Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06293/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31st October 2017	**On 1st November 2017**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

E W A
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Adama -Adams of Counsel, instructed by Tamsons Legal Services
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Ghana born in October 1982. He arrived in the UK in May 2004 on a visit visa. He made a series of applications, the

last of which was a human rights application dated 27th July 2015. His appeal against the decision of the respondent refusing that human rights application dated 18th February 2016 was dismissed by First-tier Tribunal Judge Ford in a determination promulgated on the 6th February 2017.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Adio on 23rd August 2017 on the basis that it was arguable that the First-tier judge had erred in law in making contradictory findings relating to the best interests of the children and the proportionality assessment under Article 8 ECHR.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The grounds of appeal contend, in summary, that firstly the First-tier Tribunal failed to give adequate reasons for rejecting what was said in the letter from Shan & Co solicitors; secondly it is argued that the First-tier Tribunal contradicted itself by finding at paragraphs 44 and 50 of the decision that it was in the best interests of the two minor children to be allowed to continue their private and family lives in the UK, but then in dismissing the appeal, and that this was a failure to properly apply s.117B(6) of the Nationality, Immigration and Asylum Act 2002; thirdly it is argued that there was a failure to apply Appendix FM of the Immigration Rules and to make a proper proportionality assessment under Article 8 ECHR.

5. I said to the parties at the commencement of the hearing that my preliminary view was that there was an error of law at paragraphs 56 and 57 of the decision of the First-tier Tribunal. I had checked that this was the version of the decision Judge Ford had intended to send out and she had confirmed that the only error was that paragraph 56 should have concluded “following the guidance given in MA Pakistan”, text which currently was at the beginning of paragraph 57. There was no text missing from the decision. The parties both agreed that the dismissal of the appeal under s.117B(6) of the Nationality, Immigration and Asylum Act 2002 erred in law as it had not been sufficiently reasoned at paragraph 56 even with this added portion of text. Mr Adama-Adams did not wish to pursue any of the other grounds of appeal, and both parties were happy that we proceed to remake the appeal on this point immediately. The appellant and his wife have had a further child, E, born in July 2017 since the last hearing so there are now three British citizen children of the family: D who is 9 years old, J who is 15 months and E who is 3 months old.

Conclusions – Error of Law

6. The conclusion that the letter from Shan & Co solicitors was not reliable evidence was based on the fact that it was only produced in copy form and was not in the original bundle. I do not find that this was a finding that was not open to the First-tier Tribunal. In any case it was of very little relevance to the issues to be determined. The appellant was not entitled to succeed under the Immigration Rules because he had criminal convictions which he had not declared and so could not meet the requirements of paragraph S-LTR 2.2 which states *whether or not* to the appellant's knowledge false information had been submitted with the application. Even though it was said to be an error by the caseworker at Shan & Co not to include the appellant's convictions, this was not relevant to the provision as the appellant speaks English and had signed the application form so can rationally be assumed in fact to have had some sort of knowledge of the provision of the false information.

7. The First-tier Tribunal had to determine whether the appellant was entitled to succeed on human rights grounds. He did not have a separate right of appeal under the Immigration Rules. However, it was of course relevant to the public interest in his removal whether he could meet the requirements of the Immigration Rules. The First-tier Tribunal sets out at paragraph 47 to 49 why they were not satisfied that the appellant could meet the suitability requirements of the Immigration Rules with unarguably rational reasoning.

8. The First-tier Tribunal unarguably considers the appeal generally under Article 8 ECHR, starting from paragraph 50 of the decision. Correctly the first consideration is the best interests of the minor children which are, again unarguably correctly, noted to be a primary consideration. There is no contradiction in the position of the First-tier Tribunal: both at paragraph 44 and 50 it is seen as in the best interests of the children to remain in the UK and continue their lives here.

9. Consideration is unarguably given to s.117B(6) of the Nationality, Immigration and Asylum Act 2002 at paragraph 56 of the decision, with the First-tier Tribunal directing itself appropriately by reference to the decision of the Court of Appeal in R on the application of MA (Pakistan) & Ors v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705. I find however that this decision making is incomplete and the First-tier Tribunal errs in law for failure to complete a reasoned proportionality balancing exercise before concluding the appeal should be dismissed on this basis.

Submissions – Remaking

10. Mr Tufan submits that it is reasonable to expect the three British children to leave the UK. This is clearly anticipated as permissible both in MA (Pakistan) and under the Immigration Directorate Instruction – Family Migration – Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 Year Routes" which is set out in SF and

Others (Guidance, post – 2014 Act) [2017] UKUT 120. The appellant has a criminal record and a poor immigration history, and despite the finding that it was in the best interests of all the children to remain in the UK the Upper Tribunal should conclude that it was reasonable to require the children to leave the UK.

