



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

Appeal Number: HU/09981/2016

THE IMMIGRATION ACTS

Decided without a hearing

**Decision & Reasons Promulgated
On 27 May 2020**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**ABUBAKARI [A]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Introduction

- 1.** This is an appeal by the appellant against the decision of First-tier Tribunal Judge Green (“the judge”), promulgated as long ago as 28 June 2017, in which he dismissed the appellant’s appeal against the respondent’s decision of 30 March 2016, refusing his human rights claim.
- 2.** It is apparent from the two dates stated in the previous paragraph that this appeal has a lengthy procedural history. In all the circumstances, I need only summarise it relatively briefly here. The appellant, a citizen of Ghana, applied for leave to remain on the basis of his relationship with his British partner, JA. She suffered from a number of medical conditions which, it was claimed, prevented her from going to live with the appellant in Ghana. The application was refused, both in respect of the relevant

Immigration Rules (“the Rules”) and in a wider context. On appeal, the judge essentially concluded that:

- i. there would be no “insurmountable obstacles” in respect of the appellant returning to Ghana [12];
- ii. there would be no “very significant obstacles” to the appellant reintegrating into Ghanaian society [14];
- iii. therefore, the appellant could not succeed in respect of the relevant Rules;
- iv. that there were no “exceptional circumstances” in the case to justify success under Article 8 on a wider basis;
- v. that the appellant could return to Ghana alone if necessary and make an appropriate entry clearance application from there [16].

3. The appellant’s grounds of appeal sought to challenge each of those conclusions.
4. An initial application for permission to appeal was refused by the First-tier Tribunal. A renewed application was refused by the Upper Tribunal on 12 June 2018. That refusal was then the subject of judicial review proceedings. Following a substantive hearing, the Upper Tribunal’s refusal of permission was reduced by the Outer House of the Court of Session (AA v Secretary of State for the Home Department [2019] CSOH 56; the Opinion of Lady Wise). Permission to appeal to the Upper Tribunal was then granted by the Vice-President on 15 April 2020.
5. In this way the matter has come before me.

Procedural issues: the Covid-19 pandemic

6. In light of the exceptional circumstances brought about by the Covid-19 pandemic, on 23 March 2020 the Senior President of Tribunals issued a Pilot Practice Direction. On that same date, the President of the Upper Tribunal (IAC) issued the Presidential Guidance Note No.1 2020. These two documents highlighted the utility of the Upper Tribunal making decisions without a hearing, with specific reference to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. This course of action is always, of course, subject to the overriding objective and the need to ensure fairness to both parties in all the circumstances.
7. In respect of the current appeal, directions were sent out at the same time as the grant of permission (that being 20 April 2020). These directions sought submissions from the parties in respect of the error of law issue. In addition, they stipulated that any objections to the error of law issue being determined without a hearing had to be submitted within a specified timeframe.

8. In the event, both parties have provided helpful submissions as to the merits of the appellant's appeal. Neither side has raised any objections to the error of law issue being determined without a hearing.
9. Having given careful consideration to the matters set out in paragraph 6-8, above, and in particular the respondent's submissions (to which I will return to shortly), I have concluded that the error of law issue in this appeal can fairly be determined without a hearing. Pursuant to rule 34 of the Tribunal's Rules, I therefore proceed to undertake this task.

