



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000216

First-tier Tribunal No: HU/56487/2021
IA/15363/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 30 August 2024**

Before

**UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE LANDES**

Between

**WILLIES TORTO FAWEL
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Kogulathas (Counsel, instructed by Sterling Lawyers Ltd)
For the Respondent: Ms S McKenzie (Senior Home Office Presenting Officer)

Heard at Field House on 24 July 2024

DECISION AND REASONS

1. This is the remaking, under section 12 (2) (b) (ii) of the Tribunals, Courts and Enforcement Act 2007 of the decision of Judge Fox promulgated on 8 December 2022 allowing the appellant's appeal under s 82 (1) (b) Nationality, Immigration and Asylum Act 2002 against the respondent's decision of 8 October 2021 ("RFRL") to refuse his human rights claim arising from an application of 30 October 2020 for leave to remain as a fiancé. This remaking follows the setting aside of Judge Fox's decision by Upper Tribunal Judge Perkins for material error of law in a decision and reasons issued on 25 April 2024. Upper Tribunal Judge Perkins directed that the appeal be reheard in the Upper Tribunal. His error of law decision is attached in the annex below.

The hearing before us

2. The documents before us and on which we have relied are the bundles of documents which were before the First-Tier tribunal, together with the additional skeleton argument provided for the error of law hearing, and an updated bundle of documents (updated witness statements, a marriage certificate and photographs) which was supplied to us on the morning of the hearing, the respondent having been provided with it earlier and being aware of its contents. We admitted those documents despite the lack of a notice under rule 15 (2A) Tribunal Procedure (Upper Tribunal) Rules 2008 and the fact that they were served very late, as the additional evidence was brief and necessary for us to consider the current position given the hearing before Judge Fox was just over 2 years' ago.
3. We heard evidence from the appellant and his wife. The appellant confirmed the contents of his witness statements and was cross-examined. In summary he explained that he held a bachelor's degree in marketing in Ghana. He had worked in an advertising agency for 5 - 6 years and was about 30 when he left Ghana. He had studied for the first year of a marketing course in France. He had been able to take a gap year, but then he was not able to return to his studies. He thought it might be difficult to get immediate employment if he returned to Ghana because he had left the country for 5 years, but he had not looked at the employment system now. He had no immediate family left in Ghana, as his mother and stepfather lived in France and his siblings in the USA. His stepfather had sold the family home. The appellant had no ties with extended family in Ghana. He explained that he had planned to leave the UK in April 2020 as he had a ticket to go back to France in April, but he could not leave because of lockdown. It was put to him that the exceptional assurance letter he had received was not an extension of his leave and he said that it was an extension until 31 October.
4. The appellant said it would be difficult for himself and his wife to go to Ghana. The cost of everything would mean they could not both live there. He repeated that he had not wanted to flout any laws and it had taken so much away from them, his wife had had to seek counselling and it was going to be a lot of strain on her to move away from England. He was asked what their concerns were given their status was uncertain and he said that they had just wanted to continue their lives, they had been really grateful to be allowed to get married but for 4 years their lives had been on hold. He said they had not thought about going back to Ghana because they thought you could switch as part of coronavirus and that was the main reason they applied. It would be difficult for them both mentally and financially if he had to return to apply for entry clearance; his wife would have to go back to working full-time and they would have to be away from each other for a while, he was not sure with his wife's mental health what she could do.
5. The appellant's wife confirmed the contents of her witness statements and was cross-examined. She was tearful when giving evidence. She said that she had been having counselling for the impact the last 4 years had had and the time it had all taken. That had taken an impact on her and their relationship and now they were married and living together the appellant was a massive emotional help for her. She had found lockdown by herself very difficult and the appellant was a big support for her; she had struggled with work in the past few years and removed herself from social relationships. She said that there were days when she could not get through the day or do activities and she had time off with sickness, if the appellant went back to Ghana, she would not have that emotional support. There were days when she had not wanted to be here because of the

whole process. She did not believe that they could live together in Ghana. Their life was settled in the UK for the last 4 years and she had never lived in any other country, she had her work, their church community and their friendships here. She needed stability now. She was going through face-to-face counselling and she had built a relationship with a counsellor in Nottingham; she was driving an hour to get to the appointments and they were important to her to counteract everything she had had to endure. The appellant did not have any family in Ghana and he had no status to return to France as the process had gone on so long; their whole life was here and they had done everything right and by the law. COVID had happened and it was a really difficult time for everyone; the Home Office had a concession and they had used that concession and applied with integrity.

