



UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: HU/18903/2016

THE IMMIGRATION ACTS

Heard at: Field House  
On 17 January 2019

Decision and Reasons Promulgated  
On 6 February 2019

Before  
Deputy Upper Tribunal Judge Mailer

Between  
FRANCIS [A]  
ANONYMITY DIRECTION NOT MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr C Lam, counsel, instructed by Templeton Legal Services  
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Ghana, born on 10 June 1968. He appeals with permission against the decision of First-tier Tribunal Judge Bulpitt, promulgated on 15 October 2018, dismissing his appeal against the refusal by the respondent on 22 July 2016, of his application for leave to remain in the UK on human rights grounds.
2. Judge Bulpitt noted that the appellant had a long history of immigration applications from February 2006 until his current application made on 14 July 2016.
3. The appellant asserted that he is in a genuine and subsisting relationship with Ms [T], a British national, and that they have been living together in a relationship akin to marriage for more than two years. Judge Bulpitt found at [25] that the couple were living together in a genuine and subsisting relationship akin to marriage.

4. The appellant also claimed to have a genuine and subsisting parental relationship with Ms [T]'s eleven year old son, [A]. It was accepted that the appellant has had two children with her, [E], aged 3 and [EA] aged 7 months at the date of hearing.
5. The appellant contended that the requirements of paragraph EX.1 of Appendix FM are met as it would not be reasonable to expect [A], [E] or [EA], all British citizens, to leave the UK and also because there are insurmountable obstacles to the appellant continuing family life with Ms [T] outside the UK.
6. The respondent contended that the appellant failed to meet the suitability requirement in the Rules and paragraph EX.1 is only relevant to [E] and [EA], and it would be reasonable to expect them to leave the UK [8].
7. In that respect the appellant stated in evidence that during the summer of 2015 he was arrested and prosecuted for using a fraudulent document. That was a forged visa which he used in order to obtain employment with TFL. He pleaded guilty to that offence and was sentenced to four months in prison [15].
8. A letter from Thamesmead Health Centre dated 15 November 2017 stated that the appellant and [E] are registered at the surgery and that the appellant attends appointments with [E]. Ms [T] is employed as a dinner lady. The family income is supported by benefits [21].
9. On 3 January 2018 the appellant and Ms [T] had another child, [EA]. It is confirmed by the Thamesmead Health Centre that the appellant is registered as her father and attends medical appointments with her [22].
10. When cross examined, the appellant confirmed that [EA] and [E] were in good health. Ms [T] travelled to Ghana with [E] and [A] a year ago in order to visit Ms [T]'s family. The appellant claimed that his parents were no longer alive and although he has a brother he did not know his or any of his extended family's whereabouts [23].
11. In her evidence, Ms [T] stated that she tried to return to Ghana to visit family every two years with [A] accompanying her on four or five occasions, and [E] "the last time". Her mother and father plus three younger siblings live in Ghana. [A] enjoyed a close relationship with her youngest brother. She claimed that [A] would not fit in to Ghana as he was born and has grown up in the UK [24].
12. As noted, Judge Bulpitt found that they had been living together in a relationship akin to marriage for at least two years. Further, he accepted that it is more likely than not that the appellant has stepped into the shoes of a parent in respect of [A] and has a genuine and subsisting relationship with him [29]. He had regard to s.55 of the Borders, Citizenship and Immigration Act 2009. The appellant does not see his two children from the relationship with a Ms [G]. His removal would have no impact on them [31].

