



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

Appeal Number IA/36089/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 23rd April 2015**

**Determination Promulgated
On 13th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

**JOSEPHINE AKOMA-ANSONG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop (Counsel, instructed by Shan & Co)

For the Respondent: Mr S Walker (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. In this determination the term the Appellant refers to Ms Akoma-Ansong, the Appellant before the First-tier Tribunal, the term the Respondent refers to the Secretary of State who was the Respondent before the First-tier Tribunal.
2. The Appellant's immigration history is set out in the First-tier Tribunal decision of Judge Parker, promulgated on the 11th of November 2014. The Appellant came to the UK on a visit visa to see her husband at a time when she was pregnant, she did not return to Ghana but

stayed in the UK and gave birth to her daughter who is a British citizen. The Appellant's application to vary her leave was refused and she appealed.

3. The substantive appeal was heard by First-tier Tribunal Judge Parker at Taylor House on the 16th of October 2014 and allowed for the reasons given in the decision promulgated on the 11th of November 2014. The primary findings are set out at paragraphs 16 to 22 of the decision followed by consideration of the position of the Appellant and her daughter under article 8 and section 117B of the 2002 Act.
4. The Judge found that the Appellant and her husband were not impressive witnesses. Having married in December 2011 and becoming pregnant a month later pursued an appeal in a visit visa application. I do not have the visit visa application but it appears that the appeal must have been pursued at a time when the Appellant knew she was pregnant and she chose to travel when heavily pregnant. There was no explanation why a settlement application had not been made. The Judge rejected the claimed reasons for her failure to return, there being no medical evidence to show that she could not have flown. The Judge rejected the claim that it had been their intention that the Appellant was to have returned to Ghana at the end of her visit to have the baby there and apply for settlement. That is a clear finding that they intended to circumvent the Immigration Rules in that regard.
5. The appeal was dismissed under the Immigration Rules for the non-payment of an NHS bill. The Judge went on to consider article 8, section 117B(6) of the 2002 Act and the cases of Chikwamba [2008] UKHL 40 and Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 48(IAC). In paragraph 35 there is reference to the Appellant's inability to meet the Immigration Rules if required to make an entry clearance application but found, in paragraph 35, there was insufficient evidence to second guess the ECO's decision.
6. In summary it was found that there was potentially a lengthy separation if the Appellant and her daughter were to return to Ghana and apply for entry clearance and in those circumstances it was not reasonable to expect the Appellant's daughter to leave the UK.
7. I am satisfied that the decision contains a number of errors which are material to the appeal. The Judge had found that the Appellant had not sought entry as a genuine visitor and that it was not her intention to leave at the expiry of her visa. It had also been found that the Appellant did not meet the Immigration Rules on the application made and it appeared that the Appellant might not meet the Immigration Rules on a settlement application made properly from abroad, paragraph 35.
8. The Judge had referred to the speed with which previous applications had been considered and so the finding of delays in respect of an entry clearance application would have been on the basis that the Appellant would not meet the Immigration Rules. There is no reference to the case of Ekinici [2003] EWCA Civ 765 (17 June 2003) in which Simon Brown LJ, in paragraph 17, observed "It would be a bizarre and unsatisfactory result if, the less able the applicant is to satisfy the full requirements for entry clearance, the more readily he should be excused the need to apply."
9. There is an error in respect of the approach to be taken to section 117B of the 2002 Act. Whether the Appellant leaves the UK voluntarily or under compulsion her daughter can remain in the UK with her father. There is no question of the child, or any children, being "expected" to leave the UK. In any event it was the Appellant's stated intention to return to

Ghana with her child and live there. It would be difficult to see how it would be unreasonable for the Appellant to carry out her previously stated intentions.

10. The errors are such that I am satisfied that the decision of the First-tier Tribunal cannot stand. The Appellant's immigration history, the finding that she was not a genuine visitor carried implications for proportionality decision. Added to that were findings that the evidence did not show that medically she could not have travelled to Ghana whilst still pregnant, pregnancy is not itself a bar to air travel and the finding that she might not meet the requirements of the Immigration Rules. In those circumstances the finding that her removal would be disproportionate cannot, on the reasons given, be maintained and the decision is set aside.
11. At the hearing submissions were made with regard to the remaking of the decision and I have considered these along with the unchallenged findings made in the First-tier Tribunal decision. I bear in mind that article 8 is not to be regarded as a by-pass to the Immigration Rules and by the terms of paragraph 400 of the Immigration Rules the article 8 assessment is to be carried out against the rubric of Appendix FM and paragraph 276ADE. I am also obliged to treat the Appellant's child's best interests as a primary consideration and this forms part of the assessment under article 8.
12. The fact that the Appellant entered with the intention of avoiding immigration control and may not meet the requirements of the Immigration Rules on an application properly made are strong reasons for finding that she should return to Ghana. She came knowing that she was pregnant, apparently aiming to have the child here. Her stated intention that she wanted to return to Ghana with her daughter, whilst apparently false, has not been shown to be not possible. There is no expectation that her daughter should leave the UK if the Appellant goes.
13. Of course it is in the interests of her daughter that her parents remain together and provide a stable upbringing. It is also in her daughter's interests that her parents go about their affairs lawfully and without seeking to obtain advantages to which they are not entitled and not placing themselves in predicaments such as this. I emphasise that this situation has been brought about entirely by the actions of the Appellant and her husband. They are not in any way the victim of circumstances over which they had no control.
14. The Appellant's daughter is not to be punished for the behaviour of her parents. However, the Appellant is not to be rewarded with leave to remain when she cannot meet the Immigration Rules simply because she has contrived to have a child here and then remain. There is a danger, recognised in the ECHR case of Jeunesse that some may use children as a means of circumventing immigration control and that states are entitled to expect that individuals will comply with the rules that apply to them.
15. It is difficult to see what is unreasonable about expecting someone to abide by the rules that apply and which they are fully aware of. In this case the Appellant can live in Ghana, as she said she intended to do. Given that the Appellant does not meet the Immigration Rules and her behaviour in getting to the UK and since I am satisfied that requiring her to return to Ghana to apply in the proper manner is entirely proportionate and does not place the UK in breach of its obligations.
16. This is not a case where Chikwamba could be said to be analogous. In that case the Appellant was in a situation largely not of her making, there were considerable obstacles to the making of an application to re-enter the UK and there would be delays in circumstances where she

would be bound to succeed in the application which would be a formality. In this case none of those observations apply.

17. Whilst the Appellant has established a family life in the UK this has been achieved by her deliberately seeking to evade immigration control, where she can live in Ghana and apply safely from there but in circumstances where she might not meet the Immigration Rules. Her being in the UK is not a justification for circumventing the rules that apply. Her daughter can travel with her to Ghana but is not expected to do and if the family wish to remain together her husband, also originally from Ghana, can return with them. It has not been shown that he could not do so or that that is an unreasonable alternative.
18. In summary I find that the First-tier Tribunal erred and the decision is set aside. I find that the Appellant's removal to Ghana is proportionate given her immigration history and the other findings made against her. Article 8 and section 55 considerations do not require her to remain in the UK and the fact that she might not meet the Immigration Rules severely undermines her position and aggravates the attempt to evade immigration control.

CONCLUSIONS

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

I do not set aside the decision.

I re-make the decision in the appeal dismissing the appeal of Josephine Akoma-Ansong.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing the appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 8th May 2015