



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12664/2015

THE IMMIGRATION ACTS

Heard at Field House
On 10th January 2018

Decision & Reasons Promulgated
On 30th January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ISAAC [O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson of Counsel instructed by Nasim & Co Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Obhi of the First-tier Tribunal (the FtT) promulgated on 2nd March 2017.
2. The Appellant is a national of Ghana born [] 1966 who on 2nd June 2015 made a human rights application for leave to remain in the UK based upon his family and private life.

3. The Appellant entered the UK as a visitor on 20th December 2003 with permission to remain until 11th June 2004. He overstayed and did not apply for leave until 29th January 2013. He then applied for leave to remain as the spouse of a person settled in the UK. This application was refused on 15th March 2013 with no right of appeal.
4. The Appellant made a similar application on 24th April 2014 which was refused on 29th May 2014 without a right of appeal. On 2nd June 2015 the Appellant made a further application for leave to remain on the basis of his family and private life, this application was refused on 19th November 2015 with a right of appeal to the FtT.
5. The basis of the application for leave to remain is that the Appellant met Ama [K], who is a British citizen, in 2007. Their relationship commenced in 2009 and they underwent a customary marriage on 30th January 2010. This was a proxy marriage celebrated in Ghana by their families.
6. The Appellant pointed out that he had been resident in the UK since 2003 and that he and his spouse were on an NHS waiting list for infertility treatment, and his spouse has employment in the UK and a private life in this country, and there would be insurmountable obstacles to the couple relocating to Ghana.
7. The Respondent's reasons for refusal are contained in a letter dated 19th November 2015 and are summarised below.
8. It was accepted that the Appellant and his spouse were in a genuine relationship and that the Appellant satisfied the suitability requirements of paragraph R-LTRP.1.1.(d)(i) and (ii). The Respondent went on to consider section EX.1(b) and refused the application for leave to remain on the basis that there were no insurmountable obstacles to family life between the Appellant and his spouse continuing outside the UK.
9. The Respondent considered the Appellant's private life with reference to paragraph 276ADE(1) of the Immigration Rules, finding that he had not resided in the UK for a continuous period of twenty years, and there would be no very significant obstacles to his integration into Ghana.
10. The Respondent considered whether there were any exceptional circumstances which would warrant a grant of leave to remain pursuant to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules and decided that there were no such exceptional circumstances.
11. The FtT heard evidence from the Appellant and his spouse. The FtT found that the financial requirements of Appendix FM were satisfied because the spouse earned above the minimum income threshold, and noted that the Appellant speaks English and that they were in a genuine relationship. The FtT found that the suitability criteria were not met because the Appellant did not have permission to be in the UK but accepted this may not be an issue if it was proved that insurmountable obstacles existed to family life continuing outside the UK.

12. The FtT found that such insurmountable obstacles did not exist. The FtT did not accept that there were any exceptional circumstances which would justify allowing the appeal with reference to Article 8 outside the Immigration Rules. The FtT found that there is a genuine and subsisting relationship between the Appellant and his spouse, but found that the Appellant could return to Ghana to make an application for entry clearance. The FtT referred to the case of Chen [2015] UKUT 189 (IAC). The FtT therefore found that the Respondent's decision did not breach Article 8 of the 1950 Convention and the appeal was dismissed.
13. The Appellant applied for permission to appeal which was granted by Judge Gibb of the FtT in the following terms;
 1. The Appellant, a citizen of Ghana, was refused leave on 19.11.2015, and his appeal against removal was dismissed by Judge of the First-tier Tribunal Obhi (promulgated on 2.3.2017). This means that the hearing was just before the judgment in Agyarko v Secretary of State [2017] UKSC 11, on 22.2.2017 but promulgation was just after it.
 2. The grounds, which were in time, complain that the judge erred in her approach to Article 8 and the tests in the Rules.
 3. The grounds are poorly drafted. They contain errors, such as referring to children at para 8, and lack proper analysis and specificity. They also fail to mention the Agyarko case.
 4. However, the test for granting permission is not the same as assessing the quality or otherwise of the grounds.
 5. Although the judge is not to be blamed given the timing, nevertheless the Agyarko case, which can be said to have established what the law in this area had been, undermines the legal framework that she applied in a number of ways. First it showed that the SS (Congo) threshold that she used in reasoning and in questioning the Sponsor was wrong; second it showed that 'insurmountable obstacles' and 'exceptional circumstances' were different tests (and a couple could succeed on the latter having failed on the former); and third it showed that public interest would be at its lowest in a case where the Rules were met save for entry clearance (as here) (see paras 48 and 51 of Agyarko).
 6. It is therefore arguable that the judge erred in law in that the legal framework applied, relying on SS (Congo), and on Chen [2015] UKUT 00189 (IAC) in relation to entry clearance was not the correct one in the light of the Supreme Court judgment in Agyarko v Secretary of State [2017] UKSC 11.
14. Following the grant of permission the Respondent submitted a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, contending, in summary, the FtT directed itself appropriately, considered whether there were any insurmountable obstacles to family life continuing in Ghana in paragraph 24, and also considered Article 8 outside the rules, and properly balanced the Appellant's interest against the public interest.

