**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-003030

First-tier Tribunal No: LH/00507/2022
HU/52609/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

18th October 2023

**Before**

**UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

**ESTHER KISIWAA OWUSA**
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr E Nicholson, Counsel, instructed by Legal Rights Partnership
For the Respondent: Mr N Wayne, Senior Home Office Presenting Officer

**Heard at Field House on 18 September 2023**

**DECISION AND REASONS**

**Introduction**

1. The appellant is a citizen of Ghana who entered the UK with leave as a spouse. The period of leave was 29 April 2019 to 6 February 2022. On 19 March 2022 she applied for further leave as a spouse.

2. On 14 April 2022 the respondent refused the application on the basis that it did not meet the requirements of paragraph E-LTRP.2.2. of Appendix FM of the Immigration Rules. E-LTRP.2.2. provides, in relevant part, that an applicant must not be in the UK in breach of immigration laws unless either paragraph 39E of the Rules applies or paragraph EX.1. applies.

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3. As the application was made 41 days after the appellant's leave expired the respondent decided that paragraph 39E was not applicable. This is not in dispute.

4. The respondent also decided that paragraph EX.1. was not applicable because there was no evidence that the appellant and her partner would face insurmountable obstacles continuing their relationship in Ghana. It was also not accepted by the respondent that there were any exceptional circumstances.

5. The appellant appealed to the First-tier Tribunal where her appeal came before Judge of the First-tier Tribunal Parkes ("the judge"). In a decision dated 16 November 2023 the judge dismissed the appeal. The judge found that the appellant and her husband gave inconsistent reasons for the delay in applying for further leave as a spouse. The judge noted that the appellant's oral evidence was that she delayed making the application because she had failed an English language test but that she also stated that the failure to apply on time was an oversight. The judge recorded the evidence of the appellant's partner as being that the application was not made on time because of his poor eyesight which meant he could not read to prompt his wife to renew the visa. The judge then found that there would not be insurmountable obstacles to the relationship continuing in Ghana and there was no reason why the appellant would face any particular difficulties upon return to Ghana.

6. In paragraph 17 the judge set out his proportionality assessment under Article 8, stating:

> "The Appellant's obligation is to comply with the Immigration Rules that apply to her. On the Appellant's side of the balance is the evidence that if she applies from Ghana then, with the support of her partner, her application will succeed. There is no evidence to show that applications are taking an unduly lengthy time to process and the evidence does not show that the circumstances the Appellant would face in Ghana would be unduly harsh or that she would face very significant obstacles to reintegration. In the circumstances I find that the Appellant's circumstances do not outweigh the public interest in the application of the Immigration Rules and that it is proportionate for the Appellant to return to Ghana to make the renewed application in the manner required".

7. The appellant is now appealing against this decision.

**The Grounds of Appeal**

8. There are three grounds of appeal.

9. The first ground submits that the judge erred by failing to consider whether the public interest in the appellant's removal was affected by the fact that, were she to apply for entry clearance from Ghana, her application would be successful. In making this submission, the appellant relies on *Chikwamba v SSHD* [2008] UKHL 40.

10. Ground 2 submits that the judge erred in law by failing to take into consideration that the relationship between the appellant and her husband was not a relationship to which only "little weight" could be attached pursuant to section 117B(4)(b) of the 2002 Act, given that the marriage subsisted for several years before the appellant entered the UK. It is also submitted in ground 2 that the judge failed to take into consideration in the proportionality assessment that

the appellant could have avoided overstaying by applying for leave on-time, notwithstanding her inability at that stage to meet the English language requirement. The grounds note that this "theory" was advanced by the judge in paragraph 10 where he stated:

> "The application could have been made with the result outstanding and while it would fail a later pass would improve the Appellant's arguments that there would be no gap in the Appellant's lawful residence"

11. The third ground of appeal submits that the decision contained two incomplete sentences that render the decision, considered as a whole, not intelligible. These are:

    (a) paragraph 2 which states "In this appeal the burden of proof lies on the Appellant. In order to succeed the Appellant must show that the on a balance of probabilities the facts which are relied on"; and

    (b) paragraph 10 which states "That there are 3 explanations suggests that the Appellant simply failed to address the issue, failing the exam was clearly".

12. In considering this appeal I had the benefit of a Rule 24 response from the respondent and a Rule 25 response drafted by Mr Nicholson. I also had the benefit of hearing clear and helpful submissions from both Mr Nicholson and Mr Wayne.

**Ground 1: Failure to consider whether the public interest in the appellant's removal was affected by her meeting the requirements for leave to entry to the UK (the *Chikwamba* argument)**

13. Where it is apparent that a person facing removal would be granted entry to the UK were he to leave the UK and make an application for entry clearance, this may be relevant to the proportionality assessment under Article 8 ECHR. This has been discussed in numerous cases, most recently by the Court of Appeal in *Alam v SSHD* [2023] EWCA Civ 30, where it was confirmed that in all such cases a full analysis of the article 8 claim is necessary.

