



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/06419/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 21 May 2018

Decision & Reasons Promulgated  
On 8 June 2018

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PATIENCE COSTA-PEREIRA  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss A Everatt, Senior Home Office Presenting Officer  
For the Respondent: Mr S Karim, Counsel instructed by Jove Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State refusing her leave to remain on human rights grounds. I see no need for, and do not make, an order restricting publication of the details of this appeal.
2. The appeal before the First-tier Tribunal was against a decision made on 16 July 2016 refusing the claimant's application for leave to remain on human rights grounds. The claimant is a citizen of Ghana. She was born in December 1975. She entered the United Kingdom in June 2002 as a visitor and had a period of lawful leave on the basis of a relationship to an EEA national between 2003 and 2008. She then made three further unsuccessful applications for leave to remain between 2013 and 2014.
3. The appeal before the First-tier Tribunal concerned an application based on the claimant's relationship with a British citizen, a Mr Anthony Jones Snelgrove. The First-tier Tribunal noted that the refusal of the application was based on a finding that the claimant had not

established insurmountable obstacles in the way of family life continuing with her partner outside the United Kingdom and, in any event, the application was refused with reference to Article 8 of the European Convention on Human Rights.

4. There are aspects of the decision that are, frankly, puzzling. The judge said at paragraph 20:
 

“The Tribunal need not consider any separate Article 8 assessment. The Rules themselves are the appropriate starting point (and often the end point) of any consideration.”
5. The judge then went on to allow the appeal “under the Immigration Rules” and for no other reason.
6. The application was made on 6 January 2016 and refused 18 February 2016. Both the application and decision are after 6 April 2015 and are subject to s82 of the Nationality Immigration and Asylum Act 2002 as amended by the Immigration Act 2014. There was no power in law to allow an appeal under the Immigration Rules and it is a matter of surprise and concern that the judge on this not only purported to allow the appeal under the Immigration Rules but said quite openly at paragraph 20 that “the Tribunal need not consider any separate Article 8 assessment.”
7. I have reflected carefully on Mr Karim’s submissions but I cannot find that the First-tier Tribunal’s statement of the law is anything other than totally wrong. Far from there being no need to consider any separate Article 8 assessment in this case making such an assessment was the only thing that the judge was there to do. Whilst the Rules certainly illuminate an Article 8 balancing exercise they do not determine it and the judge’s primary concern should have been about the operation of Section 117A-D of the 2002 Act. These sections form part VA of the Act and apply where the Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under Section 6 of the Human Rights Act 1998. This statutory obligation encapsulates the Tribunal’s function and it is what the judge should have done.
8. There are parts of the decision and reasons that suggest the judge’s attention might have been focused correctly. Paragraph 1 recognises that the application was made on human rights grounds but there is nothing that I can identify as a proper Article 8 balancing exercise analysis even if it was described as something else.
9. Mr Karim pointed out in his submissions that the First-tier Tribunal allowed the appeal on two related but separate reasons. First, there is a finding that there were, within the meaning of paragraph 276ADE of HC 395, “insurmountable obstacles” in the way of the claimant returning to Ghana. Second, and separately, there was a finding under R-LTRP.1.1(d)(iii) that paragraph EX.1.(b) of Appendix FM of HC 395 applies because there were “insurmountable obstacles” to family life with [the British citizen] partner continuing outside the UK.
10. In order to come within the scope of paragraph 276ADE(1)(vi) there must be “very significant obstacles to the applicant’s integration into Ghana.”
11. It must follow that the reference at paragraph 16 to there being “insurmountable obstacles” when considering paragraph 276ADE is a misdirection.
12. Nevertheless when asking himself if there were difficulties facing the claimant establishing herself in Ghana the Tribunal applied an “insurmountable obstacles” test as explained at paragraph 16 of the Decision and Reasons when deciding if the claimant could continue her

family life in Ghana with Mr Snelgrove. The Tribunal applied an “unsurmountable(*sic*) obstacles” test as explained at paragraph 17 of its decision. There was a gloss on this at paragraph 18 where the Tribunal found “very serious hardship” awaiting the claimant’s husband partner in the event of his having to establish himself in Ghana.

13. I cannot read this Decision and Reasons as if the judge were applying distinct tests, one described correctly as “insurmountable obstacles” and the other described incorrectly as “unsurmountable obstacles”. The judge was clearly muddled because he did not identify the correct test under 276ADE but I am satisfied his mind was set on applying the “insurmountable obstacles” test. There is no striking difference between the tests and I construe the reference to “unsurmountable” as an unimportant slip.
14. Mr Karim’s argued that the grounds were wholly academic because the Secretary of State had not challenged the finding that it was expecting too much of the applicant to relocate but only the finding that it was expecting too much to expect her husband to relocate.
15. This is taking an overly descriptive of approach to the grounds of appeal.
16. They begin with a challenge to the whole approach to article 8 of the European Convention on Human Rights. They include a particularised challenge to the finding that the claimant and her husband face insurmountable obstacles in the way of establishing themselves as a couple but the grounds do not permit the construction that the respondent was satisfied with the consideration of the case concerning how the claimant might establish herself on her own. Apart from the obvious point that if that were the case the decision would not have been challenged it is quite clear from the grounds that the First-tier Tribunal’s approach to article 8 as a whole was challenged.
17. I am satisfied that the judge did decide that it was too much under the Rules both to remove the applicant on her own and remove the applicant because of the effect that removal would have on her husband.
18. I now consider the Decision and Reasons to see what “very significant obstacles” were found for the purposes of the proper application of paragraph 276ADE and what “insurmountable obstacles” were found for the proper application of EX.1(b). I find these points to be entirely inadequately explained. In the case of the applicant and her partner the Tribunal found there were “no family, close friends or contacts in Ghana” and this was sufficient to support the finding that there would for the claimant be “unsurmountable obstacles” to her continuing her family life in Ghana with Mr Snelgrove. At paragraph 18 there were matters found to create “very serious hardship” for the claimant’s partner in the event of his establishing himself in Ghana. This was based on the claimant’s partner being a British citizen employed in the National Health Service who had never lived outside the United Kingdom and had no experience of Ghana or African culture.
19. I have read the Decision and Reasons as a whole and I find nothing that adds any flesh to this summary. I agree with the Secretary of State that this reasoning is totally inadequate. It does not always identify a consistent or clear test but even if that can be overlooked (it cannot) the reasons for the finding are exceedingly superficial.
20. I do not accept that a person needs close friends or contacts to establish herself in Ghana or that there will be serious hardship for a 58-year-old British man with a good employment history in establishing himself in Ghana. It just does not follow.