15. Directions were issued making provision for there to be hearing before the Upper Tribunal to ascertain whether the FtT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

16. Mr Richardson relied upon the grant of permission to appeal, in particular paragraph 5 thereof and the third point made therein.
17. Mr Richardson stated that it was accepted, in view of the high threshold, that the Appellant could not show insurmountable obstacles to family life continuing outside the UK. There was therefore no challenge to the FtT decision on that point.
18. In summary I was asked to note that the FtT accepted that the Appellant and his spouse were in a genuine relationship, and that they would be able to adequately financially maintain themselves, by reason of the spouse's income from employment. The FtT was wrong to say that the Appellant did not satisfy the suitability criteria, as the Respondent specifically accepted that he did at paragraph 11 of the reasons for refusal decision. It was contended the FtT was also wrong at paragraph 23 in finding that the point to be considered was whether there were insurmountable obstacles either to the Appellant returning to Ghana and applying for entry clearance or the couple both returning to live their lives in Ghana. Mr Richardson submitted that the insurmountable obstacles test related only to whether there were insurmountable obstacles to the couple continuing their family life outside the UK.
19. It was contended that the FtT erred by not following the principles in Agyarko, which set out the law as it always should have been applied. The only reason why the FtT dismissed the appeal with reference to Article 8 outside the Immigration Rules was because the Appellant was in the UK without leave, and it was found that he could return to Ghana and apply for entry clearance. Such a finding was not in line with the guidance at paragraph 51 of Agyarko. Mr Richardson submitted the FtT's reasons for dismissing the appeal, in that the Appellant could return to make an application for entry clearance, were in fact reasons given in Agyarko at paragraph 51 for allowing the appeal.
20. Mr Tarlow relied upon the rule 24 response. It was submitted that the FtT had made findings which it was entitled to make upon the evidence, and there was a public interest in maintaining effective immigration control.
21. At the conclusion of oral submissions I reserved my decision. Both representatives agreed that if an error of law was found, the decision could be remade taking into account the evidence that had been before the FtT, and there would be no need for a further hearing.

Conclusions and Reasons

Error of Law

22. I find that the FtT erred in law for the reasons given in the grant of permission to appeal. There is no criticism of the FtT and it is evident that care has been taken in the preparation of the decision. However Agyarko provides the correct guidance, and that guidance was not followed by the FtT.
23. It is not contended on behalf of the Appellant that there are insurmountable obstacles as defined in EX.2 to family life continuing outside the UK. Agyarko confirms at paragraph 48 that if the insurmountable obstacles test is not met, and the refusal of the application would result in unjustifiably harsh consequences such that refusal would not be proportionate, then leave should be granted outside the Rules on the basis that there are exceptional circumstances.
24. At paragraph 51 of Agyarko, it is confirmed that there may be no public interest in removal of an individual, even if that individual was residing in the UK unlawfully, if he or she was otherwise certain to be granted leave to enter if an application was made from outside the UK.
25. In conclusion, on the error of law issue, the failure of the FtT to apply the guidance in Agyarko amounts to a material error of law which means that the decision of the FtT is set aside.

