Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/23051/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 October 2018	**On 9 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS BECKY MANTEY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr R Layne, of Counsel instructed by Citywide Solicitors

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Metzer who, in a determination promulgated on 30 January 2018 allowed the appeal of Mrs Becky Mantey against a decision of the Secretary of State made on 20 September 2016 to refuse to grant her leave to remain on human rights grounds.

2. Although the Secretary of State is the appellant before me I will for ease of reference refer to him as the respondent as he was the respondent in the

First-tier; similarly, I will refer to Mrs Becky Mantey as the appellant as she was the appellant before the First-tier Judge.

3. The appellant is a citizen of Ghana born on 15 March 1970. She entered Britain in 2001 as a visitor for medical treatment. She overstayed and in September 2004 made an application for leave to remain as a visitor for private medical treatment. That was refused in February 2005. In 2010 she applied for indefinite leave to remain outside the Immigration Rules – that was refused on 17 December 2010. On 15 April 2014 she applied for leave to remain under the family and private life provisions but that was refused on 11 June 2014. She then made the further application for leave to remain on human rights grounds, the refusal of which is the subject matter of this appeal.

4. When the application was refused the Secretary of State pointed out that the appellant did not have children here, that she had overstayed her leave to remain and had not had leave to remain since 2001, and that with regard to the exceptional circumstances put forward which related to the medical treatment which she was receiving for glaucoma and the fact she suffered from Type 2 diabetes, there would be medical treatment available for her in Ghana.

5. The grounds of appeal emphasised that the appellant's spouse was a British citizen who was settled in Britain and stated that the respondent had erred in failing to accept that within the meaning of paragraph 276ADE(1)(v) there would be very significant obstacles to the appellant's integration into Ghana if she were required to leave Britain, because the appellant was completely dependent on her spouse for day-to-day support without which she could not survive. She would not have the support she received in Britain and that would constitute significant obstacles to her reintegration into Ghana. It was also argued that the Secretary of State had erred in finding there were no exceptional circumstances which would mean that the appellant should be allowed to remain in Britain.

6. The determination of the judge is extremely short. He noted the appellant's evidence that she had met her husband in 2002, that they had married in December 2011 and that she was dependent upon him for shopping and medication and taking her to her appointments. It was also stated that he had family in Britain - two children from a former relationship who, having been abandoned by their mother in Ghana, had joined him and the appellant in Britain in November 2017. The judge also heard evidence from the appellant's husband and said that he had taken into account the appellant's husband's wage certificates and the marriage certificate.

7. The judge stated that the sole issue was whether or not there would be a disproportionate interference with the appellant's right to family life under Article 8(2) of the ECHR were the appellant to be returned to Ghana,

taking into account the respondent's legitimate interest in immigration control.

8. In paragraph 7 the judge set out his findings as follows:-

> "**MY FINDINGS**
>
> 7. Given the particular circumstances of the Appellant's husband who has fought to have his two daughters come from Ghana to live with him and the Appellant in the United Kingdom after their mother abandoned them and the fact that he is working and has all his family in the United Kingdom, I do not consider it reasonable for the Appellant's husband to return with the Appellant to Ghana even though he is of Ghanaian extraction. The Appellant would therefore be returning to Ghana alone. She is in a poor state of health and relies very heavily upon her husband to look after her. The relationship was precarious at the beginning given the Appellant's lack of immigration status which is relevant to 2002 Act. However, taking into account the extent to which the Appellant's husband looks after her and the fact that his two daughters are living with them and that the Appellant's husband's family all live in the United Kingdom and he is a British citizen and that the Appellant herself has no family that she is close to in Ghana, I find carrying out the balancing exercise and taking into account the Respondent's legitimate interest in immigration control that this is an exceptional case such that there would be a disproportionate interference with the Appellant's right to family life under Article 8(2) of the ECHR for the Appellant to return to Ghana, particularly bearing in mind the length of time she has spent in the United Kingdom albeit unlawfully and the degree of care required and carried out by her husband with whom there is a clear and deep love".

The judge therefore allowed the appeal on human rights grounds.

9. The Secretary of State appealed stating that the judge had materially misdirected himself in law and had given inadequate reasons for his decision. It was stated that the judge had failed to assess the public interest in line with jurisprudence from the higher courts and he had failed to have any regard to the Immigration Rules and the requirement that there be "insurmountable obstacles" to family life continuing abroad pursuant to EX.1. The judge, it was argued, had erroneously used the test of whether or not he considered it reasonable for the appellant's husband to return to Ghana with the appellant and had therefore "failed to have any regard to the Supreme Court decision of **Agyarko**".

10. It was submitted that in any event his reasoning was wholly inadequate. The judge had relied upon the fact that the husband's two daughters were now in Britain and the husband worked in Britain and had family here but

had failed to recognise that the two children had entered Britain in November 2017 having spent their entire lives in Ghana. The judge had failed to engage in any best interests assessment based upon this factual matrix. Equally, mere reliance upon the husband being British and working here placed the choice of the appellant and her husband over and above the UK's right to control its borders. Family life in this case had been contracted whilst the appellant was here unlawfully. It was stated that the judge mentioned that the husband had family in Britain but there was no consideration of whether family life actually existed or with whom. It was stated that whilst it was acknowledged by the judge that the husband has other children in Britain, there was nothing to suggest that these other children live with the husband, nor is there consideration of the kind of relationship that they enjoyed, if any. It was argued that the judge had not considered the issue of insurmountable obstacles as a factor in the proportionality exercise and failed to have any regard to the ongoing cost of the appellant's NHS treatment. The judge had also failed to have any regard to evidence, or the lack thereof, as to whether there was care available for the appellant in Ghana. While the judge had acknowledged that the appellant had been unlawfully in Britain it was self-evident that he had failed to attribute little weight to that family life as is required by Section 117B. The care given by the husband could be continued in Ghana.

11. Mr Duffy argued that the grounds set out a reasons challenge. The reality was that the judge had not engaged with the situation here. He had not applied the test of insurmountable obstacles and merely that of whether or not it was reasonable for the appellant to return. That was not the correct test. Moreover, he had referred to the appellant's situation here as being precarious – that was wrong – the reality was that she had overstayed since 2001. While the judge was correct to state that the appellant's husband was a British citizen, he had ignored the fact that the appellant's husband's children had only received settlement when they had entered into Britain last year and there was nothing to indicate that the children could not return to Ghana with their father and the appellant. He asked me to set aside the decision.

12. Mr Layne stated that the decision, although short, was not perverse. The judge had dealt with all the main issues in the case and the reality was that the children, who had had a disrupted life when their mother had abandoned them in Ghana, had only recently entered Britain. Given their ages of 10 and 15 it would not be in their interest to further disrupt their life here in uprooting them yet again. Moreover, he pointed out that the appellant was blind in one eye and that the sponsor cared for her and that she could not live without that care. He stated that while it was the case that the judge had not mentioned the issue of insurmountable obstacles, the reality was that the appellant's circumstances were such that the obstacles she would face in Ghana would be insurmountable.

13. Mr Duffy in reply stated that he was not arguing the decision was perverse but that the proper exercise had not been carried out in that the judge had not considered whether there would be insurmountable obstacles to the appellant and her husband living in Ghana with the husband's two children who had only recently arrived in Britain. The issue was not whether there would be insurmountable obstacles for the appellant if she returned to Ghana on her own but whether or not there would be insurmountable obstacles to family life continuing there. He asked that I set aside the decision and return it to the First-tier Tribunal.

Discussion.

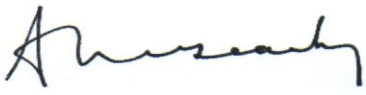
14. I consider that the judge clearly did not consider the facts as to whether or not there would be insurmountable difficulties to the appellant's husband and his wife returning to Ghana. It was incumbent on him to do so as is clear from the judgement in **Agyarko** **[2017] UKSC 11**. By not applying that test, or at least taking it into consideration, he erred in law. While I accept that the appellant has very serious medical problems and requires care from her husband the reality is that that care would continue should the family life continue in Ghana. Moreover, the children have spent all their lives to date, apart from the last year, in Ghana and they would therefore be returning to the life which they had led there in the past.

15. In these circumstances I consider it appropriate to set aside the decision of the First-tier Judge and that it is further appropriate that the appeal be remitted to the First-tier so that the necessary findings of fact can be made and the relevant test applied.

Notice of Decision

The determination of the First-tier Judge is set aside. The appeals are remitted to a judge in the First-tier for a hearing afresh on all issues.

No anonymity direction is made.

Signed  Date: 6 November 2018

Deputy Upper Tribunal Judge McGeachy