



IAC-AH-SC-V1

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

Appeal Number: IA/43176/2013

THE IMMIGRATION ACTS

**Heard at Manchester
On 16th April 2015**

**Decision & Reasons Promulgated
On 8th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MRS HARRIET ANTWIWAA DONKOR
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Ghana born on 16th January 1971. On 14th February 2013 the Appellant applied for leave to remain on the basis of her relationship with her partner and her private life. The Appellant's immigration history was that she had first arrived in the UK in 2004 with leave to enter as a dependant. That leave was extended on five occasions prior to the current application. On 3rd October 2013 the Appellant's application was refused on the grounds that she failed to qualify for leave by virtue of E-LTRP.1.2 of Appendix FM namely that in order to qualify for leave the Appellant's partner must either be a British citizen present and

settled in the UK or be in the UK with refugee leave or humanitarian protection and that he failed to meet any of those requirements. Further the Secretary of State was not satisfied that EX.1 applied in the Appellant's case and her application was consequently refused and in addition she did not qualify for the leave via the 10-year route.

2. The Appellant appealed and the appeal came before Immigration Judge Feeney sitting at Taylor House on 21st November 2014. In a decision promulgated on 13th January 2015 Judge Feeney concluded that the Secretary of State had failed properly to consider EX.1 and its application in the present case amounted to an error of law and he remitted the appeal back to the decision maker for reconsideration of the application of EX.1 Appendix FM and by way of consideration under Section 55 of the 2009 Act.
3. On 20th January 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 23rd February 2015 First-tier Tribunal Judge Parkes granted permission to appeal. Judge Parkes noted that the grounds argued that the judge was wrong to apply paragraph EX.1 as the Appellant did not meet the relationship requirements of Appendix FM E-LTRP.1.2 and that EX.1 was not freestanding. Judge Parkes noted that the Appellant's husband did not have British citizenship, refugee status or indefinite leave to remain. He also noted that it was argued that the judge did not properly approach Section 55. He considered that there was merit in the Grounds of Appeal. The Appellant's husband's leave did not appear to be sufficient to comply with the Sponsor's requirements under Appendix FM and so paragraph EX.1 would not be reached independently and that it would have to be shown that it would not be reasonable to expect the children to live in Ghana. I note that this is an appeal by the Secretary of State and for the purpose of continuity throughout the appeal process I refer herein to the Secretary of State as the Respondent and Mrs Donkor as the Appellant. The Appellant has not had legal representation throughout these proceedings and she again appears in person. The Secretary of State appears by her Home Office Presenting Officer Mr McVeety.

Submission/Discussion

4. Mr McVeety submits that the judge should have made a decision and that it was open for the judge to give due and proper consideration to a freestanding appeal under Article 8. He submits that the correct approach is for the First-tier Tribunal to make a decision under Article 8 and points out that the Appellant would not meet the requirements of paragraph EX.1 and that it would be open to the First-tier Tribunal to consider the Article 8 application outside the Rules but clearly this has not taken place due to the approach adopted by the First-tier Tribunal Judge.
5. Mrs Donkor acknowledges the position but indicates that she wishes to make no further comment or representations therein.

The Law

6. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
7. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

8. The First-tier Tribunal Judge has failed to make a decision pursuant to Article 8 and I agree entirely with the view expressed by Mr McVeety that it was open to the judge to make findings pursuant to Article 8. I acknowledge the point made by Mr McVeety that EX.1 is not freestanding and that was confirmed by the Upper Tribunal in the decision of **Sabir (Appendix FM - EX.1 not free standing) [2014] UKUT 00063 (IAC)**. In this instance there is therefore a clear material error of law. It is clear that the judge has made no findings when indeed she should have done so and the correct approach is to remit the matter back to the First-tier Tribunal to be reheard.
9. There is one caveat in this matter. Mr McVeety acknowledges that the Appellant's husband was granted indefinite leave to remain on 10th April 2015 i.e. less than a week before this hearing. Whilst he urges me (and I agree with him) to remit the matter to the First-tier Tribunal he asked me to note this position in the determination (which I do) and indicates that it may as a result be a matter for the Secretary of State to reconsider but that he is not in a position to address this issue at the present time.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law. The decision of the First-tier Tribunal is therefore set aside and the matter is remitted to the First-tier Tribunal to be reheard at Taylor House on the first available date 28 days hence. Leave is also given to either party to file and serve an up-to-date bundle of documents at least seven days prehearing. Should the Appellant require an interpreter then she is requested to notify the Tribunal Service within fourteen days of receipt of this determination.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge D N Harris