were no exceptional circumstances. Accordingly his removal remained appropriate.
11. First-tier Tribunal Judge Abebrese found that the claimant did not satisfy the requirements of the rules in relation to his suitability, eligibility and the exceptions under EX.1. Nor did he satisfy the requirements under paragraph 276ADE [9].
12. He then considered whether the claimant provided sufficient evidence warranting further consideration of his appeal. He referred to Gulshan [2013] UKUT 640.

13. He found that the claimant provided good arguable grounds to consider whether there are compelling circumstances. The evidence of the claimant and his partner was credible and consistent “with their relationship.” [11] He considered Article 8 under the Human Rights Convention. He directed himself in accordance with Razgar.
14. He concluded that the claimant's removal would constitute an interference with his family life. He accepted that the claimant had formed such family life with his partner in the UK and that they have two children together.
15. It would not be in the public interest for the claimant to be removed. His children are British and have a close relationship with him. It would be difficult for them to adjust to life in Ghana. [13] It would also be “difficult” for them to be away from their father if he were removed and they remained in the UK.
16. He had regard to the public interest considerations in the Nationality, Immigration and Asylum Act 2002 as amended. He took into account s.117. He and his family are very much a part of their local community. The claimant is an influential figure in the church community [13].
17. He found that the claimant was “credible in respect of his separation from his former wife.” [14] He is in a genuine and subsisting relationship with his partner. It was not disputed that he had been in the UK since 1996. He had two children aged 9 and 7. He lived separately from his partner and children because of reporting restrictions but spent a substantial period of time with them [14]. He takes them to school, he enjoys activities with them. They are British. Even though this could not on its own be treated as a “trump card”, when looked at under s.55 of the Borders Act 2009, it was in their interests that the claimant remains with them in the UK. They are at an age when they could reasonably adjust to life in Ghana but this would constitute a negative step “to ask them both to make this adjustment.” His removal would accordingly constitute a disproportionate interference in the circumstances [14].
18. On 4 December 2014, Upper Tribunal Judge Kekić granted the secretary of state permission to appeal on the basis that the factors identified by the First-tier Tribunal Judge at paragraphs 12-13 were matters already covered within the rules and there were no other compelling factors warranting a grant of discretionary leave under Article 8.
19. Mr Melvin submitted that the First-tier Judge gave no ‘case specific findings’ that there were arguably good grounds and compelling circumstances not sufficiently recognised under the rules. Nor was adequate attention given to the fact that the claimant is not the children’s primary carer and does not live with the family at the family home.
20. Nor did the Judge adequately consider the provisions of s.117B(4) of the 2002 Act. The claimant was without leave when family and private life took place. At best his position here was precarious.
21. On behalf of the claimant, Mr Doyle, who represented the claimant before the First-tier Tribunal as well, submitted that it was not clear why the

Judge found that the claimant did not meet Appendix FM of the rules. However, he accepted that there had been no application for permission to appeal by the claimant in that respect.

22. He nevertheless submitted that there was a proper basis for the Tribunal to have allowed the appeal under Article 8.
23. He referred to recent decisions on Article 8, including Ganesabalan R (on the application of) v Secretary of State for the Home Department [2014] EWHC 2712 (Admin) and in particular paragraphs 9 and 10 where the Court held that there is always a second stage in which the Secretary must consider the exercise of discretion outside the rules and must be in a position to demonstrate that she has done so. Appendix FM and Rule 276ADE are not a complete code insofar as Article 8 compatibility is concerned.
24. Accordingly, it was permissible for the First-tier Judge to assess Article 8 on the basis that the appendix FM requirements do not constitute a complete code.
25. He referred to paragraph 134 of MM (Lebanon) [2014] EWCA Civ 985, to the effect that if the relevant group of immigration rules is not a complete code then the proportionality test will be more at large, albeit guided by Huang tests and the UK and Strasbourg jurisprudence.
26. The Huang test was endorsed in Patel and Others v SSHD [2013] UKSC 72. The decision to remove the claimant would have sufficiently serious consequences, given that he has a British partner and two British children. In the circumstances, the Tribunal was entitled to consider and assess the claimant's case under Razgar.
27. He also referred to the recent judicial review decision of the Upper Tribunal in R (on the application of Oludoy and Others) v SSHD (Article – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC). There, Upper Tribunal Judge Gill stated that there was nothing in Nagre, Gulshan or Shahzad that suggest that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the immigration rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. That is consistent with paragraph 128 of R (MM and Others) v SSHD [2014] EWCA Civ 985 that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion based rule.
28. Judge Gill referred to Ganesabalan, supra, to the effect that there is no prior threshold which dictates whether the exercise of discretion should be considered; rather, the nature of the assessment and the reasoning which are called for, are informed by threshold considerations.
29. He also submitted that paragraph 117B(4) of the Immigration Act 2014 was subject to s.117B(6) which provides that in the case of a person who is not liable to deportation, the public interest does not require the

person's removal where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. A qualifying child means a person who is under the age of 18 and who is a British citizen.

Assessment

30. First-tier Tribunal Judge Abebrese found the evidence of the claimant and his partner to be credible. He accepted that he had formed a family life with his partner in the UK and that they have two children together. His partners as well as the two children are British citizens. The children have a close relationship with him and it would be difficult for them to adjust to life in Ghana. It would also be difficult for them to be separated from their father.
31. The current approach is that the immigration rules, and in particular Appendix FM, cannot be considered as a "complete code."
32. Judge Abebrese has directed himself in accordance with Razgar. He took into account factors including the claimant's very lengthy residence in the UK. The evidence showed that he was no longer with his ex-wife. Further, he had regard to the interests of the children, who are British citizens, aged 9 and 7. He noted his involvement with their day to day life. He enjoyed activities with them. Even though they could adjust to life in Ghana, this would constitute a negative step to ask them both to make this adjustment. [14]
33. Finally, he had regard to s.117 of the 2002 Act. Although little weight should ordinarily be given to a private life established by a person at a time when his immigration status is precarious, the public interest does not require his removal where he has a genuine and subsisting parental relationship with his British children and it would not be reasonable to expect the children to leave the UK.
34. I conclude from the above analysis that there was nothing irrational or perverse in those findings, which are sustainable in terms of the evidence available.

Notice of Decisions

The making of the decision of the First-tier Tribunal did not involve the making of any errors on a point of law. The decision shall accordingly stand.

The Secretary of State's appeal is dismissed.

No anonymity direction is made.

Signed

Dated 19 February 2015

Deputy Upper Tribunal Judge Mailer