Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04273/2015
HU/03485/2015
HU/03486/2015
HU/03487/2015
HU/04932/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 May 2017	**On 22 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

KOFI MENSAH
GIFTY AWAW
[Y O]
[K O]
[M O]
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Karim (for Genga and Co Solicitors)
For the Respondent: Mr S Staunton (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellants appeal against the decision of the First-tier Tribunal of 2 December 2016 dismissing their appeals, themselves brought against the refusal of their human rights claims on 19 July 2015.

2. The applications of the mother, Gifty (born 23 August 1983), and the three children ([MO] born 2008, [YO] born 2009, and [KO] born 2014), had been made on the basis of the private and family life that they had established in the UK based on long residence here. The mother stated that she had entered the UK in April 2003.

3. The immigration history provided by the Respondent sets out that the mother applied for a residence card, presumably on the basis of some degree of relationship to an EEA national exercising Treaty Rights, though that application was refused on 21 February 2010. On 26 January 2011 an application for leave to remain outside the rules was refused. Further information was submitted on 30 April 2015, leading to further consideration leading to the refusal letter from which these proceedings emanate.

4. The applications were refused. The Secretary of State did not accept that any residence in the UK was established before January 2008 when there was a record of the eldest daughter's birth at Homerton Hospital. As to routes under the Rules, Gifty had no extant relationship with the children's father, Kofi Mensah (born 7 February 1974), and so had no claim under the partner route; and no claim under the parent route because she lacked sole responsibility for their care, given the role that the father was accepted as playing in their lives, picking them up from school, seeing them over the weekend, visiting relatives and attending church, school and medical appointments with them. It was not accepted that she would face very significant obstacles to integration in Ghana given she had lived much of her life there and could be presumed to be accustomed to the local culture, society and language. There were no exceptional circumstances present given that the children were wholly dependent on their parents and had no independent lives; Ghana had a functioning education system. The close relationships that it was said the children had with grandfather, uncles and aunts in the UK could be maintained via modern means of communication.

5. Although the parents are not in an extant relationship, Kofi Mensah's appeal was joined to that of Gifty and the children. He originally made an application in his own right for leave on private and family life grounds, asserting that he had entered the UK in July 2002, which was refused because he had no partner in the UK; his own parent application failed as the children did not live with him. He too could be expected to re-integrate in Ghana given he had spent his earlier life there.

6. The Appellants all appealed, and in due course those appeals were heard by the First-tier Tribunal. In its decision it begins by focussing its attention on the best interests of the children, particularly the oldest child [MO], who it recognised had lived continuously in the UK for 8½ years. The Judge stated "I attach very significant weight to fact that this is a young child, who has spent more than seven

years of his formative life, since birth, in the UK. She would … have put down roots and developed social, cultural and educational links … it is likely to be highly disruptive she is required to leave the UK." Both [MO] and "to a degree her younger siblings, have made significant progress in their schooling, and consequently, … their removal to an educational and cultural environment … with which they are totally unfamiliar, would cause a measure of disruption … having regard to the strength of ties that they have established in the United Kingdom." Accordingly it was clear that their best interests were in favour of their remaining in the UK.

7. The First-tier Tribunal did not accept that the parents had no contact whatsoever with any extended family members in their country of origin; they could be assumed to have retained their social and cultural ties there, and were in good health, and were therefore not "so incapacitated as to render them unable to provide effective support and care for their children".

8. The First-tier Tribunal went on to consider the question of reasonableness of the childrens' departure from the UK. It noted the need to maintain immigration control, and the fact that private and family life was to be afforded limited weight when established in full knowledge of its precarious nature. It accepted that the eleven years for which Kofi had reported to the Home Office was a relevant consideration when assessing the weight to be afforded immigration control as a public interest: however, this was consistently a period over which he had been content to let things lie rather than pursue any regularisation of his status, and so deserved only little weight.

9. The First-tier Tribunal concluded that it was necessary to balance the public interest considerations against the childrens' best interests: "I fully recognise the significance and the weight to be attached to the fact that the minor child has spent more than seven years [here]. I have however come to the conclusion … that it would not be unreasonable to expect the … children … to leave the United Kingdom."

10. Grounds of appeal alleged that the First-tier Tribunal had erred in law in failing to give adequate reasons for its conclusion that public interest concerns outweighed the best interests of the children: in particular, that no powerful reason contraindicating the starting point that a seven-year child's residence should normally be permitted to continue had been identified.

