Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02251/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th April and 12th November 2018	**On 03rd January 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

FEBI ACHAEMPONG
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F Saeed, Solicitor
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Bart-Stewart promulgated on 8 February 2018, in which the Appellant's appeal against the decision to refuse his protection and human rights claim dated 15 February 2017 was dismissed. Further to the first hearing in this appeal on 30th of April 2018, I found an error of law in the decision of First-tier Tribunal Judge Bart-Stewart, set that decision aside (so far as it related to the human rights parts of the appeal, there being no challenge to the protection or EEA matters, the findings on which stand) and listed a

further hearing to remake the decision under appeal. The procedural history to this appeal and reasons for the error of law are set out in my earlier decision included as an annex to the present one, the contents of which will not be repeated here in savers where necessary.

The Respondent's Decision

2. The Respondent considered the Appellant's private and family life in the United Kingdom. The claim under the Immigration Rules was refused on the basis that the Appellant failed to meet the suitability criteria in S-LTR.1.6 of Appendix FM given his past use of deception to enter the United Kingdom. However, the Respondent went on to consider the other substantive requirements of the Immigration Rules as the Appellant sought leave to remain on the basis of his family life with his partner and two children, all of whom were at that point Ghanaian citizens. The Appellant remains married to another individual and had not established that he meets the definition of having a partner with the person who he claims to be in a relationship with, nor had he established that he is in a genuine and subsisting relationship with her. The requirements of the rules in R-LTRPT of Appendix FM were also not satisfied because the Appellant did not have leave to remain at the time of his application, and his claimed partner is the other parent of the children and leave to remain on that basis had already been refused. It was not accepted that there was a genuine and subsisting relationship with the children with conflicting evidence as to his involvement with them.

3. Further, the Appellant did not meet the requirements of paragraph 276ADE of the Immigration Rules for a grant of leave to remain on the basis of private life, specifically that he would not face any significant obstacles reintegrating into Ghana where he has social, familial and cultural ties as well as where he completed his education and had a work history. There were no exceptional circumstances and no basis for grant of discretionary leave to remain outside of the Immigration Rules.

The evidence

4. Included in the Appellant's bundle as a statement made by the Appellant on 3 November 2015 prepared for his previous appeal, in which he uses and address in Dagenham, does not claim to be in a relationship with his partner but states that he goes to see his children every weekend in Corby while the mother is working.

5. The Appellant made three written statements in the course of this appeal, dated 11 January 2018, 14 April 2018 and 6 August 2018. The Appellant's first statement deals in part with his previous relationship with an EEA national and in part with his relationship with current family members. The Appellant's eldest daughter has been registered as a British Citizen and has resided in the United Kingdom continuously for 11 years (as at the date of that statement) since birth. She has been diagnosed as diabetic and has to take insulin, requiring additional care. The Appellant is in the

process of trying to establish contact and shared residence rights with regards to his other children, including a declaration of parenthood for his second child in family court proceedings. The previous family Court application was returned and a new one submitted on 5 January 2018.

6. In his statement dated 14 April 2018 (unsigned), the Appellant sets out an update to his previous statement and his disagreement with his previous appeal decision. He refers to family court proceedings to establish child contact and residence rights for his three children and confirmation that he is the biological father of his second child. He sees his children every weekend and attends church with them. The Appellant states that his relationship with his partner has soured since the earlier appeal decision but they have agreed that he stays in London from Tuesday afternoon to Thursday afternoon and at other times he looks after the children while she works nights. The Appellant sleeps in his eldest son's room when staying in the family home (the second child). The Appellant again refers to his EEA national wife.

7. In his written statement signed and dated 6 August 2018, the Appellant states that he is getting on much better with his partner and his residing with her and their children in Corby. He said that at times he spent Tuesday and Wednesday at his cousin's address in London but would always be in Corby from Thursday to Monday so his partner could go to college and to work. He has permanently lived with his family in Corby since the previous appeal hearing in September 2016. Prior to that and since 2012 they have lived together on an on-off basis with a difficult relationship, in part because the Appellant was still married to someone else and would not divorce her and in part because he was not able to work and support the family.

8. The Appellant's partner and second child were granted discretionary leave to remain in the United Kingdom for 30 months and the Appellant has been asked for information from the Respondent as well. I note at this point, that at the date of the hearing before me there was no positive reconsideration by the Respondent of the Appellants Case.

9. The Appellant refers to being the sole parent dropping off and picking up children from school, being registered as the authorised parent on school records, refers to family photographs and letters of support from others. The Appellant describes a very close relationship with his eldest child, her recent diagnosis of diabetes and his support for his second child who has sleep apnoea. This includes staying with him in hospital in London for sleep studies while the other children can remain at home with their mother. The Appellant is trained as to what to do case of an emergency during the night for his son. The Appellant is very attached to his youngest child has now one year old.

10. Part of this statement, said to be made by the Appellant, is clearly written by and/or copied and pasted from his partner's statement.

11. The Appellant attended the hearing, adopted his written statements and gave oral evidence in English. He stated that his partner supported his appeal but one of his children were sick over the weekend so she had to stay at home with them and in her absence her written statement is relied upon.

12. The Appellant remains married to an EEA national who he stated was working in the United Kingdom and to whom he speaks once in a while. The Appellant stated that his relationship with this person ended around 2010 and he didn't have an answer as to why he had not divorced her.

13. The Appellant's family in the United Kingdom include his partner and three children, born in 2006, 2009 and 2017. The Appellant has been permanently living with them since August 2016 and has also been in a relationship with his partner throughout the time since then. His relationship is not the best but they try to reach agreement for the sake of the children and sometimes when the couple argue the Appellant leaves and goes to his cousin's house or a friend's house. In the period between August 2016 and 2017, the Appellant stated that he takes the children to school during the week, looks after them every Saturday and Sunday night while the mum is working (which she has been able to do since a grant of leave to remain) and at the weekend they help out at and attend church, ride bikes and go to the park. The Appellant and his partner sometimes go together to church maybe once or twice in a month.

14. Prior to 2016, the Appellant was living in London and said that he went to Corby a couple of days week to help with childcare. The situation changed after the Appellant was in immigration detention when his partner realised that he was then no help with the children and it was difficult for her to work, so she agreed he could stay more often to help with the children. He stated he lives at the address six days a week and the other day with his cousin because his partner wanted to take responsibility for the children one day a week. It is normally a weekday but not the same day every week. At the address in Corby, the Appellant sleeps in his son's room due to his sleep apnoea although he does not know if his partner does this on the night he is not there.

