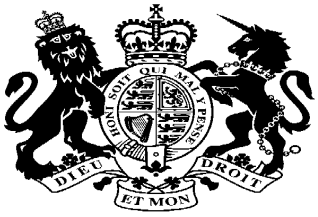


Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01043/2010

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court on 23 December 2013	**Determination Promulgated on 31 January 2014**

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

ALFRED NIL-LOMO OKAI MENSAH ABBEY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Sood, instructed by Burton & Burton Solicitors
For the Respondent: Mr Smart, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant, a citizen of Ghana, born on 17 May 1988, maintains that his rights and those of his family under Article 8 of the ECHR would be breached if he were deported, that being the intention of the respondent following the making of an automatic deportation order on 11 November 2010.

2. This matter came before us as a remittal from the Court of Appeal following an order to that effect dated 23 May 2013. The parties were in agreement that the appeal was to be decided by us *de novo*. That being so, it is unnecessary to set out here the history of the appeal prior to the proceedings in the Court of Appeal.

3. The parties were also in agreement that as the decision to deport the appellant was made prior to 9 July 2012, the matter did not fall to be considered in the context of the provisions of the Immigration Rules in force after that date. There was also agreement that the appellant's British children and wife could not be expected to accompany him to Ghana so it is therefore a 'family splitting' case.

Background

4. The undisputed aspects of the appellant's history can be summarised as follows. He came to the UK as a visitor on 25 September 2003. He came as a visitor again on 26 September 2004 and he overstayed, studying full-time until December 2005. He returned to Ghana at some point not specified in the papers before us. He was then refused leave to enter as a visitor when he attempted to re-enter on 12 January 2006 because it became apparent that he had overstayed his previous leave. He subsequently obtained entry clearance as a student and entered again on 24 March 2007. He studied for a BSc in Forensic & Security Technologies, having obtained extensions of leave as a student.

5. On 18 May 2010 the appellant was convicted of dishonestly making false representations to make gain for self or another or cause loss to the other or expose other to risk and making or supplying articles for use in fraud. The circumstances of the offence were that he used identity fraud to steal from an individual and from banks, the knowledge of how to do so having been obtained during his security technology studies.

6. On 14 June 2010 the appellant was sentenced to 18 months imprisonment, that sentence subsequently being reduced to 12 months on appeal. He was released from criminal detention on 11 November 2010 and from immigration detention in January 2011.

7. As a result of the conviction, on 11 November 2010 the respondent made a deportation order against the appellant under the automatic deportation provisions of s.32 of the UK Borders Act 2007.

8. The appellant, from a relationship with a former partner, Ms Kirsty Wainwright, has a British daughter, Summer, born on 19 June 2008.

9. The appellant married Ms Tracey Grannum, a British national, on 21 September 2010. They have two British children, Messiah, born on 24 May 2010 and Neveah, born on 9 July 2013.

Article 8 ECHR

10. We referred to the questions identified as relevant in Article 8 cases which were set out by Lord Bingham in paragraph 17 of the judgement in the case of Razgar [2004] UKHL 27, as follows:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well- being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

11. It was not disputed that the appellant has a family life with his wife and his three children. The respondent did not accept that the appellant's relationship with Summer was as strong as claimed because of the inconsistent evidence given by the appellant, his wife and Ms Wainwright about his involvement with Summer. We noted that the appellant maintained in his recent witness statement that he sees Summer every weekend. However, in oral evidence he indicated that he sees her less frequently and that he did not know the exact treatment she had following an accident in the autumn of 2013, suggesting that he did not see her during the period of her treatment. There was also the inconsistent evidence given by the appellant and Ms Grannum at a previous appeal hearing as to how often he saw Summer. It remained our view, however, that even if the relationship was not as high as put forward for the appellant, since his release from detention he has seen her fairly regularly, sometimes every other weekend, assists her with homework when he sees her and is listed at her school as a person to contact. We accepted that she has stayed with him during school holidays and that the appellant, his wife and Ms Wainwright are doing their best to promote a good relationship between the children even though they live in different towns. The appellant has been out of detention for

nearly 3 years and we accepted that he has the parental relationship with his children commensurate with the level of contact he has with Summer and living full-time with and sharing care for his other two children.