13. The Judge had regard to the decision in MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88. He referred to the strong links that the family have in Ghana and the fact that [E] has already been taken to Ghana by Ms [T]. He found that the best interests of [E] and [EA] will be met equally in Ghana or the UK so long as they are with their parents. They would retain their British citizenship in either country [32].
14. [A] has lived in the UK for all 11 years of his life and is a British citizen. Moving from the UK would involve disruption of his education although, given his age, he is about to experience some disruption in any event as he moves into secondary education. He has begun developing some independence by walking to school on his own. Those are factors which point towards the fact that his best interests involve him remaining in the UK [33].
15. Against that conclusion however he noted that [A] has retained strong links to Ghana. He visits every other year and was described by Ms [T] as having a close relationship with his uncle, her younger brother, in Ghana.
16. He found that the educational system in Ghana "is similar to that in the UK and includes teaching in English". Considering the factors in the round, he found that on balance [A]'s best interests are to remain in the UK but this is only marginally the case as there are factors which mean that his interests would be well met in Ghana [33].
17. He considered at [35] whether the appellant has met the requirements under the Rules. He noted that it is certainly true that the sentence imposed on the appellant meant that the conviction is not one which automatically means that he falls foul of the suitability criteria. It is to the appellant's credit that he pleaded guilty and served his sentence properly. However, the offence of which he was convicted is one committed directly against the immigration controls which the UK has in place, involving as it did a forged visa. It therefore is more serious when considered in an immigration context. It also followed his entry into the UK illegally and his failure to leave when previous immigration applications have been refused.
18. Viewed with this background, he "thinks" that on balance the appellant's conduct including that conviction means that he fails to meet the suitability requirement of the Rules. He did meet the eligibility requirements [36].
19. At [38] he noted that while the best interests of [E] and [EA] would be equally well met in Ghana or the UK as long as they are with their parents, the best interests of [A] are to remain in the UK. That is the primary consideration under EX.1(a) but it is not the only consideration. That is particularly true given the fact that he found that [A]'s best interests are only marginally in favour of remaining in the UK. There are other competing considerations. This includes his strong ties in Ghana where he has grandparents, aunts and uncles, one of whom he has a particularly good relationship

with. He has been a regular visitor to Ghana throughout his life and therefore has strong cultural ties there.

20. Whether in the UK or Ghana, his stage of education is such that he is about to experience a significant change as he enters secondary education. The reasonableness of requiring him to leave the UK also needs to be considered in the context of the question being considered, namely whether the appellant should be granted leave to remain in the UK. This means that the appalling immigration history of the appellant and the impact allowing the application would have on the UK's economic wellbeing are further relevant considerations which strongly suggest that it would be reasonable to expect [A] to leave the UK [38].
21. Balancing all these competing considerations and treating their best interests as a primary consideration, he found on balance that it would be reasonable to expect [A], [E] and [EA] to leave the UK and therefore the requirement under EX.1(a) is not met by the appellant [38].
22. There would not be insurmountable obstacles to the appellant continuing family life with Ms [T] outside the UK. The strong ties that the family has maintained and the family support which would await them there meant that they would not experience significant difficulties in continuing their life in that country. Both have transferable skills which would help them find employment in Ghana [39].
23. Accordingly, the appellant did not meet the requirements under the Rules as he failed the suitability requirement, and because Paragraph EX.1 does not apply [40].
24. He considered Article 8 "outside the Rules." He answered the first four questions posed in Razgar affirmatively [41]. He had regard to the proportionality question which involved balancing the strength of the public interest in his removal against the impact on his family life. He referred to various authorities at [42].
25. At [43] he identified factors in favour of removing the appellant including the fact that he did not meet the requirements under the Rules; his dreadful history of failing to comply with immigration requirements; the history of his immigration applications on the basis of private life and family life with other partners. He had made applications in respect of two previous partners as well as an application for a residence card with a third partner.
26. On each occasion the relationship ended quickly after the application was refused. He has had children with two of those previous partners and then ceased to maintain contact with those children following the refusal of his immigration application. His conviction for fraud suggests that his presence in the UK is not conducive to the public good; his relationships have been established whilst he has been in the UK unlawfully and little weight should be given by virtue of s.117B(4) of the 2002 Act. That is particularly relevant since the fact that the respondent was seeking to remove

him was well known both to him and Mrs [T] when they commenced their relationship. The appellant and his family are not financially independent and receive state benefits. Further, there are close cultural and family ties which the appellant's family has maintained with Ghana.

