



IAC-AH-CO-V1

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

Appeal Number: IA/27617/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 22 April 2015**

**Decision & Reasons Promulgated  
On 8 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HANBURY**

**Between**

**MR RICHARD ANANE BROBBEY  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Mr R Sharma of Counsel

For the Respondent: Mrs A Brocklesby-Weller, a Home Office Presenting Officer

**DECISION AND REASONS FOR FINDING**  
**NO ERROR OF LAW**

**Introduction**

1. The appellant, a citizen of Ghana, was born on 22 August 1976. He originally came to the UK in 2002 illegally. He claims to have married a French national by the name of Cherryl Charline Aurore Michelle Vespier on 15 December 2003. Subsequently, on 27 April 2004, he submitted an application under the Immigration (European

Economic Area) Regulations 2006 ("2006 Regulations") on 27 April 2004. That application was refused on 21 October 2004.

2. The appellant then appears to have formed a relationship with one Nade Fabiola Gbra and they had a child together (Joceline Grace Brobbey) on 6 June 2005. Ms Gbra subsequently became a naturalised British citizen in 2007.
3. The appellant was discovered working illegally at Greencore on 18 February 2010 and was served with a notice (form IS151a) as an illegal entrant advising him that he was liable for removal from the UK. On 16 April 2010 the appellant applied for further leave to remain but this was refused with no right of appeal on 30 March 2011. A request for reconsideration was received on 18 April 2011.
4. Action was taken to remove the appellant as an illegal absconder on 9 February 2013 and on 16 April 2014 he was issued with forms IS75 and IS76 giving the appellant a one stop final chance to submit any further evidence he wished to have considered. According to the respondent's decision notice dated 20 June 2014, the appellant failed to provide evidence requested despite being given two extensions to submit the required documents. Accordingly, the appellant was informed that on 19 June 2014 a decision had been made to refuse his application for leave to remain on the basis that the appellant's removal from the UK would not constitute a breach of any of the UK's obligations under the European Convention on Human Rights (ECHR) as incorporated into English law by the Human Rights Act 1998. The respondent also refused to vary the leave to remain in the United Kingdom and informed the appellant that he had a right to appeal by 2 July 2014.

### **The Appeal Proceedings**

5. The appellant's notice of appeal, which was received on 2 July 2014, claims that the respondent had failed to consider the fact that the appellant met the criteria in the 2006 Regulations. The respondent ought to have confirmed the appellant's right to reside in the UK as a partner of an EEA national (presumably Nadia Fabiola Gbra). It is alleged that the respondent failed to consider the appellant's partner was exercising treaty rights in the UK. The appellant also averred that the appellant's human rights, and specifically his rights to a private or family life under Article 8 of the ECHR, would be disproportionately interfered with if he were removed from the UK. The appellant's circumstances were said to be "unique" in that he had formed close connections with the UK where he had been "woven into the very fabric of life". The respondent had failed to give proper consideration to the relevant matters necessary for assessing the appellant's application. The respondent had allowed herself to be influenced by irrelevant facts and erred in law.
6. The appeal came before Judge of the First-tier Tribunal Paul, who having heard evidence from Ms Gbra, Ms Eunice Mensah and the appellant himself, decided that the respondent's decision had not been in accordance with the "the Rules" and he also allowed the appeal "on human rights grounds". No anonymity direction was made and no fee award was payable.

7. The present appeal is by the respondent, whom I will continue to refer to as “the respondent” despite the fact that her role has been reversed. I note by a notice of appeal dated 18 December 2014 the respondent alleges that the First-tier Tribunal Judge (FTJ) made a material error of law in allowing the appeal. The reference to “the Rules” in the Immigration Judge’s conclusions is a reference to the “Immigration Rules”. The respondent points out in her grounds that the appellant cannot satisfy that route because there are no insurmountable obstacles to family life continuing with his partner in Ghana. As far as the appellant’s child is concerned, it was necessary for the appellant to show a genuine and subsisting relationship with a British child and that he met all the other requirements of the Rules. This he was unable to do. The Immigration Judge had departed from the concept of reasonableness in artificially separating his consideration of “outside the Rules” under Article 8, with reference to Section 117 of the Immigration Act 2014, and this was not the correct approach.
8. EX.1 (i) of the Immigration Rules expressly requires an appraisal of what is reasonable before the Rule can be met. EX.1 deals with exceptions to eligibility requirements of the rules in cases where the applicant has or claims to have a genuine and subsisting relationship with a child who fulfils certain criteria.
9. The concept of reasonableness involves an assessment of the appropriate legal threshold. In this case no proper reason for finding that it was unreasonable for the appellant’s child to leave the UK had been given. The Immigration Judge had found that the appellant had a genuine and subsisting parental relationship with his daughter and that it was not in the best interests of his child to be relocated to Ghana. However, it is alleged in the grounds that the Immigration Judge had given no adequate reasons for finding that it was not in the best interests of the child to leave the UK. The proportionality assessment required under the Rules/ Article 8 (i.e. the reasonableness test as contained in EX.1 Section 117B (vi)) was flawed. There is a clear distinction between what is reasonable and what is perceived to be in the best interests of the child the two are not necessarily the same and the former could be displaced by public interest factors. A difference in provision of schooling as between the UK and Ghana was not itself sufficient to render the removal of the appellant unreasonable. And in any event there was a need for effective immigration control. The respondent alleges that the family unit could relocate to Ghana otherwise the appellant’s daughter and partner could choose to remain in the UK and the appellant could make an application from Ghana to return to the UK. Article 8 does not confer a choice upon an individual as to where he wishes to exercise his private or family life. It protects a fundamental right. The appellant and his partner had no legitimate expectation of maintaining the status quo and there was a public interest in maintaining effective immigration control which in this case outweighed other considerations.
10. Judge of the First-tier Tribunal Mark Davies thought that these grounds were at least arguable on 4 February 2015 when he gave permission to appeal to the Upper Tribunal. He considered that the Immigration Judge had given “no explanation whatsoever as to why he finds it would not be reasonable for the appellant, his

