



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

Appeal Number: IA/40912/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 8 December 2014**

**Decision & Reasons Promulgated
On 22 December 2014**

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MARK AKWASI SARPONG
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr M. Shilliday, Senior Home Office Presenting Officer

For the Respondent: Ms A. Heller, Counsel, instructed by J R Immigration Ltd

DECISION AND REASONS

1. The respondent (henceforth "claimant") is a citizen of Ghana born on 16 July 1995, who entered the United Kingdom as a visitor, following a successful appeal. His date of entry was 21 January 2012. On 27 April 2012 the claimant was adopted by his sponsor, his brother (fourteen years older than the claimant) and the brother's wife (a person present and settled in the United Kingdom). The adoption took place in Ghana, according to the law of that country, having, it seems, been initiated in March 2012.

2. On 15 May 2012, an application was made for indefinite leave to remain to be granted to the claimant, as the adopted child of parents settled in the United Kingdom. That application was refused by the Secretary of State on 19 July 2013.
3. The claimant appealed against that decision and his appeal was heard in Birmingham on 24 April 2014 by First-tier Tribunal Judge Lagunju. In a determination promulgated on 23 June 2014, the judge allowed the claimant's appeal, both under the Immigration Rules and by reference to Article 8 of the ECHR.
4. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 6 November 2014. In the decision granting permission, the First-tier Tribunal noted that it was "debatable as to whether the [claimant] was a child at all relevant times". Permission was also granted by reference to Article 8 of the ECHR.
5. At the hearing on 8 December, Mr Shilliday applied for permission to amend the Secretary of State's grounds in order to pursue the point noted by the First-tier Tribunal; namely, that by the date of decision, the claimant was not under the age of 18 and, accordingly, could not succeed under paragraph 298 of the Immigration Rules. In support, Mr Shilliday relied upon the judgment of the Court of Appeal in SO (Nigeria) [2007] EWCA Civ 76. This made it plain that, except in applications made from abroad, the fact that a person had reached the age of 18 by the date of the Secretary of State's decision was fatal to that person's ability to succeed under the Rules, which require a person to be under that age.
6. For the claimant, Ms Heller quite properly conceded that that point was plain; and that, accordingly, she did not oppose the application. In deciding whether to grant permission, I also had regard to the fact that the matter could not be said to come as a surprise to the claimant, having been articulated in the grant of permission, and that Mr Shilliday's skeleton argument - in which the issue was fully developed - had been sent to Ms Heller on 5 December 2014.
7. In all the circumstances, having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I granted permission to Mr Shilliday to amend the grounds. I also heard submissions regarding the judge's findings concerning Article 8.
8. The judge allowed the claimant's appeal under the Immigration Rules. She did so on the basis that she found no difficulty with the Ghanaian adoption. She also accepted the evidence that the claimant's mother had suffered a stroke, so as to be confined to a wheelchair, and that the claimant has sustained an injury whilst playing recreational football in the United Kingdom. The claimant had been in hospital for two weeks as a result of that injury. Since September 2012 he had been studying at Abingdon & Witney College for a course leading to GCSEs. He had not

played football at the college since his accident. He had made friends at the school and also got on well with his sister-in-law and her two children.

9. The judge found that the adoption was not one of convenience. She therefore found that the claimant met the requirements of the Rules. So far as Article 8 was concerned, the judge, at paragraph 19 of the determination, purported to follow “guidance” contained in the Court of Appeal judgment of Edgehill & Anor [2014] EWCA Civ 402, considering the application “in line with the Rules that were in place when the application was made”, which was May 2012. The judge then purported to undertake an analysis of the kind required by Razgar [2004] UKHL 27. She found that the claimant had established a private and family life in the United Kingdom. At paragraph 25, she took account of the length of time the claimant had been in this country, the circumstances which led to his presence, and that he was “in the process of embarking on a new life with his new adoptive parents. If he were to leave the UK his education, family and personal relationships would be disrupted.”

The judge concluded as follows:-

“26. Having weighed these factors against the public interest in maintaining effective immigration control, I find there is nothing undesirable about the [claimant’s] presence in the UK. Accordingly I find that the respondent has failed to show to the requisite standard, that the decision is proportionate”.

