



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/12917/2014
IA/12931/2014
IA/13122/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 22 June 2015

Decisions and Reasons Promulgated
On: 1 July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MISS VIDA OBEIDA DAWUDU GYAWU
MASTER MCKENZIE KOFI DAWUD TWUMASI
MASTER ZAIN OSEI KOJO TWUMASI
(NO ANONYMITY DIRECTIONS MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Waithe of Counsel

For the Respondent: Ms J Isherwood, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondents are citizens of Ghana born on 15 April 1975, 27 May 2005 and 6 October 2008 respectively. They are a mother and her two sons. However for the sake of convenience, I shall refer to the latter as the “appellants” and to the Secretary of the State as the “respondent”, which are the designations they had in the proceedings before the First-tier Tribunal.
2. I shall consider the first appellant’s appeal and for the sake of convenience refer to her as “the appellant” and I shall specifically refer to the second and third appellant where necessary.

3. The appellant's appeal to the First-tier Tribunal was against the decision of the respondent dated 26 February 2014 to refuse the appellant further leave to remain in the United Kingdom pursuant to Article 8 of the European Convention on Human Rights.
4. A Judge of the First-tier Tribunal, DA Pears allowed the appellant's appeal pursuant to Article 8 of the European Convention on Human Rights. First-tier Tribunal Judge JM Holmes in a decision dated 2 April 2015 granted the respondent permission to appeal to the Upper Tribunal, it being found to be arguable that the First-tier Tribunal Judge arguably erred in his approach to the Article 8 appeals and to properly apply either ss117 A-D of the guidance to be found in **EV Philippines [2014] EWCA Civ 874**.
5. Thus the appeal came before me.

First-tier Tribunal's Findings.

6. The respondent refused the appellant's application to remain in the United Kingdom outside the Immigration Rules on the bases of her and her two sons's private life.
7. The First-tier Tribunal allowed the appellant's appeal, concluding that :

"[57]." "Before the start of submissions I indicated that I found the first appellant an unreliable witness. Her counsel on that point did not seek to persuade me otherwise. She could not answer simple questions in a straightforward manner. Her explanation for why her mother was not present was unconvincing. Her statement was contrived at one part, not be as frank as it should have been..... Further there were issue where I conclude on the basis of the evidence as a whole that she was lying and I refer to the matters set out in paragraph 50. Mr Twumasi's was a much more convincing witness; he answered questions in a clear manner even when they might have been said to be against the children's interest such as indicating that he taught them something about Ghanaian culture and the fact that he had family back in Ghana. His history of the decline in his relationship, the reasons for it and the effect on the children all hung together and were credible."

[58] "I find that Mr Twumasi is telling the truth and he and the first appellant are no longer in a relationship although currently sharing accommodation. I accept that the first appellant is however their primary carer and his role as secondary though important."

[59] "I accept that in the light of his limited leave in his answers set out in paragraph 56 that he will remain in the UK until March 2017 and that the second and third appellant will lose extensive face-to-face contact with him."

[60] "if the case turned on the first appellant's Article 8 rights I would have no hesitation in rejecting her claim since she has been in the UK unlawfully for years and a private life has been built up whilst her immigration status was precarious. As

section 117B above says her private life should be afforded little weight and that the maintenance of effective immigration control is in the public interest.”

[62] “That however is not the case as far as the second and third appellant are concerned. They are minors, their best interests are a primary consideration, I have more evidence than the respondent had about those best interests and that since the decision was made their father has been granted limited leave to remain. It therefore seems that the second and third appellant’s have been put forward an arguable basis for the exercise of discretion, the respondent has not assessed the relevant factors because of the leave being granted to their father and a repeat evaluation is necessary”

[63] “As I indicated in submissions however undeserving and untruthful the first appellant might be that was no fault of the second and third appellant’s”.

[64] “I find on the basis of what is set out above that second appellant has been in the UK for more than seven years and has been in the UK education system since 2009. His ability to speak a language other than English is limited and his understanding of Ghana and its culture is restricted.”

[65] “I find on the basis of what is set out in paragraph 39-42 and 64 above that the second appellant has developed social cultural and educational ties that it would be inappropriate to disrupt. [56] “I find that there has not been identified compelling reasons why the second appellant should be removed”. [67] “As a separate reason the second and third appellant’s both have extensive face-to-face contact with their father which they would lose if they had to go to Ghana.”

[72] I conclude that if the second appellant can remain, it would not be proportionate to remove the third appellant whose best interest to remain are not as great as the second appellant only because he is younger and has been in the UK for less than seven years but he should not be split from his brother”.