14. The judge found that the appellant would succeed in an application from outside the UK. In the light of this finding, it was necessary for the judge to consider (a) whether the public interest in effective immigration controls was reduced (and if so to what extent) by the fact that the application from abroad would succeed; and (b) whether the disruption to the appellant's private and family life in the UK as a result of temporary separation to make an application outweighed that public interest.

15. In my view, the judge fell into error by not addressing these questions. There is nothing in the decision indicating that the judge took into account that the public interest in effective immigration controls might be reduced because an application from abroad would succeed. Nor can I discern from the decision that the judge engaged with the question of whether a temporary move to Ghana in order to make an application for entry clearance would be disproportionate. In paragraph 17, which contains the judge's proportionality assessment, the judge found that the appellant would not face unduly harsh circumstances or significant obstacles to reintegration in Ghana. However, the question of whether temporary removal would be disproportionate was not addressed (other than to observe that

there was no evidence of an unduly lengthy time for applications from Ghana). I therefore am persuaded that the judge erred.

16. However, I do not accept that the error is material. There is a public interest in the Immigration Rules being complied with and people not overstaying their visa. The appellant overstayed her visa by over a month. The judge considered the appellant's explanation for this and gave sustainable reasons for finding that the appellant had not given an adequate explanation for overstaying. The public interest in the appellant's removal is not particularly strong; it is significantly less than would be the case if, for example, she had circumvented the Immigration Rules or had a poor immigration history. However, it is nonetheless the case that the public interest in effective immigration controls weighs, to some extent, against the appellant.

17. The appellant's evidence was that her children are in Ghana. It therefore follows that returning to Ghana to make an application would not separate her from her children. She would also have somewhere to reside whilst her application is pending, as she could stay with her children. There was no evidence before the First-tier Tribunal indicating that the appellant's husband would be unable to continue with his life in the UK (working to the same extent he currently works) whilst the appellant is in Ghana, or that he would be unable to visit the appellant whilst the application was pending. There was also no evidence, as the judge observed in paragraph 17, that applications from Ghana are taking an unduly lengthy time to process.

18. I asked Mr Nicholson to draw my attention to any evidence that was before the First-tier Tribunal indicating difficulties that would ensue from the temporary separation of the couple. The only document that he was able to identify was the appellant's application form where she stated, in answer to a question about whether any children are affected by the application, that if the application is refused it will affect her children's support. In answer to a question asking whether there are any other reasons for wanting to stay in the UK the appellant stated "I want to be with my husband".

19. These brief sentences in the application form are not evidence that, on any view, establishes a significant disruption to the appellant's private or family life. There was in fact almost no evidence before the First-tier Tribunal indicating that there would be any substantial negative impact on the appellant, her husband or her children as a consequence of the appellant returning to Ghana to apply for entry. In these circumstances, although the public interest in removing the appellant is relatively low, the lack of evidence on the other side of the scale (demonstrating disruption to the appellant's family and private life) means that, on any legitimate view, based on the evidence before the First-tier Tribunal, the only outcome a judge could reasonably reach was that it would not be disproportionate to expect the appellant to leave the UK to apply for entry clearance. Accordingly, I am satisfied that the error identified in ground 1 is immaterial.

**Ground 2: Little weight under sub-section 117B(4)(b) of the 2002 Act and failing to take into account that leave could have been extended by applying on-time notwithstanding a failure to meet the English language requirement**

20. I am not persuaded that the judge erred by attributing little weight under Section 117B(4)(b) of the 2002 Act to the appellant's relationship with her

husband because the judge did not state that he did so and there is nothing in the decision to indicate that the judge applied only little weight to the relationship.

21. I do not consider the fact that the appellant could have made an in-time application to be a relevant consideration assisting the appellant. The appellant was required to apply to extend her leave by a certain date and did not do so. There is, as explained above, a public interest in applicants complying with the Immigration Rules and the fact that the appellant did not do so means that the public interest in effective immigration controls weighed against her irrespective of whether or not she could have applied in-time by following the route identified by the judge in paragraph 10 of the decision.

**Ground 3: Incoherent reasoning and unintelligibility of the decision**

22. The reasons for the decision are set out in paragraphs 7 to 17. They are clear and leave the reader in no doubt as to why the judge reached the decision he did. In paragraph 2, when setting out the legal framework, the judge ended a sentence at its mid-point. Whilst it is not clear what the judge intended to say in that particular sentence the overall legal framework in paragraphs 2 to 4 is clear and Mr Nicholson did not identify any error in the self-direction.

23. In paragraph 10 the judge also ended a sentence at a mid-point. This results in a lack of clarity as to the judge's concluding comments on the inconsistencies he identified in the evidence about why the application was not made in-time. However, reading paragraph 10 as a whole it is clear that the judge rejected the explanations given by the appellant and her husband because of several inconsistencies and the unclear sentence does not render these reasons unintelligible.

24. I am satisfied that, despite the incomplete sentences in paragraphs 2 and 10, the judge's reasons for the decision are clear and understandable. The carelessness in paragraphs 2 and 10 does not, therefore, give rise to an error of law.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

**D. Sheridan**
Judge of the Upper Tribunal
Immigration and Asylum Chamber
**10.10.2023**