



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

Appeal Number: IA/13752/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 6th February 2015**

**Decision & Reasons
Promulgated
On 16th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**YAW GYIMAH
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

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

For the Respondent: Mr H Pratt of WTB Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a determination of Judge of the First-tier Tribunal Raikes promulgated on 19th September 2014.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to him as the Claimant.

3. The Claimant entered the United Kingdom on 19th March 2013 as a visitor, with a visit visa valid between 11th February 2013 and 11th February 2014. After arriving in the United Kingdom he met Vera Adu-Gyamfi to whom I shall refer as the Sponsor, and who has indefinite leave to remain in the United Kingdom. The couple underwent a marriage ceremony. They both remained in the United Kingdom but this was done by proxy in Ghana on 25th August 2013, and the marriage was registered on 18th September 2013.
4. Although the Claimant had a multivisit visa, he should have only stayed in the United Kingdom for a maximum of six months. He overstayed and on 10th February 2014 applied for leave to remain using form FLR(FP) the reason for his application being that he wished to remain in the United Kingdom with his wife, the Sponsor. The application confirmed that the Claimant and Sponsor had married by way of a proxy marriage carried out in Ghana by family members, and contended that they were able to support themselves without recourse to public funds and that they had adequate accommodation. They had third party financial support from the Claimant's brother who was a general practitioner in the United Kingdom. It was accepted in the covering letter dated 7th February 2014, which was submitted with the application, that the application could not succeed under the Immigration Rules, but contended that the application should be granted under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention). The application was refused on 4th March 2014, the Secretary of State refusing to vary leave to remain, and making a decision that the Claimant should be removed from the United Kingdom. The reasons for refusal are contained in a letter dated 4th March 2014. The application was considered under section EX.1 of Appendix FM. There was no indication that EX.1(a) applied, because at that time the couple did not have any children. In relation to EX.1(b) it was acknowledged that the Claimant may have a genuine and subsisting relationship with his partner, but it was not accepted that there were insurmountable obstacles to family life with that partner continuing outside the United Kingdom. Therefore the application failed with relation to Appendix FM.
5. The Claimant's private life was considered with reference to paragraph 276ADE of the Immigration Rules and failed because the Claimant had only entered the United Kingdom on 19th March 2013, and in relation to paragraph 276(vi) it was not accepted that the Claimant had no ties (which was the test at that time) to Ghana.
6. The Secretary of State did not accept the application disclosed any exceptional circumstances which would warrant granting leave to remain outside the Immigration Rules. It was noted that the Sponsor was less than two months pregnant, there was no medical evidence provided to indicate that she was unable to travel, and the Secretary of State concluded that there was nothing preventing the Claimant and Sponsor returning to Ghana.

7. The Claimant appealed contending in summary that the refusal breached Article 8 in that the Claimant resided with the Sponsor who has indefinite leave to remain in the United Kingdom. The Sponsor is pregnant and the Claimant is the father of the child, and the Claimant and Sponsor intended to live together permanently in a genuine relationship. Adequate financial maintenance was available from a combination of the Sponsor's earnings and third party support from the Claimant's brother. The Claimant had family in the United Kingdom but no family in Ghana and no ties to that country.
8. The appeal was heard by Judge Raikes (the judge) on 3rd September 2014. The judge heard evidence from the Claimant, the Sponsor, and the Claimant's brother who was providing third party financial support. The judge found (paragraph 30) that "there does not appear to be any issue about the Appellant and his wife returning to Ghana per se". The judge noted that the Claimant had lived in Ghana all his life until he arrived in the United Kingdom in March 2013 as a visitor. It was also noted that the Sponsor lived in Ghana all her life until 2009. The judge however went on to find that the appeal could not succeed under the Immigration Rules recording in paragraph 33, "I am not satisfied that the Appellants have met the Immigration Rules as stated in respect of either Appendix FM or paragraph 276ADE."
9. The judge went on to consider Article 8 outside the Immigration Rules, and found that because the Claimant and Sponsor had a child, it would be unreasonable to expect the child to leave the United Kingdom. It is apparent that the child was born after the refusal, and after the Notice of Appeal was entered. The date of birth is not recorded in the First-tier Tribunal determination or the papers submitted in connection with the appeal but the indication given is that the child was born in August 2014. The judge in assessing proportionality, noted that the child is a British citizen, because the Sponsor had indefinite leave to remain, and although recording in paragraph 43 that "there would be no real issues with the family returning to Ghana per se" the decision to remove the Claimant would be disproportionate as it would prevent his child from exercising his rights as a British citizen.
10. The judge concluded that the Secretary of State's decision was not fair and reasonable, and found it to be disproportionate and therefore the appeal was allowed under Article 8 outside the Immigration Rules.
11. This decision caused the Secretary of State to apply for leave to appeal to the Upper Tribunal. In brief summary it was contended that the judge had erred in the Article 8 consideration. It was contended that the judge had not taken into account case law such as Nagre [2013] EWHC 720 (Admin) and Gulshan [2013] UKUT 00640 (IAC). It was contended that an Article 8 assessment outside the rules should only be carried out where there are compelling circumstances not recognised by the rules, and the judge had not identified such compelling circumstances and had failed to provide

adequate reasons for finding that the Secretary of State's decision breached Article 8.