[73] “it was not argued before me that the second and appellant’s father could take over the care of the children, become their primary carer and the first appellant could return to Ghana, however it is only because of my conclusion in relation to the second and third appellant’s and because the alternative was not ventilated that the first appellant’s appeal should be allowed since if the second and third appellant’s remain it would not be proportionate to remove the first appellant as their mother and primary carer”.

The grounds of appeal.

8. The grounds of appeal state the following which I summarise. At paragraph 57 the Tribunal found that the first appellant, who is the mother of the other two appellants, is an unreliable witness and at paragraph 60, stated that if the case just turned on her article 8 rights, it would be rejected. In making this finding the Tribunal has failed to provide adequate reasons for finding that the best interests of the second two appellants are to remain in the United Kingdom on the basis of their educational needs, despite stating at paragraph 62 their interests are a primary consideration, merely because they have been educated in the UK.

9. The Tribunal has failed to provide adequate reasons for going against some of the established principles of case law. None of the appellants are British citizens and these cases confirm there is no right to an education in the United Kingdom and that the best interests of children are to remain with their parents even if those parents have no right to remain in the UK, as is the case of the first appellant. The Tribunal has failed to provide adequate reasons for finding that it would be inappropriate to disrupt the educational ties the second and third appellant has, as there was no credible evidence before it that the children's education could not be continued in Ghana.

Error of law Decision

10. Therefore the appeal involves two steps, the first being to determine whether there is an error of law in the determination of the first-tier Tribunal Judge and the second, if I find there was an error, to hear evidence or submissions to enable me to remake the decision or send it back to the First-tier Tribunal for redetermination.
11. Having considered the determination as a whole, I find Judge's consideration of the appellant's appeal in respect of Article 8 of the European Convention on Human Rights is materially flawed. The Judge by allowing has not given adequate reasons for why the appellants should succeed given that they have been in this country unlawfully for a very long time.
12. The appellant's application was made pursuant to Article 8 of the European convention on Human Rights in respect of her and her two son's private life and there was no dispute that the appellant does not meet the requirements of the Immigration Rules.
13. Although the Judge referred to an abundance amount of case law in his determination, made material errors of law in his application of the case law. The Judge failed to consider that the appellant and her sons are not British citizens and do not have a right to be educated in the United Kingdom.
14. The Judge failed to provide proper and cogent reasons for finding that the second appellant has lived in this country for seven years and therefore that somehow entitles him to continued British education for the rest of his life. The Judge failed to consider that the appellant's two son's education could be continued in Ghana.
15. The case of **EV Philippines** which was referred to by the Judge at paragraph 28 of his determination stated that none of the appellant's family were British citizens. It is clearly stated in **EV Philippines** that if the parents are removed, then it is

entirely reasonable to expect the children to go with them. Because the best interests of children are to remain with their parents. In **EV Philippines states** “although it is of course a question of fact for the Tribunal, I cannot see the desirability of being educated at the public expense in the UK can outweigh the benefits to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world”.

16. The Judge having referred to paragraph 60 of **EV Philippines** came to the opposite conclusion that the appellant’s two sons have established educational ties to the United Kingdom and that this trumps the respondent’s interest in the fair and orderly immigration control.

17. For the reasons given above, the determination of the First-tier Tribunal is set aside as it is infected by material error.

Remaking the Decision

18. In Human Rights claims, it is for the appellant to show that there has been, or there will be, if the respondent acts as he intends to, an interference with his human rights. The standard of proof is that there must be a real risk that such interference will be suffered. If that is established, and the relevant article permits, it is then for the respondent to establish that the interference was justified. Where the respondent has to establish anything, the normal civil standard of a balance of probabilities applies.
19. I have considered all the evidence in the appeal including evidence to which I have not specifically referred. I have taken into account the submissions at the hearing and I will re-make the decision taking into account the appellant’s circumstances and to the public interest question as it applies to the facts of this case.
20. In looking at Article 8 I have considered the decision of the House of Lords in **Huang v SSHD [2007] UKHL 11**. The House of Lords gave guidance that in assessing proportionality there was no legal test of truly exceptional circumstances, reaffirmed the analysis they had given in **Razgar, R (on the Application of) v SSHD [2004] UKHL 27** and also reaffirmed the importance of continuing reliance on established Strasbourg jurisprudence relating to Article 8. Lord Bingham’s step by step approach in **Razgar** continues to apply in all expulsion cases. Firstly, it is necessary to establish whether there is a private or family life with which removal would interfere and then Lord Bingham’s five questions, the step by step approach, should thereafter serve as a framework for deciding such cases.
21. I remind myself that the mere existence of a family relationship or a private life is not sufficient for the applicability of Article 8(2). Much more is needed. At paragraph 20 of Lord Bingham’s judgment in the case of **Huang** he said this:

“In an Article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be

expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.”

