



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/00774/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 20 April 2017**

**Decision & Reasons Promulgated
On 15 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**JOE YEBOAH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs of Counsel instructed by Bestway Solicitors
For the Respondent: Mr P Nath of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Ghana born on 12 September 1972. He states he entered the United Kingdom clandestinely in 2001. He brought himself to the attention of the authorities on 17 February 2012 when he applied for leave to remain based on his marriage by proxy in Ghana to Diane Akuoko. She is a British citizen present and settled in the United Kingdom

and was born on 1 June 1973. She is a Band 7 paediatric nurse at a London teaching hospital.

2. The Appellant made two applications for leave to remain both of which were refused with no in country right of appeal. Following judicial review proceedings, the Appellant on 15 September 2015 made a third application for leave to remain on human rights grounds.

The Secretary of State's Decision

3. On 18 December 2015 the Respondent refused the application. She accepted the Appellant and his wife had been in a genuine and subsisting relationship but did not accept it had continued to subsist after July 2015. She considered the Appellant did not meet the requirements of Appendix FM of the Immigration Rules and, in particular, paragraph E-LTRP.1.7 and that Section EX did not apply.
4. Further, the Respondent considered the Appellant had family in Ghana and both he and his wife could re-locate there and she would be able to work in her profession in Ghana. She concluded there were no insurmountable obstacles to family life being pursued in Ghana. The Appellant had medical issues but the Respondent considered none were life threatening and that treatments were available in Ghana.
5. On 7 January 2016 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended and in particular by the Immigration Act 2014. The detailed grounds of appeal extend to some thirteen pages of typescript. They comprise a short immigration history for the Appellant which is in any event clear from the Respondent's decision and the rest of the grounds amount to lengthy statements of law and the rare occasional general reference to the Appellant's circumstances.

The First-tier Tribunal's Decision

6. By a decision promulgated on 27 October 2016 Judge of the First-tier Tribunal D A Thomas dismissed the appeal. She found all the witnesses credible and that the Appellant and his wife were in a genuine and subsisting relationship and intended to live together permanently as husband and wife. At para.19 she concluded the Appellant met all the eligibility requirements of paragraph E-LTRP of Appendix FM and went on to state that Section EX.1 was not applicable. The Appellant did not meet the requirements of paragraph E-LTRP.2.2 because he had been unlawfully in the United Kingdom. She went on to conclude that it was "a clear option for the Appellant to return to Ghana and make an application for entry clearance" and noted that given her findings "any separation to the parties caused by a return to make a proper application will be temporary". She went on to dismiss the appeal.

7. The Appellant sought permission to appeal. On 27 February 2017 Judge of the First-tier Tribunal Gibb first extended time for making the application for permission to appeal and then granted permission to appeal. He stated:

“The grounds are lengthy and poorly drafted, so much so that I cannot summarise them. The only point of any value is that they drew attention to [17-19] of the determination. ... Despite the poor grounds a reading of [17-19] does disclose an arguable error on a point of law in the Judge’s reasoning. Having made findings that the Appellant met the general and eligibility requirements (contrary to the refusal) the Judge should have turned to consider EX1. Instead the Judge directed herself to *Sabir*, and gave no consideration to EX1. Since E-LTRP.2.2.(b) uses the words ‘unless paragraph EX.1 applies’ this was an arguable legal error.”

The Hearing in the Upper Tribunal

8. The Appellant and his wife attended the hearing together with their church pastor and another member of the church.
9. The representatives agreed that initial submissions should be made by Mr Nath for the Respondent. He submitted briefly that he had concerns about paragraph 19 of the decision of Judge Thomas and how it dealt with the issue of Section EX.1 of Appendix FM.
10. In response Mr Biggs for the Appellant referred to his Note which in essence (as Mr Biggs agreed) at greater length and detail re-iterates the ground upon which Judge Gibb granted permission to appeal. As Mr Biggs neatly put it that the grant of permission “hits the nail on the head”. Having found the Appellant met the requirements of paragraph E-LTRP the Judge was duty bound to consider Section EX.1.
11. Mr Biggs continued that having made favourable findings of fact, the Judge had not conducted a full analysis of what constituted insurmountable obstacles and had only addressed the circumstances in the event of temporary (not long term) separation between the Appellant and his wife if he were to return to Ghana to seek entry clearance. She had made a brief reference to the possibility of the wife re-locating to Ghana but had not conducted a proper and full analysis or assessment of the position of the Appellant and his wife in those circumstances.
12. Mr Biggs concluded that these matters amounted to material errors of law and the decision should be set aside.
13. Both parties stated they were not in a position to proceed to a substantive re-hearing in the event that I found the Judge’s decision should be set aside. Additionally, Mr Biggs referred to the need to obtain up-to-date evidence and that in the event of a re-hearing he expected extensive oral testimony would be given. Mr Biggs urged that the Judge’s findings of fact be preserved but that the appeal be remitted to the First-tier Tribunal to

which Mr Nath for the Respondent had in the event I found there was a material error of law, no objection.

Consideration

14. I agree with the sentiment Mr Biggs expressed that the grant of permission identifies a material error of law and on that basis the decision of the First-tier Tribunal must be set aside in its entirety except for preservation of the finding that the Appellant and his wife are in a genuine and subsisting relationship. Having regard to the submissions about a re-hearing already detailed, and Section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 and paragraph 7.2 of the Practice Statement of 10 February 2010 (as amended) the appeal is remitted for hearing afresh (save as already mentioned) to the First-tier Tribunal.
15. The Respondent's reasons for decision states the application leading to the decision under appeal was made on 15 September 2015 and accordingly the provisions of the Immigration Act 2014 will apply. Nevertheless, it may be appropriate for the Appellant to explain at any remitted hearing the extent to which he considers he meets the requirements of the Immigration Rules even if grounds for appeal are limited to human rights issues because the extent of compliance with the Immigration Rules may have a bearing in any proportionality assessment. With this in mind, the provisions of paragraph 284 of the Immigration Rules may have some relevance.
16. In passing, I comment that the medical evidence for the Appellant who is said to have a number of conditions was sparse and the Appellant may be advised to obtain leave to submit documentary evidence giving details of all his medical problems. The parties may also wish to address the tension between the provisions of Section EX of Appendix FM and Section 117B(4) of the 2002 Act.

Anonymity

17. There was no request for an anonymity order and having considered the issues raised, I find no such order is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained a material error of law and save for the finding of the genuine and subsisting nature of the relationship between the Appellant and his partner is set aside and the appeal is remitted for re-hearing in the First-tier Tribunal.

No anonymity order is made.

Signed/Official Crest

Date 25. iv. 2017

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal