



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/10824/2015
IA/10826/2015

THE IMMIGRATION ACTS

Heard at Field House
On 26th June 2018

Decision & Reasons Promulgated
On 4th July 2018

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

EMMANUELLA NAA AMERLEY GYAPONG (1)
DANIEL NII AMARTEY GYAPONG (2)
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Sharma, of Counsel, instructed by Bishop & Sewell LLP
Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are citizen of Ghana born in June 1997 and June 1999 respectively. They arrived in the UK in December 2013 in order to visit their father (the sponsor) who is present and settled in the UK with his partner, and their two children. Prior to their arrival in the UK the appellants had lived with their maternal grandparents in Ghana. After their entry to the UK they say that their maternal grandmother became seriously ill, and their maternal grandfather asked their father to keep them in the UK. On 5th February 2014 the appellant's maternal grandmother died, and as a result their father made an application for them to remain in the UK under paragraph 298 of the Immigration Rules on 19th November 2014. This application was refused in March 2015. The appeal to Judge of the First-tier Tribunal Davies was dismissed, but Deputy Upper Tribunal Judge Harris found material errors of law in the decision, and remitted the matter to the First-tier Tribunal to be heard de novo. The appeals were reheard by Judge of the First-tier Tribunal Mayall, who dismissed them in a determination promulgated on the 3rd October 2016.
2. Permission to appeal was granted on the basis that it was arguable that the First-tier judge had erred in law. For the reasons set out by Deputy Upper Tribunal Judge Chapman in her decision promulgated on 1st December 2017 and appended as Annex A to this decision, it was found that Judge Mayall had erred in law and his decision was set aside with no findings preserved.
3. The matter came before me to remake the appeal pursuant to a transfer order dated 22nd March 2018.

Evidence & Submissions – Remaking

4. The first appellant's evidence, set out in her two witness statements and her oral evidence is, in summary, as follows. She came to the UK in December 2013 when she was 16 years old with her brother the second appellant to visit her father and meet his partner and their two daughters. At that time she lived with her maternal grandparents in Ghana. She and the second appellant had lived with her mother, but when she was about 7 years old her mother met a new partner and he often became angry with her and her brother and beat them and so from 2004 she and her brother lived with her maternal grandparents. Her grandmother was elderly, had problems with her legs and diabetes. She and her brother started to have contact with her father in the UK from 2009 when he visited Ghana. Her father funded her and the second appellant's expenses and education through her grandparents, or sometimes by giving money to his cousin Sam Nelson to pay her school fees. Sam Nelson also attended the first school open day with her at her boarding school. The contact with her mother from 2004 was limited to short phone calls, when she called the grandparents. When they travelled to the UK her grandmother had been unwell and been in hospital for quite a bit of the time. From 2011 to 2013 she had attended a boarding school so she was not sure exactly when her grandmother had become unwell.

5. When she and the second appellant came to the UK the intention was to stay for a two week visit, with just enough luggage for that visit. They never had anything sent from Ghana at a later date. While visiting in the UK her grandmother became very unwell and was hospitalised, and she died in February 2014. Her grandfather was not well enough to care for her and her brother and so asked her father to keep her and the second appellant in the UK. She and the second appellant were happy to stay as they liked living with their father, his new partner and their two step siblings. In Ghana there was no one else who could have cared for them: her mother's brother is an alcoholic. Her father has a cousin Sam Kwesi Nelson whom they sometimes stayed with in school holidays for 2 to 4 weeks to give their grandparents a break but he could not take them full time, and he travelled a lot for his work. Sam Nelson had a wife and two children of a similar age to her and the second appellant.
6. The first appellant started school in the UK at the end of January 2014 which was before her grandmother died in Ghana. She now has a strong bond not only with her father but also with his partner and her two half sisters. She and the second appellant look after the half-siblings by helping them with homework, taking them shopping, watching television together, getting them ready for school (washing, dressing, hair brushing and giving breakfast) when their parents have left for work and collecting them from school. She would be devastated to lose her family life in the UK, particularly as she had not had a close relationship with her biological mother and because she greatly enjoys the relationship with her younger siblings. Her biological mother died in October 2016 in Ghana of a stroke following a car crash, and this was a sad event even though she had not seen her for 7 years and felt abandoned by her and her new husband, but the first appellant has felt very supported by her father and step-mother in the UK throughout this time.
7. She and the second appellant are active members of the Destiny Apostolic Church which the family attend. She obtained a BTEC level 3 diploma in business at Hackney Community College in July 2016, and has been offered a place at Middlesex University to do a degree but cannot take this up until her immigration status is resolved. If she is able to do so she will continue to live at home with her family. She does not believe she could study in Ghana at university because she does not believe the Ghanaian universities would accept UK qualifications, and because it would be expensive with paying fees upfront and accommodation as her grandfather has moved to the village. She would have nowhere to stay in Ghana any more - and it would be all the more expensive as she and the second appellant are both ready to attend university at the same time.
8. The second appellant also gave evidence which is set out in his two statements and in oral evidence. Much is in common with the first appellant and so I do not set it out again in detail but just set out the evidence where it is personal to him or adds additional detail. He was 14 years old when he entered the UK. He attended a private school in Ghana which was not a boarding school, and the fees were provided by his father and paid by his grandfather. His grandmother had been spending most of her time in hospital as she was unwell when he and the first

