IAC-AH-SC-V2

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04977/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 27 October 2022	**On the 06 December 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

IKO
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L Lourdes instructed by JML Solicitors
For the Respondent: Mr T Melvin, Senior Presenting Officer

DECISION AND REASONS

1. This appeal comes before me following a finding by Upper Tribunal Judge Owens that the decision of the First-tier Tribunal dismissing Mr Owusu's appeal was flawed by legal error and was set aside. This is the remaking of the decision on the appeal.

2. Following a helpful position statement from Mr Melvin and a skeleton argument of Mr Lourdes, themselves subsequent to a case management hearing before Upper Tribunal Judge Blundell, it is clear that the remaining issues before the Tribunal are as follows. The first issue is that of whether the appellant meets the suitability requirements under the Immigration

Rules. The second is whether he has a genuine and subsisting parental relationship with his children. The third is with regard to issues of private and family life and paragraph 276ADE(vi) of HC 395 and finally Article 8 outside the Rules.

3. It will be helpful that to confirm that the respondent has conceded that it would not be reasonable for the appellant's partner (now ex-partner) nor his children to relocate to Ghana, given her and the children's vulnerability. The Secretary of State has also conceded and does not dispute that the appellant is the father of his two twin sons J and N, in light of the most recent DNA report provided by the appellant to the Secretary of State.

4. It can be seen from the decision letter of 15 November 2018, refusing after reconsideration the appellant's human rights claim, that he has been in the United Kingdom since 2007, and it appears that he has been without leave since 19 July 2009. Subsequent to that he made various applications which were refused, most recently an Article 8 claim made on 10 December 2013 which was refused and certified, that certification having subsequently been withdrawn, and further evidence having been provided on 1 November 2018.

5. The basis of his claim to remain in the United Kingdom is on account of family life with his twin sons J and N. They are his children by his former partner Deborah Adu-Boakye.

6. The appellant has provided three witness statements from 2019, 2020 and 2022. In the first of these he referred to the genuineness and subsistence of his relationship with Ms Adu-Boakye with whom he was living, together with the twins. He referred to being her support since 2012 when the twins were born. He said at paragraph 24 of that statement that he shared his time living with Ms Adu-Boakye and looking after their children. Whenever she went on holiday he was responsible for looking after them on a full-time basis. He referred to the genuineness of the relationship. He said that he had parental responsibilities with the boys and spent a lot of time with them and supported them financially. (It is relevant to mention that there are also a number of references in this statement to his relationship with his other child born as a consequence of an extramarital relationship, in 2010). She no longer forms a relevant part of this appeal.

7. In his 2020 witness statement the appellant said, with reference to Family Court proceedings, which had taken place, that he only attended when he was told by Ms Adu-Boakye that he must attend to give evidence in relation to the twins as he wanted to ensure that the Family Court made any order in favour of his children. He referred again to the genuineness and subsistence of their relationship and their shared responsibility for the children. He said that they continued to reside in one family unit and he was actively involved in the twins' school runs and letters from the school confirming this. During the home schooling period in lockdown he was actively involved in teaching the children alongside their mother.

8. In the 2022 witness statement the appellant referred to the fact that his relationship with Ms Adu-Boakye had broken down in around April 2022. He said that despite what had happened in the relationship he still continued to look after their children and continued to share parental responsibility for them. They were both schooling and he was actively involved in doing their school runs and communicated with them on the phone each day. When they needed anything they asked him and he bought stuff for them and they went swimming and played football and he had taken them to the London Eye. Periodically they came and stayed with him at his house and they did activities and their mother had no issue in them continuing their relationship with him.

9. In his oral evidence the appellant confirmed the truth of these statements and wished to adopt them as his evidence-in-chief.

10. He said he had a good relationship with his children and tried to be a role model and to be a good father. They stayed with him every half-term and were in fact staying with him at the moment. This would be every six weeks and sometimes every month and it depended.

11. At the time when they were born he used to live with their mother and looked after them every day. He had been in their lives consistently as their father and they did a lot of activities such as swimming. If he were not allowed to remain in the United Kingdom, that would have a big effect on him and on them. He talked to them every day and he was the only father they had. Separation from them would lead to depression, anxiety and stress.