15. In cross-examination, the Appellant was asked further about his partners non-attendance at the hearing and was asked if it was a coincidence that she was not here given the previous indication that she was not likely to attend. One of the children was vomiting on Saturday night and on Sunday, he could not go to school on Monday, the day of the hearing. It was planned for the Appellant's partner to attend court, she was going to come with the youngest child while the elder ones were at school and their godmother was going to collect them from school. The children's godmother lives in Corby and had previously made a statement in support of the Appellant's appeal.

16. The Appellant lives in Corby and sometimes elsewhere with a friend or his cousin if his had an argument with his partner. He is not registered for

council tax at the address in Corby but stated that he is on the water and TV licence bills. The Appellant was bailed by the CIO to live at his partner's address and continues to be subject to monthly reporting restrictions.

17. In relation to the family court proceedings, the Appellant stated that he pursued these because his name was not on the birth certificate for his second child and sometimes his partner threatens that he would be able to see the children in the future when she gets angry. The order for residential contact was said to be in case the Appellant wanted to take the children away in the future. In re-examination the Appellant sought to clarify his answer that when the children were on holidays the agreed residence order would allow him to take the children and for example bring them to London to stay with his cousin. The order is something proper to prevent an argument with his partner if she threatens to stop him seeing the children.

18. The Appellant's partner and two youngest children are Ghanaian citizens, the eldest child is a British Citizen. When asked why the family could not live in Ghana, the Appellant said that he met his partner here, the children can't speak any language of Ghana and haven't been there. The second child also has difficulties from birth and with sleep apnoea which the Appellant did not think could be supported in Ghana. It was agreed that all of the children would be able to continue with their education in Ghana but there was concern that the Appellant would not be able to afford the required medication for his eldest daughter, albeit he did not know how much this would cost.

19. The Appellant first met Rev Searle in the summer of 2017 and he has been to the Appellant's home about four times most recently earlier this year. Mr Muhammad is a friend of the Appellant who lives in London and provides him with financial support, he last saw him in the summer.

20. Rev Searle attended the hearing, confirmed and adopted his written statements and gave oral evidence in English. He has known the appellant for two years and two months, coming to his church often with at least one of his children, sometimes all three and his partner comes when she can. He has seen the Appellant with his partner and children as a family unit as claimed, seeing him with his children on a regular basis over the last two years including at the family home.

21. Rev Searle last went to the family home a couple of months ago to assist the Appellant's partner with her statement, which was done on his computer and he witnessed her signing and dating it.

22. In cross-examination, Rev Searle was asked if he knew why the Appellant's partner had not attended the hearing. He said that she has a level of fear about coming to court and is very reticent about sharing details of her private life and her past, including about the children and her partner. She also has a fear of the Respondent and immigration generally and is

worried about affecting her own status in United Kingdom. Rev Searle did not expect her to attend the hearing she was scared of coming to court and there are problems in her marriage with the Appellant. She is afraid of the Appellant being sent back to Ghana and didn't originally want the children to know anything about that possibility although she now seems to talk to the eldest child about this. Marriage counselling services have been identified for the couple but they do not have the financial resources to pursue it and have not attended any sessions.

23. Mr Mohamed attended the hearing, confirmed his details and adopted his written statement and gave oral evidence in English. He said that he met the Appellant in 2005 and visits him regularly in Corby where he has seen the Appellant together with his partner and children. The last time was about a month ago.

24. In cross-examination, Mr Muhammad says the Appellant and his partner have been in relationship for about 10 years. When the Appellant is not in Corby with the family, he comes to London and lives with a family friend in Dagenham. Mr Muhammad provides financial support to the Appellant and also sometimes lends him his car.

25. Mr Mante attended the hearing, confirmed his details and adopted his written statement, then gave oral evidence in English. He is the Appellant's cousin who the Appellant sometimes resides with when he has issues with his partner. The Appellant also brings his children to stay with Mr Mante on the weekends and school holidays. The Appellant lives in Corby when needed to care for his children and spends time at his cousin's address, particularly if there is a misunderstanding with his partner. Whether and when the Appellant comes to live with his cousin fluctuates and it is irregular. Mr Mante states that the Appellant has a very close relationship with his children but a difficult relationship with his partner and he could give no examples of when he had seen the Appellant and his partner together.

26. There is a written statement from the Appellant's partner signed and dated 6 August 2018, witnessed by Rev Searle. She states that she is the Appellant's partner who has lived with her and their children in Corby on and off since 2012. The Appellant looks after the children from Thursday to Monday each weekend, sleeping and living with them in Corby, allowing her to work nights and weekends and the children to be looked after. The Appellant has permanently moved in and lived with the family after the last appeal hearing in September 2016. The Appellant's partner was told the hearing did not go well and the Appellant was likely to be sent back to Ghana, at which point she realised she did not want to lose him or have a situation where he could not have contact with and look after the children. The level of contact increased and the Appellant's immigration bail address was changed to the family home.

27. The Appellant and his partner still have arguments, following which he goes and stays with his cousin. The arguments include problems that the

Appellant is unable to work and provide for the family and that he is still married to another woman. The Appellant is described as a good father with a close relationship with his children, including supporting them with their medical needs.

28. If the Appellant were not permitted to remain in the United Kingdom, it would be detrimental for the health of the eldest two children, particularly with their different medical problems and the need for a parent to stay overnight with one child in hospital on occasion.

29. The Appellant's partner ends her statement stating that she hopes to come to court to give evidence in support of the application but there were two possible problems. First, there is no one to look after the children who would be at school and second, the Appellant has not been able to work, she has no savings and may not be able to afford the cost of coming to London.

30. As above, there are parts of the statement of the Appellant's partner which are identical, or virtually identical to sections of the Appellant's statement.

31. The Appellant's bundle included a letter from his eldest child dated 17 August 2016 in which she expresses her fondness of her father and that he takes care of her and her brother while her mother is at work. An almost identical letter dated 1 August 2018 was also on file.

32. In addition to the witness evidence, the Appellant's bundle included a report from Diana Harris, Independent Social Worker dated 14 June 2017 and a significant volume of other documentation including previous immigration documents, unofficial blood test report, employment documents, medical documents in relation to the Appellant's children, family court documents, photographs and a number of supporting written statements from individuals who did not attend the oral hearing. The supporting written statements consistently talk of the Appellant caring for his children in Corby from Thursday night to Monday while his partner is studying and/or at work and talk about a loving relationship with his children.

33. The conclusion of the Independent Social Worker is that it is in the best interests of the Appellant's children to remain in the United Kingdom in their current circumstances, with both parents sharing caring and parental responsibility for them. The assessment was conducted with the Appellant and his two eldest children present (the youngest child had not been born at that time), the Appellant's partner not being involved in the main assessment session, with a follow-up telephone interview with her afterwards.

