Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03615/2019
HU/03616/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 July 2019	**On 9 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

ADISA [A]
AND
[T V]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Solomon of Counsel instructed by Stanley Richards Solicitors
For the Respondent: Mr T Lindsay of the Specialist Appeals Team

ERROR OF LAW DECISION AND REASONS

The Appellants

1. The Appellants are mother born in 1985 and son born on 26 February 2005. They are both citizens of Ghana. On 4 June 2012 they entered as visitors with leave for 6 months. In time, they sought further leave as

visitors which on 5 March 2013 was refused. Appeals against that decision were withdrawn.

2. On 27 December 2013 they sought leave to remain on the basis of their private and family life in the United Kingdom. On 31 January 2014 the Respondent (the SSHD) refused their applications. Their appeals were dismissed and their appeal rights exhausted by the end of August 2015.

3. On 4 June 2016 they claimed subsidiary protection which the SSHD refused. Their appeals were dismissed and they became their appeal rights exhausted by the end of May 2017. The applications for leave outside the Immigration Rules based on the second Appellant's medical needs and the Appellants' exceptional circumstances and private and family life in the United Kingdom leading to the subject appeal were made on 24 July 2018.

The SSHD's decision

4. On 11 February 2019 the SSHD refused the applications. Neither of the Appellants satisfied the time critical requirements of paragraph 276ADE(1) of the Immigration Rules. The SSHD considered the first Appellant would not face very significant obstacles on return to Ghana.

5. The SSHD took account of the second Appellant's diagnosis of severe autism with chromosomal disorder and global developmental delay and that he was unable to speak and needed care in the ratio of 3:1 because of his aggression and that he was attending a special needs school and it would be difficult to travel to Ghana because of his medical condition.

6. The SSHD noted the Appellants were supported by the local authority and the first Appellant said she had ties with a local church. She also said that in Ghana her son, the second Appellant, would not receive the necessary support. The SSHD referred to the high threshold necessary to engage rights under Article 3 of the European Convention based on medical grounds and the background evidence about the availability in Ghana of education and medical support for the second Appellant's conditions. The second Appellant's best interests were to remain with his mother and they could return as a family unit to Ghana. The Appellants had not identified any exceptional circumstances such as to warrant the grant of leave to remain.

Proceedings in the First-tier Tribunal

7. On 21 February 2019 the Appellants lodged notice of appeal challenging the SSHD's consideration of paragraph 276ADE(1) and asserting exceptional circumstances in the form of the formative years spent by the second Appellant in the United Kingdom, that he cannot speak and is accustomed to the standard of care he is currently receiving. In relation to this, it was asserted the SSHD had failed to take account of his own

guidance. A further ground was that the SSHD had not adopted the structured approach to the assessment of the claim outlined in *R (Razgar) v SSHD [2004] UKHL 27*. The grounds continued that given the second Appellant could not be removed, his mother, the first Appellant, should be permitted to stay because he needed her to care for him.

8. By a decision promulgated on 14 May 2019 Judge of the First-tier Tribunal JWH Law dismissed the appeal on all grounds. On 21 May 2019 the Appellants lodged notice of appeal.

9. On 22 February 2019 Judge of the First-tier Tribunal EM Simpson granted permission because it was arguable the Judge had erred in relation to his assessment of the best interests of the second Appellant and had not made clear findings of his "comparative best interests as between the UK and if returned to Ghana" and that at the date of the hearing he was close to have completed 7 years in the United Kingdom. Further, it was arguable that despite the Judge's self-direction he had given weight to the first Appellant's poor immigration history in his consideration whether it was reasonable for the second Appellant to return to Ghana and had given inadequate consideration to his needs and consequential dependence on his mother.

