Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24811/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 April 2017	**On 18 May 2017**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MS ELIZABETH MENSAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Record
For the Respondent: Mr Avery

DECISION AND REASONS

Background

1. The Appellant is a citizen of Ghana born in 1968. Her immigration history is that she entered the UK on a visit visa in April 2010 which was later extended to 30 September 2010. She has overstayed since. On 23 January 2015 she made an application for leave to remain on the basis of her relationship with a British citizen, Mr Albert Addo. The application was refused on 19 June 2015. It was stated that she

could not satisfy the requirements in paragraph EX.1. of Appendix FM of the Immigration Rules.

2. She appealed.

3. Following a hearing at Harmondsworth on 19 May 2016 Judge of the First-tier M B Hussain dismissed the appeal under the Rules. He found no reason to consider the claim on human rights grounds outside the Rules.

4. He heard oral evidence from the Appellant, Mr Addo and the Appellant's adult daughter. His findings are at paragraph [9ff]. Following what both representatives before me agreed was an unnecessary consideration of whether the marriage was genuine and subsisting, there being no issue on that matter, the judge's brief analysis is at [15ff]. He noted that the Appellant was unlawfully in the UK [15].

5. The only other analysis is at [16, 17] where he wrote:

> *'16. Under paragraph EX.1 the appellant has to demonstrate that there are insurmountable obstacles to him and his wife/partner enjoying family life elsewhere than the United Kingdom. Paragraph EX.2. defines what constitutes insurmountable obstacles. In this regard, the only evidence before the Tribunal was set out in paragraph 5 of the appellant's husband's statement which stated*
>
> > *"I am unable to relocate to Ghana because I have been living in the UK for over twenty four years and am in full time employment. I do not have any relatives in Ghana and all my life has been spent in the UK. I came to the UK at the age of 31 years and have spent the majority of my adult life in the UK".*
>
> *17. The points in the passage quoted above did not point to any significant obstacle in my view preventing the appellant's husband from returning to his home country to enjoy family life with the Appellant.*
>
> *18. I find therefore that the appellant does not meet the requirements in paragraph EX.1'.*

6. She sought permission to appeal which was refused on 17 November 2016. However, on reapplication permission was granted on 22 February 2017, a judge stating:

> '…
>
> *2. As noted in the Grounds of Appeal, the Sponsor's witness statement sets out that he has two children from a previous relationship that he supported emotionally and financially. In principle a relationship of that nature, if accepted as amounting to a genuine relationship of real substance, might be relevant: arguably to the assessment of insurmountable obstacles and without doubt to the need to strike a fair balance between the public interest in enforcing immigration control in the light of private and family life connections to the UK …'.*

Error of law hearing

7. At the error of law hearing before me Ms Record did not seek to argue that the Appellant met the Rules. However, in failing to consider, indeed, make any reference at all to the husband's children, one of whom is a minor and with both of whom he has a close relationship, the judge materially erred. Such an issue should have been considered under Article 8 outside the Rules.

8. The judge also erred in failing to give consideration to whether the Appellant should have to return to apply for entry clearance.

9. Mr Avery's response was to question what evidence was advanced before the First-tier as to the existence and substance of a family life between the Appellant and her husband's family and between the husband and his children and any alleged interference that removal would engender.

10. I considered that in failing to give any regard to the, albeit brief, evidence that was before him about the children and the relevance such might have in striking a balance between the public interest in enforcing immigration control and private and family life connections, the judge materially erred.

Rehearing

11. There being no challenge to the decision under the Rules I concluded that the appropriate course was to rehear the matter in respect of Article 8 outside the Rules. No objection was made by either side to the case proceeding at that hearing. I heard brief evidence from the Appellant and Mr Addo.

12. The Appellant adopted her statement (6 May 2016). Asked about children of the family, she said she has two children who are aged 36 and 32, both are British citizens. Her husband has two girls by a previous relationship. They are aged 19 and 17. They live with their mother. He sees them during the day every other week or fortnight usually at a park or in a pub. She herself has met the girls.

13. Mr Addo also adopted his statement (6 May 2016). He works as an engineer with London Underground earning around £40,000 a year. He supports his daughters, paying £508 a month maintenance through the Child Support Agency. He also supports them emotionally. They live with their mother. He and his children meet every week or two usually in a local park. If precluded from meeting by his work commitments they talk on the phone.

14. He said he would not be happy to leave the UK. His daughters would be phoning him all the time. He and they are close.

15. Asked if they were present at the hearing to support the appeal he said they are at art college. They are revising. They would not have come even if he had asked them.

16. In submissions, Mr Avery said there was little evidence of compelling or exceptional circumstance within or outwith the Rules. Even in respect of Mr Addo's children

they are not living with him and the Appellant. Whilst they might meet fairly regularly there was no indication of a particularly close relationship. He has indicated that he would not move to live in Ghana. If so there was no reason to see why she should not return there and seek entry clearance.

17. In Ms Record's submission there was sufficient evidence to conclude that there is family life between Mr Addo and his children. It is a modern day family unit with his children from a previous relationship. They depend on him financially and emotionally. It would be unreasonable to expect him to leave them.

18. In fact, she noted, his position is that he would not leave the UK to live in Ghana so matters fall back on the Appellant. An adverse factor was that she was an overstayer. However, she speaks English and there is no issue with maintenance and accommodation. In the circumstances it would be unduly harsh to require her to return to Ghana and make entry clearance.