34. At the oral hearing, the Appellant handed up further documents in relation to his family court proceedings. These included an order for directions issued on 24 October 2018, referring to the children living with their

mother and a first hearing dispute resolution appointment being listed for 18 December 2018. Further to this a consent order signed on behalf of the Appellant and by the Appellant's partner on 10 August 2018, was submitted to the court on 4 November 2018 dealing with contact arrangements. There is no sealed copy or evidence of approval from the court of the same.

35. The consent order included a prohibited steps order to take effect in respect of all three children such that no person shall remove them from the jurisdiction of England and Wales, or the children school nursery. The agreed arrangements for the children state as follows:

> *"(a) for the avoidance of doubt the applicant father shall have parental responsibility and shared residence for the children ...*
>
> *(b) the agreed arrangements for the child one and three will be as follows:-*
>
> *i) at all times other than those set out here the children will reside with the Respondent Mother.*
>
> *ii) the Applicant Father shall have residential contact every week from Thursday after school when Applicant Father shall collect them to the following Monday morning when the Applicant father shall drop them to school.*
>
> *iii) the Children will also reside with the Applicant Father for the first half of the school holidays with specific dates to be agreed between the Parties, save for when the School Holiday is for just one day in which case they will reside with the Respondent mother.*
>
> *iv) nothing in the above order shall prevent the parties agreed to further additional contact between them.*
>
> *2. The proceedings in relation to Child 2, ... For whom the Applicant Father claims paternity, shall continue and be referred to a District Judge for directions."*

Closing submissions

36. On behalf of the Respondent, Mr Melvin relied on his outline written submissions in respect of the appeal rather than original reasons for refusal letter which is now out of date as the facts have changed dramatically since then. The two crucial issues in this appeal were identified as first, whether there is a subsisting relationship between the Appellant and his claimed partner; and secondly, whether the Appellant has a genuine and subsisting parental relationship with any of his three children.

37. As to the claimed relationship, the Respondent does not accept that there was a genuine and subsisting relationship as claimed and submitted that it was clear that the Appellant's claimed partner was not supporting the appeal given that she had failed to attend the hearing and give live

evidence. There was conflicting evidence as to her reasons for absence today, which were not credible. It is further entirely unclear as to why the Appellant would pursue family court proceedings if he was in a genuine subsisting relationship with the children's mother. It was however accepted that there has at some point been some kind of relationship between the Appellant and his claimed partner given that a child was born in 2017 but there is no evidence of a current relationship.

38. The Respondent accepts that the Appellant has some parental responsibility for his three children but submitted that the actual contact between them has been exaggerated. It was accepted that there was sufficient evidence that the Appellant resided with his children for three days a week and assists with medical appointments for them. However, for the other three or four days a week he does not live with the children, or even in the same location as them, or have contact with them.

39. The Respondent does not accept that there is a genuine and subsisting parental relationship between the Appellant and his children and raises significant concerns that the children were being used solely for immigration purposes. Mr Melvin highlighted the Appellant's immigration history and past findings of adverse credibility against him. His history included the use of false Ghanaian documents, a spurious asylum claim, protracted applications for leave to remain which have been unsuccessful, continued reliance on a past relationship with an EEA national of which there was little evidence and no reason for the couple not to have divorced and in conclusion it was submitted that this Appellant would do or say anything to remain in the United Kingdom, including using his own children for this purpose.

40. Mr Melvin submitted that it was difficult to argue that it would be reasonable for the children to leave the United Kingdom if there was a genuine parental relationship, given that it would be in the best interest to remain in the United Kingdom. There was no evidence to suggest that the children had ever been to Ghana, they spoke English and although they have some awareness of the culture and other languages in Ghana from their parents, they are well-established in education and integrated into the United Kingdom.

41. On behalf of the Appellant, Mr Saeed submitted that there is sufficient evidence to find a genuine and subsisting parental relationship between the Appellant and his three children and that his motive for it such a relationship is not relevant for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and in any event this was not specifically put to the Appellant and he has had no opportunity to respond to an allegation about his motives.

42. It was further submitted that both parents should be treated equally, it being likely that discretionary leave to remain has been granted to the mother and second child, as the eldest is now a British citizen and it would be inconsistent not to grant the other parent, in a situation where both

parents are involved in the children's upbringing, the same leave to remain. The Respondent has accepted that the Appellant looks after his children three days a week and some level of parental role has also been accepted.

43. Mr Saeed submitted that the Appellant was in a relationship with his claimed partner and there was no intention to hide that there were problems in that relationship and it is a difficult one, hence the family court proceedings.

Findings and reasons

44. The Appellant previously appealed an earlier decision of the Respondent dated 20 March 2015 refusing his human rights claim based on essentially the same parental relationships as in the present appeal (in respect of his two eldest children, the youngest not having been born at the time of the previous appeal). In accordance with the principles set out in Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka [2002] UKIAT 00702, the earlier determination of the First-tier Tribunal is the starting point in this appeal, although to a significant extent I accept that matters have moved on and changed since that decision.

45. It is noteworthy that in the previous appeal the Appellant did not rely on any relationship with a partner and in his evidence before that Tribunal, the Appellant stated simply that he had an understanding with his children's mother and that she is happy for him to stay with her as it takes the pressure off her having to find a babysitter and she knows the children always look forward to seeing him.

46. In a decision promulgated on 19 November 2015, the appeal was dismissed on human rights grounds by First-tier Tribunal Judge Grant. In that decision it was not accepted that the Appellant's second child was his biological son in the absence of being referred to in that way by the mother and a lack of DNA evidence. However such DNA evidence has since been produced and there are family court proceedings to have the Appellant formally recognised as the father. There is no substantive challenge by the Respondent of the paternity of the Appellant's three children, the youngest having been born since the previous appeal determination.

47. In relation to the Appellant's parental relationship with his eldest child, the key findings were as follows:

> *"9. I therefore find as a matter of fact that he is the father of one child …, A child with whom he does not reside. She lives with her mother in Corby and the appellant lives in London.*
>
> *10. There is evidence before the Tribunal that the appellant sees his daughter at weekends in [his partner's] letter dated 10 January 2014. Today, some 22 months after that letter was written there is nothing evidence to cover the period from*

February 2014 to the present date to demonstrate that the appellant has any ongoing contact with his daughter. The various school reports in the papers predate January 2014, the photographs are undated, the train ticket information refers to dates in 2013. It is clear from this that the appellant would order his train tickets online and receive an online booking with a code to collect the ticket from the self-service ticket machine. He has been sent his booking confirmation to various dates in 2013 but there is no credible evidence or any evidence that he has visited his daughter since then. [The appellant's partner] has not supported the appeal or given any evidence in support. I'm not prepared to accept the appellant's claim in evidence before the Tribunal that he has had any recent contact with his daughter as alleged or at all. I find as a matter of fact that the appellant has not demonstrated the family life exists between him and his daughter.