appellant came to visit the UK. He was mostly looked after by his grandfather at this stage as his grandmother was in poor shape.

9. He started school in the UK in the first quarter of 2014. In the UK he has completed his A levels at City Academy, and has an offer to study for a degree in business management at Brunel University which he has postponed to September 2018 in the hope that his immigration status is resolved by then. He is currently doing some on-line courses related to business management but cannot work due to his lack of a visa. He would continue to live with his father, step-mother and step-siblings if allowed to remain. They all live in a flat with two bedrooms and a sitting room. He sleeps in the sitting room, his father and step-mother have one bedroom and his three sisters (including the first appellant) sleep in the other bedroom. He is saddened by the loss of his biological mother, but had not seen her for 7 years. He does speak to his cousins, the children of Sam Nelson, when Sam calls his father sometimes. He last spoke to them a few months ago, and sometimes his father will call them on their birthdays. He has no contact with them via Facebook or similar social media sites, or with any other friends in Ghana.
10. The sponsor and father of the appellants, Mr Kwaku Gyapong, gave evidence. In summary his evidence from his statements and oral testimony is as follows. He is a British citizen who lives with his partner, Shirley Mensah Antwi (who is applying for indefinite leave to remain) and their two daughters who are British citizens aged 10 and 8 years old. He is employed as the assistant site manager at Fortismere School in Muswell Hill. He earns around £3000 a month in net pay, and his wife earns around £2000 a month as a security officer. They received child benefit and child tax credits for their two younger children. They have been told they will be eligible for a larger council property once the appellants have lawful presence in the UK.
11. The history provided by Mr Gyapong contains the same information as that given by the first appellant in relation to the situation in Ghana, their visit to the UK and the subsequent application for leave to remain. However, in addition he adds that the relationship with their biological mother had broken down shortly after the second appellant was born and he regrets that there was no contact with the appellants until 2009. He has provided for all their financial needs since this time. He would send money to the grandfather to pay for schools: he paid the second appellants, and sometimes Sam Nelson handed over the fees for the first appellant and sometimes she took the money herself as it was a cash payment system.
12. He also adds that during the two week holiday the appellant's grandfather called him to say that their grandmother was serious ill in hospital and he was not sure she would recover and asked that he keep the appellants in the UK whilst she recovered as he was 80 years old and could not cope with them as he was not in the right frame of mind due to his wife's illness. He was clear that there had been no intention for the appellants to remain prior to this: they were just coming on a two week Christmas holiday. He was told the grandmother was not feeling well but not that she was so unwell. If the grandmother had not become serious unwell he

believes he and his partner would have made a formal application to bring the appellants to the UK after they returned to Ghana following their visit via another visa application.