The Upper Tribunal Hearing

10. The Appellant attended the hearing. I was informed that the second Appellant and a carer were in a side room and it was not proposed that he should attend any part of the hearing. Mr Lindsay acknowledged the SSHD had not filed a response in accordance with Procedure Rule 24. I acknowledged to Mr Solomon I was aware of the Tribunal Caseworker's refusal on 2 July 2019 of an application for an adjournment made on the basis that Counsel who had represented the Appellants in the First-tier Tribunal and drafted the detailed grounds for appeal could not be present. I explained to the first Appellant the purpose of the hearing and procedure to be adopted who, other than to confirm her current address, took no active part in the proceedings.

Submissions for the Appellants

11. Mr Solomon relied on the grounds for appeal which were essentially threefold. First, the Judge's approach to the assessment of the best interests of the second Appellant was flawed. At paragraph 29 he had accepted that he should not be separated from his mother but had subsequently failed to find exactly what were his best interests. In particular, at paragraph 43 he had considered the likely situation on return to Ghana but not what his best interests were if he remained in the United Kingdom. His analysis of the factual matrix had not been sufficiently careful.

12. The second error was at paragraph 43 where the Judge accepted the evidence about the second Appellant's medical conditions and that on return his medical treatment would be to a lower standard than he currently received but he would be able to continue his medication with Risperidone and his mother would be able to continue her medication for depression. The Judge had concluded paragraph 43 by finding the first Appellant "took a gamble when she brought him and it was never certain he would have indefinite access to the improved healthcare which has been available". The effect of this was that notwithstanding the self-direction at paragraph 28 the Judge had allowed the poor immigration history of the first Appellant to infect his assessment of the best interests of the second Appellant. The mother's immigration history is an irrelevant matter when looking at her son.

13. The third error was in the Judge's treatment of the factors identified in s.117B Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). He had not taken into account whether it would be reasonable to expect the second Appellant to leave the United Kingdom if he were a qualifying child under s.117D which he would have become on 4 June 2019. In the light of paragraph 46 of the judgment in *R (MA and others (Pakistan) v SSHD [2016] EWCA Civ.705* the Judge should have given significant weight to this when carrying out his proportionality assessment. At paragraph 44 he had simply concluded that as at the date of the hearing the second Appellant was not a qualifying child within the meaning of s.117D and so not factored into any proportionality assessment the additional security which being a qualified child conferred or the prospect that in the immediate future the second Appellant would become entitled to such security by reason of the passage of time.

14. The parties agreed that at the date of the hearing the second Appellant had spent less than 7 years in the United Kingdom and Mr Solomon pointed out that at the date of the hearing in the Upper Tribunal the second Appellant had been in the United Kingdom for more than 7 years but the issue of the second Appellant's proximity to completing 7 years' residence had never been considered nor whether it might need to be treated as a new matter in the light of *OA and Others (human rights; "new matter"; s.120) Nigeria [2019] UKUT 00065 (IAC)*.

15. Mr Solomon continued that the Judge's assessment under s.117B(6) of the 2002 Act was flawed for the reasons identified in paragraph 31 of the grounds for appeal; namely that the second Appellant will have put down roots and developed social, cultural and educational links in the United Kingdom, that his mental health and medical conditions needed to be given due consideration and given the length of time he had been in the United Kingdom "there was a very strong expectation his best interests were to remain in the UK with his mother". In this light the Judge had materially erred at paragraph 44.

16. Mr Solomon referred to paragraph 33 of the grounds for appeal and in particular the reference there to the SSHD's guidance of January 2019 "Family Migration: Appendix FM". This has been superseded by guidance issued on 25 July 2019 but the section upon which the grounds rely remains materially the same, in particular the provision that: –