6. In her submissions Ms McKenzie relied on the RFRL and the respondent's review. She said the decision was correct on the law as it stood at the time. She said the appellant could not meet the requirements of immigration rules. It was important to highlight that the exceptional assurance the appellant was given was not the same as leave and the letter he received told him it was not leave. She referred us to paragraph 39E (5) and F of the immigration rules which explained exceptional assurance. We were taken to the Coronavirus Extension Concession and exceptional assurance concession guidance of 9 April 2024 ("the exceptional assurance guidance") and it was submitted that the appellant was not in a category in which he could switch as he had no lawful leave at that time but rather exceptional assurance which was not lawful presence.
7. When considering whether there were insurmountable obstacles or exceptional circumstances, Ms McKenzie referred us to R (on the application of Agyarko and another) v Secretary of State for the Home Department [2017] UKSC 11. She said that the insurmountable obstacles did not meet the high standard set out in Agyarko. Whilst she did not dispute the appellant's wife's credibility there was no documentary evidence from a qualified medical professional to back up that there were medical concerns; they did not amount to insurmountable obstacles. Whilst she did not deny that the appellant had tried to do what he could to get status, the couple's relationship was still precarious, the appellant had overstayed and he would have to meet the high threshold set out at [70] of Agyarko; a very strong or compelling claim. In addition, there was nothing compelling to indicate the appellant could not return on a temporary basis; we were referred to Younas (section 117B (6) (b); Chikwamba; Zambrano [2020] UKUT 129 (IAC). [86] of that case indicated that there could be a public interest in removal even if a person would be granted entry clearance when applying from abroad; there was a public interest in removal here.
8. Ms Kogulathas relied on both her skeleton arguments. She submitted that there were good reasons why the appellant applied in country. He could not return due to coronavirus and that was not disputed. She submitted that the appellant did meet the terms of the home office concession which allowed him to switch. He could meet the definition of "partner" in immigration rules through meeting the definition of "fiancé ". It was said that the appellant was an overstayer, but the policy said that he would not suffer any detriment and would not be classed as an overstayer. It had taken a year to provide the decision on the application.
9. As far as the public interest was concerned, she submitted that the applications were in good faith and in time and it was understandable why the appellant believed he could switch in country. Both Younas and Alam and another v

Secretary of State for the Home Department [2023] EWCA Civ 30 recognised that the public interest was not a fixity. This case could not be compared with Younas where the appellant had been dishonest in her intentions. In this case the public interest was not strong enough to warrant a departure even temporarily. There would be a separation for at least 6 months so that the appellant could evidence that the financial requirement could be met; this would not be proportionate given the appellant's wife's mental health; she relied on both her husband and counselling to manage her mental health and this was a long period given the delay and given that she had not been doing anything wrong; there were cases where censure was required but this was not one of those cases. The public interest would be outweighed by cumulative factors; there was no reason not to attach weight to the couple's relationship; it was not established when the appellant was in the UK unlawfully and as the appellant was not to be treated as an overstayer policy said that there was no reason not to attach weight to the relationship. There would be instability in the appellant trying to establish himself in Ghana. Bearing in mind that in Lal v Secretary of State for the Home Department [2019] EWCA Civ 1925 the Court of Appeal had said that the sponsor's difficulties with heat could be an insurmountable obstacle, we could accept that taking everything together there would be insurmountable obstacles to the appellant and his wife enjoying family life in Ghana.

10. At the conclusion of the hearing we reserved our decision.

Background including the effect of exceptional assurance and other relevant concessions

11. The appellant is a national of Ghana. He went to France in 2018 for post-graduate study and in due course obtained a French residence card valid until 8 February 2022. In December 2018 he met his now-wife, Ms Jones, online via a dating app. He visited England in January 2019 to meet her and after that they entered into a relationship where the appellant would travel from France on a visit visa and visit Ms Jones regularly.

12. On 16 December 2019, the appellant was issued with a multi visit visa valid until 16 December 2021. The last time he entered the UK on that visa was 24 January 2020 in order to visit Ms Jones. The appellant and Ms Jones did not live together due to their Christian beliefs, so the appellant visited Ms Jones from his friend's address in London whilst Ms Jones remained living at her home in Leicester. During the appellant's visit the COVID-19 pandemic began and the appellant was unable to leave the UK. The relationship between the appellant and Ms Jones deepened and on 20 August 2020, the appellant proposed to Ms Jones and was accepted.

13. We were directed to the terms of the exceptional assurance guidance. We note this guidance is recent (April 2024) and was not in force at the time of decision, but it explains what the respondent intended to do by the various concessions in force during the COVID pandemic. The concessions fell into three time periods:

- (i) 24 January 2020 to 31 July 2020 when by concession the leave of people who were in the UK and whose leave would otherwise have expired was extended to 31 July 2020 (we observe that as the appellant entered in January 2020 as a visitor, his leave would otherwise have expired earlier in July 2020 but was extended to 31 July 2020 by that concession);

- (ii) 1 August – 31 August 2020 when there was a “grace period” to allow individuals time to leave the UK and they would not be subject to the sanctions that applied to overstayers;
- (iii) 1 September 2020 – 28 February 2023 – the Exceptional Assurance concession. Guidance notes that: “Exceptional assurance offered individuals a short-term protection against any adverse action or consequences after their permission had expired, where they were unable to leave the UK due to COVID-19” explaining that it was an assurance given upon successful request to the Home Office which **“did not grant any form of immigration permission to individuals, but instead prevented current or future adverse consequences from overstaying during the period of assurance given”** and “the policy intent was that during a period with exceptional assurance or short-term assurance the holder would not be regarded as an overstayer or suffer any detriment in future applications relating to that period. **Those granted exceptional or short-term assurance were informed they could apply for permission to stay or leave the UK before the expiry of their assurance**” (the highlighting is ours). The guidance also notes that “time between an applicant’s request for exceptional assurance being submitted and it being granted should be considered as if the applicant held exceptional assurance from the date of the request” and “Exceptional Assurance and permission extended by section 3C are distinct. Exceptional assurance provided temporary assurance to people who could not leave the UK due to Covid-19 related travel restrictions or self-isolation. Section 3C is set out in primary legislation and extends current permission where an in-time application is made, and the current permission expires without the application being decided.”

