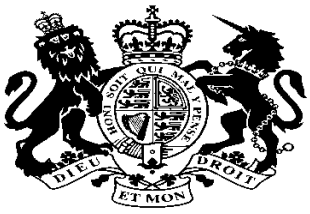

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/22382/2016**
HU/23319/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13 April 2018

Decision and Reasons Promulgated
On 26 April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HUBERT [L] &
[K L]
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Ms Kiss, Senior Home Office Presenting Officer
For the Respondent: Ms M Cohen (Counsel) instructed by Legal Rights Partnership

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Juss, promulgated on 24 August 2017, which allowed the Appellant's appeal.

Background

3. The first Appellant is the second appellant's father. The first appellant was born on 1 December 1968. The second appellant was born on 4 January 2007. Both appellants are Ghanaian nationals. On 1 September 2016 the appellants applied for leave to remain in the UK on article 8 ECHR grounds. The respondent refused their applications on 8 September 2016.

4. The first appellant entered the UK illegally in 2003. On 24 February 2012 he applied for leave to remain in the UK as the spouse of a British citizen. The respondent refused that application on 19 March 2013. The first appellant had no right of appeal against that decision. On 5 August 2014 the first appellant was served with a form IAS151A informing him of his liability to removal. The first appellant unsuccessfully tried to judicially review that decision. On 4 August 2016 the first appellant submitted further representations.

5. The second appellant was born in the UK for January 2007. On 24 February 2012 he applied for leave to remain as a dependent on article 8ECHR grounds. That application was refused on 19 March 2013. Following unsuccessful judicial review procedure, the second appellant submitted further representations on 4 August 2016.

6. Both appellants submitted applications for leave to remain on article 8 ECHR grounds of 1 September 2016. On 8 September 2016 the Secretary of State refused the Appellants' applications. On 2 August 2017 the second appellant was granted British citizenship. The second appellant's mother died on 7 March 2016.

The Judge's Decision

7. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Juss ("the Judge") allowed the appeals against the Respondent's decision. Grounds of appeal were lodged and on 1 February 2018 Judge O'Garro gave permission to appeal stating

> "1. The respondent seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Juss, sitting at Birmingham, who in a decision promulgated on 24 August 2017 allowed the appeal against the Secretary of State's decision to refuse leave to remain.
>
> 2. The grounds of appeal assert that the Judge's decision is wrong because he failed to consider the case properly under article 8 looking through the lens of the immigration rules before proceeding to consider article 8 outside the immigration rules. That the Judge failed to give proper regard to the public interest considerations. That in considering the appeal outside the immigration

rules the Judge has failed to give adequate reasons why the appellant's circumstances are exceptional or compelling.

3. Appendix FM states at paragraph GEN 1.1 that the appendix "reflects how, under article 8 of the human rights convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK". It follows that an appellant, who makes specific application under appendix FM, is implicitly making a claim that he or she is entitled to entry/leave to remain on the basis of that provision that seeks to incorporate his human rights. The Immigration Directorate Instructions define a human rights claim as including an application under appendix FM.

4. In Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC) the tribunal held that (i) in cases to which the new immigration rules introduced as from 9 July 2012 by HC 194 apply, Judges should proceed by first considering whether a claimant is able to benefit under the applicable provisions of the immigration rules designed to address article 8 claims. Where the claimant does not meet the requirements of the rules it will be necessary to go on to make an assessment of article 8 applying the criteria established by law.

5. Having carefully considered the decision, I find arguable merit in the grounds in terms in which they are set forth. The grounds disclose an arguable point of law and permission to appeal is granted."

The Hearing

8. (a) For the respondent Ms Kiss told me that the decision contains a number of errors of fact. Both appellants are Ghanaian nationals; both appellants are male; there are two appellants. Yet in [1] of the decision the Judge identifies a solitary appellant as a female Jamaican national. It is beyond dispute that the mother of the second appellant died in 2016, yet the Judge claims to have heard evidence from her in [8] of the decision. At [16] of the decision the Judge takes the respondent's delay in making the decision as a factor against the respondent, when there was no significant delay. Ms Kiss told me that the Judge has produced a decision which is inadequately reasoned.

(b) I reminded Ms Kiss that the second appellant became a British national before the Judge's decision was promulgated. She agreed that he must succeed because he is a British citizen.