27. He set out those factors in favour of maintaining the appellant's family life in the UK at [44]. This included the finding that it would be in the best interests of [A] that he remain in the UK and his genuine and subsisting relationship with the three British children, [A], [E] and [EA]. Section 117B(6) of the 2002 Act did not apply because, for reasons that he had already given, he found that it would be reasonable to expect the children to leave the UK.
28. The factor attracting the greatest weight is the best interests of the children which includes his finding that [A]'s best interests involve remaining in the UK although his best interests are far from clear cut and as he has made clear, where they lie is a marginal decision. There are also good reasons why his interests would be met by living in Ghana [45].
29. Cumulatively, the factors in favour of removal are “exceptionally powerful” and outweigh the factors in favour of maintaining his family life in the UK including [A]'s best interests.
30. Accordingly, the respondent's decision did not breach the UK's obligations under the Human Rights Convention [47].
31. On 3 December 2018, First-tier Tribunal Judge Ford granted the appellant permission to appeal. She found it arguable that the Tribunal erred in its assessment of reasonableness, failed to give sufficient weight to the child's best interests and wrongly concluded that it was only marginally the case that it was in [A]'s best interests to remain in the UK.
32. Mr Lam, who represented the appellant before the First-tier Tribunal, adopted the grounds in support of the application for permission to appeal.
33. When considering the best interests, the Judge failed to give sufficient weight to the issue of the child's nationality as a British citizen. At no stage in the reasoning was the issue of his British citizenship considered “or at least given sufficient weight.” That is a material error as the best interests of the child are a primary consideration in addressing whether it is reasonable to expect them to relocate.
34. He submitted that at [33] the Judge “speculated” that the education system in Ghana is similar to that in the UK. [A] had been a pupil at a primary school for five years. He had just started secondary school. There was no evidence that the education system in Ghana is similar to that in the UK.

35. He referred to the decision of the Upper Tribunal in Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197, where the Tribunal noted that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable.
36. [A] has been resident in the UK for 11 years. He has not lived in any country apart from the UK. He has established his own private life. His mother and siblings are British citizens as well. Mr Lam submitted that when balancing those factors against the two limited factors identified by the Judge, the finding that his best interests are only marginally better served by remaining in the UK is not supportable.
37. He also submitted that the assessment of “reasonableness” with regard to the proposed relocation of the children represented a substantial departure from the secretary of state's guidance. That should have been considered in line with the Upper Tribunal decision in SF and Others (Guidance Post 2014 Act) Albania [2017] UKUT 00120.
38. The applicable guidance indicated that it is not considered reasonable to expect a British child to leave the UK unless there are public interest considerations of such weight to justify removal of a non-EEA parent. Examples of such weighty considerations include significant or persistent criminal offences and a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules. Mr Lam submitted that in this case as the sponsor has an isolated conviction for fraud, a low harm offence for which he was given a relatively short sentence of four months; and he had not repeatedly and deliberately breached the immigration rules.
39. He submitted that whilst the appellant's immigration history is poor, as he has not had leave to remain throughout his residence, he has nevertheless made applications in an effort to normalise his status which were appropriate at the time even if the relationships on which they were based ultimately ended. There is no suggestion that he made fraudulent applications or used deception in applying for leave to remain in the UK.
40. He submitted that the children are not to be blamed or held to account for their parents' wrongdoing. He referred to the decision of the Supreme Court in KO (Nigeria) v SSHD [2018] UKSC 53 at [32].
41. With regard to the finding that the children have a link to Ghana, the Judge did not have regard to the fact that they are British citizens: ZH (Tanzania) v SSHD [2011] UKSC 4 at [30] where Lady Hale stated that although nationality is not a “trump card”, it is of particular importance when assessing the best interests of any child. At [32] she found that the intrinsic importance of citizenship should not 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 of this when they come back as adults.