11. Overall I find the appellant is not a credible witness. He obtained his original visitor visa by deception and he was evasive, vague and incredible in his evidence before the Tribunal.

12. I find as a matter of fact the appellant does not demonstrated that he has a genuine and subsisting parental relationship with [his daughter]. This was a matter raised in the refusal and despite the enormous size of the appellant's bundle as stated above there is no evidence to show contact is or has been ongoing since [his partner] wrote a letter in support in January 2014. …"

48. In the present appeal, the Appellant relies on having a genuine and subsisting relationship with his partner and also a genuine and subsisting relationship with his three children, whose best interests would be to remain in the United Kingdom with him and it would be unreasonable to expect them to leave the United Kingdom in accordance with section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The Respondent accepts that if there is a genuine and subsisting relationship between the Appellant and his children (specifically the eldest two children who are qualifying children on the basis of the eldest being a British Citizen and the second eldest having been living continuously in United Kingdom for more than seven years), then it would be unreasonable to expect them to leave the United Kingdom (for the reasons given in submissions set out above). The two primary factual issues to be determined are therefore whether the Appellant is in a genuine and subsisting relationship with his partner and whether he is in a genuine and subsisting relationship with his children. I deal first with the claimed relationship with his partner.

49. I find on the basis that the Appellant has three children with his claimed partner, that he has at some point(s) in time being in some form of a relationship with her. I do not however find that this has been a genuine

subsisting relationship for the length of time claimed by the Appellant, nor that there is any current genuine and subsisting relationship between them for the following reasons. For ease I continue to refer to her as the Appellant's 'partner' as he has claimed, but this should not be taken as an acceptance of the relationship or any finding that she is in fact his partner.

50. The Appellant claims to have been in a relationship with his partner since at least 2005, his evidence only being that they split around 2009 but then reformed their relationship and were again living together full-time from 2012. During this period, the Appellant made various applications for leave to remain on the basis of his relationship with a different person, an EEA national spouse between 2006 and 2010, to whom he remains married. Although the Appellant states that their relationship broke down in around 2010, no steps have been taken to obtain a divorce and no specific reason has been given by the Appellant as to why he has not sought to do so. Given the Appellant's persistence in seeking to pursue an EEA ground during the course of these appeal proceedings and his evidence that his continuing marriage is a source of problems with his claimed partner and in light of the other adverse credibility findings I make against him, I find the reason for him remaining married to the EEA national is likely to be solely because of a perceived immigration benefit in doing so. The relationship with the EEA national is not directly relied upon by the Appellant in the appeal before me, but it is a relevant part of his immigration history only to the extent that it overlaps with the claimed period of the relationship with his partner that is relied upon. On the assumption that it was a genuine and subsisting marital relationship such that the applications for an EEA Residence Card were genuine, it undermines the Appellant's claim to also have been in a genuine and subsisting relationship with his partner at the same time.

51. The Appellant has maintained at various times during the present appeal proceedings, that he has been permanently cohabiting with his partner and children since 2012 and although his relationship has difficulties, it has been a genuine and subsisting relationship throughout that period. That is the scenario that was also presented to the Independent Social Worker for the purposes of her assessment. It is however inconsistent with his partner's evidence and entirely inconsistent with the Appellant's position before the Tribunal in 2015 and the application for leave to remain which preceded it, wherein he claimed not to be in a relationship at all and placed no reliance on any such relationship with a partner. As such there were no findings in 2015 of any genuine and subsisting relationship with a partner. There is no evidence before me to suggest to the contrary and I find at that time there was no relationship.

52. As to the present position, whilst I accept that the Appellant and his partner had a third child in June 2017, suggesting at least some form of relationship in late 2016, there is a lack of evidence of any current relationship other than what is stated by the Appellant himself.

53. There is a written statement signed by the Appellant's partner which says very little about their relationship other than they had lived together on and off since 2012 and more permanently since the previous appeal Tribunal decision in 2016, with continuing problems in the relationship. I attach very little weight to the limited contents of that statement as regards the claimed relationship on the basis that in significant part, the statement is identical to that submitted by the Appellant of the same date (although at least in part it appears to have been copied by the Appellant rather than the other way round) and the two statements have clearly not been written independently of each other. It is also very odd that the Appellant's partner's signature on her statement was witnessed by Rev Searle, his evidence being that he helped only with her statement because of printer problems, but had no involvement in the Appellant's statement signed on the same date and on his case, rom the same family home. There is no particular reason why the signature on a written statement needed to have been witnessed at all for the purposes of these proceedings, nor why it was in fact done in this case.

54. There is a suggestion in the statement that the Appellant's partner may not be able to attend the appeal hearing, but it is for a different reason than that given for her non-attendance on the day and a different reason again to that given by Rev Searle as to why she may not have attended the hearing in any event. I do not accept the Appellant's account as to why his partner did not attend the appeal hearing (as per her indication of the possibility of not doing so and Rev Searle's evidence that he did not expect her to attend), based on the claimed illness of one of his children as this was not supported by any medical evidence nor any statement from the mother. I find it much more likely that there was no intention on the part of the Appellant's partner to attend the oral hearing, to avoid the possibility of cross examination and because in fact there was no relationship. The witnessing of her signature on her written statement may have been an attempt to bolster the credibility of the same without her attendance, although no such submission was in fact made before me. In any event I do not find that the Appellant's partner genuinely supports this appeal on the basis of any claimed relationship between her and the Appellant and for the further reason set out below, it is likely that her very limited support of this appeal is in the interests of maintaining the status quo of the Appellant providing convenient childcare for the children to allow her to continue with her current work arrangements.

55. The written statements from the Appellant's eldest daughter do not refer to any subsisting relationship between her parents, only that the Appellant looks after the children while the mother is at work. The other supporting statements and oral evidence, as well as the Independent Social Worker report are all on the basis of an assumed claimed relationship rather than providing any specific evidence of it. In particular I note that very few examples could be given of the Appellant and his partner together or as a family together with the children, including, only occasional attendance at church by the Appellant's partner with the rest of the family.

56. Although it is stated that the Appellant has been bailed to his partner's address in Corby, there is little in the way of any documentary evidence of him living there and he accepted that he was not registered for council tax there, although said he was on the water bill and TV licence. The consistent position before me from the written and oral evidence, was that the Appellant stayed in the family home in Corby only for part of the week, from Thursday afternoon through to Monday morning, during which time he cared for his three children when his partner was neither studying or at work doing night shifts (and resting during the day). I reject the Appellant's claim that he resided there for 6 days a week or only infrequently went to stay elsewhere as an exaggeration.