12. There was agreement that the appellant has established a private life in the UK, having lived since he came here in 2007. In addition to his wife and children, he has formed relationships with his wife's family, his brother is studying here and sees him and his family regularly and he has the links to the UK to be expected from someone who has studied and brought up children here during his 7 year residence.

13. No dispute arose as to the next three Razgar questions being answered in the appellant's favour and the advocates properly focussed the remainder of their submissions on proportionality and the important part played by the best interests of the children in this matter.

The Proportionality Assessment

14. We turn first to the appellant's three children whose best interests are at the heart of this appeal. We referred to the guidance provided in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4. We accept that in considering this issue it is important for us to consider the future development of a relationship as well at that which currently exists: see Deron Peart v Secretary of State for the Home Department [2012] EWCA Civ 568.

15. We also referred to MK (best interests of child) India [2011] UKUT 00475 (IAC) in which the Upper Tribunal held that:

(i) The best interests of the child is a broad notion and its assessment requires the taking into account and weighing up of diverse factors, although in the immigration context the most important of these have been identified by the Supreme Court in ZH (Tanzania) [2011] UKSC 4, the Court of Appeal in AJ (India) [2011] EWCA Civ 1191 and by the Upper Tribunal in E-A (Article 8 –best interests of child) Nigeria [2011] UKUT 00315 (IAC);

(ii) Whilst an important part of ascertaining what are the best interests of the child is to seek to discover the child's own wishes and views (these being given due weight in accordance with the age and maturity of the child) the notion is not a purely subjective one and requires an objective assessment;

(iii) Whilst consideration of the best interests of the child is an integral part of the Article 8 balancing exercise (and not something apart from it), ZH (Tanzania) makes clear that it is a matter which has to be addressed first as a distinct inquiry. Factors relating to the public interest in the maintenance of effective immigration control must not form part of the best interests of the child consideration;

(iv) What is required by consideration of the best interests of the child is an "overall assessment" and it follows that its nature and outcome must be reflected in the wider Article 8(2) proportionality assessment.
Consideration of the best interests of the child cannot be reduced to a mere yes or no answer to the question of whether removal of the child and/or relevant parent is or is not in the child's best interests. Factors pointing for and against the best interests of the child being to stay or go must not be overlooked; and

(v) It is important when considering a child's education to have regard not just to the evidence relating to any short-term disruption of current schooling that will be caused by any removal but also to that relating to the impact on a child's educational development, progress and opportunities in the broader sense.

16. We were provided with a social work report dated 8 October 2013 from Mr Charles Musendo, an Independent Social Worker. He was instructed specifically to comment on the best interests of the appellant's three children. He interviewed the relevant parties in September 2013. We accepted that he is an appropriately qualified person to produce such a report and that much of what he says about the relationships between the appellant and his children is generally consistent with the other evidence before us.

17. We had some concern, however, about Mr Musendo's relatively limited knowledge of and contact with those concerned and noted that much of his information was provided to him by the parents who, as above, have at times exaggerated aspects of their evidence concerning the appellant's relationship with his children. We also noted that certain statements made by the parents appeared to have been accepted without question, for example, at [44] it is suggested that the children are closer to the appellant than their mothers. It appeared to us that this fell to be explored further by Mr Musendo when the appellant has lived very little, if at all, with Summer and Ms Wainwright has always been her primary carer. We also queried if that could be so for Summer and Messiah given that the appellant had played a very limited part in their lives for over a year whilst he was in detention.

