



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

Appeal Number: HU/03058/2015

THE IMMIGRATION ACTS

Heard at Field House

On 2nd October 2018

Decision & Reasons

Promulgated

On 25th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

**JDO
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Nwike, Solicitor; Pillai & Jones Solicitors

For the Respondent: Mr C Avery, Senior Presenting Officer

DECISION AND REASONS

The Appellant appeals against the determination of First-tier Tribunal Judge Chudleigh dismissing her appeal on the basis of her human rights. The Appellant appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Andrew in the following terms:

“I am satisfied that there is an error of law in the decision in that the judge may not have given sufficient weight to the fact that the Appellant has children who are qualifying children, one of whom is a British citizen and cannot be compelled to leave the United Kingdom.”

I was not provided with a Rule 24 response by the Respondent but was given an indication that the appeal was resisted, although not with any vigour.

Error of Law

In my view there is a clear material error of law in the decision such that it should be set aside but only in respect of discrete and specific paragraphs in relation to the judge's analysis and findings upon the proportionality of the Appellant's removal and, in particular, in relation to the assessment of the best interests of her children against the public interest in the Appellant's removal. Thus, in paragraphs 23 to 43 of the decision, in my view the judge's starting point should have been the Secretary of State's published position in her policy, namely Appendix FM 1.0b, published on 22nd February 2018 (or its predecessor), which mentions at pages 76 to 77 of that policy that it will not be reasonable to expect a British child to leave the United Kingdom with an applicant parent or its primary carer. The guidance itself reads as follows:

“Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1.(a) is likely to apply.”

In contrast, the First-tier Tribunal's analysis of Article 8 and Section 117B of the Nationality, Immigration and Asylum Act 2002 was the normal course one would take when assessing the best interests of a *non-national* child who has resided in the United Kingdom for less than or above seven years (in compliance with the Court of Appeal's judgment in *MA (Pakistan)* [2016] EWCA Civ 705), however, the same does not apply where the child is a British citizen. As the Secretary of State's published guidance makes plain, the public interest is far weaker if not nominal in respect of British children. In light of this guidance I take into account the decision of the Vice President of the Upper Tribunal in *SF and others (Guidance, post-2014 Act)* [2017] UKUT 120 (IAC), wherein the Upper Tribunal found at [7] to [12] of that reported decision that where guidance (I pause to note that this decision refers to the same guidance but in its previous form, which is in the same material terms to the guidance in its present form) has been published on behalf of the Secretary of State concerning British citizen child, which leads to the inexorable conclusion that a parent should be granted a period of leave in order to enable the British citizen child to remain in the United Kingdom with such a conclusion must inevitably apply to others in the same scenario. The Upper Tribunal stated at [11] that if the Secretary of State has published guidance in a migrant's favour, such as that in Appendix FM 1.0b, a decision of the Tribunal on the topic of reasonableness must be consistent with that guidance and be made in favour of a parent on the same basis as that published by the Secretary of State in her guidance.

Thus, whilst the First-tier Tribunal has gone to great lengths to analyse the proportionality of the Appellant's removal and the broad public interest in her

removal, the published guidance in respect of parents of British children, and the Secretary of State's position as quantifiable in this guidance, has not been taken into account which is an omission in the decision and a material error of law, such that it should be set aside.

In light of the above findings I set aside paragraphs 23 to 45 of the First-tier Tribunal Judge's decision alone, those paragraphs being the only ones that are infected by this discrete legal error.

I canvassed with the parties whether if I found an error what would be the appropriate relief arising, and both representatives agreed that those paragraphs as referred to above in the First-tier Tribunal's decision should be set aside due to error and both encouraged me to remake the decision on the basis of the evidence as contained in the First-tier Tribunal's decision from paragraphs 1 to 17, those paragraphs not being affected by error and setting out the uncontroversial facts in this appeal. Thus, in that light, I go on to remake the decision as follows.

Remaking the Decision

In light of my findings, I briefly remake the decision in these terms.

Given that the First-tier Tribunal's findings at paragraphs 1 to 17 are not infected with legal error I set those paragraphs out for the sake of completeness in my decision and incorporate them herein:

- "1. Appellant is a citizen of Ghana who was born on 17 July 1976. She made a human rights application for leave to remain on 8 May 2015 on the basis of his private life and family life in the United Kingdom (UK) with [JA] (J) who was born on 4 September 2005 and [KA] (K) who was born on 29 October 2012. That application was refused on 26 June 2015.
2. An appeal was lodged on 21 July 2015. The matter came before the First-tier Tribunal on 10 October 2016 when the appeal was dismissed. However, that decision was set aside by the Upper Tribunal on 12 July 2017 and the matter was remitted to Hatton Cross to be re-heard.