14. According to the immigration history in RFRL, the appellant applied to the respondent for exceptional assurance on 22 September 2020. At the time, despite the appellant’s belief that he was in the country lawfully, he was in fact an overstayer (the grace period described in the paragraph above having ended and he not having applied for 3 weeks or so for exceptional assurance).
15. The appellant was granted exceptional assurance to remain in the UK until 31 October 2020. We quote the letter which was sent to the appellant granting him exceptional assurance.

“CONFIRMATION OF EXCEPTIONAL ASSURANCE

Dear Willies Torto Fawel

Thank you for contacting the Coronavirus Immigration Team.

We have considered the circumstances of your case and can confirm that an exceptional assurance will be provided which will allow you to remain in the UK until 31 October 2020.

If you do require longer and/or are unable to leave the UK by 31 October 2020 you must reapply nearer this date by visiting the website and resubmitting the online form with supporting information.

Your immigration record has been updated to reflect this and you will remain on the same terms and conditions as your previous grant of leave. If the conditions of your previous

grant of leave allowed you to work, study or rent accommodation then you are able to continue on those conditions until the expiry of your assurance as detailed above. Please note that this is not an extension of your leave.

During this time, you will not be regarded as an overstayer or suffer any detriment in any future applications. However, you must make plans to leave the UK prior to the date that your assurance expires. If you do not leave on or before this date, you will be classed as an overstayer.

Please continue to check the GOV.UK webpages, as this is where updated advice, including updates on the extension period will be published.....”

16. Reading it closely, although the appellant was told in the fourth paragraph that he would remain on the same terms and conditions as his previous grant of leave (in this case, as a visitor), he was also told that this was not an extension of his leave and although during the time of the assurance he would not be regarded as an overstayer, or suffer any detriment in future applications, he would be classed as an overstayer if he did not leave the UK on or before the date his assurance expired.
17. Paragraph 39E immigration rules (as amended with effect from April 2024) (HC590) sets out the exceptions for overstayers (i.e. where a person will not be treated as if they were an overstayer). By the terms of paragraph 39E (5) a person will not be treated as an overstayer if the period of overstaying is between 1 September 2020 and 28 February 2023 and is covered by an exceptional assurance, defined at 39 F as a written notice given to a person by the Home Office, stating that they would not be considered an overstayer for the period specified in the notice. However, at the date of RFRL, 39 E (5) and 39 F were not part of immigration rules, and the only COVID-related exception for overstaying was in 39E (3) where the period of overstaying was between 24 January and 31 August 2020.
18. We can see that the appellant might have assumed by being told as guidance says that he could apply for permission to stay before his assurance expired, firstly that he would not suffer any adverse consequences by so doing and secondly that he did not have to apply for further exceptional assurance in addition to permission to stay, but as exceptional assurance was not an extension of leave he did not have the benefit of section 3C leave, that is the statutory extension of leave under section 3C (2) Immigration Act 1971, which extends leave when an application is made during the currency of leave, but leave expires without the application being decided.
19. On 30 October 2020, the appellant applied for leave to remain as a fiancé. He explained in his witness statement that he had researched the position on the Gov.uk website and discovered that people in his position would be granted special dispensation to switch from a visit visa to a fiancé visa within the UK. His solicitors wrote to the respondent by letter of 18 November 2020 enclosing relevant documents and saying *“this application is being made in respect of the Home Office coronavirus concessions which enables the applicant to vary his leave to remain as a visitor to that of a fiancé, in country, as the applicant was*

unable to return to his home country or France due to the Covid-19 pandemic". They explained that the appellant was applying for a "six month fiancé visa."

20. In fact, the appellant and his solicitors were wrong about the appellant being able to apply successfully in country but this is because at the time of application the appellant was not in the UK with visitor leave continued under section 3C but only under the protection of the exceptional assurance as we explain below.
21. There were provisions for in-country application for those who would, in normal times, have had to return to their home countries to make the desired application. The exceptional assurance guidance provides a link to the archived guidance in force on 9 June 2020 "Covid-19 advice for UK visa applicants and temporary UK residents" which explains that "you can apply from the UK to switch to a long-term UK visa until 31 July 2020 if your leave expires between 24 January 2020 and 31 July 2020." That archived guidance sets out a timeline which we have followed to find the guidance in place when the appellant made his application on 30 October 2020. It was the guidance in force on 16 October 2020 and under the heading "if you intend to stay in the UK" it says "if you decide to stay in the UK you should apply for the necessary leave to remain in the UK. You'll also be able to submit an application form from within the UK where you would usually need to apply for a visa from your home country. You'll need to meet the requirements of the route you are applying for and pay the UK application fee....". Confusingly under the heading "if your leave expires after 31 August 2020" it also states "you can submit an application form from within the UK where you would usually need to apply for a visa from your home country. You'll need to show your application is urgent...you'll need to pay the fees and meet all requirements of your visa as normal, except the need to submit the application in your home country. This is being kept under review." In other words at the time the appellant applied the advice was still that you could, at least in certain circumstances, apply for a visa from within the UK on routes where you would normally have to apply outside the UK. We can see why the appellant might have assumed that if he applied for a visa as a fiancé, he would be assessed on the same basis as someone who was applying from outside the UK.
22. We were directed by Ms Kogulathas to the terms of the Family Policy – Family life (as a partner or parent) and exceptional circumstances of 17 May 2024 which at p 83 set out the terms of the coronavirus concession as it related to in-country applications. The policy explained that ordinarily there was no flexibility in respect of allowing immigration status requirements to be met. The relevant part states:

