



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16050/2016

THE IMMIGRATION ACTS

Heard at Field House
Oral determination given following hearing
On 10 October 2018

Decision & Reasons Promulgated
On 6 December 2018

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

REBECCA [G]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Bexson
For the Respondent: Mr D Clarke

DECISION AND REASONS

1. The appellant in this case is a national of Ghana who was born on 25 November 1953 so she is will soon be 65. Having come to this country in April 2001 she has currently been here over seventeen years.
2. The appellant in her first witness statement set out the circumstances in which she came and the reasons why she never returned at the end of her leave which she ought to have done. What she says about this is that she had been to this country

before but returned in 2001 in order to seek financial help from her brother-in-law who lived in the UK to support her children; she was unable to obtain this and there were apparently disagreements with her family in Ghana because by custom after her first husband had died she had been expected to marry another person within that family but she had refused to do so. Having been left without financial support she felt she had no option other than to remain in this country.

3. There is of course a large public interest in enforcing immigration control and that includes making it clear that people such as the appellant who have no right to remain in this country do not assume that they can just flout the Immigration Rules and remain when they have no right to do so. However she did remain and after having been in this country for two years or so in 2003 she met Mr [K]; she saw him regularly and they formed a relationship which culminated in them moving in together in 2005. They married in 2012.
4. The respondent does not suggest that this is other than a genuine long-term permanent relationship or that the couple do not care for each other. I add for the purposes of completeness as to this aspect of the case that having heard both the appellant and her husband give evidence I find that this is a genuine and subsisting relationship.
5. The appellant made some attempts to obtain leave to remain which were unsuccessful but then in March 2016 she applied again for leave to remain based on her family life with her husband under Article 8. That application was refused and her appeal against this refusal was dismissed by First-tier Tribunal Judge R G Walters in a decision which was promulgated on 19 January 2018. The appellant appealed against this decision and was granted permission by Upper Tribunal Judge Perkins who noted that the judge appeared to have ignored medical evidence which was contained within the file.
6. The case then came before me and at an error of law hearing the respondent did not contest that as Judge Perkins had indicated Judge Walters had indeed made a material error of law by ignoring the medical evidence. It is for this reason that the appeal has now been relisted before me in the Upper Tribunal so that a fresh decision can be made.
7. I gave directions on the last occasion as to further evidence which could usefully be served but the appellant has not been well served by her solicitors, although I stress that none of the fault lies with Counsel who has represented her at this hearing. It appears that although some instructions were given by the appellant to her solicitors and material provided as well, this was not forwarded to Counsel or put in as evidence. In particular there was evidence relating to the cost of medication which the appellant's husband would require which was only put before the Tribunal today after I had allowed a brief adjournment for this information to be forwarded from the appellant's solicitors who had had it for some considerable period of time.

8. Also although such evidence would have been helpful to the appellant no evidence was put before the Tribunal as to the cost of the medical treatment in Ghana which Mr [K] would require if he was to move to that country, the sole income of the couple being just under £1,000 a month from Mr [K]'s pension. Accordingly this Tribunal has to do the best it can on the limited evidence available.
9. The basis of the appellant's case is that, having regard to paragraphs EX.1 and EX.2 of Appendix FM of the Rules, there would be insurmountable obstacles to the appellant's family life with her husband continuing were they both to return to Ghana and that accordingly in these circumstances she should succeed under the Rules. Insofar as the claim is based on Article 8 outside the Rules, I would of course have to have regard as the decision maker to what is set out within Section 117B(4) of the Nationality, Immigration and Asylum Act 2002 (inserted by the Immigration Act 2014) whereby it is provided (at 117B(4)(b)) that little weight should be given to the relationship between the appellant and her husband because it was "established ... at a time when [the appellant was] in the United Kingdom unlawfully".
10. Also, by paragraphs 117B(4) and (5) I would have to give little weight to the private life established by the appellant in this country during this time because it was established both when she was in this country unlawfully and also when obviously her immigration status was precarious.
11. What is an "insurmountable obstacle" is defined within paragraph EX.2 of Appendix FM as meaning "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". As was made clear by the Supreme Court in the recently decided decision in *Agyarko and Ikuga* [2017] UKSC 11 this is a high hurdle to be overcome.
12. As the Supreme Court in that decision made clear at paragraph 43, the words "insurmountable obstacles" have to be considered on the basis that the decision maker has to ask itself "whether the family could 'realistically' be expected to move". Accordingly, as the decision maker I now have to consider whether or not this couple could in light of all the evidence which is now before the Tribunal "realistically" be expected to move. This Tribunal has to ask itself whether or not such difficulties as there may be, first of all would be very significant and if so whether they could not be overcome without very serious hardship for either the appellant or her husband.
13. As I have already noted it would have been of great assistance if this Tribunal had had before it better evidence relating to the difficulties both of access to medical treatment which the appellant's husband will require (to which I will return in a moment) and also to the cost of this treatment.
14. Mr Clarke on behalf of the respondent very properly submits (even though I do not for reasons which follow wholly accept these submissions) that in the absence of evidence as to what such treatment would cost the court cannot assume that this couple could not afford such treatment as would be required and could not assume

that the pension (of under £1,000 a month), which is what the family's income would be, would be insufficient to meet the costs of such treatment as would be required in a poor country such as Ghana.