Re-Making the Decision

26. Only one ground of appeal is available to the Appellant, and I must decide whether the Respondent's decision is contrary to section 6 of the Human Rights Act 1998. The Appellant argues that the Respondent's decision fails to respect his private and family life rights that are protected under Article 8 of the 1950 Convention.
27. In deciding this appeal I adopt the balance sheet approach recommended by Lord Thomas at paragraph 83 of Hesham Ali v SSHD [2016] UKSC 60, and in so doing have regard to the guidance of the functions of this Tribunal given by Lord Reed at paragraphs 39 to 53.
28. The burden of proof lies on the Appellant to establish his personal circumstances in the UK and why the decision to refuse his human rights claim interferes disproportionately in his family and private life rights in this country. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout.
29. I base my decision on the following facts.
30. The Appellant entered the UK as a visitor in December 2003. He overstayed and first made an application to regularise his status in January 2013. The Appellant's spouse was born in the UK and is a British citizen. The relationship between the Appellant and his spouse commenced in 2009. They underwent a customary marriage in

Ghana on 30th January 2010. This was a marriage by proxy. The Respondent accepts that the couple have a genuine relationship. The couple are on an NHS waiting list for infertility treatment.

31. The Appellant's spouse has family in Ghana as does the Appellant. Their relationship commenced in the knowledge that the Appellant had no leave to remain. The spouse is employed as a social worker. The FtT accepted that the financial requirements of Appendix FM are satisfied in that the spouse has employment which provides an annual income of approximately £48,000 per year. The Appellant speaks English.
32. The FtT was wrong at paragraph 23 to state that the Appellant did not meet the suitability requirements.
33. It is conceded on behalf of the Appellant that he and his spouse cannot satisfy the high threshold of insurmountable obstacles, and therefore his appeal cannot succeed with reference to EX.1. The couple do not have children therefore EX.1(a) is not relevant.
34. I must consider Article 8 outside the Immigration Rules in the light of the guidance given in Agyarko. Having found that Article 8 is engaged on the basis of the Appellant's family life with his spouse I must consider the public interest, and therefore must consider the considerations listed in section 117B of the Nationality, Immigration and Asylum Act 2002.
35. Sub-section (1) of section 117B confirms that the maintenance of effective immigration controls is in the public interest.
36. Sub-section (2) confirms that it is in the public interest that a person seeking leave to remain can speak English, and sub-section (3) confirms that it is in the public interest that a person seeking to remain in the UK is financially independent. The Appellant can speak English and is financially independent, but these are neutral factors when considering proportionality and the public interest.
37. Sub-section (4) confirms that little weight should be given to a private life or a relationship formed with a qualifying partner established by a person at a time when the person is in the UK unlawfully. The Appellant has been in the UK without leave with the exception of the visa that he was granted as a visitor that expired in June 2004.
38. Sub-section (5) confirms that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. The Appellant's appeal is based upon his family life rather than his private life.
39. Sub-section (6) is not applicable in this appeal, as the Appellant and his spouse do not have children.

40. At paragraph 49 of Agyarko it is stated it is important to consider whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the existence of family life in the host State would be precarious. Where this is the case, it is likely only to be in exceptional circumstances that removal of the non-national family member would breach Article 8. That is the case in this appeal. It is of significant relevance that the Appellant and his spouse started their relationship when the Appellant had no leave to remain, and both the Appellant and his spouse were aware of this. Taking the above into account, I find it appropriate to set out below paragraph 51 of Agyarko;

51. Whether the applicant is in the UK lawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant – even if residing in the UK unlawfully – was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in Chikwamba v Secretary of State for the Home Department.

41. It is not contended that the Appellant is a foreign criminal. Taking into account the findings made by the FtT, and the facts which are set out earlier in this decision, if the Appellant left the UK, returned to Ghana and make an entry clearance, he would be granted entry clearance. There is a subsisting and genuine relationship, the financial requirements are satisfied, and the Appellant can speak English. There are no criminal convictions. The Appellant would not be a burden on public funds. Applying the guidance in Agyarko at paragraph 51, I find that in this case there is no public interest in the Appellant's removal from the UK, therefore there are exceptional circumstances in this case in that the Respondent's decision would result in unjustifiably harsh consequences and is disproportionate, because there is no public interest in the Appellant's removal.

Notice of Decision

The decision of the FtT involved the making of an error of law such that it is set aside and re-made. The appeal is allowed pursuant to Article 8 of the 1950 Convention.

Anonymity

The FtT made no anonymity direction. There has been no request for anonymity made to the Upper Tribunal and I see no need to make an anonymity direction.

Signed

Date: 15th January 2018

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

Although the appeal has been allowed I make no fee award. The appeal has been allowed because of evidence presented to the Tribunal which was not before the original decision maker.

Signed

Date: 15th January 2018

Deputy Upper Tribunal Judge M A Hall