



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

Appeal Number: IA/01554/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 25 May 2016**

**Decision & Reasons
Promulgated
On 13 July 2016**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**KWABENA NTI (+4)
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Miss Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Mr S Praisoody, Counsel, instructed by Shan & Co

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a national of Ghana. Although he is the sole claimant, his partner and their three children are

dependants in his appeal. In a determination sent on 23 October 2015 First-tier Tribunal (FtT) Judge Morgan allowed on human rights grounds the claimant's appeal against a decision made by the appellant (hereafter the Secretary of State for the Home Department or SSHD) refusing his human rights claim and deciding to remove him. The judge noted that it was not in dispute that the appellant could not succeed under the Immigration Rules (see para 6), but concluded that the refusal decision was a disproportionate breach of the appellant's and his family's human rights, placing particular reliance on the best interests of the child. At para 17 the judge stated:

“There are other factors that weigh in the family's favour in the balancing exercise that I must undertake in respect of Article 8. However I am not persuaded that these factors, without the lengthy residence of the British born daughter, would necessarily outweigh the legitimate rights to exercise effective immigration control. I have given considerable weight to the respondent's legitimate right to exercise immigration control. However on the particular factors of this case I find that this does not outweigh the best interests of the British born child. I find that the couple's immigration history weighs against them in the balancing exercise that must be performed in respect of Article 8. However, I find that the weight given to their immigration history is sufficient to outweigh the best interests of the daughter which I find clearly favour her remaining in the United Kingdom. I note in particular and reiterate that a child must not be blamed for matters for which he is not responsible such as the actions of his parents. In summary having considered all of the factors in the round, I find that expecting the appellants to return to Ghana is disproportionate because the daughter was not only born in the United Kingdom but has now spent her early and significant, formative early childhood education in the United Kingdom and that it would not be reasonable to expect her to return to Ghana. Whilst the immigration history of the parents clearly weighs against the family in the balancing exercise the fact remains that the British born child is well integrated into the United Kingdom and in particular into the educational system. It is this factor that cases the balance within proportionality assessment to fall in favour of the British born child.”

2. The appellant's family comprises his partner, their two children and a stepdaughter. The appellant arrived in the UK in 2000 on a student visa but became an overstayer in January 2001. The appellant's partner, Miss Mensah, claims to have entered the UK using a false passport on 18 June 2008.
3. The SSHD's grounds of appeal advanced the following main grounds: that the judge failed to afford sufficient weight to the public interest as expressed in the Immigration Rules, contrary to the guidance given by the Court of Appeal in **SS (Congo) [2015] EWCA Civ 387**; that the judge failed to provide adequate reasons for concluding that the best interests of

the elder daughter could only be served by remaining in the UK; and wrongly relied on an irrelevant consideration by treating as a factor in favour of the appellant the delay on the part of the respondent in failing to remove him when he first came to the attention of the Home Office as an overstayer in 2010.

4. I consider that the SSHD's grounds are made out.
5. Despite stating that he had given "considerable weight to the public interest question (para 15) the judge nowhere treated the failure of the claimant to meet the requirements of the Immigration Rules as a relevant factor in assessing the public interest; and indeed in the same paragraph, appeared to suggested that the 7 year requirement relating to children set out in the Rules was merely "an administrative cut-off point".
6. A further difficulty with the judge's assessment of the public interest question was that he himself acknowledged in paragraph 15 that "[m]ost of the factors within 117 [ss117A-D of the Nationality, Immigration and Asylum Act 2002] weigh against the family". Those factors include of course s.117B(4)(b) which mandates a court or tribunal to attach "little weight to" "a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully". Given that the appellant's partner was a dependant in this appeal, that should have meant that the judge by analogy (the partner not being a qualifying person) attached little weigh to the relationship between the couple. Even outwith the scope of s.117B4)(b), it is an established principle of Article 8 jurisprudence that a relationship formed when a person's immigration status is precarious carries les weight than one established when immigration status is lawful: see **Rajendran** (s./117B - family life) [2016] UKUT 138 (IAC).
7. Despite noting the considerable public interest he professed to have weighed against the claimant and the family's "poor immigration history" (paragraph 15), the judge effectively declined to attach significant weight to this factor because of the view he took at paragraph 16:

"On the particular facts of this case the respondent bears some responsibility for the circumstances in which the appellants find themselves. If the respondent had sought to remove the appellant in 2010, when he first came to the attention of the Home Office as an overstayer, the daughter would have still been very young and would not be attending school. The respondent chose not to exercise removal thereby also depriving the appellant of the right to appeal the initial decision in 2011. The delay in this case has enabled the appellants to present a very different set of circumstances than those in which they found themselves back in 2010/2011. The daughter has now been at school for several years and is progressing extremely well. I note in particular the end of year report, which can be found at page 20 of the appellant's bundle. Her critical formative years of

childhood education have taken place in the United Kingdom. I accept the appellant's evidence that his stepdaughter would face difficulty in adapting to life in Ghana given that all the ties to date and her critical early childhood development has taken place in the United Kingdom. It is these factors and these factors alone that enable a finding that the decision to remove the family is disproportionate given the formative years spent by the daughter in the United Kingdom."