> '… The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together …
>
> It may be reasonable for a qualifying child to leave the UK with the parent or primary carer where for example:
>
> - the parent or parents, or child, are a citizen of the country and so able to enjoy the full rights of being a citizen in that country
> - there is nothing in any country specific information, including as contained in relevant country information which suggests that relocation would be unreasonable
> - the parent or parents or child have existing family, social, or cultural ties with the country and if there are wider family or relationships with friends or community overseas that can provide support:
>   - o [you] must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of their life and how a transition to similar support overseas would affect them
>   - o a person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate there
>   - o parent or parents or a child who have lived in or visited the country before for periods of more than a few weeks. should be better able to adapt, or the parent or parents would be able to support the child in adapting, to life in the country
>   - o [you] must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country
>   - o for example, a period of time spent living amongst a diaspora from the country may give a child an awareness of the culture of the country
>   - o the parents or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period
>   - o fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice
> - removal would not give rise to a significant risk to the child's health
> - there are no other specific factors raised by or on behalf of the child
>
> …
>
> The parents' situation is a relevant fact to consider in deciding whether they themselves and therefore, their child is expected to leave the UK. Where both parents are expected to leave the UK, the natural expectation is that the child would go with them and leave the UK, and that expectation would

be reasonable unless there are factors of evidence that mean it would not be reasonable.'

Mr Solomon concluded that having regard to the factors enumerated in the SSHD's Guidance, the Judge had erred in law finding that it would be reasonable for the second Appellant to leave the United Kingdom with his mother.

17. Referring to the "*Robinson*" obvious point raised in the grant of permission, Mr Solomon pointed to the findings at paragraphs 20 and 27 of the Judge's decision that the second Appellant's behaviour had been "mitigated" with Risperidone and that his "aggressive behaviour has been controlled since September 2017 by the use of Risperidone". This did not set well with the evidence of continuing high dependency and the required care ratio of 3:1 or even the now reduced ratio of 2:1. His aggressive behaviour was not controlled but was made more manageable with the medication but he continued to require a care ratio of 2:1. He referred to the letter of 14 January 2019 from the second Appellant's consultant at pages 197-198 of the Appellants' bundle filed on 17 July 2019.

18. Mr Solomon submitted that in this light the Judge's evaluation of the evidence was flawed which consequently infected his assessment of the proportionality of the SSHD's decision. The second Appellant continued to have multiple needs and to be highly dependent on his care support network. He had now developed substantial ties in the United Kingdom with the special school he attended and with his medical and social services support teams. The Judge's reasoning was inadequate to support his conclusions and his decision should be set aside.

Submissions for the SSHD

19. Mr Lindsay resisted the application and relied on the judgment in *KO and Others [2018] UKSC 53*. The Judge's key finding at paragraph 44 of his decision was that the second Appellant was not a qualifying child and that it would be reasonable for him to leave the United Kingdom with his mother. In this light, the Judge's assessment of the proportionality of the decision under appeal was sound. He had referred at paragraph 27 to the 2014 decision dismissing an appeal based on the private and family life of the Appellants. The First-tier Tribunal had at that point assessed the best interests of the second Appellant and the Judge in the decision now under appeal had correctly applied the principles of *Devaseelan* at paragraphs 22 and 27 of his decision. He had noted developments or changes since 2014, namely the natural growth of the second Appellant (he is said now to weigh 84kg), the increased length of time he had spent in the United Kingdom and the latest medical evidence.

20. The Judge had noted the beneficial effect of the medication the second Appellant was taking and that the care ratio had reduced to 2:1. He had noted at paragraph 11 that care facilities were available in Ghana and there was no evidence that these did not extend to include a care ratio of

2:1. In short, the Judge had recorded changes since the 2014 decision and considered the evidence and had reached sustainable conclusions. For the purposes of this appeal, the second Appellant was not a qualifying child.

21. The First-tier Tribunal finding in 2014 that the second Appellant could return with the first Appellant, his mother, to Ghana had not been successfully challenged. Mr Lindsay referred to paragraphs 46-52 of *KO and Others* as authority for the principle that qualifying children may be removed. The second Appellant was not a qualifying child and so a fortiori could be removed. The SSHD relied on paragraph 42 of the judgment in *R (MA) (Pakistan) and Others v SSHD [2016] EWCA Civ. 705* in which Elias LJ considering the principle that a child should not be blamed for the moral failing of his parents stated that:-

> "… .it is not blaming the child to say that the conduct of the parent should weigh in the scales when the general public interest in effective immigration control is under consideration. The principle that the sins of the fathers should not be visited upon the children is not intended to lessen the importance of immigration control or to restrict what the court can consider when having regard to that matter."

