



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/12008/2015

THE IMMIGRATION ACTS

Heard at Bradford
On 10th February 2016

Decision & Reasons Promulgated
On 22nd February 2016

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADELAIDE OKOAMPAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mrs R Petersen, Home Office Presenting Officer
For the Respondent: Mrs N Khan, Joseph & Khan Solicitors

DECISION AND REASONS

1. The claimant is a citizen of Ghana born on 13th December 1984. She entered the UK as a visitor on 10th July 2014 and subsequently applied for leave to remain on human rights grounds.
2. It was accepted that she could not meet the requirements of the Immigration Rules because she entered as a visitor and therefore could not comply with Appendix FM

paragraphs E-LTRP.2.1 and R-LTRPT.3.1. The judge considered whether there were exceptional circumstances which would allow him to consider the appeal outside of the Rules. He had regard to Chikwamba v SSHD [2008] UKHL 40 and wrote as follows

“I have to consider whether exceptional circumstances exist in this case such as to allow me to consider it outside of the Immigration Rules. I have found that the appellant did not know that she was pregnant when she entered the UK in July 2014. She has given birth to a son who is a UK citizen who holds a UK passport and who she is breastfeeding. She is married to a UK citizen who also holds a UK passport. Her husband works and at the date of the hearing in all probability earns sufficient to meet the financial requirements of Appendix FM if the appellant were to be returned to Ghana and make an appropriate application from there. If the appellant were compelled to leave the UK she would have to decide whether to take her son with her. If she did he would be deprived of the care and love of his father. If she did not the opposite would apply but the child would no longer have the benefit of his mother feeding him. In addition it is highly likely that the father would have to give up his employment to care for his son. The impact of that on his earning capacity might well be carried through to the application to be made.”

3. On that basis he allowed the appeal outside the Rules.

The Grounds of Application

4. The Secretary of State sought permission to appeal on the grounds that the judge had failed to conduct an adequate assessment of why it was considered that the claimant could not return to Ghana to obtain the correct entry clearance. There was no assessment of how long she would have to remain to enable her application to be processed and how this would render the decision disproportionate. There was also no adequate assessment of her ability to meet the requirements of Appendix FM/SE, and in any event the fact that the claimant's husband is British and in employment does not in any way constitute an exceptional circumstance.
5. Permission to appeal was granted by First-tier Tribunal Judge Cox on 19th October 2015.

Submissions

6. Mrs Petersen submitted that the judge had used Article 8 as a general dispensing provision. He had failed to assess how long it would take her to apply for entry clearance from abroad. She asked that the decision be reversed.
7. Mrs Khan submitted that the judge had reached a sustainable conclusion. He was right to take into account the welfare of the child who was 15 months old at the date of the hearing. She was now pregnant with a second child and should not be required to leave.

Consideration of Whether there is an Error of Law

8. The judge plainly failed to take into account all relevant considerations, in particular the ability of the claimant to return to Ghana to apply for entry clearance.
9. In R (On the Application of Chen) v SSHD (Appendix FM-Chikwamba-temporary separation-proportionality) UKUT 2015 the Upper Tribunal held

“Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to rejoin family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon case law concerning Chikwamba v SSHD [2008] UKHL 40.”

10. The claimant’s circumstances are by no means unusual. The judge simply did not adequately explain why he considered they were such that leave should be granted outside the rules and why removal would interfere with her Article 8 rights.
11. Accordingly the decision is set aside.

Further Submissions

12. Mrs Petersen submitted that on the evidence before the judge the sponsor was earning a sufficient sum to satisfy the maintenance provisions of the Immigration Rules. It appeared that he had over £18,600 from his main job which would meet the requirements, since his two children were British and the rules did not require an additional sum for them. There was no reason to conclude that there would be any particular delay in an application for entry clearance.
13. Mrs Khan submitted that the claimant had been advised not to travel by her midwife. She risked being separated from her husband and two children for an indefinite period of time which could not be in their best interests.

Findings and Conclusions

14. The starting point in considering this appeal is the fact that the claimant cannot meet the requirements of the Immigration Rules. There then has to be an examination of whether her circumstances are sufficiently compelling to require a grant of leave outside them, which includes an assessment of the best interests of the children. In reality, that comes down to the question of the return to Ghana to enable an application for entry clearance to be processed.
15. The claimant has one child and is pregnant with another. It may be that she is unable to fly at the moment because of her late stage of pregnancy, but she could make a voluntary departure as soon as the child is born or if she becomes well enough to fly.

That in itself is not a sufficient reason to require a grant of leave under Article 8 outside of the Rules.

16. The sponsor works for Bradford District Care Trust and according to his witness statement, he earns £17,353.60 gross, for a 30 hour week, although the judge concluded that he earned a little more, £21,100 gross. He also had a second job with an NHS professionals employment agency with a minimum 16 hours a week at an hourly rate of £7.79 per hour.
17. Mrs Khan said that he was no longer doing the extra work, but he has been working as a health trainer administrative support with them since 2013, and there is no reason why he could not start up with them again, or with another agency. The children would not be expected to leave the UK, as British citizens, but they could remain here for a short period whilst the entry clearance application was processed. The parties are aware of the Immigration Rules and the maintenance requirements which they have to satisfy, and they have the benefit of legal representation. If properly advised, and they put in all of the required evidence as set out in Appendix FM/SE, there is no reason to think that there will be any undue delay in the claimant's application for entry clearance.
18. The claimant has not argued that there are any difficulties per se for her in staying in Ghana for a short period.
19. No circumstances have been put forward which establish that the temporary separation required to make an application for entry clearance would be disproportionate to the Secretary of State's legitimate aim of maintaining law and order and immigration control.

Notice of Decision

The original judge erred in law. His decision is set aside. It is re-made as follows. The claimant's appeal is dismissed.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Taylor