10. The judge’s Article 8 analysis is plainly legally deficient. The test is not whether there is anything “undesirable” about the claimant remaining in the United Kingdom. Rather, the question is whether the claimant has established a private and/or family life of such a quality as to defeat the powerful state interest in removing those persons who fail to meet the requirements of the Rules.
11. It is, of course, possible that the judge’s approach to Article 8 was influenced by the fact that she had found that the claimant met the requirements of the Immigration Rules. Since, however, that finding was wrong, the need for a proper Article 8 analysis was all the stronger.
12. I therefore set aside the determination of the First-tier Tribunal. I heard submissions from the parties regarding the re-making of the decision by reference to Article 8.
13. It was common ground that the matter comes down to an assessment of proportionality. In this regard, I note that it took some fourteen months for the Secretary of State to decide the claimant’s application, by which time, as I have stated, the claimant was over the age of 18 and could not meet the requirements of the Rules. I apply the law as set out by the House of Lords in EB (Kosovo) [2008] UKHL 41. I do not consider that the delay is, in this case, indicative of a dysfunctional system, such as to result in less importance being given to maintaining a system of immigration controls,

than would otherwise be the case. The delay has, however, resulted in the claimant strengthening both his private and family life ties with the United Kingdom, such that I accept he feels part of the family of his brother and sister-in-law, as well as having friends and an academic career in the United Kingdom.

14. Nevertheless, adopting the approach of the House of Lords in Huang [2007] UKHL 11, it will only be in a small minority of cases that a person who fails to meet the requirements of the Immigration Rules will be able successfully to deploy Article 8 as a means of remaining in the United Kingdom. This is so, whether one looks at the Rules as they were at the date of application or as they were at the date of decision. There is no suggestion in the present case that the claimant could meet any of the relevant requirements of the “old” Rules and it is common ground that he can meet none of the requirements of the present Rules. Accordingly, the question is whether the claimant would face such a degree of hardship, if returned to Ghana, as to make his removal disproportionate. I accept the evidence regarding the medical position of the claimant’s grandmother. So far as the football accident is concerned, I have not been presented with any evidence to show that this is a significant ongoing problem for the claimant. Instead, I was shown a letter dated 1 August 2013 from the claimant’s GP to the claimant, concerning a “vascular disease annual review”, in which it is stated that “experience has shown that patients suffering from a history of heart disease, peripheral vascular disease or stroke benefit from a regular review with their doctor”. This shows that the claimant appears to be a person who benefits from annual reviews for some cardiovascular reason.
15. Whilst I accept that the claimant may look to his brother as a father-figure, since the claimant’s own father disappeared when the claimant was very young, the fact is that the brother left the claimant, in order to make a life in the United Kingdom. The fact that the claimant’s mother requires a carer, following her stroke, may to some extent have increased the claimant’s reliance upon his brother. However, it is also clear from the evidence that the claimant has other relatives living in Ghana, including a sister. The claimant plainly has not lost relevant ties to Ghana. Whilst I accept Ms Heller’s submission that there is no necessarily “bright line” between the needs of a person under the age of 18 and someone slightly over that age, the claimant is an adult, who has benefited from education in the United Kingdom, which no doubt will stand him in good stead in Ghana. There is no suggestion that, following return there, he would be destitute, or even close to it. The accident occasioned during the football game does not appear to have had any lasting consequences. The GP’s letter is indicative of a need for annual checks. However, there is no evidence before me to show that the claimant is suffering from any actual specific cardiovascular disease. In any event, there is no suggestion that checks would be unavailable in Ghana or that any treatment the claimant might eventually require would be unavailable there.

16. Overall, balancing everything known to me, I do not consider that the claimant has shown that he would suffer any unduly harsh consequences, were he required to leave the United Kingdom. In other words, his removal would not be a disproportionate interference with his Article 8 private and family life rights.

Decision

17. The determination of the First-tier Tribunal contains an error of law. I set it aside and re-make the decision in this case by dismissing the claimant's appeal under Article 8 of the ECHR.

Signed

Date **18 December 2014**

Upper Tribunal Judge Peter Lane