



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28816/2014

THE IMMIGRATION ACTS

Heard at Field House
On 14 December 2015

Decision & Reasons Promulgated
On 2 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR C Y
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Hoshi of Counsel
For the Respondent: Miss J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Ghana born on 18th January 1974 and he appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 against a decision by the Secretary of State dated 24th June 2014 to refuse to grant him leave to remain in the United Kingdom on human rights grounds. The appellant's wife, Miss D S and their two children born on 14th February 2007 and 27th March 2011 (now aged 8 and 4 years old) had no separate valid appeals but their interests were said to be relevant to

the appeal under the principle of **Beoku-Betts v SSHD** [2008] UKHL 39 and were to be considered.

2. The appellant's appeal came before the First-tier Tribunal and was dismissed on 1st December 2014. The Upper Tribunal found an error of law in the First-tier Tribunal (a panel) decision erred in its assessment of proportionality by failing to make a finding as to the length of time the appellant had spent in the United Kingdom. Although challenge was made to the assessment of the best interests of the children the findings made by the First-tier Tribunal regarding the children's interests were, however, found to be sound (particularly at paragraph 39 of that decision). As stated at paragraph 49 of the First-tier Tribunal decision, which dismissed the appeal, it was implicitly accepted that the first child had only known life in the United Kingdom and was settled at school and in line with **ZH (Tanzania) v SSHD [2011] UKSC 4**, the children's best interests were to stay in the family unit but that it would be reasonable for the children to return to Ghana albeit that the elder child had been in the United Kingdom for over seven years.
3. The appellant claims that he came to the UK in 1988 at the age of 14 years with his cousin who was some 25 years his senior. There was no Home Office documentary evidence of the claimant's residency in the United Kingdom before 2003 when a "no time limit" (NTL) stamp was inserted in the claimant's passport. An investigation in 2007 was commenced and it appeared that it was granted by a corrupt Home Office official on payment of a fee. The appellant was arrested on 5 July 2010 on suspicion of entering the UK illegally and a removal notice was served. There was no evidence that he was charged or convicted.
4. The appellant applied for indefinite leave to remain on 19 November 2010 which was refused but following a pre-action protocol that decision was withdrawn and a further decision was issued on 24 June 2014 which is the subject of this appeal.
5. It was conceded at the hearing before the First-tier Tribunal on 13 November 2014 that the appellant was unable to meet the requirements of the Immigration Rules. The Secretary of State accepted that the claimant had established both family and private life in the UK and the parties agreed at the First-tier Tribunal that the issue before the Tribunal was focused on the fifth stage of **Razgar v Secretary of State for the Home Department [2004] UKHL 27**. The extent to which the decision is remade is therefore confined to the assessment of proportionality outside the rules.

The First-tier Tribunal Decision

6. The Tribunal before it had a bundle of documents from the appellant and respondent respectively and also had a report prepared by a qualified psychotherapist Miss Susan M Pagella. There were also supportive statements from friends and from the appellant's church.
7. The evidence recorded in that decision was that the appellant claimed that he arrived in the UK with a relative, in 1988 and did not attend school but eventually obtained work in a variety of roles principally a national minimum wage job such as cleaning. Between 2002 and 2010 the appellant supported his partner Miss D S and his children

providing them with accommodation until he was arrested in July 2010. Since then he has relied on donations from the church where he is an usher and food and money offered by friends.