9. I told Ms Cohen that I did not need to hear from her. I told both parties' agents that the decision contains an error of law and would be set aside. I said that I would substitute my own decision, taking the second appellant's British citizenship as my starting point.

Analysis

10. At [1] of the decision, the Judge incorrectly identifies both appellants as being one female Jamaican, when they are two males who at the date of hearing both had Ghanaian nationality. At [8] of the decision, the Judge claims to have heard evidence from the second appellant's mother, who passed away in 2016. Those are clearly errors of fact.

11. At [11] the Judge records that the second appellant has an outstanding application for British nationality. The decision was not promulgated until 24 August 2017. Three weeks before the decision was promulgated the second appellant became a British national.

12. In the 40 days between the date of hearing and the promulgation of the decision there was a material change in circumstances, because the second appellant was granted British citizenship.

13. In E and R (2004) EWCA Civ 49 the Court of Appeal said that "a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area." The Court of Appeal set out the ordinary requirements for a finding of unfairness as follows:

> i) There must have been a mistake as to an existing fact including a mistake as to the availability of evidence on a particular fact;
>
> ii) The fact or evidence must have been established, in the sense that it was uncontentious and objectively verifiable;
>
> iii) The appellant (or his advisors) must not have been responsible for the mistake; and
>
> iv) The mistake must have played a material (not necessarily decisive) part in the Adjudicator's reasoning.

14. The Judge's decision is based on a mistake of fact. The decision relies on a finding of fact that the first appellant's child is a Ghanaian national, when, before the date of decision, the second appellant became a British Citizen. The mistake relates to a fundamental fact which almost certainly would have resulted in a different outcome. The decision is tainted by material error of law. I set the decision aside.

15. There is sufficient material before me to enable me to substitute my own decision.

The Material Facts

16. The first appellant is a Ghanaian national who entered the UK in December 2002. In 2005 he met [EA], and a relationship developed between them. The second

appellant was born to the first appellant and [EA] on 4 January 2007. [EA] died in the UK on 7 March 2016.

17. The second appellant is now 11 years old. He is in his final year of primary school and will start secondary education later this year. His primary carer is the first appellant. The second appellant is happy and well settled at school. He enjoys playing for a local junior football team.

18. On 17 May 2017 the second appellant applied for British citizenship. On 2 August 2017 the second appellant was granted British citizenship. The decision against which both appellants appeal was promulgated 22 days later, on 24 August 2017. Three weeks before the decision was promulgated the second appellant became a British citizen.

19. Because the second appellant is a British citizen he no longer requires leave to remain in the UK. He has the right to remain in the UK.

20. The first appellant is the second appellant's primary carer. He is the second appellant's sole surviving parent. The first and second appellants live together.

Analysis

21. Because the second appellant is a British citizen he no longer requires leave to remain in the UK. He has the right to remain in the UK.

22. The respondent's IDIs on Family Migration (Paragraph 11.2.3) deals with British children. The August 2015 version states that, save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. However, it also states that "where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer". The section goes on to address the grant of leave to the parent indicating that it may not be appropriate if there is no satisfactory evidence of a genuine and subsisting parental relationship or where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation but none of that gets round the unequivocal statement that it would always be unreasonable to expect a British child to leave the EU.

23. The respondent's decision was that the first appellant meets the eligibility and suitability requirements of the immigration rules but cannot meet the requirements of paragraph EX1, because the respondent's view is that it is reasonable for the second appellant to return to Ghana with the first appellant. That logic is wholly undermined by the respondent's decision to grant the second appellant British citizenship. The respondent's own guidance says that it is unreasonable to expect the

second appellant to leave the EU. It cannot therefore be reasonable for the second appellant to go to Ghana.

24. The Upper Tribunal in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) held, considering this guidance that even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal

25. The respondent's own guidance says that it is not reasonable for the second appellant to leave the UK, and that is not reasonable for the first appellant to leave the UK. The first appellant meets the requirements of the immigration rules. The second appellant is a British citizen to whom the immigration rules no longer apply. He cannot be removed.

Article 8 ECHR.

26. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed…" In Agyarko [2017] UKSC 11**,** Lord Reed (when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8) made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

27. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

28. On the facts as I find them to be, family life exists. On the facts as I find them to be the first appellant is the father of a British citizen. On the facts as I find them to be the first appellant now meets the requirements of the immigration rules.