12. It was contended that having a British child is not a "trump card" enabling an individual to stay in the United Kingdom.
13. Permission to appeal was granted by Judge of the First-tier Tribunal McWilliam who found the grounds seeking permission to appeal not to be particularly well drafted, but that there was arguable merit in the contention that the judge had inadequately explained why it would not be reasonable to expect the British citizen child to leave the United Kingdom noting that the child is very young, and that both parents are citizens of Ghana.
14. Following the grant of permission, the Claimant lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 contending in summary that the judge adequately considered whether it would be reasonable to expect the British citizen child to leave the United Kingdom. It was contended that the judge had carried out a balanced consideration and appropriately considered relevant legal tests, and in particular had considered section 117B of the Nationality, Immigration and Asylum Act 2002. It was submitted that it was not open to the Secretary of State to argue that it would be reasonable to expect the British citizen child to leave the United Kingdom, in the light of the Secretary of State's own guidance set out at section 11.2.3 of the Immigration Directorate Instructions on Family Migration and the following extract was quoted in support of this contention;

Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.

15. The Tribunal issued a direction that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal determination contained errors of law such that it should be set aside.

The Upper Tribunal Hearing

Error of Law

16. Mr McVeety relied upon the grounds contained with the application for permission to appeal. In particular he submitted that the judge had erred in paragraph 43 in assessing proportionality. The judge had in fact regarded British citizenship as a trump card and had not undertaken a balanced proportionality exercise. It appeared from the determination that the appeal had been allowed simply because the child was a British citizen. While it was accepted that significant weight must be attached to British citizenship, Mr McVeety submitted there were other factors that

needed to be considered, and the judge had given inadequate reasons for the findings that were made.

17. Mr Pratt in making oral submissions relied upon the rule 24 response, and pointed out that the judge had taken into account in paragraph 41 the young age of the child, although the exact age had not been given. Mr Pratt relied upon the Secretary of State's Immigration Directorate Instructions referred to in the rule 24 response which indicated that it would not be reasonable for a British child to have to leave the United Kingdom.
18. Having considered the submissions I found that the judge had erred in law as contended by the Secretary of State. ZH (Tanzania) [2007] UKSC 4 indicates that nationality is not a "trump card", although it is of particular importance in assessing the best interests of any child. My view was that the judge had not undertaken a balanced proportionality exercise, and had not given adequate reasons for finding that it would be unreasonable for the child to leave the United Kingdom and had given inadequate reasons, when making the Article 8 findings. The Upper Tribunal gave guidance on the need for reasons in Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC) in the following terms which are set out in the headnote;

It is generally unnecessary and unhelpful for First-tier Tribunal judgment to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.

19. The judge made conflicting findings, and found in paragraph 30 that there did not appear to be any issue with the Claimant and his wife returning to Ghana per se. The judge found that the requirements of section EX.1 in Appendix FM could not be satisfied, which included a consideration of whether it would be reasonable for the child to leave the United Kingdom. The judge found against the Claimant under the immigration rules, but then went on to allow the appeal under Article 8 outside the rules, on the basis that it would be unreasonable for the child to leave the United Kingdom. I found that inadequate reasons were given for findings and therefore the decision of the First-tier Tribunal was set aside.
20. Both representatives indicated that they were in a position to proceed so that the decision could be remade.

Remaking the Decision

21. The Claimant attended the hearing, but Mr Pratt indicated that it was not proposed to call further evidence, and the evidence given to the First-tier Tribunal would be relied upon.
22. Both representatives agreed that there had been no challenge to the findings made by the judge in relation to the immigration rules, and

therefore findings made that the appeal could not succeed under the immigration rules must be preserved. I found this to be the case, although in my view there was a conflict between the judge's findings that the appeal could not succeed under EX.1(a) which deals with the issue of whether it is reasonable to expect a British child to leave the United Kingdom, which the judge dismissed, and the subsequent findings in relation to Article 8 outside the rules, that it would not be reasonable for a British citizen child to leave the United Kingdom and therefore the appeal was allowed.