22. I must consider Lord Bingham’s step by step approach and in so doing I recognise that at all stages of the Article 8 assessment when deciding whether there is a family or private life, when deciding whether any existing family or private life is the subject of an interference having grave consequences and when deciding whether any such interference is proportionate to the legitimate public end sought to be achieved, the approach is to take into account a wide range of circumstances including the appellants previous family and personal circumstances and the likely developments in the future.
23. I have further considered the decision of the House of Lords in **Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39** in which Baroness Hale observed that ‘the right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed’. It was further said that: ‘Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims’. In light of this decision, I have to consider the family life of all those who share their family life with the appellants. In particular, I have to consider the Article 8 rights of the appellant’s and her two sons.
24. Mr Waithe submitted that the second appellant has made an application for British citizenship on the basis that he has been in this country for more than seven years. In fact the second appellant has been in this country for nine years. He argues that the second appellant’s mother and siblings should be both given leave to remain in this country on the basis that his mother is his primary carer and based on his family life with his brother.
25. In **MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC)** the Upper Tribunal gave guidance on dealing with cases covered by the new Immigration Rules introduced by HC 194 on 9 July 2012. The panel noted that the new Rules set out a number of mandatory requirements relating to Article 8 cases which make clear that if these requirements are not met, the Article 8 claim under the Rules must be refused. However, the new Rules only covered Article 8 claims brought under some, not all, parts of the Rules. Even if a decision to refuse an Article 8 claim under the new Rules is found to be correct, Judges must still consider whether the decision complies with Section 6 of the Human Rights Act 1998 and, in automatic deportation cases, whether removal would breach a person’s rights under the ECHR (Section 33(2) UK Borders Act).

26. Thus, the two stage approach to assessing Article 8 claims in the context of deportation and removal remains imperative as the new Rules do not encapsulate the guidance in Maslov v Austria – 1683/03 [2008] ECHR 546, endorsed by the higher courts in the UK.
27. In the case of Iftikhar Ahmed v Secretary of State for the Home Department [2014] EWHC 300 (Admin) held it is settled law that considerations under Article 8 are imbedded in the Immigration Rules such that if the Secretary of State applied those Rules then, ordinarily, Article 8 considerations would have been fully catered for.
28. It has been essentially argued by the three appellants that they are entrenched in the British way of life and the second and third appellant's are going to school and that should not be interfered with.
29. In the case of **ZH Tanzania** it was stated that it is not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the rights to grow up in the country of which they are citizens. The appellants are all nationals of Ghana and therefore the facts in **ZH Tanzania** are different than the facts in this case. The appellants have lived in this country illegally from the outset and have never had leave to live here.
30. Even if the second appellant is able to procure British citizenship my decision remains the same. I have considered the second appellant's interests as my primary consideration which is not to say that it is my only consideration. I also consider the third appellant's interests as my primary consideration even though he has not lived in this country for seven years.
31. I find that the starting point is that it is in the second appellant's sons best interests is to remain with his mother who has been his primary carer. The appellant's father who is separated from their mother is a secondary carer. He only has limited leave to remain in this country on the bases of his two sons who live here and therefore it will be his choice whether he wants to return to Ghana to be with them.
32. Ms Isherwood was unable to explain why the appellant's father was given leave to remain in this country until 2017. The second and third appellants' father was granted discretionary leave on the basis that he has two children in this country. His application however did not include the second and third appellants as his dependents. The second and third appellant's father was at the time of the previous determination not working in this country but was nevertheless given limited leave to remain on those bases.
33. The appellant's father therefore can return to Ghana with his family as his leave expires in 2017. He therefore would have to apply for further leave to remain and to that extent the appellant's father's immigration status is precarious in this country.

Given that the appellant's father's leave to remain in this country is based on his two son's presence here, if they are to return to Ghana therefore there father can return with them, if that is his wish.