8. DS is the mother of his two children. There was no evidence that DS had entered the UK legally in June 2002 and DS had not worked since arriving in the UK. She was diagnosed with HIV positive during her pregnancy and takes medication for the condition. The elder child is monitored for HIV but taking no medication. The younger child has no medical conditions. The elder child speaks English fluently and attends junior school while the younger child is about to attend primary school. It was stated that neither children could speak their parents' native language Twi but had some basic understanding. The evidence put forward was the appellant's mother had passed away in 2011 and Miss DS's father passed away when she was a child and her mother and older siblings lived in Ghana but they had little contact. By the date of the hearing before me it was submitted that Miss DS's mother had indeed died. Miss DS had commenced training as a hairdresser but this had not been completed. It was the appellant's case that he had not been aware that there was any impropriety in obtaining the visa as alleged by the Home Office and was not present when his cousin obtained the NTL stamp. He had submitted his passport in 2009 in order to apply for a passport for his son and it had been returned by the Home Office without comment. Subsequently that British citizenship had been revoked.
9. It was the respondent's case that although the appellant had established family life there was nothing to suggest the family could not relocate to Ghana. The claimant's objection was based principally on him being used to the comfort of the UK and most of the reasons for the appeal related to the anticipated difficulty in adjustment to Ghana a country with which both the appellant and Miss DS were familiar. It was accepted that there would be a period of settlement which may be difficult but returning as a family would enable the appellant and Miss DS to help their children adjust to a new school and environment.

Conclusions

10. I had specifically considered the evidence with relation to the appellant's entry into the UK and I clearly find that he has not substantiated his claim that he entered as a minor in 1988 and prior to the year 2003 and I say so for these reasons. Mr Hoshi invited me to consider the case of **TK Burundi [2009] EWCA Civ 40** and to be cautious before making findings regarding credibility on what one might find inherently probable and that corroboration is not necessarily required particularly if it can be difficult to obtain. The fact that there was no documentary corroboration in the UK prior to 2000 could be explained by the fact that the appellant was exploited by family members and was illiterate. I find this difficult to accept, not least because the appellant was born in 1974 and by the year 2003 he would have been at least 28 years old. He himself in his evidence before the First-tier Tribunal confirmed that he would go to work and undertake jobs such as cleaning jobs and I am not persuaded that there would be no documentary footprint of this appellant in the UK between 1988 and 2003 either from an employer or from the NHS or from a landlord. The

appellant indeed gave evidence that he was working and needed to produce his passport and that is why he obtained his passport from his relative in the UK.

11. Miss Isherwood suggested that the story of the appellant was unlikely because the story of the appellant and his partner were broadly similar and yet there was nothing done about the partner's immigration status and therefore he knew that his NTL stamp was false because of the hesitation in applying for status for his wife. That said I do take Mr Hoshi's point that the appellant did produce his passport for the purposes of obtaining British citizenship for his son.
12. Mr Hoshi suggested that I should reject the global assertion that the oral evidence given to me was vague or that the discrepancy between the appellant's oral evidence and his witness statement that he was given the passport at different times and because it was such a long time ago. However as Mr Hoshi did concede the appellant's wife, who gave evidence before me, had stated that she had met the appellant at a time when she was not in the UK and this does not persuade me that her evidence was reliable as it was such a fundamental error. There were numerous questions to which she responded that she did not know the answer or was vague or could not give a time estimate. She was asked, did she remember the month when she entered the UK and she said, "I don't remember dates like that". She then stated that she met her husband in January 2002 and then stated that she did not remember. I can accept that she has suffered with depression and I take this into account but her evidence as to timings was so vague about significant matters that it was simply unbelievable. When she met her husband is a matter of some significance and I am surprised that she could not remember even some years later. When asked why she did nothing about her status she said "I didn't have anything". I can accept that money might be a problem but that has not prevented the appellant from pursuing his own application or that of his child.
13. Mr G, who also gave evidence before me, changed his evidence from initially stating he had met the appellant in 2002 to having him in 2000. He then on further examination claimed that he had met the appellant in 2000 and met him again in 2002. Even though the witness had previously given evidence on behalf of the appellant he was clearly not clear as to what he should be saying. I find his evidence to be unreliable. I also found the letter from the church without the author in court to support the contention that the appellant was in the United Kingdom from an earlier date than 2003 to be unreliable. It would appear that the church had changed its name.
14. I do not accept that the appellant did not know that the NTL stamp was questionable. The appellant was at least 28 years old when he obtained this stamp and if he had lived under the radar as he claims that he had done, he at the very least must have questioned why he had that stamp. I do not accept that he entered the UK as a minor and that he had no independent documentary evidence prior to that date.
15. Although I was referred to **TK Burundi** the following was recorded as part of the judgment in the Court of Appeal at paragraph 21:

'[21] The circumstances of this case in my view demonstrate that independent supporting evidence which is available from persons subject to this jurisdiction be provided wherever possible and the need for an Immigration Judge to adopt a cautious approach to the evidence of an appellant where independent supporting evidence, as it was in this case, is readily available within this jurisdiction, but not provided. It follows that where a Judge in assessing credibility relies on the fact that there is no independent supporting evidence where there should be supporting evidence and there is no credible account for its absence commits no error of law when he relies on that fact for rejecting the account of an appellant'.