23. In any event, I agreed that in the absence of any challenge to the First-tier Tribunal findings under the immigration rules, the only issue before me related to remaking the decision in relation to Article 8 outside the rules.
24. I ascertained that I had all the documents upon which the parties intended to rely. I had the documents that had been before the First-tier Tribunal, those being the Secretary of State's bundle with annexes A-E, and the Claimant's bundle comprising 167 pages.

The Secretary of State's Submissions

25. Mr McVeety submitted that the appeal should be dismissed as the Claimant, Sponsor and their child would encounter no problems if they returned to Ghana. Both the adults originated from Ghana, and the child was of a very young age. Alternatively the Sponsor and her child could remain in the United Kingdom and it would be proportionate for the Claimant to return to Ghana to make an entry clearance application to satisfy the immigration rules. Mr McVeety submitted that this was not a case such as considered by the House of Lords in Chikwamba [2008] UKHL 40, in that in this case the Claimant would not be returning to Ghana to make an entry clearance application simply for the sake of procedure. In this case there had been no satisfactory attempt made to satisfy the immigration rules for leave to remain as a spouse. I was asked to find that significant weight should be attached to the fact that the immigration rules dealing with family life could not be satisfied, and the Claimant's removal from the United Kingdom would be proportionate.

The Claimant's Submissions

26. Mr Pratt pointed out that ZH (Tanzania) predated the Zambrano decision, and that it was not permissible to expect a British citizen child to leave the United Kingdom. I was asked to find that it was not open to the Secretary of State to argue that it was reasonable for the child to leave.
27. In relation to section 117B of the 2002 Act, Mr Pratt submitted that the Claimant could speak English, and could be financially maintained by third party support from his brother. There had been no dispute that the family have a close and loving relationship, nor had there been any dispute that they have a British child.

28. I was asked to attach significant weight to the British citizenship of the child and to allow the appeal under Article 8.
29. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

30. I have taken into account all the evidence, both oral and documentary, which has been placed before me. As there has been no challenge to the First-tier Tribunal findings in relation to the immigration rules, I have to consider Article 8 outside the immigration rules. The Claimant has to prove that Article 8 is engaged. The Claimant must show that he has a family and/or private life that would engage Article 8, and thereafter it is for the Secretary of State to show that the decision which is the subject of challenge is lawful, necessary for one of the reasons set out in Article 8(2), and proportionate.
31. I find as a fact that the Claimant is a Ghanaian citizen and I accept that he entered the United Kingdom as a visitor on 19th March 2013. He subsequently met the Sponsor and he overstayed in this country. There has been no challenge to the fact that a proxy marriage was undertaken. I am not asked to decide upon the validity of that marriage. I do find that the Claimant and Sponsor are in a genuine and subsisting relationship, and this has not been challenged by the Secretary of State.
32. I also find that the couple have a child who it appears was born in August 2014, and the fact that this child is a British citizen has not been challenged by the Secretary of State.
33. In relation to Article 8, where this has been considered under the immigration rules, I have to decide whether it is appropriate for this to be subsequently considered outside the rules. I take into account the guidance given in MM (Lebanon) [2014] EWCA Civ 985 and I set out below paragraph 135;

Where the relevant group of IRs upon their proper construction, provide a “complete code” for dealing with a person’s Convention rights in the context of a particular IR or statutory provision, such as in the case of “foreign criminals”, then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to “exceptional circumstances” in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a “complete code” then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.

34. I find that Appendix FM and paragraph 276ADE are not a complete code, unlike the immigration rules that deal with deportation, and therefore I conclude that it is proportionate for Article 8 to be considered outside the rules.

