



IAC-HX-DML-V1

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

Appeal Number: IA/40514/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 21 October 2015**

**Decision & Reasons Promulgated
On 8 January 2016**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR YAW YEBOAH
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Ms Sreeraman
For the Respondent: Mr Olawanle

DECISION AND REASONS

1. Mr Yeboah is a citizen of Ghana born in 1974. He appeals against a decision of the Secretary of State made on 25 September 2014 to refuse further leave to remain under paragraph 322(1) of the Immigration Rules as leave was being sought for a purpose not covered by the Rules and under paragraph 276CE with reference to paragraph 276ADE.
2. Although in proceedings before me the Secretary of State is the Appellant, for convenience I maintain the designations as they were before the First-

tier Tribunal, thus Mr Yeboah is the Appellant and the Secretary of State the Respondent.

3. The history is that the Appellant was granted discretionary leave to remain under Article 8 on the basis of his relationship with Lordina Nyame. Unfortunately, his spouse died on 1 June 2013. The Secretary of State concluded that the grounds under which he was previously granted discretionary leave no longer persisted therefore the application was refused.
4. He appealed.
5. Following a hearing at Hatton Cross on 23 April 2015 Judge of the First-tier Tribunal Rees allowed the appeal on Article 8 human rights grounds.
6. The judge notes that it was accepted that the Appellant could not meet the requirements of the Rules (at paragraph [7]). The issue was Article 8 and "*can he reasonably be expected to go back to Ghana*".
7. Her findings are at [18]ff. She notes that at all times he lived with his wife in a genuine relationship. Also that he could have been granted indefinite leave but for a drink driving conviction in February 2011.
8. The judge accepted the Appellant's account. Specifically that he has made friends in the UK and has family here. Also, that he has no family in Ghana and that any connection with Ghana is limited to his late wife's family. His family here have their own lives and "*cannot be expected to manage his affairs here*". [20]
9. The judge adds that she has "*taken into consideration the public interest considerations of Section 117B*" and did not "*think it fair to call his status in the UK precarious given that he was lawfully here as a spouse who was then bereaved. All other considerations of public interest are met.*" [21]
10. The judge further found that he had not been imprisoned for the drink driving offence and that there had been no further offending [22]. Also that he is "*integrated into society*" and that there would be "*significant obstacles*" [23] to his returning to Ghana. Further, the "*bereavement and consequent emotional and psychological distress is such as to amount to compelling circumstances*" [26]. She concluded that removal would not be proportionate to the legitimate public end sought to be achieved.
11. The Secretary of State sought permission to appeal which was granted on 17 August 2015.
12. At the error of law hearing before me Ms Sreeraman made the following brief points. First, whilst the judge noted that the Appellant was not pursuing his case under the Rules she was required to consider the Rules as they are the starting point and focus of Article 8 assessments.

13. The failure to engage with the Rules was material to the overall Article 8 assessment. Indeed, the judge should not have considered Article 8 outside the Rules at all.
14. Further, even in her analysis outside the Rules the judge erred. She was wrong to find that the Appellant's status in the UK was not precarious. Also, she failed to give reasons for concluding that there would be "*significant obstacles*" to the Appellant returning to Ghana.
15. Mr Olawanle's position was that there was no error of law merely a disagreement with the decision. The judge was correct to move to a second stage consideration. As for finding that the Appellant's leave was not precarious she was entitled to reach that view because the Appellant had discretionary leave as a spouse who had come with a view to settlement.
16. As for the submission that inadequate reasons had been given for the conclusion that there would be "*significant obstacles*" to the Appellant returning to Ghana the judge had found him to be a truthful witness, that his family and friends were in the UK and that he has no family in Ghana. It was a conclusion she was entitled to reach. In addition he had lost everything. It was difficult to see how he could readapt to life in Ghana.
17. In looking at this matter I consider that the judge materially erred.
18. The basis of the application was family life as a partner. It appears, correctly, to have been accepted that his wife, having died, the application clearly could not succeed on that basis. Also, that it could not succeed under paragraph 276ADE in respect of private life. However that is not the end of the matter.
19. In **SSHD v SS (Congo) & Ors [2015] EWCA 387** it was explained that if the requirements of the rules cannot be met, and a judge finds that an Article 8 assessment outside them is required, this must be properly explained. Paragraph 33 provides guidance. The "*compelling circumstances*" justifying an assessment "*need to be identified*". The test "*not as strict as a test of exceptionality or a requirement of 'very compelling reasons'... in the context of foreign criminals, but which gives appropriate weight to the focussed consideration of public interest factors as finds expression in the Secretary of State's formulation of the new rules in Appendix FM*".
20. In failing to explain why she considered it appropriate to proceed to an Article 8 assessment outside the Rules she committed a material error of law.
21. Further, in her assessment under Article 8 the judge erred in finding (at [21]) that the Appellant's status here was not "*precarious*" (see **AM (S.117B) Malawi [2015] UKUT 0260**: "*A person's immigration status is*

'precarious' if their continued presence in the UK will be dependent upon their obtaining a further grant of leave").

22. Moreover, the judge failed to give adequate reasons for her conclusion that there would be "*significant obstacles*" to the Appellant returning to Ghana. She appears to have reached that view simply on the basis that she accepted the evidence that he has no family there. The judge failed to consider issues such as that the Appellant has only been in the UK since 2009, that he is an adult in good health, that he is familiar with the cultures and customs of Ghana and spent his formative years there. Also, that he would have the support of his UK based siblings.
23. It is noted that the judge at the end also took into account in favour of the Appellant the bereavement and his consequent emotional and psychological distress. However, in light of the legal errors and the failure elsewhere to give adequate reasons the judge's assessment under Article 8 is fatally flawed.
24. I set aside the decision to be remade. No further hearing was sought.
25. It is clear that the Appellant made the wrong application. Instead of applying on the basis of "Family/Private life of a Partner on a 10 year route to settlement" he should have applied for leave to remain as a bereaved partner.
26. That such was his position is clear from the fact that he gave details of his wife's death in the form.
27. In my judgment it should have been self-evident to the Respondent that the Appellant had made a technical error in his application about the nature of the application and that consideration should have been given under BPILR of Appendix FM.
28. Ms Sreeraman, who lodged a copy of the relevant guidance appeared to acknowledge that the Respondent had failed to consider the correct Rule and that it was appropriate that such be done.

Notice of Decision

The decision of the First-tier Tribunal shows material error of law. It is set aside and remade as follows:

The appeal is allowed to the extent that it is not in accordance with the law. The application awaits a lawful decision by the Respondent.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Conway