16. I do not accept that it would have been difficult to produce some documentary evidence in relation to the claimed years prior to 2003 and none was produced. I do not say that the evidence would be readily available but I find it not credible that for 15 years and after reaching a majority the appellant could locate, even taking into account his immigration status, no independent documentary evidence prior to 2003. My findings do not rest fundamentally on the absence of any documentary evidence but together with the rest of the evidence, I do not accept that the appellant entered the UK prior to 2003. Even if it was accepted that he entered in the year 2000 that does not accord him the sufficient amount of time to bring himself within the Immigration Rules which is the starting point for an assessment of proportionality or moreover evidence his entry into the United Kingdom as a minor which is his claim. Even his witnesses do not assert that they knew him on entry as a minor. I make it clear that I do not accept he came into the United Kingdom prior to 2003.
17. I therefore do not accept that the appellant can meet the Immigration Rule 276ADE and when considering proportionality and the last stage of **Razgar** I must consider the children's interests as a primary consideration but this is what has been done through findings which have been preserved.
18. The decision by a panel of the First tier Tribunal dismissed the appellant's appeal but an error of law was found on the basis that there was no finding in respect of the number of years the appellant had indeed been in the United Kingdom which may have an impact on the overall proportionality assessment. However the findings with respect to the children were preserved. These were as follows:
 39. *We have considered as a primary consideration the effect of removal to Ghana on both of the appellant's children, and with particular additional consideration of D, now 7 years of age who has known only life in the UK and is settled in school, speaking fluent English.*
 40. *It is an overriding requirement in this case that the children of these caring parents remain with their parents as a family unit and that they are not separated from their parents.*
 41. *We accept that there will be an inevitable upheaval in the life of the children by returning to Ghana. However they are both very young and within the loving care of a family unit, a wider family with a grandmother, aunts and uncles and also within their parents' Church, will be able to adjust to a new environment. With regard to D, he is young enough to adapt to a new school. He has been attending primary school in the UK for about 2 years. He speaks English and he*

will therefore have a significant advantage at school in Ghana. DV is not yet four and has not started primary school. They have some understanding of their parents' native language and will rapidly learn a new language once embedded in Ghanaian life and school will readily adapt to it within a loving family unit. Their private life in Ghana will be developed through the private life of their parents as they are too young to have private life of any significance as an individual at their respective ages. The overriding requirement is that both children remain with their parents.

42. *It is understandable that the appellant wishes to remain for the sake of the children's education in the UK, but the immigration rules cannot be displaced by a preference alone for the socio-economic advantages that the UK may offer."*

19. There was no error in the assessment by the First-tier Tribunal but because of the further year that the children have been in the United Kingdom and the fact that the error of law was said to touch on the assessment of proportionality for completeness I have revisited the proportionality assessment.
20. These children are still at the primary stage of their education, they have no health difficulties and clearly their best interests are to remain with their parents in one family unit. The children are all Ghanaian and they have extended family in Ghana albeit that it was claimed by the parents that they had little contact with those relatives. It may be an advantage for the children to have an education in the UK but at this young age albeit that the older child has been in the UK for seven years I find no reason that he cannot relocate with the support of his parents. Indeed this was the finding made by the First tier Tribunal.
21. What was clear was that in the evidence before me that the appellant stated his children could speak Twi and I find that as the appellant and his wife needed interpreters that it is most unlikely that they would be able to only communicate with their children in English. It is encouraging that the older child can speak English fluently and no doubt the younger child can do so because they both attend school but at their tender age their best interests are to remain with their parents in one family unit.
22. I, like the First-tier Tribunal, find that the interests of the children are served in remaining with their parents in a stable family unit. There was no evidence that the children had any significant educational or health needs and I consider that it is reasonable that parents return to Nigeria. The appellant has not been in the United Kingdom since being a minor and therefore has forged less of a private life in the United Kingdom. I take note of the position of the Secretary of State regarding Article 8 and which is set out in the Immigration Rules **SS Congo v SSHD [2015] EWCA Civ 317**. The appellant has not been in the United Kingdom for 20 years and there are no significant obstacles to his return to Ghana. The First-tier Tribunal found it was reasonable for the children to return and this was after having considered the various reports in relation to the children including that of Ms Pagella.