35. In considering Article 8 outside the rules, I take into account the guidance given in Razgar [2004] UKHL 27, and I accept the Claimant has established a family life with the Sponsor and their child, and also a private life, which engages Article 8. I find that the proposed interference with that family and private life is in accordance with the law, on the basis that the Claimant cannot satisfy the requirements of the immigration rules, in order to be granted leave to remain.
36. I conclude that the proposed interference is necessary in a democratic society in the interests of maintaining effective immigration control, which is necessary for the economic well-being of the country.
37. The issue to be decided is whether the proposed interference is proportionate to the legitimate public end sought to be achieved.
38. The decision in Beoku-Betts [2008] UKHL 39 means that I have to consider the Article 8 rights of all members of the family, not only the Claimant. In considering proportionality I take into account sections 117A and 117B of the 2002 Act. If this appeal did not involve considering the interests of the child, I would have no hesitation in dismissing the appeal as in my view, if I was considering the Claimant alone, the decision to refuse to vary his leave to remain, and to remove him from the United Kingdom would be in accordance with the law, necessary in the interests of maintaining effective immigration control, and proportionate. The Claimant has entered the United Kingdom as a visitor with no expectation of being granted settlement, undergone a marriage ceremony when he only had leave to remain as a visitor, subsequently overstayed, and cannot satisfy the immigration rules.
39. However the couple have a British citizen child, and the best interests of that child are a primary consideration. ZH (Tanzania) confirmed that the best interests of the child broadly means the well-being of the child, and a consideration of where those best interests lie will involve asking whether it is reasonable to expect the child to live in another country. In making a proportionality assessment under Article 8, the best interests of the child must be a primary consideration, although they can be outweighed by the cumulative effect of other considerations. Having found that although nationality is not a “trump card” Lady Hale stated that it is of particular importance in assessing the best interests of any child and that significant weight should be given to the importance of British citizenship, recording at paragraph 32;
 32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults.
40. Lord Hope, in agreeing with Lady Hale stated at paragraph 41;

41. But there is much more to British citizenship than the status it gives to the children in immigration law. It carries with it a host of other benefits and advantages, all of which Lady Hale has drawn attention to and carefully analysed. They ought never to be left out of account, but they were nowhere considered in the Court of Appeal's judgment. The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood.
41. The Upper Tribunal in Azimi-Moayed [2013] UKUT 00197 (IAC) confirmed that as a starting point it is in the best interests of children to be with both their parents, and it is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
42. Guidance on consideration of the best interests of children was given by the Court of Appeal in EV (Philippines) [2014] EWCA Civ 874 and I set out below paragraphs 35 and 36;
35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed they return; (e) how renewable their connections with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
36. In a sense the Tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the results may be the opposite.
- In this case the child is too young to have commenced education. There are no relevant medical issues. The child is British and has never been to Ghana. Both the child's parents are however Ghanaian citizens and I conclude that there would be no linguistic, medical or other difficulties to the child adapting to life in that country.
43. In reaching my conclusion as to the best interests of the child, my primary finding is that the best interests would be served by remaining with both

parents. As a secondary finding I conclude that the best interests of the child would be to remain with both parents in the United Kingdom, where the child could enjoy the benefits of being a British citizen.

44. The above however is not a complete answer, as I have to consider whether there are any countervailing factors to take into account, and I have to reach a conclusion as to whether it would be reasonable for the child to leave the United Kingdom.
45. I take into account paragraph 95 of Sanade and others (British children – Zambrano-Dereci) [2012] UKUT 00048 (IAC) which I set out below;

95. We shall take this helpful submission into account when we consider the application of Article 8 to each Appellant's case. We agree with it. This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania). If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation.

46. I also take account of the IDI referred to in the rule 24 response and in particular section 11.2.3 which has the heading "Would it be unreasonable to expect a British citizen child to leave the UK?" Set out below is the section in part;

Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.

Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

47. Having found that the best interests of the child would be served by remaining with both parents in the United Kingdom, I have to consider the matters contained in section 117B of the 2002 Act. In summary this states

that the maintenance of effective immigration controls is in the public interest. It is in the public interest that persons seeking to remain in the United Kingdom are able to speak English and are financially independent. Little weight should be given to a private life or a relationship formed with a qualifying partner which is established by a person at a time when the person is in the United Kingdom unlawfully, and little weight should be given to a private life established by a person when that person's immigration status is precarious.

48. I set out below section 117B(6);

In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.

I find that, in the light of the authorities referred to above, it would not be reasonable to expect the child to leave the United Kingdom. In my view section 117B(6) assists the Claimant because it specifically states that the public interest, to which I accord very significant weight, does not require his removal, if he has a genuine and subsisting parental relationship with a qualifying child. It has not been disputed that the Claimant does have such a relationship with a British child. Therefore, it is my view, that the Respondent's decision to remove the Claimant does breach Article 8 and is disproportionate because he has a British citizen child, and therefore the appeal is allowed on that basis.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The Claimant's appeal is dismissed under the immigration rules.

The Claimant's appeal is allowed on human rights grounds in relation to Article 8 of the 1950 Convention.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity, and the Upper Tribunal makes no anonymity order.

Signed

Date 11th February 2015

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

As the appeal is allowed I have considered whether to make a fee award. I make no award. The appeal has been allowed because of evidence that relates to the Claimant's child, who was not born when the Secretary of State's decision was made.

Signed

Date 11th February 2015

Deputy Upper Tribunal Judge M A Hall