Consideration

19. In considering this matter, as indicated, no challenge was made to the dismissal of the appeal under the Rules.

20. As for Article 8 outside the Rules the first issue is family and private life. There is clearly family life between the Appellant and her husband Mr Addo. It was not suggested there is family life between the Appellant and her children who are both in their thirties. She appears to have grandchildren although no evidence was led about any involvement she may have with them. I accept there is family life between Mr Addo and his daughters by a previous relationship. They are aged 19 and 17. Although neither attended the hearing or gave statements I see no reason to doubt the evidence that Mr Addo is close to his daughters and that they meet or otherwise keep in touch regularly. The Appellant said she had met the girls. That apart there was no evidence of any particular emotional connection between her and them.

21. The Appellant has been in the UK since 2010. There is effectively nothing before me other than that she has been here since then and the limited family ties to indicate the establishment of any significant private life built up since then.

22. Mr Addo's position is that he would not leave the UK. As such there would be no disruption to any family life that he has with his children. The main interference with family life would, of course, be between the Appellant and her husband.

23. Any such interference would be in accordance with the law and in pursuit of a legitimate aim. The issue is whether the decision is necessary in a democratic society, including whether it is disproportionate to the legitimate aim of immigration control.

24. The Appellant speaks English and it was not suggested she is a burden on taxpayers. Her husband earns a significant salary in his work for London Underground. However, an Appellant can obtain no positive right to a grant of leave to remain

from either s117B (2) or (3), whatever the degree of fluency in English, or the strength of her financial resources.

25. I can give little weight to any private life as she has been in the UK unlawfully since 2010.

26. In respect of the children of her husband it is in their best interests for them to remain with their mother who is their primary carer. There is no reason why continued contact with their father could not continue by phone or personal contact. As he will not be leaving the UK the current situation can remain unchanged financially and emotionally. As indicated there is no evidence of any particular ties between the Appellant and her husband's family

27. On other matters it is not in her favour in the balancing exercise that she has spent the vast majority of her life in Ghana and there would be no issues of language or culture to cope with were she to return. It seems clear that her husband would be able financially to support her while she is there.

28. Nothing was put before me to indicate any significant medical issues.

29. Her complete disregard for the laws of this country by overstaying for five years before bringing herself to the attention of the authorities does not assist her in the balancing exercise.

30. As also indicated it was not argued by Ms Record that the Appellant could satisfy the Rules which also does not assist her.

31. The consequence of the Appellant being removed and her husband remaining might be, although no evidence was given on this matter, that the marriage could not be sustained in the long-term. The Respondent's position is that the Appellant could seek entry clearance from Ghana.

32. Ms Record made reference to **Hayat (nature of Chikwamba principle) Pakistan v SSHD [2011] UKUT 00444** at

> *'23. The significance of **Chikwamba**, however, is to make plain that, where the only matter weighing on the Respondent's side of the balance is the public policy of requiring a person to apply under the Rules from abroad, that legitimate objective will usually be outweighed by factors resting on the Appellant's side of the balance.*
>
> *24. Viewed correctly, the **Chikwamba** principle does not, accordingly, automatically trump anything on the state's side, such as a poor immigration history. Conversely, the principle cannot be simply "switched off" on mechanistic grounds, such as because children are not involved …'*

33. In fact the Upper Tribunal decision was appealed to the Court of Appeal (**SSHD v Hayat; SSHD v Treebhawon (Mauritius) [2012] EWCA Civ 1054**).

34. There, at [30], the court said:

> *"In my judgement, the effect of these decisions can be summarised as follows:*
>
> *…*
>
> *a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.*
>
> *b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ there is a sensible reason for doing so.*
>
> *c) Whether it is sensible to enforce that policy will necessarily be fact sensitive, Lord Brown identified certain potentially relevant factors in **Chikwamba**. They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK.*
>
> *d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the Appellant has no lawful entry clearance."*

35. In **R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189**, the Tribunal (at [36]) stated:

> *'I do not accept that, in using the phrase 'sensible reason', Elias LJ was setting out the test for applying the guidance in **Chikwamba**, nor that he reversed the burden of proof. The burden remains upon the applicant to place before the Secretary of State all material that he or she relies upon to suggest that removal pursuant to the refusal of leave would breach Article 8'.*

36. Finally, at [39]

> *'In my judgement, if it is shown by the individual (the burden being upon him or her) that an application for entry from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance of proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was 'precarious'. In other words, in the former case, it would be easier to show that the individual's*

*circumstances fall within the minority envisaged by the House of Lords in **Huang** or the exceptions referred to in the judgements of the ECtHR than in the latter case. However, it all depends on the facts'.*

37. In this case the Appellant has made no case as to any form of hardship that she and/or her husband would suffer if she were required to make an application for entry clearance.

38. The Appellant's leave had expired well before she and Mr Addo began their relationship. They were married in the full knowledge that she did not have leave and that she had no lawful status. It may be that an entry clearance application would satisfy the Rules. However, on the facts of this case there is no evidence of significant interference with family life that would be caused by temporary removal. Nor that the prospective length of disruption would be anything other than temporary.

39. There is no evidence of interference to any connection she may have with her adult children and her grandchildren. As indicated there was no evidence of any particular connection with her husband's children. There is no reason why during a temporary separation she could not easily keep in touch with her husband and others in the families.

40. I also see no reason why, if they wished it, her husband could not go with her to support her temporarily. Again there was no evidence that any disruption would be severe. It was not suggested that a temporary period in Ghana would preclude him from continuing financially and emotionally to support his daughters. The effects on his children and interference with family life, on the evidence before me, would not be major. I conclude that there is a sensible reason for enforcing the policy.

41. For these various reasons on the facts of this particular case I conclude that removal would not be disproportionate to the legitimate aim of immigration control. The appeal fails on Article 8 grounds.

Notice of Decision

The decision dismissing the appeal under the Immigration Rules stands.

The appeal is dismissed under Article 8, ECHR.

No anonymity direction made.

Signed Date 17 May 2017

Upper Tribunal Judge Conway