13. When the grandmother died in February 2014 he realised he could not send the appellants back as their grandfather as he was too old and his mental state was poor due to losing his wife. The grandfather also called and asked that he keep the appellants in the UK. He went to the funeral to pay his respects, and the discussion about where the appellants should live continued, with the grandfather maintaining that he could not care for them. It was at this point he decided to apply for them to remain permanently in the UK. He was happy to keep the appellants in the UK as they had fitted in well with his UK family, and his partner was also happy with this arrangement. It took time to get the relevant documents together and this is why an application was only made once the appellants had overstayed their leave to remain in the UK. He enrolled the second appellant in school in February 2018.
14. The appellants mother had had to cease caring for the appellants as her partner had mistreated them in the past and did not agree for them to stay with her. She has now died following a car crash, and he attended the funeral in November 2016 on behalf of the appellants. He knows that they are grieving this loss, as well as that of their maternal grandmother, even though she did not bring them up. His cousin Sam Kwesi Nelson could not help provide a home for the appellants because he travels from home a lot as he works in the mining sector and is very busy, and he had never had any parental responsibility for the appellants. Sam Nelson is now the only person he speaks to in Ghana except occasional calls to the appellants' grandfather in the village as his own parents have passed away.
15. He, his partner and his two younger daughters would be devastated if the appellants had to leave the UK as they are emotionally part of the family particularly for the younger siblings. Other issues would be they would have nowhere to live in Ghana and no family to join there as their grandfather has now gone to live in the village due to his age. He has made enquiries in Ghana and established that they could not enter university there with their British qualifications but would have to do an entrance examination, and issues with fees and accommodation would make this very difficult. He would find it difficult to maintain family life with the appellants via visits as it would cost too much to visit during school holidays, and both his younger daughters are in school and he works in a school.
16. In the reasons for refusal letter the respondent contested that the appellants' father was solely responsible for them as he contended that their mother lived in Ghana and had a responsibility to take care for them even if her husband refused to allow her to maintain and accommodate them, and further other family members lived in Ghana, and thus that paragraph 298 (i) of the Immigration Rules was not met. It was also considered that the accommodation was insufficiently large in the UK given it was shared with the appellants' step mother and two step siblings, and that

given the appellant's father receipt of child tax credits there were insufficient funds, and so paragraph 298(v) of the Immigration Rules was not met either. It was not considered that the appellants could meet paragraph 276ADE of the Immigration Rules either.

17. When considered outside of the Immigration Rules it was noted that the appellants had previously resided in Ghana for most of their lives, and would have family and schools there to return to, and could continue contact with their father through modern means of communication. Consideration was given to s.55 of the Immigration, Citizenship and Borders Act 2009 but it was considered in the best interests of the appellants to return to Ghana as they had a mother and other family members there, they were in good health and could resume their education in that country.
18. Mr Melvin added, in oral and written submissions, that I should not accept that the appellants were telling the truth about the history to this application. The first appellant started studying before her grandmother died in Ghana and so it should be concluded that they did not intend to return even before this event. The grandmother had been sick for a long time in any case. The appellants' mother had given a letter which did not indicate she had relinquished all responsibility for the appellants. It should not be accepted that she had died, or that the grandfather had gone to live in the village. Sam Nelson had indicated he was the guardian for the children in a letter to the Ghana High Commission dated November 2012 and that he paid for the school fees, although he now says he cannot care for them as he has separated from his wife. He could however help with arranging accommodation for the appellants, and they could sit the entrance examinations to attend university. The sponsor had lied to obtain visit visas for the appellants at an appeal to the First-tier Tribunal. They would have family support in Ghana. It is not accepted that there is a family life relationship between the appellants and their father, step-mother and step-siblings particularly as they are now adults. They cannot meet the Immigration Rules and there are no exceptional circumstances to warrant a finding that it would be a breach of Article 8 ECHR to dismiss the appeal.
19. Mr Sharma argued, relying upon a skeleton argument and oral submissions, as follows. Firstly, he says that the appellants can meet the requirements of paragraph 298 of the Immigration Rules, and that paragraph 27, which states that an applicant will meet a Rule if there is a requirement that an applicant be a minor and they were a minor at the date of application but not the date of decision in entry clearance matters, should be applied even though this is an in-country application. There is no reason for the distinction, and no case law on the point. It is clear that the appellants' mother abdicated responsibility for their upbringing, had very little input and now has died. It had not previously been contested that she had died and no reasons were given for this and nothing was put to the witnesses before the Upper Tribunal. Her letter, written before her death, made clear she wished her children the best and that the best was for them to be with their father. It is also clear that the father has funded their education and other living expenses whilst they were in Ghana, whilst delegating day to day care, and now has taken over full

responsibility on all levels. The only question is whether sole responsibility exists, not whether it has existed for any particular period of time.

20. Mr Melvin's contention that the appellants and sponsor are not credible witnesses is strongly contested. The visit visas were refused only because it was not accepted that the appellants were related to their father as claimed: DNA evidence showed that this was the case. The evidence regarding the grandmother has been consistent across all witnesses. However, even if false assertions were found to be made by others, the appellants, as children, cannot in any case be blamed.
21. It would not be proportionate and right to require the appellants to return to Ghana for the following reasons: they would not be able to do their degree studies; there is no one in Ghana for them to join and provide accommodation as their grandfather is very aged and lives in a village and Sam Nelson cannot assist; and they are now a settled part of their father's family with family life relationships with their younger half-siblings who have written their own letters to support the appeal and whose best interests must be considered under s.55 of the Immigration, Citizenship and Borders Act 2009 as a primary consideration.
22. At the end of the hearing I reserved my decision.