18. Mr Musendo sets out at [44] to [46] his concern that the currently limited behavioural issues of Messiah and Summer that arose when they were separated from the appellant whilst he was in prison could be exacerbated if the appellant was deported. For what it is worth, this provides a further example of our concerns about the weight to be placed on the report, as Mr Musendo relies here on information from the parents of the problems and has no first-hand knowledge or information from other sources such as the children's schools. Mr Musendo states in [46] that "[a]ny further separation could be very devastating for Summer and Messiah" and at [47] he comments that for children of their age separation could have "severe" effects, could lead to mental health issues and impede their ability to form healthy relationships and undermine their self-esteem. In so far as they were expressed speculatively, as outcomes that "could"

occur rather than "would" or "were likely" to arise for these children, we did not find these comments controversial.

19. We also saw little to disagree with in Mr Musendo's observation that the children will have less input regarding their Ghanaian heritage if the appellant is deported but found that this would be of less seriousness where the children's mothers were willing to promote their heritage, where Mrs Grannum is of Ghanaian heritage herself and that for the moment the appellant's brother lives in the same city and visits regularly so would also be able to assist to some extent in that regard.

20. We accepted the confirmation in the social work report that the appellant shares care for his two children with Ms Grannum. He carries out the usual parental tasks of getting Messiah ready for school, feeding and putting Neveah to bed and so on. We accepted also that Ms Grannum will have struggled when she became a single parent whilst the appellant was in prison and that she is likely to find it difficult again if he is deported, especially as she now has two children. We accepted also that her own distress at separation from will further impact on the children. We noted, however, her indication to the social worker that the appellant has a close relationship with her father and brother so there would appear to be some support available there if the appellant were deported, even if mainly from a distance as they are not nearby. Also, as above, the appellant's brother is nearby and is a regular visitor, so could be expected to offer her some support. We do not dispute that life would also be more difficult for Ms Wainwright who is able to share some of the parenting of Summer with the appellant and who will have to manage entirely alone if he is deported.

21. Notwithstanding the indications we have given that the social work report cannot be accepted at its highest, we accepted the conclusions of Mr Musanda at [75] onwards that all three children have a strong attachment to the appellant and that their future well-being, psychological stability and educational achievements may be affected by his deportation. We accepted that the relationships that have developed between the children would be unlikely to continue at the current level even though both mothers could be expected to promote contact as best they could. It appeared to us, however, that whether the children would feel "abandoned" by the appellant would depend in part on the efforts made by the parents and wider family to keep indirect contact as regular as possible and to facilitate visits where possible.

22. Mr Musendo's ultimate conclusion at [84] was that it was strongly in the best interests of the children that the appellant remain in the UK. We do not seek to differ substantially there from, even if we have not, as above, taken all that is in the report at its highest, particularly as the family histories indicated to us that the children were more likely to have stronger attachments to their mothers than the appellant and that the two older children have lived without him already without exhibiting serious behavioural problems. It remained our clear view that the best interests of the children lie in being brought up with both their parents present.

23. We noted that Ms Sood raised in her skeleton the issue of the Children's Commissioner of England being asked to file evidence as an intervener but that point was not taken any further at the hearing before us and it was not clear how it would have added to the report from Mr Musendo.

24. We turn now to the other factors that we must weigh in the balance. The case of Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046 (IAC) sets out the following basic principles that can be derived from case law concerning the issue of the public interest in relation to the deportation of foreign criminals:

(i) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place.

(ii) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.

(iii) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge.

(iv) The appeal has to be dealt with on the basis of the situation at the date of the hearing.

(v) Full account should also be taken of any developments since sentence was passed, for example the result of any disciplinary adjudications in prison or detention, or any OASys or licence report.

25. The importance of the public interest being afforded significant weight also features in the more recent Court of Appeal decision of SS (Nigeria) v SSHD [2013] EWCA Civ 550, which states at [54], in regard to automatic deportation:

> "The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgement only be justified by a very strong claim indeed."