57. The Appellant stays in his son's room when stays at the family home, not sharing a room with his claimed partner and I do not accept that there were any medical reasons for him to do so to assist with his son sleep apnoea given that there was no medical evidence that this was required nor done by his mother on days when the Appellant was not staying at the property. I do not find that the Appellant and his claimed partner are cohabiting as a couple in the usual sense of that word, even if he stays at the property a number of nights in a given week.

58. Leaving aside the aspect of the family court proceedings in relation to the paternity of the Appellant's second child, the majority of the family court proceedings for residence and contact with the Appellant's children are fundamentally inconsistent with the claimed relationship and cohabitation with his partner. Even in a difficult relationship, there would be no plausible need for such proceedings to be issued or pursued, even, as the Appellant claims, on a preventative basis in case he wants to take his children away for a short break to stay with friends or to prevent a future dispute. The nature of the terms agreed by the Appellant and his claimed partner to settle these parts of the proceedings in relation to the eldest and youngest child, do not suggest any subsisting relationship or cohabitation at all and instead agree that the children shall reside with their mother, with the Appellant having residential contact from Thursday after school to the following Monday morning and with specific arrangements for school holidays. As to the usual weekly arrangements, they seem to reflect the existing position and although nothing in the agreement prevents greater contact, none is evident in the material and evidence before me.

59. For all of these reasons, I do not find the Appellant to be credible in maintaining that he is in a genuine and subsisting relationship with his claimed partner, or that he is cohabiting with her and I do not find that she had any intention of supporting this aspect of his appeal. The Appellant is not in a genuine and subsisting relationship with a partner as claimed. There is in any event no submission on behalf of the Appellant that he could meet the requirements of Appendix FM of the Immigration Rules for a grant of leave to remain on the basis of such a relationship, nor any substantive submissions that his removal would constitute a disproportionate interference with it.

60. I turn next to whether the Appellant is in a genuine subsisting parental relationship with any or all of his three children. The eldest child, born in 2006 is now a British Citizen who has been resident in the United Kingdom from birth. The findings of the previous Tribunal in a decision promulgated on 19 November 2015 are that at that time, there was no evidence of any recent contact or relationship between the Appellant and his daughter and no genuine and subsisting parental relationship. That is the starting point from which I assess whether there is evidence postdating that appeal to suggest any change in that position.

61. As to the other two children, the second was born in 2009, is a Ghanaian national who presently has discretionary leave to remain in the United Kingdom until December 2020 (in line with his mother). Although at present the Appellant is not identified as his father on his birth certificate, there are ongoing family court proceedings in relation to that and the Respondent has not made any substantive challenge to the Appellant's claimed paternity and to deal with the change of circumstances since the previous decision in this regard above. The third child was born in mid-2017 and is also a Ghanaian national. This child is not a qualifying child for the purposes of section 117B(6) of the Nationality, Asylum and Immigration Act 2002.

62. The strongest of the three parental relationships is between the Appellant and his daughter, the eldest child, given her age and that she has made a statement in support of this appeal; however, in essence the evidence is broadly generic as to the relationship with each child and I find no fundamental distinction between them. The findings I make below are in relation to all three children.

63. There is broadly consistent evidence before me of a significant increase in contact between the Appellant and his children from late 2016, including him staying with them on a regular basis and providing care while their mother was studying/at work/resting after a night shift from Thursday afternoons to Monday mornings. There is also evidence from different sources of the Appellant attending hospital appointments in London with his second child, including overnight stays in hospital with him for sleep study purposes. The evidence also includes an increased role by the Appellant with regards to the children's school from late 2016 and documentary evidence in the form of photographs. The supporting written statements, including the oral evidence from witnesses outside of the family, also consistently support an ongoing relationship, at least since 2016 between the Appellant and his children.

64. The report of the Independent Social Worker also finds that there is a genuine and subsisting relationship between the Appellant and his children, albeit I attach little weight to this report given the circumstances under which the assessment was conducted and the misrepresentation of the family situation to Ms Harris which is inconsistent with the earlier findings of Judge Grant in 2016 and my findings as to the Appellant's claimed relationship with his partner. The situation presented to the

Independent Social Worker was that the Appellant had been consistently and permanently living within the family unit since 2012, in a genuine relationship with his partner throughout that time and in a genuine and subsisting parental relationship with his children throughout that time; which is clearly not the case based on earlier Tribunal findings as well as my own. In addition, there was no assessment of the family together and the only input from the Appellant's claimed partner was a brief telephone call after the main assessment and no critical analysis of that claimed relationship at all.

65. There is little dispute on the facts that the Appellant provides care for his children for part of the week, is involved in their education and medical care. That much is accepted by the Respondent, however it was submitted that this did not amount to a genuine and subsisting parental relationship because the Appellant's motives for doing so were to obtain an immigration advantage. There is considerable force in the suggestion of the Appellant's motive being for immigration purposes rather than a motivation of parental responsibility given first, the significant and substantial change in the level of contact and the relationship with his children after the dismissal of the Appellant's previous appeal, the timing of which I do not find is a coincidence. Secondly, the Appellant's pursuit of family court proceedings and reliance on the same for immigration purposes in circumstances which are fundamentally inconsistent with his claimed relationships, particularly with his partner. Thirdly, the Appellant's immigration history and previous adverse credibility findings, including deception and the use of false documents, form part of the relevant context. Finally, the Appellant's claimed partner's motives for her limited support of the appeal form part of the context, her evidence (to the extent that that can be relied upon for the reasons already set out above) is that she appeared to have a change of heart after the previous appeal Tribunal decision, that she wanted the Appellant to be able to maintain a relationship with his children essentially to provide convenient childcare for them while she was working.

66. For these reasons, I have little hesitation in finding that the Appellant was primarily motivated by immigration reasons to re-establish contact with his children, pursue family court proceedings and establish a relationship with his children in late 2016, a significant change of circumstances from the findings of Judge Grant in November 2016. However, I do not find that that in itself can lead to a conclusion that there is no genuine and subsisting parental relationship in existence. Whether there is such a relationship must be based on the factual reality of the Appellant's day-to-day and overarching parental role in his children's lives and given the child-centred focus of the assessment in section 117B(6) of the Nationality, Immigration and Asylum Act 2002, must also be viewed from the perspective of the children involved. Whatever the Appellant's motive for the relationship does not change how it would be viewed by the children themselves or how in reality that relationship is undertaken and maintained. On the facts of this case, I have found that the Appellant does undertake a direct parental role in his children's lives for approximately

half of the week, being involved socially, with their education and in support of medical conditions. I find that this amounts to a genuine and subsisting parental relationship regardless of the Appellant's reasons or motive for how that situation came about in late 2016.

