Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01799/2013
IA/01800/2013
IA/01801/2013
IA/01802/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 7 October 2013	**On 29 October 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

E A KISSI
B DUA-AGYEMANG
MOS KISSI-AGYEKUM
& M P Y KISSI-AGYEKUM

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr G Pall, of J R Rahman, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellants are husband, wife and two children, all citizens of Ghana. On 2 January 2013 the respondent refused their applications for leave to remain as a PBS (Points Based System) Migrant and three dependants. They appeal against a determination by First-tier Tribunal Quigley, promulgated on 27 June 2013, dismissing their appeals against those decisions.

2) In the First-tier Tribunal, the appellants conceded that they could not meet the requirements under the Rules relating to the PBS nor the Rules relating to their private and family life in the UK in respect of Article 8. Their cases were argued only on Article 8 grounds, outwith the Rules.

3) These are the grounds of appeal to the Upper Tribunal:

> … The judge appears to have concluded that … the [first] appellant could [not] maintain himself in the UK without recourse to public funds because his accounts were regularly overdrawn … The judge erred … as the fact that the appellant was regularly overdrawn would not have precluded him from being a burden to the public purse [*sic*]. Her misconstruction … amounts to an error in law.
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> … The judge at paragraph 33 … misdirected herself [in] assessing the Article 8 case. The judge failed to set out what circumstances were considered in finding that the refusal did not amount to a breach of Article 8 … there was no detailed consideration … as to the circumstances of the sponsor's [*sic; presumably this should be "first appellant's"*] family life or any balancing exercise … to provide a sound basis for the findings … made.
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> … The judge despite being directed … in the appellant's representative's submissions … paid no regard to the best interests of the [first] appellant's children and fails to justify her lack of favourable discretion at paragraph 34 which is essential given that [the first appellant's] son was only 6 months off … the 7 year qualifying mark in accordance with paragraph EX1.

4) Permission was granted on the view that the judge might not have differentiated clearly between the consideration under the Rules and a "freestanding proportionality assessment", which had arguably not been conducted "within the correct legal framework".

5) Mr Pall firstly directed attention to paragraph 30 of the determination. The judge noted that the first appellant was overdrawn by £478.16 on 10 May 2013 and the second appellant by £1,126.06 on 3 May 2013, and concluded that the evidence did not support the submission that the appellants could maintain themselves without recourse to public funds. Mr Paul said that was illogical. He also sought to criticise paragraph 33 of the determination, where the judge finds that interference with the private life of the appellants would be proportionate, and would not entail any breach of Article 8. He relied on the observation in the grant of permission for the submission that this failed to distinguish the case within the Rules from the case outwith the Rules. It was only necessary for the appellants to show a "good arguable case" in order to justify consideration outwith the Rules. The judge had failed to set out what she made of the best interests of the children as a primary consideration. Her determination should be set aside and the decision reversed.

6) Mr Mullen acknowledged that the overdrafts were not very large, and did not justify the conclusion that the appellants would not be able to maintain themselves without recourse to public funds. He said that was incidental to the outcome. As to Article 8, the judge set out all the relevant factors, even if in fairly short form, at paragraph 32.

The case did not involve any interference with family life, as the family would be returning only as a unit. The judge correctly noted nothing to suggest any adverse effects of return to Ghana, where education is available to a reasonable standard, and where the first two appellants were educated; and nothing to suggest that the children would not be able to forge new friendships and continue to develop, or that the first two appellants would be unable to find employment and to continue church activities. Even if the conclusion would have been better expressed as "no disproportionate breach of Article 8 interests", the determination reached a correct answer for adequately explained reasons, and should stand.

7) I indicated that I was not persuaded that the determination contained any error such as to require it to be set aside.

8) The judge went rather far in concluding on the basis of modest overdrafts that the appellants could not maintain themselves. The running of a permitted overdraft is not evidence of general inability to self-maintain. Many people regularly run overdrafts without having to call for public financial relief. However, I agree with the Presenting Officer that this is a small point, of no significance to the outcome.

9) The legal framework around Article 8 might have been set out more extensively, but that is no reason to find error in a determination which arrives at the correct decisive questions. The determination explicitly considers Article 8 both within and outwith the terms of the Rules. It is well established that a "near miss" (in respect of the third appellant's age) is not a good reason for allowing an appeal – Miah & Others v SSHD [2012] EWCA Civ 261. The judge's summary of the private life interests leaves nothing out. Mr Pall in course of submissions accepted my observation that the case was not run (and could not have been run) on the basis that there is anything seriously detrimental to the best interests of the children as a potential consequence of their return to Ghana. The evidence failed to disclose anything about the best interests of the children or otherwise in respect of private life which might have outweighed the application of the Immigration Rules. The judge disposed of the case correctly both outside and inside the Rules.

10) The determination of the First-tier Tribunal shall stand.

11) No anonymity order has been requested or made.

Hugh Macleman

9 October 2013
Judge of the Upper Tribunal