15. On behalf of the appellant, Ms Bexson submits that there would be difficulties which are apparent from the (admittedly now very out of date) US State Department Report of 2010 which demonstrates that within Ghana healthcare is both difficult to access and not available freely. Certainly, even though the medical reports are out of date, it is clear that Mr [K] would not be entitled to free medical care in Ghana and not all medical care is readily available, although as I have said there is insufficient evidence before the Tribunal to enable the Tribunal to make a precise finding as to the extent to which such medical care as might be necessary would be available or what it would cost.
16. Having this background in mind I turn now to consider the medical health of the appellant's husband which is the key factor in this case. Mr [K] is a 76 year old gentleman who is a British citizen and although of Ghanaian extraction has lived in this country for nearly 50 years. He was a teacher and during the course of evidence spoke with some passion and pride as to his previous career in which he had taught geography at a state school to O level students; he informed the Tribunal that the results he obtained for his students have not been bettered by subsequent teachers. I have no reason to doubt other than that the appellant's husband has been of great value to the community whose children he has served.
17. Although 76 should not these days be assumed to be "old" and there are many people of that age who are in robust health unfortunately Mr [K] is not one of them. There is medical evidence before the Tribunal which although not necessarily as full as it might be is nonetheless sufficient for this Tribunal to be able to conclude that Mr [K]'s condition might be properly described as frail. Among other ailments he suffers from chronic kidney disease, he has a deteriorating renal function, type 2 diabetes, hypertension, angina, dyslipidaemia, sickle cell anaemia, sickle cell trait, cellulitis and an enlarged prostate. He also told me in evidence and I entirely accept that he has lost the sight in his right eye and now has difficulties with his left eye as well. In addition he has severe hip problems. He is very well served as is his entitlement by the National Health Service in this country and has a continuity of care which is of great assistance to him. It is hardly surprising given the ailments that he has that he also suffers from hypertension and some depression.
18. The most recent medical evidence is from his GP, Dr Ahmed, dated 20 September 2018 who states that Mr [K] is "on regular treatment and attends follow up clinic for his diabetes and hypertension review". He also notes that for the last two years Mr [K]'s health "is rapidly deteriorating and mentally he is much stressed". He refers to his chronic kidney disease "due to diabetes and vascular disease" and also refers to his arthritis of both hip joints, as well as low back pain. Mr [K] is reviewed by physiotherapists as well and is under regular treatment for his enlarged prostate. He has persistent dizziness and he is off balance and often spinning following "his insulin dependent diabetes". He is regularly reviewed by an endocrinologist.

19. I must have this medical condition in mind when I ask myself whether or not realistically this family could be expected to move to Ghana merely because they have not at the present moment put in compelling evidence that the treatment which would be required would eat up all of their income or that it would not be accessible. As I indicated earlier I do not accept entirely the submission made by Mr Clarke that I should not without such evidence make a finding that such treatment would not be available or affordable.
20. While it would have helped if precise figures had been produced this couple does not have a large income, being dependent on Mr [K]'s pension and the evidence which eventually was produced to the Tribunal and which I accept was to the effect that the drugs which currently the appellant's husband takes would in Ghana cost in the region of £88 per month. Clearly he would also have to pay for regular visits to hospital and to the various doctors he would need to see. Currently in evidence and I have no reason to doubt that this evidence is entirely truthful Mr [K] visits a hospital for one reason or another on average every fortnight, and he regularly sees his GP. All of these things would cost money in Ghana and also it is not at all clear just how he would access this treatment.
21. If forced to relocate to Ghana, this very frail man and his 64 or 65 year old wife would between them have to locate a variety of different doctors in order to treat the various ailments for which Mr [K] requires constant supervision and constant medication. This Tribunal does not consider that he can realistically be expected to relocate to a country where he knows no doctors at the moment, where there is known to be difficulty of access to medical treatment in any event, and where the cost of such treatment is unknown.
22. As a matter of common humanity somebody in his condition and at his time of life should not be expected (or obliged) to relocate; this Tribunal regards this as a paradigm case where there could properly be said to be insurmountable obstacles to family life being continued in the country to which this couple would be obliged to go. On the facts of this case, the Tribunal is able to reach this decision even without the detailed evidence as to accessibility and cost of treatment which could possibly have been made available had the appellant's solicitors been more efficient than they were. The appellant's appeal must accordingly be allowed within the Rules as EX.1 will apply in her case.
23. Having this in mind this is also in my judgement one of those rare cases where the appeal should also be allowed outside the Rules under Article 8 because the circumstances are sufficiently compelling that exceptionally it would not be proportionate to require this appellant and her husband to relocate to Ghana.
24. This Tribunal acknowledges that the public interest in maintaining consistent and effective immigration control is a strong one and that it is only exceptionally that in an individual case the circumstances would be so compelling that notwithstanding this public interest, a person should be allowed to remain under Article 8 outside the Rules. However the Tribunal considers the facts in this case to be so compelling that

it would be inhumane, in light of the very frail state of health of Mr [K] which is overwhelmingly obvious both from the medical reports I have seen and from the evidence I have heard, to require this couple to leave this country now.

25. It follows that this appeal must be allowed under Article 8 and I so find.

Notice of Decision

I set aside the decision of First-tier Tribunal Judge Walters in which he dismissed the appellant's appeal against the decision of the respondent refusing her application for leave to remain as containing a material error of law and remake the decision as follows:

The appellant's appeal is allowed, under Article 8.

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read "Ken Craig". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Upper Tribunal Judge Craig

Dated: 28 November 2018