



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12998/2016

THE IMMIGRATION ACTS

Heard at Field House
On 10 July 2018

Decision and Reasons Promulgated
On 27 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

MS SELINA ASANTE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Reid, Counsel for Grazing Hill Law Partners, Islington,
London

For the Respondent: Mr Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana born on 24 April 1961. She appealed the respondent's decision dated 11 May 2016 refusing her application for leave to remain in the United Kingdom based on her claimed private and family life with Joseph Obeng and his son. Mr Obeng is her husband by a proxy marriage in Ghana in 2005. His son in the United Kingdom is an adult. Her appeal was heard by Judge of the

First-Tier Tribunal Miller on 12 December 2017 and dismissed in a decision promulgated on 8 January 2018.

2. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Hollingworth on 4 May 2018. The permission states that it is arguable that a sufficient basis exists in the context of compelling circumstances which would enable the Judge to proceed to consider whether there would be a breach of Article 8 outside the Rules, when considering the content of the Immigration Rules in relation to issues raised by the extent of the available evidence. The permission states that the Judge should have set out a greater analysis of the existence or otherwise of family and private life and carried out a full proportionality exercise. He has applied criteria pursuant to Section 117 of Section 5 of the 2002 Act but the permission states that all the criteria pertaining to Section 117 should have been applied before a conclusion was reached and that the Judge should have set out a fuller analysis about the husband of the appellant being a British citizen.
3. There is a Rule 24 response which states that the decision makes it clear that the Judge took into account the sponsor's British nationality when he assessed Article 8. The Judge commented on the sponsor's evidence and on his extended family in the United Kingdom. The response states that the Judge knew the circumstances of the marriage and found that their relationship could be carried on in Ghana.

The Hearing

4. Counsel for the appellant submitted that the permission is granted on a narrow issue and that is the Judge's approach to Article 8 outside the Rules.
5. I was referred to paragraph 29 of the decision in which the judge states that this is a case in which it is difficult to see any merit in the appellant's appeal. Counsel submitted that this is in itself an error as the Judge appears to have reached his conclusion before setting up the balancing exercise required.
6. She submitted that the Judge in this case failed to follow the case of *Razgar* (2004) UKHL 27 when considering whether there is a breach of Article 8 of ECHR. She submitted that the Judge appears not to have considered the appellant's and her husband's family life together in the United Kingdom and has made no assessment of her private life.
7. Counsel submitted that the Judge failed to note that the appellant's husband is earning a sufficient amount in the United Kingdom for the terms of the Immigration Rules to be satisfied as he earns over £21,000 per annum. I was referred to the case of *Agyarco and others (2017) UKSC 11* and Counsel submitted that there is no public interest in removing this appellant from the United Kingdom. She submitted that under the Rules the appellant can succeed as the financial requirements have been met and I was referred to paragraph 117B of Part 5 of the 2002 Act. This is referred to at paragraphs 30 and 31 of the decision. The Judge refers to the appellant being an overstayer as a visitor and refers to little weight being given to a private life established by a person

at a time when that person's immigration status is precarious. This applies to this appellant. Counsel submitted that there is no reference to the appellant's family life and the judge only refers to issues which go against the appellant's appeal and none which support the appellant's appeal.

8. Counsel submitted that the appellant speaks some English and meets the financial requirements and I was referred to paragraph 36 of the decision which refers to the case of Chen (2015) UKUT 189 and she submitted that this pre-dates the said case of Agyarco. The case of Chen refers to insurmountable obstacles to an appellant returning to his country of origin and considers a short separation of the appellant from her husband in this case. She submitted that the Judge has not properly considered this issue and that his Article 8 assessment is flawed.
9. The Presenting Officer made his submissions, submitting that although the Judge on a technical basis has erred by not considering Article 8 outside the Rules and EX.1, had he considered these he would have reached the same conclusion.
10. The judge refers to the appellant having a poor immigration history and to there being no insurmountable or very significant obstacles to the appellant returning to Ghana in this claim. The appellant came to the United Kingdom in 2001 and applied in 2012 for leave to remain outside the Immigration Rules. Neither she nor her husband have children under 18 in the United Kingdom. The Presenting Officer submitted that the Judge in this decision considers family life between the appellant and her husband and his son and the Judge also refers to the appellant and her husband having extended family in Ghana.
11. He submitted that the case of Chen is relevant and is considered by the Judge. He submitted that the appellant can return to Ghana and can apply to return to the United Kingdom and may well succeed as her husband's income is sufficient to meet the terms of the Rules. He submitted that the Judge suggests that her British husband could go to Ghana with her when she makes an application for settlement from there.
12. The Presenting Officer submitted that there is nothing to stop the appellant returning to Ghana and there would be no undue hardship if she had to do that. The Presenting Officer submitted that although this is a short decision any error therein is not material.
13. I put to Counsel that at paragraph 37 the Judge suggests that the appellant goes to Ghana and makes an application from there and that there would then only be a temporary separation from her husband. I asked her if she would consider this to be a breach of Article 8. She submitted that at paragraph 51 of Agyarco reference is made to appellants who have committed crimes such as fraud or the like having to go back to their own country and make an application from there but that somebody who came into the United Kingdom lawfully, as this appellant did, the only issue with her immigration status being that she overstayed, should not require to go back to her own country and make an application from there. She submitted that at paragraph 37 of the decision the Judge has made a bald statement that he can see no reason why the appellant should not return to Ghana and make an application for settlement from her