67. As the Respondent expressly accepted at the outset of the last hearing before me, if I were to find that the Appellant was in a genuine and subsisting relationship with his children (primarily the eldest two children for the reasons already set out above), then it would be unreasonable to expect the children to leave the United Kingdom such that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 would be satisfied and the public interest does not require the Appellant's removal from the United Kingdom. On this basis and despite the adverse credibility findings made against the Appellant, the appeal must therefore be allowed on human rights grounds.

Notice of Decision

For the reasons set out in the earlier error of law decision, the making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it was necessary to set aside the decision.

The appeal is remade as follows:

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed Date 31st December 2018

Upper Tribunal Judge Jackson

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02251/2017**

THE IMMIGRATION ACTS

Heard at Field House
On 30th April 2018

Decision & Reasons Promulgated

.....

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

FEBI ACHAEMPONG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F Saeed, Solicitor, Legal Eagles Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Bart-Stewart promulgated on 8 February 2018, in which the Appellant's appeal against the decision to refuse his protection and human rights claim dated 15 February 2017 was dismissed.

2. The Appellant is a national of Ghana, born on 8 March 1968, who was issued with a transit visa for one day on 1 November 1999, pursuant to which the Appellant travelled to the United Kingdom and decided to stay. He has returned to Ghana on four occasions since then, albeit not in recent

years. On 9 June 2016 an application for an EEA Residence Card to certify permanent residence in the United Kingdom was made, which was refused by the Respondent and the appeal against that refusal was dismissed on 11 April 2007. A further application for the same was made on 13 October 2010 and refused by the Respondent on 8 February 2011. On 24 August 2014, the Appellant was encountered by police and despite giving a false identity, his true identity was confirmed and he was arrested and served with paperwork as an overstayer.

3. A human rights claim was made on 10 September 2014, which was refused by the Respondent and the appeal against that refusal was dismissed on 19 November 2015. An application for permission to apply for Judicial Review of the same refusal was lodged on 28 July 2016 and permission was refused on 5 August 2016. Following his detention for removal on 17 August 2016, the Appellant claimed asylum the following day and a few days later lodged a further application for permission to apply for Judicial Review which was refused permission on 24 October 2016.

4. The Respondent refused the Appellant's protection and human rights claim on 15 February 2017. The Appellant's asylum claim, based on the fear of persecution on return to Ghana from unknown persons because the Appellant had helped people who were witches or gay, was refused on the basis that it did not fall within the Refugee Convention and in any event was not considered credible. Although that aspect of the decision was challenged on appeal before the First-tier Tribunal there are no further challenges in relation to that part of the Appellant's claim therefore the detail is not set out here.

5. The Respondent considered the Appellant's private and family life in the United Kingdom. The claim under the Immigration Rules was refused on the basis that the Appellant failed to meet the suitability criteria in S-LTR.1.6 of Appendix FM given his past use of deception to enter the United Kingdom. However, the Respondent went on to consider the other substantive requirements of the Immigration Rules as the Appellant sought leave to remain on the basis of his family life with his partner and two children, all of whom were at that point Ghanaian citizens. The Appellant remains married to another individual and had not established that he meets the definition of having a partner with the person who he claims to be in a relationship with, nor had he established that he is in a genuine and subsisting relationship with her. The requirements of the rules in R-LTRPT of Appendix FM were also not satisfied because the Appellant did not have leave to remain at the time of his application, and his claimed partner is the other parent of the children and leave to remain on that basis had already been refused. It was not accepted that there was a genuine and subsisting relationship with the children with conflicting evidence as to his involvement with them.

6. Further, the Appellant did not meet the requirements of paragraph 276ADE of the Immigration Rules for a grant of leave to remain on the

basis of private life, specifically that he would not face any significant obstacles reintegrating into Ghana where he has social, familial and cultural ties as well as where he completed his education and had a work history. There were no exceptional circumstances and no basis for grant of discretionary leave to remain outside of the Immigration Rules.

7. Judge Bart-Stewart dismissed the appeal in a decision promulgated on 8 February 2018 on all grounds. The detail in relation to the protection claim is not set out here as there is no further challenge to those findings. In relation to private and family life, it was not accepted that the Appellant was in a genuine and subsisting relationship with his partner. As to the Appellant's children, although their best interests would be to remain in the United Kingdom with their mother, taking into account the Appellant's poor immigration history and conduct as well as his extended family in Ghana, there would be no disproportionate interference with his Article 8 rights if removed from the United Kingdom.

The appeal

8. The Appellant sought permission to appeal on four grounds. First, that the First-tier Tribunal refused to consider or determine the Appellant's claim that he had obtained permanent residence under the Immigration (European Economic Area) Regulations 2006. Secondly, that the First-tier Tribunal materially erred in law in failing to accept that there were extant family proceedings such that pursuant to the decision in MS (Ivory Coast) v Secretary of State for the Home Department [2007] EWCA Civ 13, he should be granted discretionary leave to remain at least to pursue those proceedings. Thirdly, that the First-tier Tribunal materially erred in law in considering the wrong facts in relation to the Appellant's claimed family life and that there was a lack of evidential basis for the findings made on it. Finally, there is an allegation that the First-tier Tribunal was biased was the Appellant.

9. Permission to appeal was granted by Judge Hodgkinson on the Article 8 grounds only on 7 March 2018. Permission was refused on the EEA point and in relation to the claim of bias. The Appellant renewed his application for permission to appeal to the Upper Tribunal on the EEA point but this was further refused by Upper Tribunal Judge Allen on 11 April 2018.

10. At the oral hearing, I sought clarification of the precise nature of the challenge under Article 8 of the European Convention on Human Rights given that the extensive handwritten grounds of appeal were at best difficult to follow and confused. Mr Saeed put the Article 8 grounds of appeal in three ways. First, in relation to the last two paragraphs of the First-tier Tribunal's decision, that insufficient reasons had been given why removal was proportionate on the facts of this case. Secondly, that there was a factual error in the judgement that only two children were referred to but the Appellant has three children in United Kingdom. Thirdly, that family life had been accepted from 2016 onwards but the First-tier

Tribunal failed to go through the balancing exercise or attach sufficient weight to the best interests of the children when doing so.

11. The second related limb in the appeal is in reliance on the decisions in MS and MH (pending family proceedings – discretionary leave) Morocco [2010] UKUT 439 (IAC), which were referred to by the First-tier Tribunal but not applied due to the finding that the Appellant had misled the court by stating that family court proceedings had actually been issued when in fact an application had been made but not yet formally issued. It was submitted that MH only requires a person to be in the "process of seeking" an order in the family court and there was no need to await the actual issue of proceedings. In the present appeal, the Appellant's initial application to the family court had been rejected for administrative reasons and had been resubmitted to his local court.