He submitted that looking at paragraph 46 of *KO and Others* dealing with the application of the findings of law made earlier to the specific facts of one of the appellants, there was no need for the Tribunal to provide "powerful reasons" for removal. If there were a need, the Supreme Court would have said so. The Judge's approach was consonant with this.

22. In the alternative, the SSHD argued that the factual matrix of the subject appeal was sufficiently similar to that of the appellant considered at paragraph 46 of *KO and Others*. He had not shown that powerful reasons were needed and his appeal had been dismissed.

23. The Judge had given adequate reasons for his conclusions and the Appellants had not shown that such reasoning was perverse. Risperidone ameliorated the second Appellant's condition such that the care ratio had been reduced from 3:1 to 2:1. The Judge had been cognisant of both the amelioration and the second Appellant's continuing need for a substantial care network.

24. The background evidence disclosed there were specialist schools in Ghana and the Appellants had not shown any evidence that adequate care arrangements for the second Appellant would not be available on return to Ghana. There was no evidence there would be a significant shortfall in care on return. The Judge's reasoning at paragraphs 45 and 46 was adequate to support his conclusions.

25. The Appellants would return as a family unit and so there would be no breach of their right to respect for their private and family life protected by Article 8 of the European Convention. The burden of proof was on the Appellants and they had failed to supply evidence that their return

together would engage the State's obligations under Article 8 in respect of their private and family life in the United Kingdom. There was no material error of law in the Judge's decision.

Response for the Appellants

26. Mr Solomon submitted that the previous decisions of 2014 and 2016 were not binding. The Appellants had shown there were good reasons and material changes sufficient to justify conclusions different from those of 2014 and 2016.

27. The Judge's assessment of the best interests of the second Appellant had been inadequate because it had not taken proper account of where he is on the autistic spectrum and of the difficulties which any changes in his life would cause as identified by his consultant. The relevant yardstick was the measure of change to the circumstances of the second Appellant on return to Ghana and not simply whether there were care facilities available for him. Careful consideration needed to be given to both the availability and accessibility of such facilities.

28. The Judge had not fully considered the case law in *R (MA (Pakistan)* and *KO and Others*. The requirement for "powerful reasons" in *R (MA)* remained good law and a material effect of the judgment in *KO and Others* had been to affirm the opinion of Elias LJ other than at paragraph 40 of *R (MA*).

29. The Judge's understanding of the effect of Risperidone on the second Appellant needed to be considered in the wider context of his medical conditions. The decision contained errors of law and should be set aside.

30. At the end of his response, Mr Solomon stated that he had been told by the first Appellant earlier that morning that she is now 3 months pregnant. I enquired of her whether she had been in a relationship because this might have been a relevant factor at the date of the hearing in the First-tier Tribunal. She stated that she had never previously been in a relationship with the putative father nor subsequently to the child's conception. Mr Solomon as a separate matter referred me to the letter of 20 November 2018 from a Primary Care Mental Health Professional at page 199 of the Appellant's bundle which also noted that in October 2018 she had been prescribed anti-depression medication. There was no subsequent medical evidence about her.

Subsequent submissions

31. Mr Lindsay for the SSHD referred generically to the 2014 determination. The Judge in the decision under review had dealt with developments subsequent to 2014. The Appellants had not filed evidence to show that even if the facilities in Ghana could have provided care for the second Appellant in 2014 they could not now provide care. Similarly, no evidence

had been submitted to show the inability of the second Appellant to cope with change had deteriorated since 2014. The Judge at paragraph 27 of his decision had identified the relevant changes.

32. He referred to paragraph 46ff of *KO and Others*. The particular appellant's appeal had been dismissed and from this could be derived the proposition that the Upper Tribunal similarly may dismiss this appeal. The "powerful reasons" test was to be applied and there were none. All that the Tribunal was required to consider would be comprised in an assessment of the factors identified in s.117B of the 2002 Act and the matters raised in *KO and Others*.