The parties' written submissions

10. I wish to express my appreciation to both parties for the succinct and considered submissions provided, particularly in light of the ongoing exceptional circumstances brought about by the Covid-19 pandemic.
11. The appellant's submissions reflect and expand upon the grounds of appeal. It is asserted that the judge's conclusions in respect of the Article 8 claim within and without the Rules are erroneous in the following ways. First, that the finding that there were no "insurmountable obstacles" in respect of EX.1 of Appendix FM was contrary to the evidence and, importantly, was based on the incorrect assumption that the appellant's partner could/would remain in the United Kingdom whilst he returned to Ghana. Second, that the judge effectively conflated the "insurmountable obstacles" test with the "unjustifiably harsh consequences" test: there should have been a separate assessment for each with independent reasoning. Third, the judge failed to apply the Chikwamba principle to the appellant's case, in light of the finding that the couple would have met the minimum income requirement under Appendix FM.
12. In response, the respondent accepts that the judge materially erred in the following respect. When conducting the "insurmountable obstacles" assessment under EX.1 of Appendix FM, the judge inappropriately took account of the fact (as he found it to be) that the appellant's partner could/would remain in the United Kingdom whilst he (the appellant) went to live in Ghana. It is acknowledged that EX.1 is not to be approached on such a premise. It is evident from the respondent's submissions that she also accepts that the same erroneous approach was applied to the judge's assessment of Article 8 outside the context of the Rules. Thus, respondent confirms that she does not oppose the first and second grounds of appeal.
13. In respect of the Chikwamba issue, the respondent asserts that there is no material error of law by the judge. However, it is rightly conceded that in light of what is said in respect of the appellant's first two grounds, the opposition to the third ground is rendered otiose.

Decision on error of law

- 14.** Having regard to the parties' respective submissions, I am satisfied that the judge materially erred in law in respect of his assessment of the Article 8 claim, both within and without the context of the relevant Rules.
- 15.** It is clear enough to me that the judge did approach the "insurmountable obstacles" and the "unjustifiably harsh consequences"/"exceptional circumstances" issues on the erroneous premise that the appellant's partner could or would remain in the United Kingdom whilst he left. Such a premise plays no part in the assessment under EX.1 of Appendix FM. In so far as the proportionality exercise outside of the Rules is concerned, the separation scenario (as it may be described) was not adequately addressed by the judge. Finally, I conclude that the judge erred by effectively relying on his conclusions under EX.1 when undertaking the proportionality exercise. Given that the assessment of EX.1 is flawed, it follows that the conclusions on proportionality are also unsustainable (a point raised at [26] of the Court of Session's Opinion).
- 16.** There is some merit in the respondent's opposition to the appellant's challenge on the Chikwamba issue, particularly in light of the recent decision of the Upper Tribunal in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC). However, as rightly accepted by the respondent, the success of the appellant's appeal to the Upper Tribunal does not depend upon this point.
- 17.** It follows from the above that the judge's decision is vitiated by errors of law and that it must, in all the circumstances, be set aside.

Disposal

- 18.** Both parties have indicated that the most appropriate course of action would be to remit this appeal to the First-tier Tribunal on the grounds that the significant passage of time since the respondent's refusal of the human rights claim and, importantly, the decision of the First-tier Tribunal, is highly likely to necessitate the production and evaluation of up-to-date evidence.
- 19.** Although remittal is the exception to the rule, having regard to paragraph 7.2 of the Practice Statement and the realistic and sensible views expressed by the parties, I agree that this appeal should be remitted for a complete re-hearing before the First-tier Tribunal.
- 20.** None of the judge's findings shall be preserved. The judge dealing with the remitted appeal and the respondent will, no doubt, be at least cognisant of the fact that the appellant and his partner have previously been regarded as credible witnesses. This does not however, bind the hands of any future judicial fact-finder.
- 21.** In respect of the relevant legal framework, the appellant's Article 8 claim shall be considered both within and without the context of the relevant Rules, having regard to any applicable guidance established by case-law.

Anonymity

22. The First-tier Tribunal made no direction and I have not been asked to adopt a different position. In all circumstances, I make no direction.

Notice of Decision

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

24. I set aside the decision of the First-tier Tribunal.

25. I remit the case to the First-tier Tribunal.

Directions to the First-tier Tribunal

- 1) This appeal is remitted to the First-tier Tribunal for a complete re-hearing, with no preserved findings of fact;**
- 2) The remitted hearing shall not be conducted by First-tier Tribunal Judge A M S Green;**
- 3) The First-tier Tribunal shall issue further case management directions to the parties, as appropriate.**

Signed: H Norton-Taylor
Upper Tribunal Judge Norton-Taylor

Date: 26 May 2020

Notification of appeal rights

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent” is that appearing on the covering letter or covering email