"Ordinarily, there is no flexibility for you to exercise discretion in allowing lawful immigration status and continuous residence eligibility requirements to be met. However you may exercise discretion to allow an applicant to stay on (extend – apply for further leave) or complete a route to settlement despite them having a short period without leave, where it is shown that they were not able to travel or apply due to COVID-19 between 1 March and 31 August 2020.

Any visitor whose period of leave expired after 31 August 2020 was still allowed to make their application from within the UK on a limited, case by case basis until 30 June 2021. We expected applicants to prove that their application was urgent at the time it was submitted or for them to provide a valid reason why they could not apply from outside the UK as a result of COVID-19 on that date. Visitors were no longer able to make in country applications after 30 June 2021".
23. The appellant did not therefore meet the immigration status requirements of immigration rules (before the application of EX.1 is considered) but it was not

because he was in the UK as a visitor at the date of decision (see E-LTRP 2.1) which states that the applicant must not be in the UK as a visitor), but rather that he was, at the time the decision was taken, an overstayer (see E-LTRP 2.2 (b)).

24. The respondent refused the appellant's application by RFRL of 8 October 2021. The respondent accepted that the appellant met the suitability, eligibility financial requirement and eligibility English language requirement. However it was not accepted that the appellant met the eligibility relationship requirements because the appellant and his partner had not been living together for the 2 years prior to application; consideration had been given to the application as a fiancé and it was noted that the appellant had presented a letter from his minister saying that the couple planned to get married in the early months of 2022 but no evidence of firm plans for the wedding had been provided. It was therefore not accepted that the appellant met the definition of "partner" within immigration rules.
25. The respondent also did not accept that the appellant met the eligibility immigration status requirement, but, confusingly, and apparently contrary to the policy, stated it was because he was currently in the UK with leave as a visitor. However, RFRL continued:

"If your leave expires before 30 June 2021, you can make your application from inside the UK where you would usually need to apply for a visa from your home country if either one of the following applies to you:

Your application is urgent, for example if you have a family emergency and cannot apply from outside the UK.

You cannot apply from outside the UK due to Coronavirus.

Travel is currently open to that country and you should seek guidance from the Government of that country prior to travel

You have not demonstrated that you meet either of the above requirements and as such do not meet E-LTRP.2.1."

26. It is not clear why the writer of RFRL went on to consider EX.1 given the finding that the appellant did not meet the eligibility immigration status requirement because he was in the UK with leave as a visitor. Contrary to the conclusions in the earlier part of the letter about the relationship, the writer explained that *"it is accepted that you have a qualifying relationship contained within EX.1"*. However it was said there was no evidence of insurmountable obstacles in continuing family life in the country of which the appellant was a national, so EX.1 did not apply, there would be no very significant obstacles to the appellant's integration into the country of which he was a national, and there were no exceptional circumstances, all parties should have been aware of the possibility that family life might not be able to be continued in the UK.
27. The appellant appealed that decision. Judge Fox was satisfied that the couple were in a durable relationship and had the intention to marry [22], the respondent had taken no issue with the language, financial or accommodation and maintenance requirements and neither did he [23] and that the appellant could not at the relevant time have left the UK to return to Ghana and/or France and make an application out of country [24]. He considered that discretion should have been applied and the application allowed, and that the respondent's decision was not in accordance with immigration rules. As can be seen from Upper Tribunal Judge Perkins' error of law decision, the appellant did not meet

the requirements of immigration rules and the judge should have conducted a proportionality exercise.

28. The appellant and Ms Jones married on 22 June 2024 in a registry office after their marriage had been referred to the respondent and the respondent had not sought to investigate the marriage.

Discussion and analysis

Meeting immigration rules?

