



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

Appeal Number: IA/32010/2013

THE IMMIGRATION ACTS

**Heard at UT (IAC) Field House
On 15th July 2014**

**Determination
Promulgated
On 28th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MISS MERCY KROFA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Spio-Aidoo, Solicitor

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Ghana whose appeal was allowed on Article 8 human rights grounds by First-tier Tribunal Judge Boyd in a determination promulgated on 24th April 2014.

2. The Secretary of State lodged grounds of application. Firstly it was said that the judge should have considered the Appellant's Article 8 application under Appendix FM and paragraph 276ADE of the Rules. Paragraph 276ADE was therefore relevant to any assessment of private life under Article 8 regardless of whether the application was made before those provisions came into force on 9th July 2012. Secondly the judge erred in law in concluding that the Appellant's failure to regularise her stay was not a fact to be weighed against her when assessing whether removal amounted to a disproportionate interference with her Article 8 rights.
3. The Appellant lodged a Rule 24 notice stating that the judge had exercised his independent judicial judgment under Article 8. The judge had found that separating the Appellant or requiring her little brother who was born and had lived for ten years here to go and live in Ghana was disproportionate to any sensible purpose expressed in the Rules. The judge had been correct to consider the five step principles as set down in the case of Razgar. The decision in relation to the Appellant was made applying the Rules in existence at the date of her application. The judge could not have decided the Appellant's case differently and in any event the judge's use of discretion could not be faulted.
4. Before me Mr Tufan expanded on his grounds. There was a lack of reasoning given by the judge. He had not applied paragraph 276ADE. The relevance of Chikwamba was unclear. The fact that the Appellant was overweight was not relevant. I was asked to set the decision aside and make a fresh decision allowing the Secretary of State's appeal and failing that if I concluded that a further fact-finding exercise was necessary to remit the case to the First-tier Tribunal. In response to submissions made by Ms Spio-Aidoo it was said that there had been delay in this case and some of it lay at the door of the Secretary of State but not all because the Appellant had changed address.
5. For the Appellant reliance was placed on Rule 24 notice. The judge had conducted an appropriate balancing exercise. Whilst the judge had referred to Chikwamba v SSHD [2008] UKHL 40 this had no effect on the decision reached and he had properly applied the five steps set out in Razgar. It was notable in this case while the decision was made in 2007 it had not been served on the Appellant until 2013. The judge had assessed all the evidence and had taken into account the interests of the Appellant's brother. He had carried out the appropriate balancing exercise. There was no error in law.
6. I reserved my decision.

Conclusions

7. There is no doubt that the judge was wrong when he noted in paragraph 16 that this was an Article 8 appeal based on the law as it stood prior to introduction of the Immigration Rules in relation to family life and private life. The judge does not explain his reasoning but he appears to have

taken no account of the approach set out in R (Nagre) v SSHD [2013] EWHC 720 (Admin) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC). The principles set out in these cases are ones which the judge should have followed namely that after applying the requirements of the Rules only if there may be arguable good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. It may also be said that it is unclear why the judge referred to Chikwamba. He failed to indicate in what way that case (he gave no citation) was relevant to the outcome of the appeal before him and the parties before me agreed Chikwamba had no application in the present case.

8. Having said that it was accepted by the Appellant's representative that the Appellant could not meet the requirements of Article 8 under the Immigration Rules (paragraph 6 of the judge's determination). It follows that the basis of the submission made to the judge was that this was a case which should be considered outwith the Immigration Rules. It is well-known that there is ample case law to justify such a proposition and that is exactly what the judge went on to do carrying out a balancing act in terms of Razgar v SSHD [2004] UKHL 27. The judge noted the acknowledgment of the Home Office Presenting Officer that the Appellant did have a family and consequently private life in the United Kingdom and that her removal would cause such interference with her life as to potentially engage the operation of Article 8 (paragraph 17). As the judge noted the question before him was whether in all the circumstances it would be proportionate or disproportionate to the legitimate public end sought to be achieved for the Appellant to be removed.
9. The judge noted that the Appellant had been here for almost eleven years. The Appellant's brother had lived all his life in the United Kingdom. He had never been to Ghana. The judge concluded it would not be feasible to expect him to leave the United Kingdom and go and live in Ghana. He noted that the Appellant's mother who had been looking after him had been here for eleven years and she was well settled. She and the Appellant were active members of the church. He noted that the Appellant relied quite heavily on the emotional support of her mother. He noted that her brother would be "indeed very upset and confused" if she was to leave the United Kingdom.
10. He noted that the Appellant was very closely involved in the church and very close to her brother. The Appellant had no family or accommodation to go to in Ghana. The Appellant was obese, had no qualifications, and it was therefore unlikely she would be employable in Ghana.
11. Against that factual background the judge found that it would be disproportionate to remove the Appellant from the United Kingdom. While this could be said to be a marginal case and other judges might have responded differently to the facts found the judge gave clear and coherent reasons why he was allowing the appeal under Article 8. He did provide

adequate reasons and it can reasonably be inferred that he considered the Appellant's circumstances compelling or exceptional. It cannot be said that his decision was so perverse or irrational that it amounts to an error in law. In short, he was entitled to find as he did, namely that to remove the Appellant from the United Kingdom, in all the circumstances, would be a disproportionate interference with her fundamental if qualified rights under Article 8 ECHR.

Decision

12. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
13. I do not set aside the decision.

Signed

Dated

Deputy Upper Tribunal Judge J G Macdonald