33. Mr Solomon referred to the decision in *JG*. There had been changes in the second Appellant's medical condition and he had now been in the United Kingdom for over 7 years. The SSHD needed to demonstrate "strong countervailing reasons" why he should not be given leave to remain.

Findings and consideration

34. In the 2014 determination of the Appellants' private and family life claims the Judge made partial adverse credibility findings against the first Appellant: see paragraphs 68-69, 95-98 and paragraph 24 of the Judge's decision under appeal. The 2014 judge found the Appellants came to the United Kingdom as visitors with the intention of obtaining better medical treatment for the evident medical problems of the second Appellant. In the event, the diagnosis was considerably more devastating than expected: see paragraphs 51- 52. The first Appellant then made a claim for subsidiary protection on the basis she was a lesbian. A claim in respect of which she was not believed: see paragraph 29 of the 2016 decision. In the same appeal the circumstances of the second Appellant were considered and it was found both the Appellants could return to Ghana. The first Appellant's additional claim based on her apostasy from Islam to Christianity was not pursued.

35. The evidence noted at the time of the 2016 determination the first Appellant claimed she became pregnant with her son after her drink had been spiked at a party and while unconscious she had been raped: see paragraph 26 of the 2019 decision under appeal and in relation to her current pregnancy, paragraph 30 above.

36. There was no challenge to the Judge's conclusion that but for the second Appellant the first Appellant had no viable claim to remain in the United Kingdom and could safely and reasonably be returned to Ghana.

37. The Judge's assessment of the best interests of the second Appellant was insufficient. The Judge noted at paragraphs 27 and 29 the changes in the Appellant since 2014, that he had become older, larger and his aggressive

behaviour was controlled by medication with Risperidone. Although he had noted at paragraph 20 the medication had assisted in reducing the care ratio by a third, he did not take account of the fact that the second Appellant care needs remained very extensive, including a care ratio of 2:1. He did not take into account the latest medical evidence from his consultant of 14 January 2019 at page 85 of the Appellants' bundle. The consultant noted the second Appellant required to be reviewed every 6 to 8 weeks because of the possible severe side-effects of Risperidone and that he cannot tolerate changes to his routine or being in crowded unfamiliar environments and that his lifelong complex neuro-developmental difficulties, challenging behaviour, rigidity to change and lack of understanding made it difficult for him to travel on public transport and this situation is likely to remain unchanged.

38. At paragraphs 33-41 the Judge cited much case law and at paragraph 44 relied on the decision in *Azimi-Moayed and Others (decisions affecting children; onward appeals) Iran [2013] UKUT 197 (IAC).* At paragraph 27 he referred to *R (MA)* but relied only on the specific circumstances of the appellant in that case and did not consider any of its jurisprudence, and in particular at paragraphs 46-52 which continue to have force after the judgment in *KO and Others*. Additionally, he did not take account of the SSHD's own Guidance on Appendix FM. He relied on the conclusions reached in the 2014 and 2016 decisions but without assessing whether later developments in immigration law relating to children and in particular the judgments in *R (MA)* and *KO and Others* had any impact on the conclusions reached by those earlier decisions.

39. For these reasons I find there are material errors of law in the First-tier Tribunal's decision such that it should be set aside. I see no reason why the Judge's limited findings of fact should not be preserved but, as already indicated, they are incomplete.

40. Submissions for the SSHD were made that the same test applied for the application of paragraph 276ADE(iv) of the Immigration Rules and s.117B of the 2002 Act. There are differences as paragraphs 13-21 of *R (MA)* identify. Submissions were made for the Appellants that there must be powerful reasons why it might be thought that a child who has spent 7 years in the United Kingdom should not be allowed to stay and that it would be reasonable to expect such a child to leave: see paragraph 44 of *R (MA)*. The point is, as the Judge correctly noted, that as at the date of the hearing before him the second Appellant had not been in the United Kingdom for 7 years.