Conclusions - Remaking

23. I do not find that paragraph 297 of the Immigration Rules is of any relevance to the determination of this appeal as it is a provision of the Immigration Rules providing for leave to enter the United Kingdom for a child who is not in the UK and is seeking entry clearance to come to the UK. These appellants were not seeking to enter the UK but to regularise their stay having already entered and overstayed. They did not have entry clearance to enter under paragraph 297 as required by paragraph 297(f)(vi). Further the rule applies to children and the appellants are no longer children but young adults aged 19 and 21 years, and there is no reason to read paragraph 27 of the Immigration Rules as applying to an in-country regularisation application when it is specifically stated that it applies to applications for entry clearance. If it had been intended to apply to all applications, wherever made, then this is what the Rule would state.
24. This is a human rights appeal and my starting point must be to consider whether the appellants can meet the requirements of the Immigration Rules relating to family and private life. There is no contention that they can meet any aspect of the family life Immigration Rules in Appendix FM. It was also not specifically argued before me that they could meet the requirements of paragraph 276ADE but I will nevertheless look at this provision. The appellants are over 18 years but under 25, but they have not spent half of their lives in the UK, so cannot meet paragraph 276ADE(1)(v). They have been in the UK for four and a half years, and could only meet the potentially relevant paragraph 276ADE(1)(vi) if they can show that they would have very significant obstacles in integrating in their country of origin if returned there.

25. Mr Melvin has contended that I should find the appellants and their sponsor not to be credible witnesses. My starting point is that Judge of the First-tier Tribunal Wyman found the sponsor to be a credible witness in the visit visa appeal decision promulgated on 18th September 2013. Naturally this is only a starting point and my conclusion can be different. The evidence given to me was all entirely consistent between the three witnesses, and between the oral evidence and the two witness statements provided by the appellants and the sponsor. The appellants and sponsor were not evasive in their answers to questions, and were careful not to claim knowledge of things that had happened when they were not present. There was nothing implausible about the history presented whereby the appellants entered as visitors but a worsening of their grandmother's health led their grandfather to ask their sponsor and father to hold on to them for a longer period. I do not find it evidence of an intention to deceive that the appellants started school prior to the death of their grandmother: it was not unreasonable for their father to place them in education whilst he awaited whether the grandfather would be able to accept them back in Ghana, particularly in a family which values and excels in education.
26. I have examined the documents relating to the entry clearance application to see if these draw any doubt on the credibility of the appellants and sponsor. There is nothing in the statement of the sponsor which is inconsistent with his testimony to the Upper Tribunal. The school documents from Ghana relating to the appellants are all consistent with their statements to the Upper Tribunal. The refusal of entry clearance was based on the entry clearance officer not being satisfied that the appellants were related as claimed to their sponsor/ father, and DNA evidence was adduced to show conclusively that this was the case, and also on the father/sponsor's funds - in response to which a substantial amount of documentation was adduced about his work and finances which is again consistent with the evidence before the Upper Tribunal. On the application form Mr Sam Nelson appears as "agent/representative", and it is (consistent with the evidence before me) noted that he works for the Mineral Resource Department Goldfields Ghana. In a letter Mr Nelson refers to the appellants being under his care, which fits with the evidence given to me as well. It is also explained in the papers that the maternal grandfather of the children receives funds from the UK and lives in Accra whereas Mr Nelson is based in the Tarkwa Gold Mine.
27. On the basis of all of the information before me I can find that the appellants and sponsor are credible witnesses.
28. There is no doubt that there would be obstacles to the claimants returning to Ghana. They are young people who I find to have on-going family life relationships in the UK with their father, step-mother and step-siblings (see my conclusions on the issue of family life below). I find that they would be extremely saddened to be separated from this family, particularly given their history of difficulties with family life. I now set out a summary of my factual findings at this point as the context for my examination of the private life aspect of this appeal which, as I have said, must first be examined under the prism of the Immigration Rules.
29. The appellants have both given evidence about the upset and cruelty they experienced when their mother remarried in approximately 2004 and her new

husband joined the family, which is supported by evidence from their late mother and maternal grandfather. I accept that he frequently became angry and hit them with his belt and shouted at them over small matters. I accept the evidence that after a couple of months there was little contact between the appellants and their mother as they went to live with their maternal grandparents, and the contact became limited to short telephone conversations. I also find that their mother has now died: despite Mr Melvin urging me to treat the documents verifying her death with caution I can see no reason to find that they are not genuine on the balance of probabilities. I had consistent, credible witness evidence from all witnesses about her death and this is supported by a certified copy of the register of deaths, a burial permit and a medical certificate giving the cause of death. There is no contention that these documents are not in the correct form or have other irregularities.

30. The appellants then lived, from approximately 2004 to the point when they entered the UK in December 2013, with their maternal grandparents but it is clear that their grandmother was often unwell, and I accept the evidence that she died in February 2014. Their maternal grandfather has written to say that after this event he could no longer cope with looking after the appellants despite his been deeply fond of them, and this is supported by two short medical opinion letters from the St Anthony Clinic in Accra indicated that he was having mobility problems, was frail and aged 81 years old. I find that he now lives in a remote village, and is not in a position to provide family care or accommodation for the appellants.
31. The other person in the appellants life in Ghana was Mr Sam Nelson, a cousin, and his family. Mr Nelson appears to be a wealthy and busy man working in gold mining. He clearly has been a good friend to the sponsor and the appellants, and assisted with passing on payments of money sent by the sponsor, and with attending big events in the appellants' lives such as taking the first appellant to her boarding school and being present for the initial parents introductory talk, and being their representative in the visit visa application. He has children of their age as well, although he is now separated from their mother. I accept that he would not be in a position to provide a family for the appellants to join, but find that he would do what he could to provide practical assistance and some moral support as he has done in the past.
32. The appellants are health young people who are clearly intelligent. They both have acceptances for university places: the second appellant to Brunel University London where he wishes to study for a BSc Honours Degree in Business and Management; the first appellant at Middlesex University where she is offered a place to study for a degree in Human Resource Management. Both had studied at private schools in Ghana prior to entry to the UK. In the UK the first appellant obtained a BTEC Level 3 extended diploma in business, and a level 2 in functional mathematical skills; and the second appellant 8 GCSEs and 4 A levels in art and design, ICT, history and business. I find that they would be in a strong position to obtain employment or do further studies in Ghana if they were to return to that country, even if this meant them taking further entrance examinations. I accept that financially it would be difficult for the sponsor to fund up front two children entering university in Ghana

without the loan system which exists in the UK, and this might mean that one or both of them had to delay their desired higher studies.

33. Both the appellants have shown themselves to be socially responsible and capable through their care for their younger siblings and work with the Destiny Apostolic Church International.
34. Viewing the evidence as a whole I find that that the appellants cannot satisfy the demanding test to show very significant obstacles to integration if returned to Ghana, and thus cannot meet the requirements of paragraph 276ADE of the Immigration Rules. They would be going back together and would be able to support one another. They lived in Ghana and were educated in Ghana until they were 16 and 14 years old. They would be returning to a place which is familiar to them, with good educational qualifications, good social skills and would have the help of a trusted family friend in finding their way and dealing with practical matters such as identifying accommodation, and could join a similar church to the one they attend in the UK and establish community ties through their religious faith. There is no doubt that their father and step-mother in the UK would also be prepared to provide some level of financial support, as they did prior to the appellants coming to the UK, for both their educational and other needs, and in this connection I note that both the sponsor and his wife are in well paid jobs in the UK.
35. As I have established that the appellant cannot meet the private and family life Immigration Rules I now move on to consider whether or not there are compelling circumstances which require consideration outside of the Immigration Rules. I find that there are as the appellants are young people who form part of a family unit in the UK which includes two younger British children, their half-siblings whose best interests must be a primary consideration.
36. This family unit has existed since December 2013, a period of four and a half years, which is a considerable proportion of their younger siblings' lives. In fact, it is unlikely that they have much recollection of the time before the appellants lived with them as they were three and a half and five years old when the appellants joined the family. The appellants, the sponsor and his wife all say that the appellants have a strong relationship with the step-siblings. They get them ready for school, washing, dressing, brushing their hair and giving them breakfast, as the sponsor and their mother do shift work and have to leave early for work. They also collect them from school, and spend time playing games, watching television and helping them with their homework. The whole family also clearly attend church together. It is said that they would be devastated by the appellants departure to Ghana, and I find that this would be so given the central role the appellants play in their lives. The two younger siblings have written their own short notes confirming the importance of the care by their older siblings and that they want them to stay. It is clear that the appellants both intend to attend local universities if their stay is regularised and to remain living at home, which means that they will be there for their siblings for the next period of years. I have no hesitation in finding that it is in the best interests of the children, the two younger step-siblings, for the appellants to be allowed to remain in the UK as part of this loving a cohesive family unit.

37. I also find that the relationship of the appellants to their father and step-mother is a family life one. Although the appellants are both young adults I find that they have more than normal emotional and financial ties with ties with their parents. They are entirely financially dependent, and have not established independent lives or alternative families. They are, as the sponsor's partner puts it in her statement, a family of six. Both appellants have drawn attention to their difficult family past: the remarriage of their mother when they were young children which resulted in their losing her as a physical presence in their lives and left them feeling abandoned by her; the death of the grandmother who took over the task of parenting with her husband; and then the subsequent death of their mother prior to any period of reconciliation or real contact. They talk of the understanding and support that they have found in the UK family, and of their intention to remain part of this close unit whilst they do their university studies. I do not find that they would be able to continue this family life by visits to Ghana as I accept the evidence of their father and sponsor that he could not afford the holidays that this would entail, particularly as he works in a school environment and he has two young children, and thus they could only travel in school holidays when air fares are at their highest.
38. As a result, I find that it would be an interference with the appellants', the sponsor and their step-mother and their younger siblings right to respect for family life for them to be removed to Ghana. The question that remains is whether this interference would be a proportionate one. This issue must be examined through the lens of s.117B of the Nationality, Immigration and Asylum Act 2002. Naturally I give weight against them to the fact that the appellants cannot meet the requirements of the Immigration Rules, and that the maintenance of effective immigration control is in the public interest under s.117B(1) of the 2002 Act. It is a neutral matter in this respect that the appellants speak excellent English, see s.117B(2) of the 2002 Act. Applying the considerations at s.117B(3) of the 2002 Act I find that the appellants are not financially independent, although I find also that they will be cared for by their sponsor/father and step-mother who have a comfortable combined income, and that there is no evidence that either they, or their parents on their behalf, will be able to likely to be able to access any social security benefits if they remain. They are both intending embarking on business related degrees and it would seem very likely that they will be net economic contributors in the future. The one issue of detriment to the public purse of their remaining will be that the family will be likely to become eligible for rehousing by the Council. Both s.117B(2) and (3) of the 2002 Act state that there are two underlying issues at stake: lessening the burden on taxpayers and integration into society. I find that the appellants are and will be integrated into society if allowed to remain, but that it is a negative against them that there will be a burden on taxpayers as they will be eligible for council housing rehousing.
39. On the positive side of the balance I make the following findings. Whilst both appellants have extensive private life ties with the UK having lived here for the past four and a half years and having studied, acquired friends and become part of their father, step-mother and step-siblings community as these ties were made whilst

they were precariously and unlawfully present they cannot be given more than little weight when considering the proportionality of their removal in accordance with s.117B(4) and (5) of the 2002 Act.

40. However, it is the best interests of the two British citizen younger step siblings that they remain in the UK and this must be a primary consideration, and is one which I find weighs strongly in favour of the appellants remaining in the UK. There are also the appellants own family life ties, made as minors and which have continued to date, when they came to the UK and remained in the UK, not as a result of their own decision-making but of the adults in whose care they had been placed. I accept that this family life was formed whilst the appellants were precariously and then unlawfully present but I find that their circumstances to be exceptional, and therefore that it is appropriate to give weight to these family life ties. The appellants do not have a choice of an alternative family life in Ghana, and they have not had a straight-forward and happy family life to date. They have lost their biological mother first through a marriage to a violent man, and then through her death, and their grandmother through illness and death with their grandfather becoming too old and frail to provide them with a family. I find that their UK family life is more important to them as young people in this context. Whilst I have found that they would not have very significant obstacles in integration if returned to Ghana in terms of their private lives these lives would be difficult, sadder and less fulfilling than the ones that they could lead here with the family support of their father, step-mother and step-siblings.
41. When balancing the matters on both sides of the equation I find that this is a case which can be characterised as exceptional in relation to the family life elements, and that on consideration of the totality of the evidence it would not be proportionate for the appellants to be required to leave the UK.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. The decision of the First-tier Tribunal was set aside.
3. I re-make the decision in the appeal by allowing it on human rights grounds.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 2nd July 2018