home country but, she submitted that the Judge has not considered the appellant's and her husband's emotional state. They have been married since 2005 and she submitted that the Judge has not done a proper proportionality assessment listing the pros and cons of the appellant being granted status in the United Kingdom outside the Rules. She submitted that this must be an error of law and that the First-Tier Judge's decision should be overturned.

Decision and Reasons

14. This appellant came to the United Kingdom in 2002 on a 6 month visit visa and has overstayed since then. She has a subsisting relationship with a British citizen. If there was a child who it would not be reasonable to expect to leave the United Kingdom or there were insurmountable obstacles to family life with her partner continuing outside the United Kingdom, the Article 8 claim would be stronger but in this case this is an appellant who has overstayed for a considerable number of years and made no attempt to rectify her status until 2012. The terms of the Immigration Rules cannot be satisfied. She has not been in the United Kingdom for 20 years and she spent most of her life in Ghana before coming to the United Kingdom. There are no exceptional circumstances. The appellant is someone who has always had a precarious existence in the United Kingdom and although her representative states that if she returns and makes an application from Ghana it will be accepted because of her husband's earnings, I have no evidence that this is an appellant who speaks English and has passed her English test. She spoke Twi at the First-Tier hearing and had this hearing been going to a second stage today, Counsel was asking if a Twi interpreter was available. I am not satisfied that if she returns to Ghana and makes her application it is a certainty that she will be successful.
15. This appellant came to the United Kingdom on a visit visa, met her husband in 2004 and entered into a proxy marriage in 2005. This appellant's husband has visited Ghana. He has brothers and sisters there. This appellant also has siblings there and a child aged 26. The appellant's husband has a child in the United Kingdom but he is aged 19. She has kept in touch with her daughter in Ghana.
16. It is clear from the appellant's husband's evidence that he knew the appellant's status in the United Kingdom when they started their relationship and when they married. The appellant's husband states that he only sees his son in the UK at weekends as his son lives with his mother.
17. Counsel for the appellant submits that no proper balancing exercise or proportionality assessment was carried out relating to Article 8 outside the Rules. The Judge does however refer to Section 117B of the Nationality, Immigration and Asylum Act 2002 and takes public interest into account and takes into account the fact that little weight should be given to a private life established by a person, at a time when the person's immigration status is precarious. This must also apply to her family life. She applied for leave to remain outside the Rules in 2012 and this was refused but she still did not go back to Ghana.

18. Although the Judge does not carry out a specific proportionality assessment, everything has been considered by him in the decision and he finds that there are no insurmountable or very significant obstacles to the appellant returning to Ghana. He also finds that there are no exceptional circumstances and that this appellant came to the United Kingdom, disregarded the terms of her visa, decided to stay and expected to be allowed to remain because she developed a private life and married here. I have considered the said cases of Chen and Agyarco. I do not find that it would be disproportionate to expect this appellant to return to Ghana and make an entry clearance application from there to re-join her husband in the United Kingdom. Temporary separation to enable someone to make an application for entry clearance in this case would not be disproportionate. The case of Chen states that for an appellant to do this would only be disproportionate in a case involving children and this case does not involve children. The case of Chen also states that when a claim outside the Immigration Rules is not considered by a decision-maker, this only makes the decision unlawful if the claimant shows that there has been a substantive breach of his or her rights under Article 8 and that is not the case here.
19. I find that the respondent's decision is proportionate and that any error made relating to Article 8 in the First-Tier Judge's decision is not material.

Notice of Decision

20. I find that there is no error of law and First-Tier Tribunal Judge Miller's decision promulgated on 31 December 2017 and that this decision must stand.
21. Anonymity has not been directed.

Signed

Dated 20 July 2018

Deputy Upper Tribunal Judge Murray