29. We are satisfied that the interference with family and private life which the decision causes is sufficient to engage Article 8 ECHR. The effect of the decision is that either the appellant and his wife who have family life together will be separated, or there will be significant interference with the private life of the appellant's wife as she, a British citizen who has lived all her life in the UK, will have to leave the UK to be with the appellant.
30. It was not suggested to us that the appellant could meet the private life requirements of immigration rules. Although the appellant will have some difficulty returning to Ghana (which we discuss below), he was born and educated in Ghana and lived and worked there until 2018, not leaving Ghana until he was about 30. There may be obstacles to his integration, but it could not be said that they would be very significant.
31. So far as family life is concerned, at the date of application and the date of decision "partner" for the purposes of Appendix FM was defined as the applicant's spouse, civil partner, fiancé(e) or proposed civil partner or a person who has been living together with the applicant in a relationship akin to marriage or civil partnership for at least two years prior to the date of application (GEN 1.2). The couple were not living together due to their religious beliefs indeed they had not been in a relationship for two years at the date of the application. Whilst they were fiancés (again as Judge Fox found see above), the relationship requirements for in-country applications, E-LTRP 1.12, provided that the applicant's partner could not be the applicant's fiancée or proposed civil partner unless the applicant was granted entry clearance as such.
32. However the appellant is now a partner within the meaning of immigration rules, now being married, so we have considered whether the EX.1 "insurmountable obstacles" test could be met.
33. The relevant part of the "insurmountable obstacles" test is set out at EX.1 (b) of Appendix FM

"EX.1 This paragraph applies if

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen...and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2 For the purposes of paragraph EX.1. (b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

34. It is apparent from Agyarko at [44] that the expression “insurmountable obstacles” in immigration rules is intended to mean and must be taken to mean the same as in the Strasbourg case law.
35. We are not satisfied on the evidence that there would be insurmountable obstacles to family life continuing in Ghana. It would be difficult for the appellant to return to Ghana as he has no family members there with whom he is in contact and no family home, but he worked in Ghana in a professional job and he has post-degree level education, his wife still has some savings and a property she owns in the UK, so the appellant and his wife would not be destitute before the appellant found employment again to support them. The appellant’s wife appears fragile. We do not doubt that she has found lockdown and the past few years very stressful and that this has had an impact on her mental health to the extent that she has sought help through counselling. However, the appellant is her main emotional support and we see no reason why she would not be able to continue her counselling from Ghana, even though it would have to take place remotely. We appreciate that it would be difficult for her in a fragile mental state to leave her friends and relations and the church which is her support, to start a new life in a new country, but she would be with the appellant and we have no medical evidence to the effect that moving would have a very detrimental effect on her mental health.
36. We appreciate from the case of Lal that the appellant’s wife’s mental fragility could in principle amount to an insurmountable obstacle but on the limited evidence we have we are not satisfied that the difficulties she would face, coupled with the difficulties the appellant would have in starting again together are very significant difficulties which could not be overcome or would entail very serious hardship. We underline very, because the test to meet is a stringent one, see Agyarko at [43]; we do not doubt that hardship would be caused.
37. We find that the appellant does not meet the requirements of immigration rules.

The proportionality balance

38. As explained in Agyarko [60] “the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test”. At [57] the Supreme Court said:
- “The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.”
39. The Supreme Court explained that the public interest was not a fixity. If someone was in the UK unlawfully or was entitled to remain in the UK only temporarily, the significance of that depended on what the outcome of immigration control might otherwise be. They gave examples [51]. They also considered that the cogency of the public interest in the removal of a person living in the UK unlawfully was liable to diminish, or looked at the other way, the weight to be given to precarious family life was likely to increase, if there was a protracted delay in the enforcement of immigration control [52]. They referred to EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] AC 1159 at [15] and [37] and to Jeunesse v the Netherlands [2015] 60 EHRR 17.

40. They concluded at [53] when considering precariousness and the public interest that the case law of the European Court of Human Rights referred to: “the persons concerned being aware that the persistence of family life in the host state would be precarious from the outset (as in Jeunesse, para 108). One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.”
41. Under section 117A of the Nationality, Immigration and Asylum Act 2002, when determining whether a decision would be unlawful on the basis that it breaches the right to respect for private and family life, when considering the question whether an interference with a person’s right to respect for private and family life is justified under Article 8(2), we must have regard in particular to the considerations listed in section 117B.
42. The potentially relevant considerations under section 117B in this case are as follows:
- “(1) The maintenance of effective immigration controls is in the public interest.
 (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English...
 (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent...
 (4) Little weight should be given to – (a) a private life, or (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully....
 (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.”
43. When considering the strength of the public interest, i.e. the public interest in the maintenance of effective immigration controls, we bear in mind that the appellant does not meet the requirements of immigration rules. He is now in fact an overstayer and as we explained above at the time he applied he could not meet the definition of “partner” because he was a fiancé applying in-country.
44. Nevertheless, we consider it significant that the appellant and his wife at all times believed that they were acting in accordance with immigration rules and concessions. The appellant wanted to marry his now wife and remain in the country lawfully. It would normally have been perfectly right to expect the appellant to leave the UK and apply for a fiancé visa from France or Ghana. However, there was a pandemic. It has been found that at the relevant time he could not leave the country to apply, and he was doing his best to find a way to remain in the UK lawfully for the purposes of marriage. We accept he believed he could do this. We have explained that he was as a matter of law wrong, but we find it significant that the concessions and policies were fluid and the position might not have been clear. We understand why the appellant might have thought he was able to do what he did. The terms of the letter from the appellant’s solicitors suggest that they thought he was entitled to apply successfully under the relevant policies and concessions, the writer of RFRL clearly thought that in principle he was entitled to apply (as he did not succeed because the writer considered he was not a fiancé and he could leave the country) and Judge Fox thought he came within the relevant policies and concessions. We have struggled to work out the effect of the policies. It must also be remembered that the pandemic and the time the appellant applied was a very worrying time. The

situation was changing rapidly. After the lifting of the first lockdown when things had seemed to start to get back to normal over the summer of 2020, there were further lockdowns and restrictions.

