



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

Appeal Number: IA/47471/2014

THE IMMIGRATION ACTS

Heard at Stoke

**Decision and Reasons
Promulgated**

On 3 September 2015

On 9 September 2015

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**JOYCE ABLAVI GLIGAH
(Anonymity direction not made)**

Respondent

Representation:

For the Appellant: Mr A McVeety – Senior Home Office Presenting Officer.

For the Respondent: Mr Bramall instructed by Permits 2 Work.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of PJM Hollingworth promulgated on the 23 April 2015 on which the Judge allowed the appeal under EX1(a) and EX1(b) of the Immigration Rules.

Discussion

2. Mrs Gligah was born on the 3 May 1977 in Ghana. On 20 January 2014 she applied for further leave to remain as a Partner under Appendix FM

which was refused on the 20 August 2014. The basis of the refusal was an inability to satisfy the income threshold specified in the Rules as required by E-LTRP.3.1 of Appendix FM. EX.1. was considered by the decision maker but it found Mrs Gligah had failed to produce any evidence that she is the parent of a British Citizen child or a child who has lived in the United Kingdom for 7 years preceding the date of the application and although it was accepted Mrs Gligah has a settled relationship with a partner in the United Kingdom, no insurmountable obstacles to family life continuing with the partner outside the United Kingdom had been shown to exist.

3. Before the Judge it was stated the issues were those relating to EX1 and EX 2 and Article 8, as it was accepted that Mrs Gligah was unable to satisfy the requirements of the Rules.
4. The statement of changes HC 354 brought in EX 2 from 10 July 2014. At the date of decision this part of the Rules specified:

EX.1. This paragraph applies if

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child who -

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

5. EX.1 contains the exceptions to certain of the eligibility requirements contained in the Rules.

6. The finding of the Judge that Mrs Gligah and her husband have a genuine parental relationship with a child who is under the age of 18 and who is a British citizen is not disputed. The first issue before the Judge was whether it was reasonable to expect the child to leave the United Kingdom, EX.1.(a)(ii) and if not whether there were insurmountable obstacles to family life with her partner continuing in Ghana, EX.1.(b) as that term is defined in EX.2.
7. The child in question was 1 year of age at the date of the hearing and therefore dependent upon his parents for all his needs.
8. The Judge found it not reasonable to expect the child to leave for the reasons given at paragraph 23 to 26 of the determination.
9. An important theme in the evidence to the judge and the findings made is the fact Mrs Gligah's husband has invested in a local shop in Waddington in Lincolnshire that he runs. The Judge refers to the fact the business could not afford to appoint a manager and that the business is fragile as it has only just been started and has been 'unimpressive' and is as yet not firmly established. The income from the business does not at this stage meet the requirements of the Rules in relation to the minimum income required for leave to remain.
10. The Judge notes the fact it is in the best interests of the child to have an assured economic future but claims it is unreasonable for the business to be disposed of given the resultant loss of capital which were found to be issues of 'substantial importance'.
11. The Judge accepted the child requires the presence of his mother and that his father could not provide care and run the business.
12. Whilst the fact the business may be a success in the future if allowed to continue may be so, although this is not necessarily made out in the evidence, to ascertain whether the 'reasonableness' test is satisfied it is necessary for all issues to be considered. This must include considering both the situation if the child moves to Ghana with his mother/parents and that in the UK. It was submitted that the only evidence submitted to the Judge related to the business and the question of the viability of sale and that business and other economic opportunities in Ghana were not explored. If this is the case it is arguable the Judge was required to find that Mrs Gligah had failed to discharge the burden as to reasonableness.
13. The fact the adults may wish to remain in the UK and continue in business may be so but this is not determinative.
14. Case law makes it clear the best interests of the child are not the determinative factor and they need to be balanced with all other relevant facts. It is accepted that for a one year old child their best interests are to be with their parents.

15. The finding relating to the need to access the NHS for this one year old child is inadequately reasoned and there is no examination of the availability of medical care in Ghana, or a specific need for the same, or of educational opportunities here and there. The fact the child is a British national is not determinative as the amendment to EX.1 clearly demonstrates by introducing the element of reasonableness.
16. The finding in relation to EX1(b) appears to be that the insurmountable obstacle is the fact the husband is trying to establish a business in the UK with no examination of the economic opportunities available in Ghana, even if there was a capital loss on the sale of the business.
17. It is arguable the Judge has viewed the continued existence of the business as the core element and based all other findings around this fact which is irrational.
18. The determination shall be set aside and the matter considered further in greater detail. Mrs Gligah was offered the opportunity for a hearing before the Upper Tribunal but through her barrister asked for the matter to be remitted to Nottingham for if the claim under the Rules fails there is the Article 8 ECHR element which the Judge failed to consider for the reasons set out in paragraph 31.
19. There are no preserved findings.

Decision

20. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. The appeal shall be remitted to the First-tier Tribunal Nottingham Hearing Centre to be heard by a salaried judge of that Tribunal other than Judge PJM Hollingworth.**
21. **Directions for the future management of the appeal shall be given by the First-tier Tribunal.**

Anonymity.

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

Signed.....

Upper Tribunal Judge Hanson

Dated the 7 September 2015