Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15342/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 October 2018	**On 5 November 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR ALFRED GABUSU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chelliah, Solicitor, Quality Solicitors (A-Z Law)
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. On 2 November 2017 the respondent made a decision to refuse the appellant, a citizen of Ghana, leave to remain. The appellant's appeal came before Judge E M Smith who, in a decision sent on 5 June 108, dismissed his appeal.

2. The appellant's written grounds challenged the judge's treatment of the appellant's case under the Immigration Rules and outside the Rules.

3. The crux of the challenge raised in the written grounds of appeal to the judge's assessment of the appellant's case under the Rules was that he had erred in finding that the appellant failed to meet the suitability requirements as set out in S-LTR.1.4 and 1.6 because he had wrongly combined three prison sentences applying the principle of totality so as to treat the appellant as someone sentenced to imprisonment in excess of twelve months, whereas his highest sentence was ten months. Mr Chelliah before me stated that the appellant no longer relied on this ground since, even if paragraph S-LTR.1.4 – 1.5 did not apply against the appellant, he could not argue that S-LTR.1.6 did apply. Mr Chelliah said the appellant relied solely on the challenges to the judge's assessment of the appellant's circumstances outside the Rules.

4. These challenges contend that the judge failed to adequately assess the best interests of the children concerned namely their son B, a British citizen aged 2, and his partner's two children from a previous relationship, aged 7 and 5 (the latter live with their respective fathers).

5. In particular it was argued that the judge had not properly decided the likelihood of B not being able to continue living with his mother and having to go into care if the appellant was returned to Ghana. There was a letter from Probation stating that Social Services considered the appellant could be seen as a protective factor for his son.

6. It was submitted that the judge made a mistake of fact in finding that there was no contact between the appellant and his partner's other two children.

7. It was also contended that the judge wrongly discounted the relationship between the appellant and his partner on the basis they had not been in a relationship for two years.

8. As regards the judge's assessment of public interest factors, the grounds submit that the judge failed to take into account that he was at a low risk of reoffending and there was a Probation report that supported his case. There was no direct victim of any of the offences and all were based on the appellant's attempts to survive by working unlawfully.

9. I see no merit in the various points raised in the grounds concerning the judge's treatment of the public interest factors. In particular, I consider he was entitled to attach limited weight to the Probation Service letter. Whilst the judge accepted that this established that the appellant had not (as the respondent alleged) breached his licence requirements, its assessment of the appellant's past conduct failed to address the appellant's deliberate failure to answer his bail or the fact that he was convicted by his own plea and sentenced to ten months for further deceit (see paragraph 26 of the judge's decision).

10. However, I do consider that the judge's treatment of the best interests of the children involved is significantly flawed. Although the judge appears to have accepted there was a family life relationship between the appellant and B and that he had been

living with his partner and B since at least December 2016 (when he came out of prison), the judge conducts no analysis of the quality and contents of the appellant's relationship with B and does not specify, for example, whether he accepts it is a genuine parental relationship. The judge's sole focus was on whether B could live with his mother notwithstanding that Social Services had put in place a child in need plan and had become involved due to possible concerns about her neglect of B. At paragraph 30 the judge considered that what was important was that:

> "the child was born just after the appellant went to prison [and] the child remained with the [partner] even if the Social Services monitored the position. The sponsor for the following 8 months appeared to cope to the satisfaction of the Social Services."

This treatment did not address whether, even if the partner had "coped" with the help of Social Services whilst the appellant was in prison, the appellant's involvement in the child's life after coming out of prison had improved the welfare of B by performing what Social Services described as a "protective role"

11. A further difficulty with the judge's unduly narrow approach to the issue of the best interests of B is that at paragraph 31 the judge considered it very relevant to the issue of the proportionality of the decision that B could go with the appellant and his partner and live in Ghana. It is far from clear that the judge understood that it is the respondent's own policy that it is not reasonable to expect a British citizen child to leave the UK.

12. Compounding the judge's errors in relation to B, he was simply wrong to state in paragraph 31 that "there is no evidence that the sponsor or indeed the appellant has contact with [the other two children]." There was such evidence and it needed to be addressed and evaluated as to whether it significantly added to the appellant's case that his and his partner's family life would be disrupted either by him alone returning to Ghana or the couple (and B) going to live as a family in Ghana.

13. Whilst I do not intend by anything said in the above analysis to suggest that the appellant is entitled to succeed in his appeal (his criminal history and his poor immigration history are weighty public interest factors counting against his case), I do not consider that the judge conducted either a proper best interests of the child assessment or a proper proportionality assessment.

14. I consider that the judge's errors of law necessitate that I set aside the decision. Given that the next judge will need to consider the situation of B and the other children much more closely, it is appropriate to remit it to the First-tier Tribunal.

Direction

15. To assist the FtT Judge who hears this case next, I direct that the appellant's representatives by 21 December 2018 produce (1) an up-to-date welfare report relating to the child B; and (2) the report already in existence from Bracknell Forest Council concerning the issue of what contact if any the appellant and his partner have with the two other children; (3) if (2) above is out-of-date, then the appellant's

representatives should produce evidence of a similar kind (from an independent professional service).

16. To conclude:

- I set aside the decision of the First-tier Tribunal Judge for material error of law.
- The case is remitted to the First-tier Tribunal with the direction set out above in para 17.

No anonymity direction is made.

Signed Date: 25 October 2018

Dr H H Storey
Judge of the Upper Tribunal