45. We observe that with the benefit of hindsight, what the appellant should have done was keep applying for conditional assurances until he was able to leave the UK and possibly seek to marry his wife in the meanwhile (if of course the ceremonies were possible due to COVID and noting that the marriage would have been referred to the respondent for potential investigation) and then return to France or Ghana and seek entry clearance as either a fiancé or as a spouse. If he had done this then we are satisfied he would have succeeded in gaining entry clearance long before now given the satisfaction of the writer of RFRL and Judge Fox that the other requirements of immigration rules were met.
46. We appreciate that normally a mistaken belief is no answer to the strength of the public interest as people are expected to know the law and be aware that visitors cannot switch categories or that overstayers will either not succeed or have to meet more stringent tests. But as we have explained above, these were unusual, confusing and rapidly changing times which are unlikely to be replicated. We note that in Agyarko it was said that a less stringent approach might be appropriate in circumstances where people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK (see para [40] above). In the case of Birch (Precariousness and mistake; new matters) [2020] UKUT 86 (IAC) a panel consisting of the then President and Vice-President held that the observations about a person's misapprehension at [53] of Agyarko, were capable of being applicable also to a person who had no leave.
47. We consider that in the circumstances we have outlined the public interest in the maintenance of effective immigration controls in the sense of maintaining immigration rules is reduced. We were referred to the case of Younas but we consider this appeal to be entirely different; in that case the appellant had been deceptive when entering as a visitor when she intended to settle in the UK; in this case the appellant had intended to return to France in April 2020 but was unable to leave because of the pandemic and tried to do what he could to regularise his stay.
48. When adopting a balance sheet approach, we consider there are no additional factors to weigh in the public interest side of the balance. The appellant speaks English and the couple are financially independent. At the time it was accepted that the financial requirements of immigration rules were met. The financial requirements of immigration rules have recently increased but we are satisfied on the balance of probabilities that with the support of the appellant and the stability that his being able to remain with her in the UK would bring, the appellant's wife would be able to return to working full-time; the appellant is also keen to work and is capable of working at a level which by itself would satisfy the requirements of the rules; the appellant's wife also still has considerable savings.
49. When considering factors in the appellant's favour, we consider the weight to give to the appellant and his wife's family life. Family life was begun when the appellant was a visitor and so had precarious status. It has continued to develop over the years when the appellant was an overstayer albeit he did not intend or appreciate he had that status. We have had regard to giving little weight to family life in accordance with s 117B (4) of the 2002 Act because of the time the appellant has been an overstayer, but for the reasons we explain we do give weight to family life. As we have said it was begun when the appellant was in the

UK legally and he subsequently was not able to leave due to the pandemic but applied during that time to regularise his stay. This is not a case where an appellant has been an overstayer for many years before making an application. We appreciate that the family life of the couple has always been precarious, as the appellant has had at best visitor leave to remain in the UK, but we consider family life has strengthened during the lengthy time the case has taken to come to a conclusion, the time it has taken being no fault of the appellant or his wife. We note that the appellant did not return to his course in France and let his residence permit expire so that he could remain in the UK with his now wife. It is similar to the relevance of delay in the decision-making process in the second sense described in EB (Kosovo), that as months become years and year succeeds year, the sense of impermanence that a couple feel begins to fade. We consider that they have a strong family life in the UK and we give weight to that family life.

50. We also take account when weighing the balance of the difficulties the appellant's wife, a British citizen, will face continuing family life in Ghana. We are not satisfied on the evidence that there are insurmountable obstacles, but as we have explained there are still obstacles and difficulties.
51. We give only little weight to the appellant's private life in the UK bearing in mind his status.
52. In conclusion we consider that the reduced public interest we have outlined is outweighed by the appellant and his wife's strong family life. In the exceptional circumstances of this case where the couple became engaged during the pandemic when the appellant could not leave the UK, we conclude that removal consequent on the decision would result in unjustifiably harsh consequences for the appellant and his wife such that it is disproportionate and breaches Article 8 ECHR.

Notice of Decision

The appeal is allowed.

A-R Landes

Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 August 2024

Annex (error of law decision)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000216
First-tier Tribunal Nos: HU/56487/2021
IA/15363/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
25/04/2024

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

The Secretary of State for the Home Department

Appellant

and

Willies Torto Fawel
(no anonymity order made)

Respondent

Representation:

For the Appellant: Mr E Terrell, Senior Home Office Presenting Officer
For the Respondent: Ms A Kogulathos, Legal Representative from Sterling Law

Heard at Field House on 8 August 2023

REASONS FOR FINDING ERROR OF LAW

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter “the claimant”, against the decision of the Secretary of State on 8 October 2021 refusing him leave to remain on human rights grounds.