34. I also take into account that the relationship of the appellant's mother and father has broken down but nevertheless live together in the same accommodation. While there would be some interruption with their family life with their father, how long the separation will be a matter entirely for the appellant's father. I therefore do not find there are any significant obstacles to the second appellant returning to Ghana with his mother and sibling to enjoy family and private life in that country.
35. In **AE Algeriav Secretary of State for the home Department [2014] EWCA Civ 653** it was held that in conducting the exercise as to the best interests of the children as a primary consideration, it would have been appropriate to consider the cost of the public purse in providing education to these children. In the case of **Zoumbas [2013] UK SE 74** it was stated by the Supreme Court that children whose parents had "an unedifying immigration history" and had spent longer than seven years in the United Kingdom it was proportionate that they are all removed as a family. The best interests of the child will always start from the premise that the child should remain with his primary carer or parent and if that parent is required to leave the United Kingdom then the child should accompany them.
36. In the case of **Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)** it was held that the starting point it is the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom than the starting point suggests that so should dependent children will form part of their household unless there are reasons to the contrary. It further states that it is generally in the interests of the children to have both stability and continuity of social and educational provision in the benefits of growing up in the cultural norms of the society to which they belong. It states that lengthy residence in the country other than the State of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear-cut but past and present policies have identified seven years as the relevant period. Apart from the terms of published policies and rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable. Short periods of residence, particularly once without leave of the reasonable expectation of leave to enter or remain, while claims are properly considered, are unlikely to give rise to private life deserving of respect and the absence of exceptional factors. In any event protection of the economic well-being of the society amply justifies removal in such cases.

37. The third appellant has been living in this country for less than five years and therefore can adjust to life in Ghana with his mother. There is no evidence that Ghana does not have schools to which the third appellant can attend and continue with his education.
38. There is no reason why the appellant cannot look after her two sons in Ghana. There is also no reason to believe that she cannot rely on her husband's extended family in Ghana to assist her settle down in that country. The appellant's father has taught the appellant's about Ghanaian culture and even though they have been in education in this country, they can continue that education in Ghana with their mother looking after them. As stated in the jurisprudence, the United Kingdom cannot educate everyone in this country other than those who are legally entitled to the education.
39. The public interest considerations are now contained in section 19 of the 2014 Act introduced into the Nationality, Immigration and Asylum act 2002 as a new part five a containing new sections 117-A-D. This sets out the statutory guidelines that must be applied with a Court or Tribunal has to decide whether an immigration decision to remove someone from the United Kingdom would be in breach of Article 8 rights. 117B states that the maintainers of effective immigration control is in the public interest and that people seeking to remain in the United Kingdom should be able to speak English and are less of a burden on taxpayers on are better able to integrate into society. It states that little weight should be given to a private life or 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. Furthermore little weight should be given to a person at a time when the person's immigration status is precarious.
40. The first, second and third appellants have been in this country illegally and therefore their immigration status has always been precarious to their mother's knowledge. She must have known that she would be required to leave the country with her children when discovered that she has lived and worked here illegally. I accept that the second and third appellant's have nothing to do with their mother's illegality and I do not penalise them for her mistakes.
41. The respondent's interests in a fair and orderly immigration control must come before the appellant's and her sons wish to continue to live in this country and benefit from the free educational system here whereas in Ghana the appellant would have to work and look after herself and her sons.
42. Even taking into account the appellant sons rights as a primary consideration, I find that the appellant's son's equilibrium is to remain with their mother wherever she lives. If she has to go back to Ghana, it is not unreasonable to expect her sons to go with her.

43. In respect of the second appellant, even if he is granted British citizenship, and taking into account his best interests as a British citizen, I find that he is nine years of age and as his mother and his brother have to return to Ghana, I find it would be entirely proportionate to require him to go with them in order for them to enjoy family life together in that country.
44. Paragraph 276 ADE of the Immigration Rules state that where (iv) an applicant is under the age of 18 years and has continuously lived in the UK for at least seven years (discounting any period of imprisonment) and (vi) that there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the United Kingdom.
45. I find that there are no significant obstacles to the second appellant returning to Ghana with his mother and brother. I find that the second appellant although now nine years old, would be able to integrate into Ghanaian society with the help of his mother.
46. I find there are no circumstances in all the appellants' case where they should succeed pursuant to Article 8 when they cannot meet the requirements of the Immigration Rules. The appellants' circumstances have been catered for within the Immigration Rules and there is no need to go outside them.
47. I do not accept that at this time, the second appellant is a qualifying child under the Immigration Rules, as argued by Mr Waithe.
48. The respondent's interest in a fair and orderly immigration control is not readily upset. I therefore find that even if there is some interference in the appellant and her son's private life in this country by their exclusion from the United Kingdom, this will be according to the law and proportionate.

DECISION

I set aside the decision of the first-tier Tribunal allowing the appellant's appeal and I re-determine the appeal and dismiss the appellants' appeals for leave to remain in the United Kingdom pursuant to Article 8 of the European Convention on Human Rights.

The appellants' appeals are dismissed

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal

The 28th day of June 2015