Fee Award

Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. I have decided to make no fee award because the basis on which this appeal was allowed was one which required the evidence placed before the Tribunal to be considered and was not on the basis of arguments placed in the application before the Secretary of State.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 2nd July 2018

Annex A: Error of Law Decision

DECISION AND REASONS

1. The Appellants are nationals of Ghana born respectively on 17 June 1997 and 6 June 1999. They arrived in the United Kingdom in December 2013 in order to visit their father who is present and settled in the United Kingdom with a partner and two minor children. It was intended that they only visit for two to three weeks. Prior to their visit the Appellants had lived with their maternal grandparents in Ghana. After their arrival in the United Kingdom their grandmother became ill and their maternal grandfather asked their father to keep them in the United Kingdom in the interim. However, on 5 February 2014 the Appellants' grandmother died and the children's father and Sponsor realised he could not send them back to Ghana as their grandfather would not be able to look after them due to his age and mental state.
2. An application was made pursuant to paragraph 298 of the Rules on 19 November 2014. The applications were refused on 4 March 2015. The Appellants appealed and their appeal came before First-tier Tribunal Judge Davies for hearing and was dismissed, but following an application for permission to appeal to the Upper Tribunal, Deputy Upper Tribunal Judge Harris found material errors of law and remitted the appeals for a hearing *de novo*. The appeals came next before Judge of the First-tier Tribunal Mayall for hearing on 5 August 2016.
3. In a Decision and Reasons promulgated on 3 October 2016 the appeals were dismissed. Judge Mayall did not accept the credibility of the accounts of the Sponsor or the Appellants as to circumstances in Ghana before they came to the UK (71). Whilst at (82) he was satisfied that the maintenance and accommodation requirements of the Rules were met, he went on to find that, in light of his credibility findings, their father was not solely responsible for them, nor were there serious and compelling family or other considerations which would make exclusion of the Appellants undesirable (81 refers).
4. In respect of Article 8 the judge held at (89):-

"I do not consider that I have been given information sufficient for me to make any firm conclusion as to where the best interests of the Appellants (even if I continue to treat the First Appellant as a child) lie. In many ways their best interests may lie in returning to their country of citizenship where they have grown up in the culture and where they undoubtedly have relatives. Even if I conclude that their best interests lie in remaining with their father, that is, and can only be, a very marginal decision".

At (90) he held:

"I do not consider that, in this case, there are any compelling or exceptional circumstances, which would require me to make a freestanding Article 8 assessment", and

at (91), *“In any event I am entirely satisfied that ... there could have been only one conclusion, i.e. that the decisions in these appeals were entirely proportionate”*.

5. Mr Sharma sought permission to appeal on a number of grounds. Firstly, on the issue of sole responsibility, it being asserted that the judge had materially erred in his assessment of this aspect of paragraph 298 of the Rules, given that *“it was undeniable that the Appellants’ father has had sole responsibility for them in the United Kingdom since 2013 when they began living with him”* and the judge had failed to address or determine this point; and secondly, that the judge had erred both in relation to the assessment of Section 55 and Article 8 of the European Convention on Human Rights.
6. Permission to appeal was granted in a decision by First-tier Tribunal Judge Kelly on 3 May 2017 solely in relation to Section 55. Permission to appeal was refused in relation to ground 1 sole responsibility and ground 2 to Article 8. A renewed application for permission to appeal was lodged by the Appellants’ solicitors in time, however, unfortunately this was not considered before the error of law hearing came before me on 16 June 2017. At that hearing Mr Sharma sought to raise the two grounds of appeal in respect of which permission had been refused, bearing in mind that the Upper Tribunal had failed to determine whether or not those grounds merited the grant of permission. On 16 June I heard submissions from both Mr Sharma on behalf of the Appellants and Mr Armstrong on behalf of the Home Office and granted permission to appeal in order that Mr Sharma would be able to put forward all three grounds of appeal. However, in fairness to the Home Office, the hearing was adjourned in order to give the Respondent the opportunity to respond to the two additional grounds by way of a Rule 24 response, thus that hearing was adjourned part-heard for an error of law hearing.
7. The adjourned error of law hearing next came before me on 6 November 2017, by which time the Respondent had lodged a further Rule 24 decision dated 18 September 2017. I heard submissions from Mr Sharma in respect of the grounds of appeal. He submitted that whilst the judge had found the evidence of the Appellants and Sponsor in relation to Ghana not to be entirely credible, this did not impact on the issue of whether or not the Sponsor had sole responsibility for the Appellants in the United Kingdom and that the judge’s finding at (72) of his decision was not determinative of the argument.
8. In relation to Section 55, Mr Sharma acknowledged that at the date of the hearing only the Second Appellant remained a minor, however it was not a bright line and he further submitted that paragraph 27 of the Immigration Rules does fix in time in relation to paragraphs 296 to 316 of the Immigration Rules and paragraph EC-C of Appendix FM in relation to entry clearance appeals, which does not expressly exclude or include in country applications and by analogy it would not be proper to refuse a case on the basis that a child has now reached his or her majority.
9. Mr Sharma submitted that the judge had erred in his approach to Section 55, that his speculation at (89) was unwarranted and it was clear from the case law *cf. AJ* (India)