12. Mr Saeed also submitted that the EEA points remain relevant to the First-tier Tribunal assessment under Article 8 because they would show that the Appellant was in the United Kingdom lawfully. However, permission to appeal had not been granted on this ground and this point was not pursued further.

13. In response, Mr Tufan submitted that the findings made by the First-tier Tribunal in relation to the pursuit of family court proceedings were lawful and open to it on the evidence available. There remained a significant question as to why family court proceedings were being pursued at all given the Appellant's claim to be living in the family home with his children. At this point Mr Saeed clarified that the Appellant's relationship with his partner was a tumultuous one and proceedings were also pursued because he had not been named on the birth certificate of one of his three children as the father.

14. In any event, the key issue in the appeal was submitted to be whether the Appellant could benefit from section 117B(6) of the Nationality, Immigration and Asylum Act 2002, that if he had a genuine and subsisting relationship with qualifying children in United Kingdom, it would be unreasonable for them to leave. The Appellant's adverse immigration history would be relevant to the question of reasonableness and would have to be taken into account. Although the Court of Appeal's decision in MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705 was not expressly cited by the First-tier Tribunal, it was submitted that in substance the assessment made was in accordance with it.

15. As a separate point, Mr Tufan said it was unclear whether the decision of First-tier Tribunal Judge Grant promulgated on 19 November 2015 in relation to this Appellant was before Judge Bart-Stewart, but an additional copy was submitted and potentially relevant given the findings of existence or otherwise of family life contained therein.

Findings and reasons

16. I deal first with what was described in oral submissions is the second limb of the appeal, that in relation to the case of MH and family court proceedings. The Appellant's claim in relation to this point before the First-tier Tribunal, as contained in his written statement signed and dated 11 January 2018, was that he was still in the process of trying to establish contact and shared residence rights with two of his children and for the third to be declared to be his son. The Appellant said this was being pursued via family court proceedings against the children's mother over contact and residence issues with all three children. The Appellant stated that he previously sent an application, but it had been returned as a new form had to be used. This was done and resubmitted on 5 January 2018. There had previously been an application to the First-tier Tribunal for directions that the family court release documents in relation to the proceedings which Mr Saeed has said was in anticipation of their issue, which had not yet happened.

17. In the documentary evidence before the First-tier Tribunal, the Appellant had included a copy of an application form under section 8 of the Children Act 1989 for various orders in relation to his three children, including for acknowledgement of parental responsibility and a contact order for the oldest child, a declaration of fatherhood for the second eldest child and a contact order for the third child. In addition, there was an application for a shared residence order in respect of all three children. The application form is signed and dated 5 January 2017 but has not been issued in the family court. It seems from a letter from the East London Family Court dated 3 January 2018, that the application was returned because it was made on an older version of the form. A further application form, similarly completed, signed and dated 17 September 2017 was also in the Appellant's bundle but again did not evidence that any proceedings had been issued.

18. The issue is dealt with in paragraph 19 of the First-tier Tribunal's decision, further to which no additional consideration was given to the argument that the appeal should be allowed on the basis of MS because the Appellant was pursuing family proceedings because it was found that no such proceedings had in fact been issued and the suggestion that they had was "totally misconceived and misleading".

19. Mr Saeed submits that that was a material error of law because the Appellant could benefit from MS if proceedings were being pursued without any requirement that they had actually been issued. On the facts in MS, the appellant in that case had already had contact proceedings issued in the family court which had been ongoing for nearly a year by the time the then Asylum and Immigration Tribunal heard the initial appeal and the Respondent had dealt with the situation by given assurances or undertakings not to remove people during such proceedings. The Court of Appeal found that as a matter of principle the tribunal should have decided whether the appellant's removal on the facts as they were when appeal was heard, i.e. with an outstanding application for contact with the appellant's children, would have violated Article 8 of the European

Convention on Human Rights. If successful on that basis, then the appellant should have been granted discretionary leave to remain for sufficient duration to cover the outstanding contact application. It was inappropriate for the Respondent to proceed on the basis of undertakings or temporary admission and therefore leave an individual in limbo.

20. The Court of Appeal in DH (Jamaica) v Secretary of State for the Home Department [2010] EWCA Civ 207 confirmed that the decision in MS concerned the unacceptability of keeping an individual in limbo rather than giving legal effect, by the grant limited leave to enter outside the Rules, to her accepted entitlement to remain here for a specified purpose. That specified purpose being the pursuit of family court proceedings. On the facts in that case, there was correspondence in relation to contact with children but no family court proceedings had been issued. The tribunal considered the current situation, that the appellant in that case would lose the opportunity of pursuing an in-country application for contact if removed at that point and how the present situation was likely to develop. The appeal against the Upper Tribunal's decision was dismissed, although it was accepted that there may be a discreet Article 8 issue about attending contact proceedings in the United Kingdom for which entry may be sought in the future.

21. The issue of pending family proceedings following MS was considered by the Upper Tribunal in MH, where it was held that the Court of Appeal had accepted in MS that a decision to remove an applicant in the process of seeking a contact order may violate Article 8, in particular on the basis that removal of a parent/applicant during contact order proceedings would be unlawful because it prejudged the outcome of contact proceedings and, more importantly, would deny the applicant a possibility of any further meaningful involvement in the proceedings which may breach Article 6 of the European Convention on Human Rights. On the facts, the appellant in MH had sought permission to remain in in the United Kingdom under Article 8 in order to pursue an existing application in family proceedings for a contact order with his daughter.

22. There is nothing in the authorities referred to above to suggest that a person being in the process of seeking family court proceedings, nor the reference to pending family proceedings, that it was envisaged or intended that this was wide enough to incorporate a person who had not actually had any proceedings issued by the family court. Further, given that on the facts of MS and MH family court proceedings had in fact been issued, I do not find that the mere intention to pursue family court proceedings, even with attempted but invalid application having been made, is sufficient to show that a person is in the process of pursuing such proceedings to take any benefit from these authorities.

23. Put differently, as the Upper Tribunal confirmed in Mohammed (Family court proceedings – outcome) [2014] UKUT 419, there is nothing in the later case of RS (immigration and family court proceedings) India [2012] UKUT 00218 (IAC) (as approved by the Court of Appeal in Mohan v

Secretary of State for the Home Department [2012] EWCA Civ 1363) which followed that supports the notion that a mere possibility of an application being made (or pursued) is a relevant criterion in an immigration appeal when deciding whether to adjourn the appeal or direct a grant of discretionary leave to remain for such proceedings to be pursued.

24. For these reasons, I do not find any error of law in the First-tier Tribunal's decision to not consider further the possibility of family court proceedings given that none had been issued in this case and in light of the later findings that proceedings were being pursued for immigration purposes only.