The Home Office Decision

3. The reasons for the refusal are set out in a letter dated 26 June 2015.
4. The appellants [sic] immigration history was outlined and the summary was not challenged by the appellant at the hearing. The appellant claimed to have entered the UK via Greece and Belgium on a Schengen Visa although this was not considered credible as the UK is not party to the travel element of the Schengen agreement. An application for leave to remain under

the 10 year route was submitted on 15 November 2012 but was refused with no right of appeal.

5. The claim was considered on the basis of family and private life under the Immigration Rules (IR) and under Article 8 of the [sic] European Convention on Human Rights. The letter stated that the respondent's duty under s. 55 of the Borders, Citizenship and Immigration Act 2009 (the 2009 Act) had been taken into account.
6. The appellant claimed not to have a partner and said that her relationship with her former partner, [SA] had broken down. This [sic] was difficult to corroborate. Mr [A]'s immigration status was unknown although it was contended by the appellant's representative that he was Ghanaian. It was not considered that the appellant had a partner in the UK.
7. The appellant's son, J had lived in the UK continuously for at least 7 years but K had not. However, from the information provided, it was not accepted that the appellant lived with J and the claim under the Immigration Rules under the parent route failed.
8. Consideration a [sic] also given to the appellant's private life claim. It was not accepted that the appellant had been in the UK continuously for at least 20 years. Further, it was concluded that the appellant has spent the first 28 years of her life in Ghana, including her formative years. She could use her knowledge of Ghana to assist her integration and that of her children. Further, the appellant had been industrious since her arrival in the UK, securing employment in various sectors and there was no reason why she could not repeat this in Ghana where she will have the right to work, unlike in the UK where she does not.
9. The circumstances of J were considered. It was considered that it was not unreasonable to remove him from the UK. English is the official language in Ghana so language would not be a barrier to integration. He is [sic] 9 years old so removal would not necessarily disrupt his education. The Country of Origin Information Service Country Report for Ghana dated May 2012 reported that free compulsory and universal education is available for all children from kindergarten to junior high school. It was considered that he did not meet the requirements of the Rules. It was in his best interests to remain with his mother, including if she was removed from the UK.
10. K was age 4. The conclusion was that she is young and easily adaptable as her life revolved around her immediate family, now none of whom had leave to remain in the UK.

11. Finally, it was considered that there were no exceptional circumstances under Article 8 that might warrant leave to remain. The fact that the two children were born and raised in the UK was taken into account. It was considered that the Appellant would be able to support the children in Ghana. Ghana has an education system and because both the appellant and the children's father are Ghanaian, it was considered that they will be familiar with the customs, culture, language and social norms of Ghana. Further, J could continue to play football in Ghana and the family could attend the Christian church. Overall, it was considered reasonable for the children to leave the UK and it was in their best interests for them to remain with the appellee [sic] as a family unit.

The hearing

12. The Appellant gave evidence at the hearing. She relied on the same bundle of documents and the same witness statement as she had done at the previous hearing.
13. She said that she arrived in the UK in 2004 and has never had leave to remain or reside in the UK. She met [SA], a Ghanaian man on her arrival. They had two children together and she is solely responsible for their upbringing. J is in the school football and beach ball teams. When J turned 10 she applied for British citizenship for J and it was granted. Her son depends on her for all his needs. J is in year 7 and K is in year 2. They are doing well at school although K struggles with reading. The appellant has done no research on schools in Ghana but agreed that there is a free secondary school. The only reason she gave when asked why her children could not go to school in Ghana was 'My son was born here and this is his country'.
14. The appellant has a mother and a sister in Ghana. Her mother lives in a room on a compound of a big piece which was her former family home. Her grandfather owned the house and he is dead but various of his children continue to live there. The appellant has not asked her mother if there is enough space for her and the children but her mother has only one room a room that was built for her. It would be a matter for her mother to give her permission to live there. Her mother does a little farming in Ghana. Her half sister in Ghana lives with her father. She is 33 years old and a seamstress.
15. Previously the appellant worked selling things like fruit. In the UK the appellant does laundry and cleans for fellow church goers. The church supports her financially. Both children suffer from asthma and her daughter suffers from eczema. The appellant confirmed that medical treatment for both conditions was available in Ghana.