29. The respondent's position is that all article 8 ECHR considerations are embraced by the Immigration Rules. The fact that I find that the first appellant meets the

requirements of the immigration rules indicates that the respondent has a willingness to grant leave to remain. The respondent's decision must therefore be a disproportionate breach of the right to respect for family life. The respondent's own rules indicate that the decision is a disproportionate interference with the right to respect for family life.

30. Family life within the meaning of article 8 is established for the appellants. The respondent's decision is an interference with that family life. The burden therefore shifts to the respondent to show that the interference was justified. The respondent relies solely on the public interest in effective immigration control.

31. The second appellant is a British citizen. S.117B(6) of the 2002 Act, which says

> (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.

32. The focus in this case is on sub-section (6) of Section 117B. Section 117B(6) is in two parts which are conjunctive. Section 117B(6)(a) weighs in favour of the first appellant because he has a genuine and subsisting paternal relationship with a British Citizen child. It is Section 117B(6)(b) which is determinative of this case.

33. The test is one of reasonableness. The simple question is whether or not it is reasonable for the second appellant, who is now a British citizen, to remain in the UK alone. The second appellant is 11 years old. He is a primary schoolboy who has only ever lived with his parents. I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the case of ZH (Tanzania) v SSHD [2011] UKSC 4. I remind myself of the cases of Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 and PW [2015] CSIH 36. The interests of the second appellant will be served if the integrity of the family unit is not challenged. It has long been settled that it is in the interests of children to live with their parents.

34. The simple answer is that it cannot be reasonable for an 11-year-old to either live alone or to be separated from his father and forced into local authority care. As the second appellant is a British citizen, the question of returned to Ghana cannot be considered reasonable because removal would be an act inconsistent with the rights and obligations of British citizenship, which the respondent herself conveyed on the second appellant.

35. The refusal of leave to remain must therefore be a disproportionate breach of the right to respect for family life. The respondent's own rules and the respondent's own guidance indicate that the decision is a disproportionate interference with the right to respect for family life.

36. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) it was held that the decision in Shamin Box [2002] UKIAT 02212 is to be followed and that the obligation imposed by Article 8 is to promote the family life of those affected by the decision.

37. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) the Tribunal further held that the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. At paragraph 9 it was said that where the ground of appeal is limited to human rights " *Clearly there can be no question of entertaining an appeal on grounds alleging that the decision was not in accordance with the law or the immigration rules. These are not permissible grounds. However if ...the claimant has shown that refusing him entry ... does interfere with his ...family life then it will be necessary to assess the evidence to see if the claimant meets the substance of the rules. This is because... the ability to satisfy the rules illuminates the proportionality of the decision to refuse him entry clearance*".

38. At paragraph 23 the Upper Tribunal said "*We have considered carefully the effect that this decision could have in other cases. Plainly this will mean that the underlying merits of an application and the ability to satisfy the Immigration Rules, although not the question before the Tribunal, may be capable of being a weighty factor in an appeal based on human rights but they will not be determinative. They will only become relevant if the interference is such as to engage Article 8(1) ECHR and a finding by the Tribunal that an appellant does satisfy the requirements of the rules will not necessarily lead to a finding that the decision to refuse entry clearance is disproportionate to the proper purpose of enforcing immigration control. However, it may be capable of being a strong reason for allowing the appeal that must be weighed with the others facts in the case.* ".

39. As I have already indicated, the respondent's own IDI's dictate that the respondent's position is that it cannot be reasonable for a British citizen child to be required to leave the UK. The respondent's decision, if it is enforced, would cause upheaval and distress, which cannot be in any child's best interests.

40. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

41. Even when I give little weight to the relationship between the appellants, the relationship still carries sufficient weight because on the facts as I find them to be the first appellant meets the requirements of the immigration rules and because the article 8 family life established encompasses the interests of a primary school age child.

42. The fact that the appellants meet every requirement of the immigration rules is an indicator that the respondent accepts that the balance of proportionality weighs in the appellants' favour, and that the public interest embodied in immigration control does not demand that the appellants should be forced to live apart.

43. I find that these appeals succeed on article 8 ECHR (family life) grounds.

Decision

The appeals are allowed on article 8 ECHR grounds.

CONCLUSION

The decision of the First-tier Tribunal promulgated on 24 August 2017 is tainted by a material error of law. I set it aside.

I substitute my own decision.

The appeals are allowed on article 8 ECHR grounds.

Signed Paul Doyle Date 23 April 2018
Deputy Upper Tribunal Judge Doyle