23. I also take note of Section 117B:

“117B Article 8: public interest considerations applicable in all cases

- (1) *The maintenance of effective immigration controls is in the public interest.*
- (2) *It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-*
 - (a) *are less of a burden on taxpayers, and*
 - (b) *are better able to integrate into society.*
- (3) *It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-*
 - (a) *are not a burden on taxpayers, and*
 - (b) *are better able to integrate into society.*
- (4) *Little weight should be given to-*
 - (a) *a private life, or*
 - (b) *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.
- (5) *Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.*
- (6) *In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where-*
 - (a) *the person has a genuine and subsisting parental relationship with a qualifying child, and*
 - (b) *it would not be reasonable to expect the child to leave the United Kingdom.”*

24. The parents have limited English and it is in the public interest and particularly the interests of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the UK are able to speak English because they are less of a burden on taxpayers and better able to integrate in the society. Secondly it is clear further to Section 117(3) that the appellant and his family are burdens on the taxpayer because neither the appellant nor his wife are able to work and they have two children at school and have relied on the NHS. I do find that little weight should be given to

their private lives established because they have been in the UK at a time when they have all been in the UK unlawfully. I pay particular attention to paragraph 117B(6) but have found relying on the decision of the First-tier Tribunal, which was a panel, that it would be reasonable to expect the older child to leave the United Kingdom. It is clear that the elder child has lived in the UK seven years, and this is an important factor.

25. Section 117B(6) identifies that the public interest does not require the removal of a person where there is a genuine relationship with a qualifying child and it would not be reasonable to expect that child to leave the United Kingdom. First, the First-tier Tribunal found the return of the children to be reasonable and that finding was preserved. Secondly, even if there had been a finding that the child's return was unreasonable Section 117B(6), although a significant factor, does not necessarily defeat the public interest. It is a factor to be taken into account.
26. I take into consideration the submission that the immigration history of the parent should not be visited on the children and I realise the children in this case had been here longer than the children in EV (Philippines) v SSHD [2014] EWCA Civ 874, who had not been here for seven years but in this case, too, the whole family are here illegally.
27. That said I also note the best interests of the child are a primary consideration rather than the primary consideration and as stated in EV (Philippines) where the parent relies on the best interests of his or her child in order to "piggy back on their rights" those rights must be seen in the light of the facts of reality that the parents have no right to remain in the country. As stated in EV Philippines

"60. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."
28. I am not persuaded that the appellant and his partner would have a lack of access to sufficient resources or the ability to work or access to medical care (Mrs DS has HIV) to enable them to relocate. It is clear that the appellant has working experience as does his wife and there is access to medical care in Ghana (Country of Origin Information Report 2012). They have family in Ghana albeit that they have made little contact recently. Both claim that their parents had passed away but they have each other to turn to for support. The appellant and his wife have very poor immigration records both entered illegally and have remained in the United Kingdom illegally.
29. In view of my findings above I find the public interest consideration outweighs that of the appellant and his family to remain in the United Kingdom and their removal is proportionate. The appeal of the appellant is dismissed.

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 him or any member of their 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. This direction is set because there are minors involved.

Signed

Date 29th January 2016

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

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

Signed

Date 29th January 2016

Deputy Upper Tribunal Judge Rimington