16. The evidence was that the children's father sees the children once a week but the children do not stay over with him ever. He lives on his own, has no other children and is not in a relationship. The appellant does not want [SA] to have the children. They currently live with an older woman, Mrs [M] who is ill. The appellant cooks and cleans for her and assists her with hospital visits. Mrs [M] is Ghanaian but is not a family member.
17. Mr [A] has applied for leave to remain in the UK and the appellant gave him a letter in support of his application but she did not know the outcome."

In light of the facts as set out above in the First-tier Tribunal's decision, I find that the Appellant's Article 8 rights are engaged by virtue of her family life with her family.

It is plain that the Appellant's removal will have more than a technical interference with the family life that she enjoys with her two children.

The Appellant's children I note are qualifying children within the meaning of Section 117D of the Nationality, Immigration and Asylum Act 2002 as the older child is a British citizen and the younger is a qualifying child. Thus, the older child, being a British citizen, may benefit from the content of the Secretary of State's Appendix FM 1.0b guidance as set out above and it would consequently be unreasonable for that child to leave the United Kingdom with its Appellant-parent. That may well be the end of the matter but I go on in my analysis regardless.

In respect of the second, younger child, that child being approximately 7 years old and having lived in the United Kingdom for the requisite period of seven years or more I note that this child is also able to take advantage of the Appendix FM 1.0b guidance in that "powerful reasons" are needed to justify the child's removal.

In terms of the public interest it is, as it is stated in the Secretary of State's published guidance in Appendix FM 1.0b, namely that first of all, it would be "unreasonable" for the older child to leave with the Appellant, that child being a British citizen; and second of all, that "powerful reasons" would be needed for the younger child to leave the United Kingdom with the Appellant parent (notwithstanding the position in respect of the first child which may make analysis of the second child's position irrelevant). Thus, in respect of the first child there is no public interest in the Appellant's removal, given that the first child is a British citizen, and in respect of the second child there would only be a public interest in the Appellant's removal in respect of there needing to be powerful reasons which counterbalance the child's continuous residence for seven years. Notwithstanding that the Appellant cannot leave the UK in the light of the first child's British citizenship, I find as follows in respect of the second child.

Pursuant to the Upper Tribunal's decision in *MT and ET (child's best interests; ex tempore pilot) Nigeria* [2018] UKUT 88 (IAC), wherein at [33] and [34] the Upper Tribunal made it plain that the starting point for a Tribunal is to look for "powerful reasons" why a child who has been in the United Kingdom for the requisite period of time should be removed, notwithstanding that their best interests would lie in remaining. Notwithstanding the Appellant's status as an overstayer, the conduct of the Appellant "MT" in the reported decision of *MT and ET* was by comparison far worse given that that Appellant was an overstayer and was unlawfully present for several years and had also committed a criminal offence of fraud. I am exercised by the Upper Tribunal's finding that MT's immigration history was described as "run-of-the-mill" immigration offending and in any event that offending was not deemed to be a "powerful" enough reason to justify the child's removal in that case. In that light, given the Appellant's status is not as egregious as that of the MT, and notwithstanding the first child's status either, I find that the second child's removal would also be unreasonable in the absence of powerful reasons to the contrary.

I take into account Section 117B of the Nationality, Immigration and Asylum Act 2002 and I note that the Appellant speaks English and appears to have been self-sufficient during her time here. I further note that the Appellant has been in the United Kingdom since 2005 at the latest and has been present unlawfully at all times when she established her family and private life during a time when her status was precarious. I further note that the decision is in accordance with firm and fair and effective immigration control. Notwithstanding the above, on balance I find that the decision is a disproportionate interference with the family life of the Appellant and her two children and the balance is tipped in favour of the Appellant.

In light of the above findings and in light of the Secretary of State's published position concerning British children who have passed the residence threshold of seven years, I find that the Appellant's removal would be a disproportionate interference with her family life.

Accordingly, I allow the appeal on human rights grounds.

Notice of Decision

The appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside in respect of paragraphs 23 through to 45.

I remake the decision in the above terms and hereby allow the appeal on human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 20th October 2018

Deputy Upper Tribunal Judge Saini