



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14515/2013

THE IMMIGRATION ACTS

Heard at Field House
On 11th March 2014

Determination Promulgated
On 21st March 2014
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Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

GILLIAN AKUFFO KISSIEDU

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Ms P Soranki, counsel, instructed by the Sethi Partnership

DETERMINATION AND REASONS

1. The appellant (hereafter the SSHD) appeals a decision of the First-tier Tribunal which allowed an appeal on Article 8 grounds against a decision by the respondent (hereafter the claimant) refusing to grant her indefinite leave to remain as the spouse of a person present and settled in the UK.
2. It was accepted by both parties that when she applied, the claimant could not meet the requirements of the Rules; further, she had not taken and passed the English Language test requirement by the date of the decision or the hearing before the First-tier Tribunal. The appeal had been allowed on Article 8 grounds. Permission to appeal had been granted on the basis that it was arguable that

the claimant had not demonstrated any insurmountable obstacles that would prevent her continuing her family life outside the UK and that the judge's reliance on Razgar and Huang was an error of law; that the judge should have referred to Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 (Admin).

3. It is a little difficult to understand the basis on which permission to appeal was granted: the grounds did not submit that it was an error of law for the First-tier Tribunal to rely upon Razgar and Huang and nor did they seek to argue that the claimant had not demonstrated any insurmountable obstacles. The grounds take issue with the First-tier Tribunal on the basis that the Immigration Rules provide a complete code that forms the starting point for any Article 8 assessment and that in effect any specifically separate Article 8 assessment should only be carried out when there are compelling circumstances not recognised by the Rules. Furthermore that the judge had not identified exceptional circumstances within the meaning of Gulshan and Nagre namely those where refusal would lead to an unjustifiably harsh outcome. The SSHD submits that it would not be unreasonably harsh to require the couple to sell their home and seek alternative accommodation whilst the claimant awaits entry clearance.
4. The First-tier Tribunal judge clearly set out the evidence before him with regard to the previous grant of entry clearance as a spouse, the change in Immigration Rules between date of entry and date of application for variation and that the only reason that the claimant did not succeed in her application under the Rules was because of the failure to meet the language test. He accepted
 - a. the claimant's account that she had not been aware of the language test requirement until shortly before she submitted her application;
 - b. that she had submitted her passport to the SSHD with her application as required;
 - c. she had explained the position to the SSHD in her letter of application;
 - d. she had requested the return of her passport to enable her to register and take the language test;
 - e. that the respondent had failed to return the passport as requested and had then sent a copy of her husband's passport;
 - f. that she has commenced a nursing course which includes work;
 - g. that she and her husband have bought a house together;
 - h. that if she were required to return to Ghana they would have to sell the house because her husband's sole income would be insufficient to meet the mortgage repayments;
 - i. that it would be unreasonable to require her husband to re-settle in Ghana as a 56 year old man who has lived in the UK for some 25 years;
 - j. that the couple have worked for their home together since they were living together and married;
 - k. that their marriage is genuine and subsisting.
5. The judge found that the claimant would "undoubtedly" pass the language test and that the "whole situation could have been avoided by the [SSHD] permitting the [claimant] to undertake her test shortly after her application...". He carefully set out the factors for and against the claimant. He carefully weighed the public

interest in requiring the claimant to leave the UK to apply for entry clearance to return as a spouse.

6. Mr Walker acknowledged the strength and force of the claimant's case and referred to the length of time the claimant and her husband have been in the UK, that she has been lawfully in the UK throughout her stay; that she was granted entry as a spouse; that there is employment and that there has been error by the SSHD in failing to return the passport as requested on a number of occasions. He stated that other than relying upon the grounds seeking permission to appeal he had nothing further to add.
7. We are satisfied that the First-tier Tribunal judge carefully analysed the evidence before him and reached a decision that was well within the range of permissible decisions. He did not approach this appeal as a "near miss" but considered the evidence as a whole and concluded that although the claimant did not meet the requirements of the rules the decision to refuse leave to remain was disproportionate when considered in the context of the public interest.
8. We have no hesitation in finding that there is no error of law in the First-tier Tribunal decision and dismiss the appeal.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

We do not set aside the decision

The decision of the First-tier Tribunal stands namely the claimant's appeal against the decision of the SSHD to refuse her leave to remain is allowed.

Date 18th March 2014

Judge of the Upper Tribunal Coker