25. In any event, had the First-tier Tribunal gone on to consider the guidance from the Upper Tribunal in RS in relation to actual proceedings, it would have been relevant to take into account factors such as whether the contemplated family proceedings would likely be material to the immigration decision; the public interest in removal irrespective of the outcome of family proceedings; and whether contact proceedings had been initiated to delay or frustrate removal rather than promote the child's welfare. In assessing these matters, a judge would normally want to consider the degree of the appellant's previous interest in and contact with the child or children; the timing of contact proceedings and the commitment with which they have been progressed; when a decision is likely to be reached; what materials (if any) are already available or can be made available to identify pointers as to where the child's welfare lies. These factors were in essence taken into account by Judge Bart-Stewart when reading her determination as a whole (this much is discernible from the decision despite the findings set out further below) and for the reasons given, it is highly unlikely that the intent to pursue family court proceedings would materially make any difference to the outcome of the appeal on Article 8 grounds. I would also note that even by the hearing before me, no family court proceedings had yet been issued.

26. Separately, there has never been a claim by the Appellant in the course of these proceedings that either Article 6 or Article 8 of the European Convention on Human Rights would be engaged on the discreet procedural fairness point, that he would be unable to effectively issue or participate in any contact proceedings once issued if he had already been removed from the United Kingdom. For the avoidance of doubt, there can be no error of law on this basis either.

27. In relation to the other grounds of appeal under Article 8 more widely, it would be helpful to first to set out the findings made by Judge Bart-Stewart against which to assess the grounds of appeal. This is however a far more difficult task than it should be given the wholly unstructured and jumbled way in which her findings and reasons are randomly set out. This section of the decision from paragraph 35 onwards follows no logical order and does not even deal separately with the protection findings which are interspersed amongst other considerations in an entirely random fashion. When dealing with the Article 8 aspects, there is no clear structure of

considering the Appellant's ability to meet the requirements of the Immigration Rules or otherwise, an assessment of the children's best interests, assessment of his right to respect for private and family life in accordance with the 5 stage approach in Razgar, including ultimately the factors to be taken into account on both sides for the balancing exercise to determine proportionality of removal.

28. The result is that the findings are confused, in places inconsistent and in other respects issues are seemingly not determined at all. For example, when considering whether the Appellant meets the requirements of the Immigration Rules, there is no clear finding on whether he fails to meet the suitability requirement in S-LTR.1.6, instead the Appellant is given 'the benefit of the doubt' on this point even in light of the findings of his use of deception and other adverse credibility findings.

29. There is a consistent finding that the Appellant has not established a genuine and subsisting relationship with his claimed partner but no clear finding as to whether he has a genuine and subsisting parental relationship with any of his children (and although reference is made to a third child expected in July 2017 and whose birth certificate was provided in the bundle, the decision focuses exclusively on the two older children). Although a genuine and subsisting parental relationship appears to be accepted in paragraph 51 and 55, supported by the evidence referred to primarily in paragraphs 38 to 41; there is also a finding in paragraph 55 that the parental involvement is motived by the Appellant's desire to remain in the United Kingdom and a wholly equivocal statement in paragraph 63 that 'even if the appellant now has a genuine and subsisting parental relationship with a qualifying child …' suggesting no actual finding of such a relationship. There is no clear finding as to actual contact between the Appellant and his children nor as to whether or not they are or have ever lived together.

30. The best interests of two (of the three) children are considered at various points in the decision with reference made to their residence since birth, age, nationality, education and medical conditions as well as development of private life particularly for the eldest child. In paragraph 56 it is stated that it would not be reasonable to expect either child to leave the United Kingdom, which is followed by consideration of whether it would be reasonable for them to remain in the United Kingdom without the Appellant. The latter is a relevant consideration only expressly under section 117C in deportation appeals, which is not the present case. The former would appear to indicate that it is in the best interests of the children to remain in the United Kingdom with their mother but if that is the assessment, it is not clearly expressed in the decision.

31. Further, although in paragraph 56 the conclusion as to reasonableness would appear to be in the Appellant's favour with regards to paragraph EX.1 of Appendix FM (although no express conclusion is given on that point) and further to section 117B(6) of the Nationality, Immigration and Asylum Act 2002; that is also questioned by the terms of paragraph 63 of

the decision to the effect that even if there is a genuine and subsisting relationship, it does not meant the Appellant should not be removed. There is however no consideration of nor proper application of the assessment of reasonableness for the purposes of section 117B(6) in accordance with MA (Pakistan) and even if the conclusion on this point was clearer in the decision, there is a lack of adequate reasons for it.

32. Although the use of a balance sheet approach is not proscribed when determining the final proportionality assessment, it has been strongly recommended by Lord Thomas in Hesham Ali v Secretary of State for the Home Department [2017] UKSC 60 and endorsed widely elsewhere, including most recently by the Senior President of the Tribunals in TZ (Pakistan) and PG (India) v Secretary of State for the Home Department [2018] EWCA Civ 1109. There are scattered references to matters of public interest in the First-tier Tribunal's decision and to some of the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002 (which is quoted) but there is a lack of clear application of all relevant matters as the 'cons' or of the 'pros' for the Appellant when it is ultimately found that there is no breach of Article 8 of the European Convention on Human Rights or of the weight to be attached to these factors.

33. Overall, I find the making of the decision of the First-tier Tribunal on human rights grounds involved the making of material errors of law. As set out above, these include a failure to make clear and consistent findings on material parts of the claim; a failure to expressly consider the Appellant's third child at all; a failure to assess whether it is reasonable for the qualifying child(ren) to leave the United Kingdom for the purposes of paragraph EX.1 of Appendix FM and/or section 117B(6) of the Nationality, Immigration and Asylum Act 2002 in accordance with MA (Pakistan) and ultimately a failure to take into account all relevant matters when conducting the final balancing exercise for the purposes of Article 8. As such, the decision of the First-tier Tribunal must be set aside.

34. It is appropriate for the re-making of the appeal to be undertaken by the Upper Tribunal as only limited further fact finding is required. That re-making will include consideration of the best interests of the children and Article 8 grounds only. There has been no challenge to the First-tier Tribunal's findings made in relation to the protection claim and no successful challenge on either the EEA issue (on which permission was refused) or the family proceedings point, on which I have found no error of law. Consequently, the conclusions on those matters are to remain standing.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

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

No anonymity direction is made.

Directions

A. The Appellant is to file with the Upper Tribunal and serve on the Respondent any further evidence on which he wishes to rely so that it is received no later than 14 days prior to the date of the next hearing.

Signed  Date 18th May 2018

Upper Tribunal Judge Jackson