42. With regard to ground 3 - the assessment of reasonableness - he submitted that what tipped the balance for the First-tier Tribunal Judge was the father's criminal history.
43. On behalf of the respondent, Mr Avery submitted that it was difficult to see how SF, supra, survives the decision of the Supreme Court in KO. He submitted that the policy was based on a misconception of the law.
44. Further, the First-tier Tribunal has looked at the situation of the children at [32] and [33]. He had regard to the changing situation as a child gets older and his position in the wider world becomes more established. He found that this was the case for [A], who has lived in the UK for all of his 11 years and is a British citizen. He has had proper regard to the disruption to [A]'s education. He balanced his best interests which involved his remaining in the UK against the fact that he has retained strong links to Ghana.
45. The reference to a similar education system in Ghana 'is not a completely unfounded assertion'. There is no evidence that the Judge's finding was incorrect.
46. With regard to [35] and suitability, he submitted that the Judge had properly concluded that he failed to meet the suitability requirements under the Rules. That was open to the Judge. His findings at [38] are consistent with the decision in KO. The immigration history of his father is a relevant consideration.
47. The Judge properly considered the factors in favour of removing the appellant when considering Article 8 outside the rules at [41] and following. The immigration history of the appellant is a relevant factor. There is nothing wrong with that. The reality of the situation is his finding that [A]'s best interests are far from clear cut and lie as a marginal decision. There were good reasons why his interests would be met by living in Ghana.
48. In the event, the findings are sustainable.
49. In reply, Mr Lam submitted that the child is paying the price for his stepfather's conviction and sentence. He referred to KO, supra at [11]. The IDI dated 22 February 2018 was considered. The consideration of the child's best interests must not be affected by the conduct or immigration history of the parent(s) or primary carer, but these will be relevant to the assessment of the public interest, including in maintaining effective immigration control; whether this outweighs the child's best interests; and whether, in the round, it is reasonable to expect the child to leave the UK.

50. He referred to the Home Office document: Family Migration: Appendix FM Section 1.0(b) published for Home Office staff on 19 December 2018. At page 69, regard was had to the decision in KO, supra, with particular reference to the case of NS (Sri Lanka) where the Supreme Court held that “reasonableness” is to be considered in the real world context in which the child finds themselves. The parents' immigration status is a relevant factor to establish that context. The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them unless there is evidence that it would not be reasonable.

### **Assessment**

51. First-tier Tribunal Judge Bulpitt has undertaken a lengthy and detailed assessment. Having assessed the evidence in detail he concluded that the appellant started to live with Ms [T] after the appellant was released from detention in November 2015. Accordingly, as at the date of hearing, they had been living together in a relationship akin to marriage for at least two years. Further, Ms [T] was a widow when she met the appellant. She and her late husband had their son, [A], who was born in 13 October 2006. It was also common ground that [A] is a British citizen.
52. He also had regard to the fact that the appellant was convicted and sentenced for using a fraudulent document, namely a forged visa which he used in order to obtain employment. Having pleaded guilty, he received 4 months in prison. They have had two children together, [E] and [EA].
53. He has had proper regard to the appellant's immigration history including his various applications which he has made since February 2006. He claimed to have entered the UK on 15 April 2000. Appeals against the refusal of his application made in February 2006 for indefinite leave to remain on compassionate grounds were dismissed in August 2007. Further applications made in March 2009 and May 2010 were both refused.
54. It was only on 6 January 2014 that he applied for leave to remain. Permission to bring judicial review proceedings was refused in March 2015. His further application in October 2015 was refused on 25 March 2016.
55. His current application which was the basis for this appeal was made on 14 July 2016. That was refused on 22 July 2016. It was against that decision that the appeal to the First-tier Tribunal was made.
56. He has had full regard to the evidence that the appellant gave at the hearing which he has set out in some detail from [11-24]. He carefully considered whether the appellant had a genuine and subsisting parental relationship with [A]. He found that the appellant had stepped into the shoes of a parent in respect of [A] and had a genuine and subsisting parental relationship with him.