11. Mr Adama-Adams submitted that that it would not be reasonable to expect the three children to leave the UK. The appellant's wife has long term incurable illnesses and currently is only able to care for the children with the help of the appellant and her mother-in-law. It was clearly understood by the First-tier Tribunal that the appellant's wife continued to have to attend hospital appointments and continued to need medical assistance for these conditions. It was not reasonable to conclude that she would cope without the appellant and that her mother-in-law could do more than she currently did to help. The assistance of the appellant was crucial to the well-being of the children. Although the appellant had criminal convictions these were for false instrument matters and were not therefore for the most serious crimes, and this and his immigration record did not make it proportionate or reasonable to expect the three British citizen children to leave the UK.

Conclusions – Remaking

12. Under s.117B(6) of the Nationality, Immigration and Asylum Act 2002 the public interest will not require the appellant's removal if he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect that child to leave the UK.

13. In this case it is accepted by all that the appellant has genuine and subsisting parental relationships with three qualifying children: his step-son D who has been in the UK for nine years and is a British citizen; and his two natural children, J and E, who are 14 and 3 months old respectively and both British citizens.

14. It is also accepted that it is in the best interests of the children to remain in the UK. They are all British citizens, and D has lived in the UK for his entirely life and is in year 5 of primary school. Their mother is a British citizen who was born and brought up in the UK. In the UK the children also have a close relationship with their paternal grandmother who assists their mother in their upbringing most days for several hours, and they also have some contact with their maternal grandfather and a maternal aunt who has also helped their mother. This assistance is important as the appellant's wife and mother of his children suffers from lupus, an auto immune disease where by the body's immune system mistakenly attacks body organs, following meningoencephalitis, which in turn causes a number of serious medical problems including cognitive impairment, arthritis and progressive kidney disease. It was accepted by the First-tier Tribunal that the appellant's wife has "very difficult medical problems" and that she could not live in Ghana. Although it was found that there was no evidence she could not travel

there to enjoy a holiday, it was not "feasible nor advisable" for the appellant's wife to relocate to Ghana to enjoy family life in that country.

15. It is clear that the decision of the First-tier Tribunal was decisively that the best interests of the children were in remaining in the UK, and that this was a totally rational decision given their citizenship, the long residence of the child D, the extended family support on both the maternal and paternal sides, and their mother's serious medical problems which make residence in the appellant's country of origin impossible.

16. I note that at paragraph 49 of MA (Pakistan) that a child who has lived in the UK for seven years provides a: "starting point that leave should be granted unless there are powerful reasons to the contrary." Further the Immigration Directorate Instruction of August 2015 which is set out in SF and others at paragraph 7 of that decision states that: "it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship." That policy suggests a refusal of leave might be appropriate if another parent could care for the child/children, or if there was criminality, or a very poor immigration history, but the impact of separation for the children should be considered.

17. It is accepted by the First-tier Tribunal that the children would be upset if their father disappeared from their lives. It is also found that he has worked, albeit illegally, to support the family, and that the appellant's wife has not been well enough to work outside of the home. The First-tier Tribunal seemed less certain whether the appellant had collected D from school on a regular basis, but he is certainly the secondary point of contact after his mother according to the school letter. The First-tier Tribunal found that the appellant's wife would be able to seek help from the UK relatives if she were to have to care for the two children she had at the time of that decision without the appellant. However in the context of the appellant having now a third child I find that the appellant's wife would struggle to provide adequately for her three children given her state of health, particular as two are babies, given that her sister has a child of her own and is seeking work, her father is 72 years old and given that her mother in law is already assisting her for several hours most days, and in the context of the acceptance that the appellant does have a genuine subsisting parental role with his children. I find in this context that the impact of separation from the appellant would be detrimental for the three children's well-being as well as upsetting.

18. The appellant does have a criminal record: he was convicted in June 2013 of two counts of possessing false documents and sentenced to 6 months imprisonment. This is plainly not a crime of violence or related to drugs but must be given weight in favour of it being reasonable for the children to be expected to leave. The appellant has also been in

the UK since 2004 unlawfully, having entered aged 21 years on a false passport in a different name. He has worked here unlawfully. He was found to have tried to have minimised his contacts with Ghana; not been wholly candid about his criminal record with the Secretary of State in relation to this application; and to have exaggerated his basis to stay before the First-tier Tribunal. However, given that this is not a deportation appeal and given particularly that it is accepted that family life cannot for medical reasons relating to their mother take place in Ghana I find by a narrow margin on a global consideration of all factors that the best interests of the qualifying children outweigh the negative factors outlined above particularly due to the impact separation would have on those children, and so ultimately find that it cannot be said to be reasonable to expect the children to leave the UK.

Decision:

1. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. I re-make the decision in the appeal by allowing it on human rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant's children.

Signed: Fiona Lindsley Date: 31st October 2017
Upper Tribunal Judge Lindsley