2. In the extreme summary outline for the purposes of introduction, it is the claimant’s case that he entered the United Kingdom lawfully as a visitor and developed a relationship with a woman he intended to marry but they did not cohabit. It is also a feature of the case that the Rules, broadly, do not permit a person who has entered the United Kingdom as a visitor to be allowed to remain as a (in this case) husband but require the visitor to leave the United Kingdom and seek permission to return as a husband. A visitor who wishes to remain lawfully as a husband can apply for leave on human rights grounds, as the claimant has done here, but such applications face the formidable, but not always insurmountable obstacle of not complying with the rules.

3. In order to understand this appeal further I want to look carefully at the Secretary of State reasons for refusing the human rights claim. This notes that the claimant entered the United Kingdom as a visitor on 23 December 2019 with leave to remain

until 23 June 2020. He proposed marriage to his fiancée in August 2020 and on 22 September 2020 applied for “CV assurance” to 31 October 2020 on the basis that he could not travel to Paris because of COVID restrictions. On 30 October 2020 he applied as an unmarried partner.

4. The refusal letter shows that the claimant was regarded as “suitable” but not “eligible”. The point taken is that the claimant’s fiancée was not a “partner” within the meaning of GEN.1.2 of Appendix FM. They were not married and had not been living together in a relationship akin to marriage for at least two years prior to the date of application. The Secretary of State also noted there were no firm plans for a wedding. Additionally, the claimant was not eligible because he was currently in the United Kingdom with leave as a visitor and such a person is not permitted under the Immigration Rules to apply for leave as husband from with the United Kingdom.

5. However, the same letter made plain that there were two recognised exceptions. The first is a case of urgency and the second is “You cannot apply from outside the UK due to Coronavirus.” However, it was the Secretary of State’s view that travel was open to Ghana and he should go to Ghana to make his application. I take it that “Ghana” is the country intended by the words “that country” in the refusal letter (page 36 in bundle).

6. It was noted expressly that the claimant did meet the eligibility requirements relating to finance and command of the English language.

7. The Secretary of State expressly considered exceptions to the ordinary requirements of Appendix FM. The claimant did not come within EX.1 because there was not a qualifying relationship. Neither did he come within EX.2 because there were not “very significant difficulties” which will be faced by “you or your partner in continuing your family life together outside the UK in the country of which you are a national”. The Secretary of State then considered “private life” as if it were something completely separate from family life but found that the claimant did not qualify. He did not live in the United Kingdom for long enough to satisfy the rules. The Secretary of State looked for but not find any exceptional circumstances. There are no children and there would be no unjustifiably harsh consequences of the decision. The letter continues (page 38):

“You commenced your relationship in the knowledge that your immigration status in the UK was not settled and continued that relationship. You had no legitimate expectation to remain here indefinitely. Therefore from the outset, all parties should have been aware of the possibility that family life might not be able to continue in the UK.”

8. The letter explained that there was a right of appeal, which the claimant exercised.

9. I consider now the Decision and Reasons of the First-tier Tribunal dated 8 December 2022. This shows that it was the claimant’s case that he travelled from Ghana to France in February 2018 in order to study. In December 2018 through the agencies of a “dating app” he made contact with a woman who is now his fiancée. They met for the first time on a visit to the United Kingdom in January 2019 in London. Their relationship developed.

10. In January 2020 he entered the United Kingdom as a visitor and stayed with a friend. The judge found that they “elected not to live together due to their Christian beliefs”. Coronavirus restrictions were imposed and the claimant extended his visit

visa until 31 October 2020 relying on Exceptional Assurance. At that time he could return neither to Ghana nor France because of restrictions.

11. On 9 August 2020 he travelled to Leicester. He discussed marriage with his fiancée's family. There was some religious ceremony where a pastor "blessed their ring" and they began planning how they might marry. It was claimant's case that because he had been granted Exceptional Assurance, he would be able to switch categories from visitor to fiancé.

12. On 30 October 2020 he made his visa application online leading to the decision complained of.

13. At paragraph 19 of the Decision and Reasons the judge considers the policy entitled "Guidance Coronavirus (COVID-19)" and the judge considers particularly a paragraph dealing with a fiancé whose wedding has not been able to go ahead because of COVID-19. The implication is that Covid restrictions might be a very good reason for extending leave beyond the six months normally allowed for a people who are engaged to marry. It does not seem to have any direct or even indirect relevance here.

14. The judge then noted that there was confirmation of exceptional assurance and the judge set out the terms of the letter dated 15 October 2020. This shows that the claimant would be allowed to remain in the United Kingdom until 31 October 2020 (barely a fortnight after the letter was written) and then explained what to do if he needed more time. The letter spelt out that the claimant's leave permitted him to "remain on the same terms and conditions as your previous grant of leave" and asserted in terms that it was "not an extension of your leave". However, he was reassured that he would not be regarded as an overstayer or suffer detriment by having remained in the United Kingdom.

15. At paragraph 21 the judge says:

"In submissions on behalf of the [Secretary of State], it was submitted, only, that the [claimant] could have given consideration to returning to Ghana but did not. There is no admission that at the time of the application that the [claimant] was unable to travel out of the UK owing to the coronavirus restrictions. The [Secretary of State] accepts that she has a discretion which can only be applied on a case to case basis but gives no detail on why such consideration could not have applied to this [claimant]."