partner and his British citizen child to relocate (sic) to Ghana. The Immigration Judge had given no proper consideration to proportionality vis-à-vis the appellant's poor immigration history and the public interest in his removal."

### **The Upper Tribunal Hearing**

11. At the hearing I heard submissions by both representatives. The respondent submitted that the relevant provision was EX.1. The appellant had two children, one with his present partner and one with a previous partner. The Immigration Judge had only considered one of the children, however. I was referred to paragraph 29 of the decision where the Immigration Judge said that it was in the child's best interests to remain in contact with her father. It was pointed out the "best interests" did not equate with "reasonableness". Holding British nationality is not a "trump card" and I was invited to substitute the decision of the Upper Tribunal to dismiss the appellant's appeal against the refusal of leave to remain. The appellant's daughter Joceline was born in 2005.
12. On behalf of the appellant it was submitted that the FTT had reached the correct conclusion. Although the appellant had two children by separate mothers, one from the Ivory Coast and one from Ghana, both those mothers were now naturalised. The appellant's length of residence and the fact that his child was a British citizen mean that they need to remain in the UK. All the correct factors were considered at paragraph 32 of the decision. They must, therefore, have been in the judge's mind when he reached his decision. The Immigration Judge had resolved the conflicts of evidence and had made no error of law. It was submitted that were I to decide that there had been a material error of law further submissions may be necessary.
13. The respondent said the appellant and Joceline did not have regular contact (two times a month) (paragraph 8 of the decision). There was no balancing exercise to be conducted. The Immigration Judge should have considered the changes introduced by the Immigration Act 2014. The appellant had no relationship with his other child.
14. Mr Sharma responded to say he did not accept the submission that the appellant only contacted his child twice a month. Although he was not the "primary carer" he was clearly an important figure in the child's life. The child was mainly cared for by the mother. The case of Senade was relied on and Section 117B of the Immigration Act. The fact that the child had been here all her life and the fact that the appellant had been in the UK for at least seven years meant relocation was problematic. The appellant and his child could not be expected to relocate. I also considered the appellant's written submissions which state that it was necessary for the respondent to show that there had been a "misdirection of law" and the key issue was: whether the Immigration Judge had identified and resolved the key conflicts in evidence and explained in clear and brief language the reasons for reaching his decision as to why the appellant had won and the respondent had lost the appeal. It was submitted that the Immigration Judge had done all that was required of him and that the appeal had been correctly decided in the appellant's favour.