11. Permission to appeal was granted by Judge Rintoul for the Upper Tribunal on 30 March 2017 because the appropriate approach set out in *Kaur* [2017] UKUT 14 (IAC) had arguably not been followed.

12. For the Appellant it was submitted that the significant weight identified in *MA Pakistan* as owed to the best interests of a seven-year resident child had not been afforded here; and the sins of the parents had been visited on the children,

inconsistently with the guidance given in *Kaur*. For the Respondent it was submitted that the best interests had been concisely, but adequately, balanced against public interest considerations and the decision was one properly open to the First-tier Tribunal.

Findings and reasons

13. At the hearing before me I indicated that I gave my ruling that a material error of law had been established. My reasons now follow.

14. This is an appeal which fell to be considered wholly outside the Rules. The Home Office refusal letters, which are unfortunately typical in their miscomprehension of the system of Rules in place, state that neither parent is eligible for the Appendix FM parent route because neither has sole responsibility for the childrens' care. However, Rule E-LTRPT.2.4 permits an application to be made by a person either with sole responsibility for the care of children, or having direct personal access to children by agreement with the person whom the child normally lives with or court order. The true barrier to the viability of the parents' applications under the parent route is in fact that one of the parents has to be a British citizen or settled in the UK (E-LTRPT.2.3): and of course both are present unlawfully.

15. [MO] is entitled to have her appeal considered inside the Rules (276ADE(iv)) on private life grounds given she had lived in the UK for seven years and six months by the date of decision in July 2015. The other family members are all entitled to put cases under Rule 276ADE(vi), if they can show very significant obstacles to integration abroad: this aspect of their cases would seem rather less promising, given the parents' history of living in their country of nationality for much of their lives. On a re-hearing, both [MO] and [YO] will have lived in the UK for more than seven years by the date of hearing, and so the family will generally be entitled to rely on section 117B(6) of the Nationality Immigration and Asylum Act 2002 as there are qualifying children involved.

16. Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 states as follows:

> "45. … wider public interest considerations must be taken into account when applying the "unduly harsh" criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B(6) … where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted
>
> 46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were

> determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment. …
>
> 49 … the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.
>
> 73 … It may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling."

17. Here, the balancing exercise is very brief: I have set it out in full above. Whilst concision is often a virtue of decision making, here the reasoning is overly compressed. Whilst the First-tier Tribunal cited authority that recognised the weight to be given to a child's best interests, one cannot discern that that guidance was in fact applied. There is nothing to show that the First-tier Tribunal recognised that the starting point in the appeals before it was that leave should have been granted to the eldest child unless there were powerful reasons to the contrary.

18. It is often said that matters of weight are for the primary decision maker. However, where the alleged defect goes to the evaluation of proportionality and lies not simply in the balancing of particular factors but in setting the scales in the first place, the Court of Appeal has repeatedly recognised that it may amount to a material error of law, see for example Arden LJ in *IT (Jamaica)* [2016] EWCA Civ 932 §2:

> "The tribunals in this case recognised the role of the public interest but fell into error because they did not direct themselves as to the weight to be given to it in balancing it against the interests of the applicant and others."

19. Furthermore, the statement that the parents were not so incapacitated as to be unable to care for the children in their country of origin is incompatible with the test of reasonableness. As stated in *PD Sri Lanka* [2016] UKUT 108 (IAC), the test of reasonableness poses a less exacting and demanding threshold than that posed by other tests such as those of insurmountable obstacles, exceptional circumstances or very compelling factors. The language used by the First-tier Tribunal is more consistent with those elevated tests.

20. There is another factor of concern here. Disconcertingly, from half way through the decision, the family's stated country of return mutates from Ghana to Nigeria: at

paragraph 11 it is said that, given that English is the official language of Nigeria, the family would not foreseeably experience any language barriers to their integration. It seems to me that given the centrality of the country of return to a proper assessment of the reasonableness of childrens' relocation, Appellants are entitled to be confident that their cases were assessed by reference to the appropriate destination. This is not simply a case where one can confidently conclude that the mistake was one of inadequate proof-reading of passages originating in a template: the references to Nigeria are multiple and, as just noted, particular conclusions about circumstances in Nigeria were stated.

21. These failings amount to material errors of law. This is not an appeal where there are meaningful findings upon which the Upper Tribunal can build, and thus it is allowed to the extent that it is remitted to the First-tier Tribunal for hearing afresh.

Decision

Remitted to the First-tier Tribunal for hearing afresh.

Signed Date 18 May 2017

Judge Symes
Deputy Judge of the Upper Tribunal