57. He had proper regard to the best interests of the appellant and the children involved pursuant to s.55 of the 2009 Act. He had had regard to the best interests of [E] and [EA] which he found would be met equally in Ghana or in the UK so long as they are with their parents.
58. He had particular regard to the best interests of [A], a British citizen who lived in the UK for all his 11 years. He referred to the disruption that would be involved in his education which, however, he would in any event be subject to as he moves into secondary education.
59. He considered that [A] had visited Ghana every other year and was described by his mother as having a close relationship with his uncle in Ghana. He also found that the education system in Ghana is similar to that in the UK and includes teaching in English. It is contended that there is no evidence substantiating that assertion. However, there has been no contention that the education system in Ghana would be contrary to his ability to progress in education at secondary school.
60. I have had regard to the appellant's bundle before the First-tier Tribunal. There does not appear to be any evidence relating to [A]'s educational progress in the UK. There is no evidence that he would be adversely affected by any move to Ghana. There is no suggestion that [A] has any specific learning or educational difficulties for which he has been receiving any specialised attention in the UK.
61. Nor is there any medical evidence that [A] is receiving any specialised medical treatment in the UK which would not be available in Ghana.
62. Judge Bulpitt found that [A]'s best interests are only marginally in favour of remaining in the UK. He weighed that up against the competing considerations including [A]'s strong ties in Ghana where he has grandparents, aunts and uncles. He has been a regular visitor to Ghana throughout his life and has strong cultural ties there.
63. He has assessed whether it would be reasonable to require [A] to leave the UK, which he stated needed to be considered in the context of whether the appellant should be granted leave to remain here. That meant taking into consideration the appellant's "appalling immigration history" and the impact that his being allowed to remain would have on the UK's economic well being.
64. As noted, the parties drew my attention to the decision in KO (Nigeria) v SSHD [2018] UKSC 53. Judgment was given by the Supreme Court on 24 October 2018. First-tier Tribunal Judge Bulpitt promulgated his decision on 15 October 2018.
65. At [19] of KO, Lord Reed held that in considering the "best interests of the children" in the context of s.55 of the Borders, Citizenship and Immigration Act 2009, there is nothing in the section to suggest that "reasonableness" is to be considered otherwise

than in the real world in which children find themselves. At [51] he considered s.117B(6) of the 2002 Act. He noted that the Upper Tribunal had directed itself correctly as to the wording of the sub-section. The parents' conduct was relevant in that it meant that they had to leave the country.

66. Lord Reed noted at [18] that as the IDI guidance acknowledges, it seemed to him to be inevitably relevant both in the context of both s.117B (6) as well as paragraph 276ADE(1)(iv) of the Rules to consider where the parents, apart from relevant provision, are expected to be, since it will normally be reasonable for the children to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave, that the provisions may give the parents a right to remain.
67. At [51] he stated that it was in the context to which he referred that it had to be considered whether it was reasonable for the children to leave with the parents. Their best interests would have been for the whole family to remain here. In the context where the parents had to leave, the natural expectation would be that the children would go with them and there was nothing in the evidence reviewed by the Judge to suggest that that would be other than reasonable.
68. First-tier Tribunal Judge Bulpitt considered the appellant's conviction, which he found affected the immigration controls which the UK has in place, as he had forged a visa in order to enable him to work in the UK. This he found therefore to be more serious when considered in an immigration context. In addition, the offence followed his very poor immigration history when the several previous immigration applications were refused. In those circumstances, he failed to meet the suitability requirements under the rules [35].
69. He has properly considered as part of his assessment as to whether it is reasonable to expect [A] to leave the UK the immigration history of the appellant and the impact on the economic well being if he were allowed to stay [38].
70. He concluded that there would not be insurmountable obstacles to the appellant continuing family life with Mrs [T] outside the UK. They both had transferable skills enabling them to obtain employment in Ghana. There has been no appeal against that finding.
71. Finally, he has considered the proportionality of the decision, having undertaken a detailed assessment of the Razgar questions. He identified factors in favour of removing the appellant against those in favour of his maintaining of family life in the UK. Having carefully considered the best interests of [A], he has given sustainable reasons as to why his interests would be met by living in Ghana. He has summed up the basis upon which he came to that decision at [46].

72. I find that there has been no material error that has been made by the First-tier Tribunal Judge.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Anonymity direction not made.

Signed

Date 23 January 2019

Deputy Upper Tribunal Judge Mailer