8. This assessment plainly failed to take into account: (i) that the appellant had failed to leave the UK once his student leave expired in 2001 and made no contact with the immigration authorities thereafter until 2010; (ii) that when eventually served with an IS.151A as an overstayer in July 2010 (when arrested for a motoring offence) the claimant made an application for LTR outside the Rules and then when this was refused, lodged a reconsideration request on 5 March 2013, lodging a Pre-action Protocol which took up a further year to be concluded (27 June 2013 - 19 July 2014). In short, the judge failed take into account that for a significant portion of the period between June 2010 and the date of decision in December 2014, the respondent was properly occupied with responding to the claimant's own application. Certainly there was no rational basis for treating the period of delay attributable as being significant.

9. An equally fundamental error afflicts the judge's approach to the best interests of the child. Despite citing established cases such as **MK (Best interests of child) India [2011] UKUT 000475 (IAC) and Zoumbas [2013] UKSC 74**, the judge failed to show that his assessment of the best interests of the child took into account all relevant factors. For the judge the only relevant factor appeared to be that (a) the claimant's stepdaughter born on 10 June 2009 was "well settled into the UK education system" and "is progressing extremely well", her "critical years of childhood education hav[ing] taken place in the United Kingdom"; and (b) "all her ties to date and her critical early childhood development has taken place in the United Kingdom" (para 16). This assessment failed to take into account the judge's own finding at para 13 that "the best interests of the daughter are to live with and be brought up by her mother and stepfather with her two half-siblings". It also failed to take into account that there was no evidence before the judge to show that the stepdaughter did not through her mother and the claimant have a knowledge of Ghanaian culture and traditions if not also of local language. Despite citing **E-A (Article 8 - best interests of the child) Nigeria [2011] UKUT 315 (IAC)** and **Azimi-Moayed and Others (Decisions affecting children; onward appeals) Iran [2013]** the judge appears to have overlooked the importance attached in their decision to the fact that children over the age of 10-11 can form significant social ties outside their own family. The stepdaughter in this case was only aged 6.

10. For the above reason the judge materially erred in law and his decision must be set aside.
11. Mr Praisoody urged that I adjourn the case for it to be remitted or reheard by the Upper Tribunal but he agreed that the claimant had not produced any evidence updating the materials relied upon before the First-tier Tribunal Judge, notwithstanding clear notice to them that they were required to do so in advance of the hearing before me.
12. Accordingly I proceed to remake the decision without further ado without the need to hear or receive further evidence.
13. The claimant advances no challenge to the judge's finding that the best interests of the stepdaughter lie with remaining with her parents and in any event I consider that such a finding is inevitable on the basis of the evidence before me. Given the young ages of the stepdaughter and her two younger half-siblings, I am not able to accept that they had established any significant ties outside their own family. The evidence does not establish that they lack understanding of Ghanaian culture and traditions and in any event I am satisfied that it would not take them long at all to integrate into Ghanaian society. It would be reasonable to expect them to do so. They have no known health problems of any significance. None of them has British citizenship. They are nationals of Ghana.
14. As regards the claimant and his partner, they, ipso facto, have knowledge of the culture and traditions first-hand and the evidence does not demonstrate that they would be unable on return the Tribunal find work and rely in support if need be from family members there.
15. In short the family life of the family could be preserved without undue hardship by them going to Ghana as a family unit.
16. As regards private life, the claimant and his partner have not demonstrated that they have significant private life ties in the UK and in any event I am required by s.117B(5) of the 2002 Act to attach little weight to such ties, given their precarious immigration status.
17. As regards the public interest factors relevant in their case, they do not meet the requirements of the Immigration Rules; they each have a poor immigration history, one being an overstayer since 2001, the other being an illegal entrant since 2008; as already noted they entered into a relationship at a time when their immigration status was precarious; their failure by a considerable margin to demonstrate any compelling or exceptional circumstances; the delay attributable to the respondent in falling to enforce their removal earlier is of small magnitude; the judge found (and there is no evidence to the contrary) that none of the children is a British citizen and that in any event the stepdaughter has no contact with her natural father (para 18). In short the family and private life of this family, even if it is accepted that the refusal decision constituted an

interference with it, is not one that has been the subject of disproportionate interference.

Notice of Decision

18. For the above reasons I re-make the decision by dismissing the claimant's appeal.

No anonymity direction is made.

Signed

Date: 12 July 2016



Dr H H Storey
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date: 12 July 2016

Dr H H Storey
Judge of the Upper Tribunal