41. Having found a material error of law and set aside the First-tier Tribunal's decision so far as its conclusions are concerned, I find it appropriate to re-make the decision.

Re-making the decision

42. The first Appellant has a poor immigration history from the moment she applied for a visitor visa for general purposes rather than one for medical purposes. She has previously been found not to be entirely credible and to be willing to use deceit or misrepresentation if it suits her purposes. She has been found to have family in Ghana. Her explanation for her lack of recent contact with them appears to be centred on the difficulties faced by the second Appellant. It is reasonable for her to return to Ghana, even if she is now 3 months pregnant. The evidence is she has no contact with the putative father. In normal circumstances it would be reasonable for her to return with her son as a family unit.

43. There can be no question but that it is in the best interests of the second Appellant to remain in the United Kingdom where he will continue receiving high quality medical treatment. He is being educated at a special school accommodating his very substantial dependency needs where there is only one other child in the class: see the letter of 3 October 2016 from Milton Keynes Council at page 105 of the Appellants' bundle. He remains at the school: see the letter of 16 January 2019 from the Head Teacher at page 203 of the Appellants' bundle. There is evidence from his consultant about the impact of any change in routine and issues he will experience if he needs to travel, particularly by air. The best interests of a child are a primary consideration but in immigration matters not the paramount consideration.

44. Given that in normal circumstances it would be considered reasonable for the second Appellant to accompany his mother, the first Appellant, to Ghana and that his best interests as a primary consideration are to remain in the United Kingdom it remains to be assessed whether the decision to remove him is reasonable and proportionate to the need to maintain proper immigration control for the economic well-being of the State, a legitimate public objective defined in Article 8(2) of the European Convention.

45. The second Appellant has now been in the United Kingdom for more than 7 years. He has become a qualifying child within the meaning of s.117D of the 2002 Act. He has very extensive medical needs. The evidence from his consultant is that if only by reason of his autism, he will be unable to adapt to life in Ghana. He relies on sign language. He will be particularly dependent on his existing care team and his mother to understand his simple everyday needs. He needs help dressing and sometimes with eating: see the letter of 12 October 2018 from the Community Paediatric Team at page 90 of the Appellants' bundle.

46. I take into account his very extensive medical and educational needs and that the State has assumed responsibility for these over a number of years and that his interests must be considered independently of any failings by his mother to comply with the immigration laws of the United Kingdom. This is notwithstanding that neither of the Appellants has had any right to remain in the United Kingdom since August 2013. I also take into account

that as at the date of this re-making of the decision a new matter for the purposes of s.85(5) of the 2002 Act has arisen as explained by paragraph 18 of *OA and Others*, namely that the second Appellant is now a qualifying child within the meaning of s.117D.

47. In effect, this adds a significant dimension to the circumstances of the second Appellant because the matters referred to in the SSHD's Guidance on Appendix FM at page 50ff will be applicable especially but not exclusively that his removal is likely to give rise to a significant risk to his health.

48. Taking all these matters into account, I am not of the view that there is any discrete public interest factor which would still make the removal of the second Appellant proportionate. It would therefore be disproportionate to remove him before he is reasonably able to make an application on the basis that he is a qualifying child: see paragraphs 32 and 33 of *JG*. It follows that his mother and primary carer, the first Appellant, should be given leave in line for the purpose of making fresh applications on the basis that the second Appellant is now a qualifying child.

49. In the event that such applications are made, consideration will need to be given to what the President stated at paragraph 87ff of *JG*.

Anonymity

50. The First-tier Tribunal did not make an anonymity direction and there was no request for such direction. Given the details of the Appellants and their circumstances I find no reason to make on my own motion such a direction.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contains an error of law and is set aside.

The appeals of the Appellants are allowed to the extent indicated in paragraph 41 of this decision.

Anonymity direction not made.

Signed/Official Crest Date 02. 08. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal