IAC-AH-KRL/PC-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/09669/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
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| **On 28 January 2015** | **On 6 February 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**DA (GHANA)**
**(ANONYMITY DIRECTION MADE)**

Respondent/Claimant

**Representation:**
For the Appellant: Ms L Kenny, Specialist Appeals Team
For the Respondent/Claimant: Ms K Currie, Counsel, instructed by Chris & Co Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision by the Secretary of State to refuse to grant him leave to remain on family life grounds, and to make directions for his removal from the United Kingdom under Section 10 of the Immigration and Asylum Act 1999. His partner and their son S, born on 26 September 2005, joined in his appeal as his dependants. As the central focus of the appeal is the best interests of S, the First-tier Tribunal made an anonymity direction; and I consider that it is appropriate that

the claimant and his family should be accorded anonymity for the purposes of these proceedings in the Upper Tribunal.

2. All the members of the family are nationals of Ghana. The claimant was born in Ghana on 17 May 1967. He entered the United Kingdom on a multi visit visa which had been issued four days earlier. The claimant did not leave the United Kingdom within the required period of six months, and on 4 September 2003 he was encountered and detained by the Home Office and served with an IS15A notice as an overstayer. The following day he claimed asylum and was released from detention. On 5 January 2004 his asylum claim was refused. On 5 April 2004 his appeal rights became exhausted.

3. The claimant's partner J entered the United Kingdom on a student visa on 8 August 2002. Her entry clearance was valid until 8 August 2003. On 24 September 2003 she applied for leave to remain as a student. Leave to remain was granted until 30 September 2004, and she successfully extended her leave to remain as a student on three further occasions. The last of which was on 3 February 2006 when she applied for leave to remain as a student with S as her dependant. Leave to remain was granted to her and S until 30 April 2010. On 30 October 2009 J was encountered working illegally, and was served with an IS15A notice due to a breach in her employment restrictions. On 5 March 2010 she applied outside the Rules for leave to remain with her son as a dependant. This application was refused with no right of appeal on 19 May 2010.

4. On 16 May 2012 the claimant included J and S in an application for leave to remain on human rights grounds. This application was refused on 29 July 2013 with no right of appeal. On 14 September 2013 the claimant made a further application outside the Rules, which was refused on 8 October 2013 with no right of appeal.

5. The claimant's solicitors wrote to the Home Office asking them to reconsider the claimant's case under Article 8 ECHR, and on 5 February 2014 the Secretary of State gave her reasons for refusing the claimant's application on reconsideration, and for serving an IS15B notice on the claimant, and IS15A part 2 notices on J and S. The IS15A part 2 notice addressed to S said that he had been served with a form IS15A part 1 notice on 7 January 2011.

6. The claimant did not qualify for leave to remain as a partner under the Immigration Rules. He satisfied the suitability requirements in S-LTR and he met the criteria under GEN.1.2 as he had provided evidence that he had been living with his partner J in a relationship akin to marriage for at least two years. But he did not meet the eligibility requirements, as his partner was not a British citizen, or a person settled in the UK, or a person with refugee or humanitarian protection. Consideration would not be given to EX.1 as the claimant failed to meet the eligibility requirements.

7. The claimant did not qualify for leave to remain as a parent under Appendix FM. This was because his child S was not a British citizen or settled in the UK and EX.1 did not apply as the claimant did not satisfy the eligibility requirements. Although S

was under the age of 18, was in the UK and had lived in the UK continuously for at least seven years it was reasonable to expect him to leave the UK. It was reasonable for family life to be continued outside the UK as J was originally from Ghana, and the family would be returned to their country of origin as a family unit.

8. On the question of private life, it was noted that the claimant and his partner had spent the majority of their lives in Ghana, including their formative years. There were no age-related issues that would prevent them from returning to Ghana. They would be able to utilise any skills and qualifications they had gained whilst in the United Kingdom to their own advantage. As the claimant had a son in Ghana born to his previous wife, he had failed to establish he had no social, cultural or family ties in Ghana.

9. Consideration had been given to the needs and welfare of the child as required under Section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children). The duty to have regard to the need to safeguard and promote the welfare of children required the Home Office to consider the effect on any children of a decision to refuse, or to remove, against the need to maintain the integrity of immigration control. It was not accepted the removal of the family would have consequences that were contrary to the best interests of S. The family would be returned to Ghana together so S would be protected and supported in the family unit that he had grown up in. With respect to S's private life, it was acknowledged that he had been the recipient of education here in the UK. It was also acknowledged the level of education available to S in Ghana might not be of an equal standard to that available to him in the UK. But it was clear that education was accessible, and that he would be able to continue his education in Ghana. With the support of his parents, there was no indication he would not thrive and achieve at school, and subsequently be able to make a contribution as he grew older.

10. The Secretary of State made a decision on exceptional circumstances. Having considered all the relevant factors, the Secretary of State was of the view that the claimant's removal from the UK remained appropriate. The claimant and his partner were not known to have any criminal convictions or to have engaged in activities or developed associations that were not conducive to the public good. But this finding in itself did not justify allowing them to remain here. They had not been compliant with the conditions attached to previous grants of leave. The claimant should have returned to his country of origin after spending six months in the UK. He failed to return to Ghana and only came to the attention of the Home Office when he was arrested on 4 September 2003. J was arrested and served with an IS15A notice on 30 October 2009 for working in breach of employment restrictions. While the claimant had spent eleven years in the UK, only six months of his time had been spent here lawfully. J had also spent eleven years in the UK, however only seven years of this had been lawful. There were not any circumstances beyond their control that had prevented them from returning to Ghana.

**The Hearing before, and the Decision of, the First-tier Tribunal**

11. The claimant's appeal came before Judge Tootell sitting at Richmond Magistrates' Court in the First-tier Tribunal on 29 September 2014. Ms Currie of Counsel appeared on behalf of the claimant. The judge received oral evidence from the claimant and his partner, and took into account the documentary evidence in the claimant's bundle.

12. In her subsequent determination, Judge Tootell held at paragraph [44] that she was persuaded by Counsel's submissions that it would not be reasonable now to expect the claimant's 9 year old son to relocate way from the UK. She found that Counsel's submissions were supported by the Tribunal's decisions in **EA (Article 8 – best interests of the child) Nigeria [2011] UKUT 00315 (IAC)** and **Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197**: "paragraph (iv) of the head note [to **Azimi-Moayed**] refers to the years after seven years of age as being of particular significance since at that point relationships and ties beyond the immediate family are formed."

13. At paragraph [46] she found there was clear evidence that S had established himself outside his immediate family unit. He had made friends and enjoyed a social life and activities both inside school and outside of home and school. He was evidently flourishing at school and she accepted Counsel's submission that it was not only the short-term impact of educational disruption which must be considered but also longer term detriment.

14. At paragraph [47], she also accepted that S was not unaware of his family's immigration status. There was evidence of his discomfort over the immigration reporting restrictions. He was aware of the lack of security of his situation in this country and this caused distress which impacted negatively upon him. The judge continued:

> 48. I find that it is no argument to point to the fact that the claimant's leave to remain in the UK was only ever intended to be temporary. This does not alter the position for his son who has spent more than seven years in the country. His stay in the UK was decided for him and he would have had no part in that decision making process. As a child, he should not be held accountable for it nor I find suffer the consequences of it.
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> 49. In light of all the above and the particular circumstances identified there, I therefore find that requiring the claimant's 9 year old son to leave the UK would be unreasonable.
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> 50. In the light of these findings I therefore find that the claimant's son meets the requirements of paragraph 276ADE(iii).

15. At paragraph [52] the judge said that even if she was wrong to find that as a result of her favourable ruling under Rule 276ADE that the claimant met all the requirements for the parent route under Appendix FM, nonetheless the claimant's appeal would fall be allowed under Article 8 ECHR outside the Rules, as a result of the

combination of his and his family's rights to respect for their private and family lives. On the topic of proportionality, she referred at paragraph [61] to Section 117B(6) of the 2002 Act.

16. At paragraph [62] she said she had already set out her findings as to why she did not consider it reasonable for the claimant's son to leave the UK, and she did not need to repeat them other than to refer to the decisions of **ZH (Tanzania) [2011] UKSC 4** and **MK (Best interests of child) India [2011] UKUT 00475**. The immigration history of the claimant and his wife in the UK could not be described as appalling. It was common ground between the parties that they had made several attempts at regularising their status. There was furthermore no question of criminal conduct. On the contrary they were both actively engaged either in employment or in health awareness activities for their local community.

## The Grant of Permission to Appeal

17. On 15 December 2014 First-tier Tribunal Judge Landes granted permission to appeal for the following reasons:

> 2. It is arguable that, as set out in ground 2 the judge did not have regard to the principles set out in **EV** and **Zoumbas**. When determining whether it was reasonable for the appellant's 9 year old son to leave the UK she did not explicitly consider whether it would be reasonable for the child to return with his parents to Ghana, but rather considered his situation in isolation … indeed she appears to have considered it was unreasonable for the claimant and his family members to have to relocate without each other rather than considering the reasonableness of return on the basis that the family would be relocating together.
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> 3. It is also arguable as set out in ground 1 that the judge misunderstood **Azimi-Moayed** in that she has used the case to place reliance on the significance of a child being older than 7, rather than seven years being a significant period which can lead to a child developing ties it would be inappropriate to disrupt, but that seven years from the age of 4 are more significant than the seven years since birth."

## The Hearing in the Upper Tribunal

18. At the hearing before me, Ms Currie mounted a robust defence of the judge's determination. She acknowledged that the judge had misquoted **Azimi-Moayed** (ground 1) but she argued the error was not material. It was clear from the rest of her decision that the judge understood the case of **Azimi-Moayed** and was not simply viewing seven years as a cut-off point.

19. Regarding ground 2, while the judge did not explicitly refer to either **EV (Philippines)** or **Zoumbas**, it was nonetheless clear from the decision that she considered the question of reasonableness of return looking at the entire family unit returning, as could be seen from paragraph [64] of her decision. It was also not the case that the judge had not taken into account the immigration status of the claimant

when assessing the question whether it was reasonable to expect S to leave the UK. The conclusion that she reached on the question of reasonableness was one that she was entitled to reach, weighing up all the factors for and against.

20. Having heard from both parties, I was persuaded that an error of law was made out such that the decision should be set aside and remade, for the reasons given in the application for permission to appeal and in paragraph 2 of the grant of permission. I gave my reasons for finding an error of law in short form, and said that I would provide extended written reasons in writing in due course. These are set out below.

21. It was agreed by the parties that I did not need to receive further oral evidence for the purposes of remaking the decision. I reviewed with the parties the judge's manuscript record of the proceedings in order to establish what evidence had been given, and submissions made, on the question of the ability of the family as a whole, or particular individuals within the family, to adjust (in the case of S) and to readjust (in the case of the parents) to life in Ghana. Ms Currie supplemented the information which I gleaned from the judge's Record of Proceedings with information from her own notes of the hearing.

**Reasons for Finding an Error of Law**

22. Prior to the introduction of the new Rules, the significance of seven years' residence was that under the child policy concession known as DP5/96 the Secretary of State used to grant discretionary leave to families with an otherwise irregular status where at least one child of the family had accrued seven years' residence. Although this policy was withdrawn in 2008, the President in **LD Zimbabwe** observed that seven years' residence on the part of a child was still significant, as prima facie after seven years' residence a child's best interest lay in him remaining in the host country.

23. However, these observations were made alongside the observation that the circumstances prevailing in the prospective country of return, Zimbabwe, were dire. When the Upper Tribunal considered again the seven year benchmark in **EA (Article 8 – best interests of child) [2011] UKUT 00315 (IAC)** (a panel consisting of the President and Senior Immigration Judge Jarvis) it was noted that the former policy DP5/96 made reference to other factors which had to be taken into account when considering whether to grant leave to remain under the policy:

    (a) the length of the parents' residence without leave;

    (b) whether removal has been delayed through protracted (and often repetitive) representations or by the parents going to ground;

    (c) the age of the children;

    (d) whether the children were conceived at a time when either of the parents had leave to remain;

    (e) whether return to the parents' country of origin would cause extreme hardship for the children or put their health seriously at risk;

(f) whether either of the parents has a history of criminal behaviour or deception.

24. A useful summary of the learning on the best interests of children in the context of immigration is to be found the determination of **Azimi–Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**:

> 30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:
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> (i) As a starting point in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
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> (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
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> (iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
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> (iv) Apart from the terms of published policies and Rules, the Tribunal notes 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 peers and are adaptable.
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> (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases.

25. The following observations of the Court of Appeal in **JW (China) v Secretary of State for the Home Department [2013] EWCA Civ 1526** are also pertinent:

> 22. In my view the correct approach is very well summarised in the Upper Tribunal decision of **MK (Best interests of child) [2011] UKUT 00475 (IAC)**, where this was said at paragraphs 23 and 24 of the determination:
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> "…If, for example, all the factors weighing in the best interests of the child consideration point overwhelmingly in favour of the child and or relevant parents remaining in the UK, that is very likely to mean that very strong countervailing factors can outweigh it. If, at the other extreme, all the factors of relevance to the best interests of the child consideration (save for

> the child's and/or parents own claim that they want to remain) point overwhelmingly to the child's interest being best served by him returning with his parents to his country of origin ... then very little by way of countervailing considerations to do with immigration control etc. may be necessary in order for the conclusion to be drawn the decision appealed against was and is proportionate."

26. **EV (Philippines) v SSHD [2014] EWCA Civ 874** provides the most recent guidance from the senior courts on the approach to best interests and the question of reasonableness. Clarke LJ said:

> 33. More important for present purposes is to know how the tribunal should approach the proportionality exercise if it has determined that the best interests of the child or children are that they should continue with their education in England. Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents. There can be cases where it is in the child's best interests to remain in education in the UK, even though one or both parents did not remain here. In the present case, however, I take the FTT's finding to be that it was in the best interests of the children to continue their education in England with both parents living here. That assumes that both parents are here. But the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.
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> 34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.
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> 35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
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> 36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.
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> 37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The

immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

27. Lewison LJ said:

> 49. Second, as Christopher Clarke LJ points out, the evaluation of the best interests of children in immigration cases is problematic. In the real world, the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to piggyback on their rights. In the present case, as there is no doubt in many others, the Immigration Judge made two findings about the children's best interests:
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> (a) the best interests of the children are obviously to remain with their parents; [29] and
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> (b) it is in the best interests of the children that their education in the UK [is] not to be disrupted [53].
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> 50. What, if any, assumptions are to be made about the immigration status of the parent? If one takes the facts as they are in reality, then the first of the Immigration Judge's findings about the best interests of the children point towards removal. If, on the other hand, one assumes that the parent has the right to remain, then one is assuming the answer to the very question the Tribunal has to decide. Or is there is a middle ground, in which one has to assess the best interests of the children without regard to the immigration status of the parent?

28. The judge went on to analyse **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC** 4 in order to elicit an answer to this question. He reached the following conclusion:

> 58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis the facts are as they are in the real world. One parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

29. He went on to observe that on the facts of **ZH** it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens. That was a long way from the facts of the case before them. No one in the family was a British citizen. None had the right to remain in the country. If the mother was removed, the father had no independent right to remain. With the parents removed, then it was entirely reasonable to expect the children to go with them:

> 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.

30. Jackson LJ agreed with both judgments.

31. The "hypothetical" approach sanctioned by Christopher Clarke LJ is in line with the guidance given by the Upper Tribunal in **MK (India)** which he cites with approval. In **MK**, the Upper Tribunal emphasised the need to conduct the initial best interest assessment without any immigration control overtones. These only came into play when the decision maker moved on to a wider proportionality assessment.

32. However, the "real world" approach is reflected in the leading speech of Lord Hodge in **Zoumbas v Secretary of State [2013] UKSC 74**, where the Supreme Court dismissed an appeal against removal brought by a Congolese family comprising Mr and Mrs Zoumbas and two daughters, who had been born in the United Kingdom on 3 February 2007 and 14 April 2011 respectively. At paragraph 24 Lord Hodge said:

> There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as healthcare and education which the decision maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and healthcare in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their wellbeing.

33. The significance of this brief survey of the relevant law is that it illuminates the question of how the decision maker should go about the task of deciding whether an applicant meets the requirements of EX.1(a)(ii) or the identical provision in Rule 276ADE. The assessment of reasonableness is a holistic one, and the immigration status and history of the parents is a relevant consideration, following **EV (Philippines)**. The fact that there is a qualifying child, either because the child has accrued seven years residence in the UK or because the child is a British national, is not a trump card, as otherwise there would not be a requirement to go on to consider whether, nonetheless, it is reasonable to expect the child to leave the United Kingdom.

34. At paragraph [60] of her decision, Judge Tootell referred to DP5/96 and to **NF (Ghana) [2008] EWCA Civ 906** where the Court made observations on how the policy had been generously applied. Considerations (c) to (e) in the policy, which I have set out in paragraph 23 above, did not in practice exclude families from taking the benefit of the policy. In short, the policy amounted to a de facto amnesty for most families where at least one child had been here for seven years. While Judge Tootell's historical perspective was entirely correct, she wrongly inferred that the

codification of the seven year rule in the rules was intended to restore the position to how it stood in 2008; and that if it was unreasonable by 2008 standards and/or from a **NF (Ghana)** perspective to require a child who has acquired seven years' residence to relocate, it must be unreasonable now:

> Even with or without the continued existence of such policies, it is difficult to see what might have changed in the terms of the ability of such minors to relocate outside of the UK after a 7 year sojourn here and the reasonableness in asking them to do so.

35. On the contrary, a great deal has changed since 2008 and **NF(Ghana)**, both in terms of governmental policy and the domestic jurisprudence: the considerations weighing *against* a family/minor with irregular status securing leave to remain on long residence grounds have to be taken into account, whereas under the old policy the SSHD could choose to ignore them.

36. The judge's assessment of reasonableness under Rule 276ADE was highly flawed as she failed to ask herself the right questions, and her consideration of the child's best interests was wholly inadequate. She did not balance the best interest considerations in favour of S remaining in the UK against the best interest considerations militating in favour of S returning with his parents to the country of which they were all nationals. The judge failed to pose and address the ultimate question which was whether it was reasonable to expect the child to follow the parents *with no right to remain* to the country of origin?

37. The judge's acknowledged error in paragraph [45] is material as it colours her approach to the assessment of S's best interests. She attaches undue weight to the years which S has spent in the UK after reaching the age of 7, and insufficient weight to the guidance of the Upper Tribunal in **Azimi-Moayed** to the significance of a child accruing seven years' residence in the UK from the age of 4. While it was open to the judge to find that as a 9 year old child S had established himself outside his immediate family unit, it was not suggested that the extent of his social life and his activities outside the home were unusual for a child of his age.

38. I accept Ms Currie's submission that his parents' immigration status features in the judge's reasoning in paragraphs [47] and [48]. But the reasoning is defective as the judge treats S's position as being analogous to that of the children in **ZH (Tanzania)**, when there is in fact a crucial difference. In **ZH (Tanzania)** the two affected children were British citizens, and so the argument that they should not suffer for the sins committed by their mother was a highly relevant consideration in the wider proportionality assessment. Conversely, in S's case, not only is he not a British citizen, he is also not lawfully present in the UK (absent a successful claim under Rule 276ADE) having been served with an IS15A notice in January 2011. Another crucial point of distinction between the children in **ZH (Tanzania)** and S's situation is that the children's father in **ZH (Tanzania)** had status, and there was no question of him going with the children and their mother to Tanzania. But in S's case, neither of the parents has status; and what is in contemplation is the removal of the entire family unit, not a break-up of the family unit.

39. The judge's engagement with the question of the immigration status of the parents was also deficient in two other respects. Firstly, in paragraph [48] she failed to acknowledge that it was not a question of the father being granted leave to remain in the UK which was only ever intended to be temporary; the true position was that the father had been an overstayer since breaching the conditions of his visit visa issued to him in 2002. Secondly, the judge placed weight on S's awareness of the lack of security of his situation as fortifying the unreasonableness of expecting him to relocate away from the UK. But logically this consideration militated in favour of the appellant going with his parents to Ghana, the country of which they are all nationals and where there will not be any lack of security about their status. Return of the family to Ghana would have the salutary effect of removing a cause of distress which S was currently experiencing in the UK.

40. As the judge failed to give adequate reasons for finding that it was not reasonable for S to leave the UK, her decision under Rule 276ADE and Appendix FM cannot stand. Her decision outside the Rules also cannot stand, as the finding on reasonableness is a crucial plank in the judge's proportionality assessment outside the Rules. The proportionality assessment outside the Rules is fatally infected by the fact that the judge's starting point on proportionality is that it is not reasonable for S to leave the UK, and thus Section 117B(6) applies.

**Evidence Relevant to the Remaking of the Decision**

41. As I have indicated in the course of my error of law ruling, what was missing from the assessment of the First-tier Tribunal Judge was a consideration of any difficulties that the family might face on return to their country of nationality.

42. In their joint witness statement which they adopted before the First-tier Tribunal, the claimant and his partner asserted at paragraph 16 that S had no ties whatsoever with Ghana and did not speak the Ghanaian language or dialects. He spoke the English language, and knew no other culture. He would struggle to make sense of life in Ghana, especially as he did not speak the language. As for them, they had no home or job waiting for them in Ghana. They had no idea how long it would take for them to find a place to stay and a job with which to support and maintain themselves there. They would be forced to go through unnecessary hardship, something which was likely to have a bad effect on their son who was used to a stable life in the UK.