## **Discussion**

15. Both parties agreed that Appendix FM and in particular EX.1 were the relevant provisions. They came into force on 9 July 2012. It appears that Appendix FM, EX.1 (a) is relevant rather than (b), i.e. the appellant relies on the “parent route” rather than the “partner route”. In particular, the Immigration Judge, at paragraph 24 of his decision, found “no insurmountable obstacles” to family life between the appellant and his present partner (Ms Mensah) continuing in Ghana. Ms Mensah is from Ghana and continues to have a number of family members there but came to the UK aged 16. Hence the Immigration Judge decided that the appeal could not succeed under the “partner route”. There was no cross-appeal by the appellant against that decision.
16. However, the Immigration Judge went on and found for the appellant under “the parent route”. This was on the basis that the requirements of EX.1 (a) were satisfied because of the relationship between the appellant and Joceline. In short, the Immigration Judge found that Joceline “meets all these requirements” in that there was a genuine and subsisting parental relationship with the appellant, she was under the age of 18, she was in the UK and a British citizen. He also decided that “it would not be in her best interests to now be relocated to Ghana”.
17. The Immigration Judge also purported to decide the appeal under “Article 8 outside the Rules” on the basis that the appellant’s removal “would be disproportionate”.
18. As to these findings, the Immigration Judge appears to have paid little or no regard to the requirement of the Immigration Rules that “little weight” should attach to family life formed whilst the appellant is in the UK unlawfully (see Section 117A and B of the Nationality, Immigration and Asylum Act 2002 and in particular s. 117B (4)). In particular, the “public interest considerations” include the requirement, where a court or tribunal determines a question of whether a person’s right to private or family life under Article 8 is breached, that effective immigration controls should be maintained in the public interest (see s.117B (1)). Little weight should attach to a private life or a relationship formed with a qualifying partner that is established at a time when the appellant is in the United Kingdom unlawfully but under section 117 B (6) the public interest does not require his removal where he has a genuine and subsisting relationship with a qualifying child. A qualifying child is a British citizen or a child who has lived in the UK for 7 years continuously.
19. Here, the Immigration Judge seems to have attached significant weight in paragraph 32 of his decision to the fact that the appellant had worked whilst he had been here, that he had not committed any criminal offences and that his current partner’s heavy dependence on public funds may if anything be reduced if he were to settle here. These are largely irrelevant or peripheral considerations I find.
20. The Immigration Judge appeared to be confused in his reasoning. He seems to have assumed that in the event of the appellant being removed to Ghana Joceline would “be expected to leave the UK”. That by no means follows. The appellant is not the main carer for Joceline. According to paragraph 8 of the decision he had contact on

two occasions each month. It does not seem to follow that the appellant's removal would require Joceline to leave the United Kingdom. Thus it does not appear obvious that section 117B (6) (b) did in fact apply.

21. The Immigration Judge was rightly concerned in paragraph 29 of the rights of the children which the appellant had helped to produce. Indeed, the best interests of the children needed to be paramount considerations, regardless of the appellant's immigration status. However, the appellant had not formed a relationship with Isabel, his child with Ms Mensah, as she was only a few months old at the date of the hearing. With regard to his elder child, Joceline, the Immigration Judge found that she would be "very sad if he had to leave". He also thought that he would not be able to afford his daughter to visit him in Ghana. That is a questionable finding, given the appellant appears to have met the income criteria for settlement in the UK. The appellant was found to have "a very important role in his daughter's life" in paragraph 14 of the decision. The Immigration Judge found that Joceline was settled at school and that it would not be in her interests to be relocated to Ghana.
22. As Ms Brocklesby-Weller pointed out, and as the grounds make clear there is a distinction between what is "reasonable" and what is perceived to be "in the best interests of a child". No reasons were given by the Immigration Judge as to why Joceline could not settle in a supportive family unit in Ghana if this did become necessary and the different education provision in the two countries was not itself a reason for not enforcing effective immigration control against an illegal immigrant. Where section 117B(6) did apply it simply meant that the appellant's removal was not required by public interest considerations, it did not mean he automatically qualified for leave to remain on article 8 grounds. Furthermore, it is likely that the appellant will be separated from his mother and daughter for a relatively short period of time given that the appellant may well have met the income requirements for admission as the partner of Ms Mensah. The period of separation was not even considered by the Immigration Judge. There as no reason why the appellant could not make an application for entry clearance from Ghana and return to live with Ms Mensah and his daughter, Isabel. Thus, his relationship with Joceline would soon be reinstated. In the interim it could be maintained by more remote means of communication.
23. As far as the finding "outside the Rules" is concerned, it is now well-established it was only in exceptional cases that a judge should depart from these requirements where there are "unjustifiably harsh consequences to the appellant or his family flowing from the refusal" of leave to remain. As the respondent has submitted, there is not a choice available to the appellant as to where he establishes family life. The purpose of the ECHR it to protect fundamental rights. The appellant did not have an expectation that he could remain in the UK in the long-term. The public interest of maintaining effective immigration control means that the respondent's decision was not disproportionate and the appellant had not established that his removal would require Joceline to leave the UK, although that was one possible outcome.

## **Conclusions**

24. For these reasons I am satisfied that the First-tier Tribunal did make a material error of law and that it is necessary to substitute the decision of the Upper Tribunal. There being no application to produce any fresh evidence before the Upper Tribunal and given the clear findings of fact made by the Immigration Judge I conclude that the respondent's decision to refuse leave to remain was lawful and in accordance with the Immigration Rules.

## **Decision**

25. The decision of the First-tier Tribunal contains a material error of law such as it is required to be set aside.
26. I substitute the decision of the Upper Tribunal that is to dismiss the appeal against the respondent's refusal of leave to remain on both the Immigration Rules and under the ECHR.
27. There is no application before me for an anonymity direction.
28. There is no challenge to the failure to make a fee award.

Signed

Dated

Deputy Upper Tribunal Judge Hanbury