[2011] EWCA Civ 1191; SS (Nigeria) [2013] EWCA Civ 550 and Caroopen [2016] EWCA Civ 1307 that he should, if he believed information was missing, have either asked questions to elicit that information of his own volition or to have adjourned the appeal. He submitted that the test was not whether there are compelling circumstances but whether a real arguable case outside the Rules in terms of proportionality has been put forward. The judge on the facts had not disputed that the Appellants were unable to live with their mother or that their grandmother had died, or that their grandfather was very old, thus effectively the children would be sent back to fend for themselves.

10. In his submissions, Mr Bramble sought to rely on the two Rule 24 responses on behalf of the Respondent. He submitted there was a clear set of credibility findings that had been made. Mr Bramble accepted that it is clear from the judge's decision that the focus was in respect of Ghana and that this could possibly be an error that the judge had not addressed the circumstances in the UK, but the credibility findings still stood. Mr Bramble submitted that the judge had dealt sufficiently with the best interests of the children at (89), bearing in mind that the mother and the uncle were still potentially in Ghana, and in relation to Article 8 that the judge had in the alternative at (91) found that even if Article 8 should be considered outside the Rules that the decision would be inevitably proportionate.
11. In his response Mr Sharma submitted in relation to the credibility findings at (72) that at its highest this is evidence that could have pointed to the mother having had responsibility before 2014, but it is not evidence of her taking responsibility after that date and that it is clear and undisputed that from 2014, i.e. the end of 2013, when the Appellants arrived in the United Kingdom, that the Sponsor has had sole responsibility for them, and that this was a distinct error of law that had not been dealt with.

Decision

12. I find material errors of law in the decision of First-tier Tribunal Judge Mayall, essentially for the reasons set out in the grounds of appeal and expanded upon by Mr Sharma in his submissions before me. It is the case that the judge solely considered the circumstances in Ghana and did not either consider or take into consideration the fact that the Appellants have been cared for solely by their father and his wife since their arrival in the United Kingdom in December of 2013. I bear in mind the decision in TD (Yemen) [2006] UKAIT 00049 and I find that it is arguable that this error could make a material difference to the outcome of the appeal in respect of the Immigration Rules.
13. In respect of the second ground of appeal which concerned both Section 55 and Article 8 of ECHR, I consider that the judge's findings were infected by his credibility findings and the sole focus on the circumstances pertaining in Ghana prior to the arrival of the Appellants in the United Kingdom. I find that is a material error which could also impact on the outcome of this appeal given that this was an in country application and not an entry clearance appeal.

14. I briefly discussed with the parties the possibility of proceeding with the resumed hearing in light of my previous direction on 30 August 2017. However, there were a number of obstacles to this course of action. Firstly, Mr Bramble had not had access to necessary documentation, i.e. the death certificates of the Appellants' mother and grandmother; and secondly, regrettably there was no updated evidence before the Tribunal, which in effect meant that reliance has been placed on statements prepared for the first hearing before Judge Davies which took place more than two years ago. Bearing in mind the overriding objective and the fact that the appeal concerns both young adults, *viz* the Appellants and children, *viz* their half-siblings, I acceded to a request by Mr Sharma that the appeal be listed in the near future for a resumed hearing.

DIRECTIONS

1. The appeal is to be listed on 15 December 2017 for one hour 30 minutes.
2. If the Appellants seek to rely on any further evidence, this should be submitted in accordance with Rule 15(2)(b) of the Tribunal (Upper Tribunal) Procedure Rules.
3. Any updated statements shall stand as evidence-in-chief in respect of the Sponsor and the two Appellants.
4. No anonymity direction is made.

Signed *Rebecca Chapman*

Date 24 November 2017

Deputy Upper Tribunal Judge Chapman