26. We also found it expedient when considering the other factors in this matter to follow the guidance provided in Boultif v Switzerland [2001] ECHR 54273, as confirmed by Uner v the Netherlands [2007] Imm AR 303, in which the Court said that in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued, the following criteria had to be considered:

(i) The nature and the seriousness of the offence committed by the Appellant;
(ii) The length of the Appellant's stay in the country from which he or she was to be expelled;
(iii) The time that had elapsed since the offence was committed and the claimant's conduct during that period.
(iv) The nationalities of the various parties concerned;
(v) The Appellant's family situation, such as length of marriage and other factors expressing the effectiveness of the Appellant's family life;
(vi) Whether the spouse knew about the offence at the time he or she entered into the family relationship;
(vii) Whether there are children in the marriage and if so their ages;
(viii) The seriousness and the difficulties which the Spouse is likely to encounter in the country of the Appellant's origin;
(ix) The best interests and well being of any children of the Appellant; and in particular the seriousness of any difficulties that they would be likely to encounter in the country to which the Appellant would be expelled;
(x) The solidity of social, cultural and family ties with the host country and with the country of destination.

27. In relation to the nature and the seriousness of the offence we have set out the details of the appellant's offence above. The sentencing remarks here take the matter little further, other than highlighting that the appellant committed his offence having been allowed to come to the UK to study for a degree and using what he learned in those studies to commit the crime. It was a crime of dishonesty, carried out over a period of months and we considered it to be serious. We accepted that the appellant must be given the benefit of eventually confessing to the police and pleading guilty.

28. The appellant has been in the UK for 7 years but we noted, however, that he was only ever here in a limited capacity and could not have entertained an expectation of remaining on a permanent basis and that he has known that his stay is precarious since the sentencing judge indicated in 2010 that deportation was likely.

29. We acknowledge that the appellant has not re-offended in the 3 years since he was released from detention. We accept that he is remorseful and has cooperated well with prison and probation authorities. It was not suggested that his risk of reoffending is anything other than low. That does not reduce the public interest in deportation significantly, however, where there remain the important factors of deterrence and proper expression of public revulsion regarding criminal offences, both of which weigh against the appellant.

30. As indicated above, other than the appellant, all of those closely involved in this matter are British, that being the reason why the respondent does not seek to argue that the appellant's family can accompany him to Ghana.

31. We have set out above our view of the appellant's relationship with his children and his wife and how their lives (and his) would be affected were he to be deported. This is not a case where the relationships and children occurred in full knowledge of criminal offences and likelihood of deportation.

32. We addressed the appellant's links to the UK above when making findings on his private life and the best interests of the children. They are of some weight given his length of residence but we found that he retains considerable ties to Ghana, having spent most of his life there and his immediate family members still being there, including his parents. In other words, we find there is nothing in terms of the appellant's moral and physical integrity that would prevent him re-integrating into Ghanaian society.

Conclusion

33. We have considered all of the above issues carefully before reaching our final conclusion. We took fully into account that the deportation of the appellant will have the effect of splitting the family and that this will cause distress and difficulty for all those concerned and damage to the development of the appellant's relationship with his children and wife and the future well-being of the children.

34. The public interest in deportation is also a very strong factor, however, and only "a very strong case indeed" can succeed as a result.

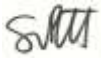
35. In Ad Lee v SSHD [2011] EWCA Civ 348, at [27] the Court of Appeal acknowledged the tensions that arise in appeals such as this:

> "The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does. Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an immigration judge."

36. Our answer to the question on the particular facts of this appeal was that we did not find it to be "a very strong case indeed" such that the public interest in deportation was outweighed, even after giving due weight to the damage this will cause to the appellant, his wife and his children.

Decision

37. **The appeal is dismissed.**

Signed: 
Upper Tribunal Judge Pitt

Dated: 21 January 2014