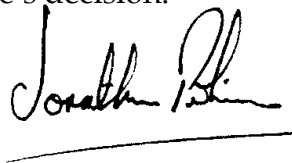
21. There are supportive statements from the claimant and her partner and close family members. They speak of her involvement in the community and support in times of family crisis but wholly failed to identify anything which, in my judgment, can be described properly as an insurmountable obstacle in the way of the claimant establishing herself in Ghana or “very significant obstacles” in the way of the applicant’s partner’s integration into life in Ghana.
22. Further I see nothing in the evidence before the First-tier Tribunal which even taken at its highest could support the findings necessary to say that the applicant satisfied the requirements of the Rules or that her partner satisfied the requirements of the Rules. To the extent that the Rules illuminate an Article 8 balancing exercise they illuminate it in favour of dismissing the appeal.
23. In reaching this conclusion I have read the skeleton argument used before the First-tier Tribunal, the grounds of appeal to the First-tier Tribunal and the supporting letters and statements. I accept that the claimant has close links with her sister in the United Kingdom. I accept too that the claimant cannot expect relocation and adjustment to life in Ghana to be a seamless passage but she has lived in Ghana as an adult. She clearly knows what to expect there because she relies on that knowledge to support her argument that her partner cannot cope but she does not no more than show that she will take time to adjust. She makes out no case that she could not earn her living, support her partner or achieve an acceptable life style.
24. Similarly the partner’s evidence is clear that he does not want to adjust to life in Ghana. I accept the claimant’s evidence that he will be disgruntled by poor public services and the vagaries of the supply of public utilities. These things explain clearly why he wants to remain in the United Kingdom. They do not show why he cannot go to Ghana.
25. In coming to this conclusion I find it revealing that neither the claimant nor her partner seem to have worked out how they might establish themselves in Ghana. There is no indication of any seriously thought-out plans but rather of their proverbially throwing their hands in the air and saying it cannot be done. They are not too old or infirm. Ghana is not a country known for its extreme poverty or economic difficulties. The necessary foundation to support the desired conclusion has not been laid.
26. There are matters to put in the favour of the claimant being allowed to stay. It does seem that her husband earns quite enough to support her without her becoming a burden on the taxpayer. She appears to speak good English and to have established links in the community so she is integrated into society. The difficulty is that Section 117B(4)(b) requires little weight should be given in a balancing exercise to “a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.”
27. This claimant has been in the United Kingdom without permission since about 2008 when her leave lapsed. There may have been periods while applications were being pursued where her presence was tolerated but no more. This is a relationship where statute requires little weight to be attached.
28. It may be that the claimant could leave the United Kingdom and apply successfully for entry clearance as a wife or partner. It has never been doubted that the relationship is other than genuine and subsisting that although not proved in a way that would satisfy the requirements of the Rules money does not seem to be a problem. It is a telling feature of the

case that this route has not been considered and again is indicative of people throwing up their hands in horror rather than doing what the Rules require.

29. I sit back and ponder a little on this case. The claimant has been in the United Kingdom for some time and although being present without permission is not to be commended she has not hidden from the authorities. She has made efforts to remain. Her partner appears to be entirely serious about the relationship and to have acted properly at all times. He has a very understandable desire for his chosen partner to live with him in his country of nationality.
30. The Rules recognise that desire and say how it can be achieved. The claimant has made little effort to achieve compliance with the Rules but has gone instead for a claim based on human rights grounds which is explained inadequately.
31. The evidence does not support a conclusion that there are very significant obstacles in the way of the claimant establishing herself in Ghana or that there are insurmountable obstacles in the way of the claimant and her partner establishing themselves there.
32. Clearly returning to Ghana will interfere with the "private and family life" of the claimant and of her partner but the difficulties can be overcome, the private and family life established in the United Kingdom cannot be given much weight and the decision is proportionate having regard to the proper purposes represented by immigration control.
33. I find the First-tier Tribunal erred in law. I set aside its decision and I substitute a decision dismissing the appeals against the Secretary of State's decision.

Decision

The Secretary of State's appeal is allowed. I substitute a decision dismissing the claimant's appeal against the Secretary of State's decision.

A handwritten signature in black ink, appearing to read "Jonathan Perkins", written over a horizontal line.

Signed

Jonathan Perkins, Upper Tribunal Judge

Dated: 7 June 2018