16. The judge reminded himself that the claimant, on his findings, was in a durable relationship and did meet the language and financial requirements. The judge found at paragraph 24:

"Taking account of **Beoku-Betts** I accept that it would be unreasonable to expect the [claimant] to leave the UK when he could not due to coronavirus restrictions, so as to return to Ghana and/or France and make a fresh application. I consider that the relevant part of his Exceptional Assurance letter is: - '*During this time, you will not be regarded as an overstayer or suffer any detriment in any future applications*'. I note that there is no specific reference to circumstances that would be similar to what this [claimant] encountered as a result of the restrictions imposed upon him. He could not make an application from out of the country. [Secretary of States] are silent on why discretion could not be applied in his case."

17. At paragraph 25 the judge said, “Discretion should have been applied and the application allowed.”

18. I set out below paragraphs 26 and 27. The judge said:

“26. In regard to the claim for meeting exceptional circumstances that would engage Article 8 ECHR, none had been identified to me.

27. On the totality of the evidence before me, I find the [claimant] has discharged the burden of proof and reasons given by the [claimant] do not justify the refusal. Therefore, the [Secretary of State’s] decision is not in accordance with the applicable Immigration Rules.”

19. The judge then allowed the appeal.

20. Understandably this prompted an appeal from the Secretary of State. Permission was granted by Upper Tribunal Judge Blundell who said:

“It is arguable that the judge failed to take the Immigration Rules as the starting point for his assessment of the appellant’s human rights claim, and that he failed to undertake any meaningful analysis of proportionality.”

21. Permission had been refused by the First-tier Tribunal. The First-tier Judge refusing permission said:

“Although a proportionality exercise was not expressly set out, the basis upon which the appeal was allowed is clear and the judge was entitled to adopt the approach taken. The [Secretary of State] appears to miss out the key consideration that, at the time of application (the material juncture for the rules including any associated concession), she herself accepted that the [claimant] could not return to Ghana.”

22. In a sense the First-tier Tribunal’s reasons for refusing permission to appeal are irrelevant, but it is, I find, significant that the reasons for refusing the Secretary of State permission to appeal was, essentially, that the judge had not explained his decision but it could be inferred.

23. Mr Terrell argued that that was not permissible and although I reflected on Ms Kogalathos’ submissions, I find that the decision is clearly unsustainable.

24. The judge further purported to allow the appeal because it was not in accordance with the Immigration Rules. The main relevance of the Rules in an Article 8 balancing exercise is the extent to which they illuminate the public interest. It is quite clear that this claimant did not meet the requirements of the Rules because he was in the United Kingdom when he applied for leave as a fiancé.

25. Further, the judge’s approach to policy is clearly wrong. It is not for the judge to exercise discretion on behalf of the Secretary of State. Where there is discretion, it is for the Secretary of State to make a decision. Very occasionally discretion could only be exercised in one way and in those circumstances there is authority to suggest that it is permissible for the judge to make a finding as if it was the judge’s power to exercise discretion because it can go no other way. Such cases are rare and unlikely to produce jurisprudence because whatever the strict legal position might be, it would be a hollow argument by the Secretary of State to object to the judge doing what the Secretary of State would have to do. That is not what has happened here. The

judge's evaluation is, frankly, rather confusing and does not show proper regard for the public interest or proper Article 8 balancing exercise.

26. There is not a clear finding that the appellant genuinely believed that he was not required to the country to make an application. It is hard to see why that would be his opinion. Exceptional assurance is clearly a shield not a sword.

27. I have looked at the Rule 24 notice prepared by the claimant's solicitors. This adopts the approach suggested by the First-tier Tribunal Judge that the meaning was plain and should be read into the decision. It asserted that the claimant can meet the private life Rules but I do not follow that.

28. The Rule 24 notice referred to Section 117B(1) of part 5A of the Nationality, Immigration and Asylum Act 2002 but that simply says the maintenance of effective immigration control is in the public interest. It is conceivable that the judge might have allowed the appeal but the explanation offered is not one for saying how the public interest is overtaken by certain events but a decision to allow the appeal because it was not in accordance with the Rules when it really was. I cannot leave the decision undisturbed.

29. I then have to decide if it is responsible to deal with the appeal without a further hearing and in my judgment it is not.

30. The claimant has taken advantage of the opportunity of setting out clearly why he wants to assert that he is entitled on human rights grounds to remain, notwithstanding the Rules but that needs to be tested and investigated.

31. For my part any honest belief that he was entitled to apply "in country" is very far from determinative.

32. In the circumstances, I find the decision should be set aside and the appeal should be heard again. I decided he could remain in the Upper Tribunal. A possible reason for this is that the definition of "partner" was relaxed in the beginning of January of this year in a way that might assist the claimant, but that is an observation not a ruling but it explains one of my reasons for keeping the case in the Upper Tribunal where the new Rule, if relevant, can be considered.

Notice of Decision

33. The First-tier Tribunal erred in-law and I set aside its decision and direct the case be heard again in the Upper Tribunal, ideally before me.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 April 2024