43. In cross-examination, the claimant confirmed that he was in contact with his 15 year old son in Ghana. They had last spoken at the beginning of the year. In cross-examination J was asked why she could not go back to Ghana. She said she had been away a long time and had lost all contact. In her closing submissions on behalf of the claimant, Ms Currie submitted that removal of the family to Ghana was bound to have a significant impact on S. He did not speak the Ghana language; it would be difficult for him to make friends; he had never lived there, and was totally immersed in UK culture.

**Discussion and Findings**

44. The question of whether it is reasonable for S to leave the United Kingdom under Rule 276ADE requires the same holistic approach that is required in a conventional proportionality assessment outside the Rules, and it should produce the same answer. The best interest considerations in favour of S remaining in the United Kingdom are adequately summarised in paragraph [46] of the decision of Judge Tootell, and it is not necessary to repeat them. The considerations going the other way include the fact that S will be returning to Ghana with both his parents, and he is still of an age when remaining within the family unit is the single most important consideration in the best interests assessment. Both parents have displayed resourcefulness in obtaining employment in the UK, and there is no reason to believe that there will be significant obstacles to them re-establishing themselves in Ghana, and providing adequate maintenance and accommodation for themselves and their son. As stated in the refusal letter, reintegration assistance is available to support the sustainability of the return of the family, and so it is open to the parents to enquire about a family return plan. The other advantages to S in returning to Ghana are that he would be able to enjoy to the full the benefits of his Ghanaian nationality, and to immerse himself in the social and cultural milieu from which both his parents spring. He would also be able to enjoy family reunion with his half-brother. His mother is heavily involved in the activities of the Seventh Day Adventist Church in Lewisham, and S has some involvement with the church as well. It is likely that this church, or another church of a similar denomination, has an established presence in Ghana, and therefore the family will be able to access a support network in Ghana through involvement in the local church in the place of relocation.

45. The best interest considerations for and against S returning with his parents to Ghana are finely balanced. But, notwithstanding the strength of S's private life claim, I find that overall S's best interests lie in him returning with his parents to Ghana.

46. If I am wrong about that, the best interests militating in favour of S remaining in the UK only prevail by a small margin, with the consequence that the public interest considerations in favour of the family's removal do not have to be very strong to render the removal decision a proportionate one. In the wider proportionality assessment I take into account that S is not to blame for his parents' immigration offending. But the fact remains that no member of the family has a right to be here, and the desirability of S being continued to be educated at the public expense does not outweigh the benefit of remaining with his parents, whom the Secretary of State is seeking to remove as immigration offenders. So I answer the ultimate question posed in **EV (Philippines)** in favour of the Secretary of State: I find it is reasonable to require S to follow his parents with no right of remain to Ghana, notwithstanding the fact that S has now accrued some ten years of residence in the United Kingdom since birth, and is well-advanced in his primary school education.

47. Part 5A entitled "Article 8 of the ECHR: public interest considerations" came into force from 28 July 2014. Section 117A provides:

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

48. Section 117B lists the following "Article 8: public interest considerations *applicable in all cases* (my emphasis)":

(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.

49. Sub-sub-sections (a) and (b) of sub-section (6) of Section 117B mirror EX.1(a) of Appendix FM. Under the structure of Appendix FM, if an applicant satisfies the requirements of EX.1(a) it is not necessary to go on to consider the public interest question. For in Appendix FM the Secretary of State has set out in considerable detail how she believes the balance between Article 8(1) and Article 8(2) should be struck in family life cases; and if a person can bring himself within the relevant qualifying criteria, then ipso facto it is not in the public interest from the SSHD's perspective for them to be removed.

50. While S is a qualifying child for the purposes of sub-section (6) of Section 117B, I find that it is reasonable for S to go with his parents to Ghana. This is for the reasons previously stated, but also having regard to the other considerations set out in Section 117B. For the avoidance of doubt, I consider that the proper construction of subsection (6) is that in determining whether it is reasonable for the child to leave the UK it is necessary to take into account the other public interest considerations listed in Section 117B. I reject Ms Currie's submission that Section 117B(6) has a peculiar status whereby it has to be considered in isolation from the other subsections.

**Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal on Article 8 grounds 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 his 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.

Signed Date 6th February 2015

Deputy Upper Tribunal Judge Monson