12. As regards his criminal record he said that from 2009 he had not been working and some of the offences were for him to get some money to pay his rent and get food and he had been stupid. The latest offence was when he had driven a friend's car as the friend was drunk and he was stopped by the police who abused him and was in custody for three or days and fined. Cannabis had been found in the car but he did not drink or smoke and knew nothing about it. Since 2018 he had come to realise that he wanted to be a father and play a role in his children's lives. He was very sorry for his stupidity when he was younger and wanted to be a role model for his children. He had committed no offences since 2018.

13. His former partner did not object to the children being with him. If it were not for him she would not bring the children up as when she had had a baby he had done everything for the children and if he was not there the children would have been taken into care as her older child had been. He had last spoken to her earlier today. He very much regretted his offences and was now a changed person and was trying to be a good father for his children.

14. On cross-examination the appellant had accepted that he had not had leave since 2009. He was asked about the dates in relation to living with his partner and the children in Reading and he said that he had been in

the relationship a year before the children were born and lived in London and after the children were born in 2012 his partner had gone to stay with her parents after giving birth. In 2013 they had decided to live together. The relationship had been on and off but even then he had played a role in his children's lives. It was the case, as he had said in his statement, that he had lived with her on an ad hoc basis between 2012 to 2019.

15. As regards the percentage of time he spent with the family he said that it was consistent with the children but 50% as to the relationship with his ex-partner. He had always been there for his children. If she had health issues he would be with the children in Reading and then come back to London. As regards him only attending the last hearing during the care proceedings in 2016, he said that before that year the relationship was on and off and he had a call from her as she there was concern about an issue so he had attended the court and they did not have his name at the time but gave him the right to give them his name. His ex-partner's older son was in Social Services' care but his being there as a father stopped his own children being taken away.

16. His ex-partner had always lived in Reading, having moved back after the children were born, from London. Originally she had gone to her parents' home but then she had got a council house. As regards evidence to show he was living there he said his bank account and GP were there and gas bills. They did not have a joint bank account.

17. The children were now in year 5. He was living in Essex, having been there for four months at his current address and previously lived in Barking where he had been for four years. He would go to Reading to collect the children and also sometimes went there as well and did activities with them. This had been going on for years. They had also stayed with him when their mother went on holiday when she would go a couple of times a year to Ghana for at least a month. He would take them to school and pick them up.

18. If asked he would say that he had joint parental responsibility for the children. As they were boys every decision needed to be discussed, for example when they wanted to play a game after school and he said not on school days and on assignments he would discuss them with them and when they came to him he taught them at home and also discussed issues such as them staying at friends' homes. He did not have a recent example of helping with a school project but when they were on Zoom in lockdown he had gone through a story with them, directed them how they understood to write it. He did not remember the name, it was a topic about hygiene and recycling containers in plastic. The most recent one was mathematics which he had done with them six weeks ago.

19. He agreed that his leave had expired in July 2009 and they made subsequent applications and the application of the partner of his now ex-partner was abandoned.

20. The next witness was Deborah Adu-Boakye. She had made two witness statements. In the first, in 2019, she referred to the fact that the appellant spent every weekend with them and sometimes weekdays and the twins and their father share a special bond. She said that he was a very important part of their lives and they had established a family life along with their two children and resided together as one family unit. If he were removed to Ghana their family lives would be severely disrupted. They had been in a subsisting relationship for many years.

21. In a second witness statement in 2020 she referred to the problems she had had after giving birth to her first son and asked the court to take into consideration her and children's circumstances in total. Only with the appellant's support was she was able to keep good care of their twin children.

22. In her oral evidence she confirmed the truth of her witness statements and wished them to form part of her evidence-in-chief.

23. She said that the appellant played a very important role in the children's lives. In the court case he had been granted parental responsibility for the twins so they shared responsibility. He had them at half-terms and helped to bring them up. Like any parent he tried his best.

24. She had been to Ghana three or four times at least, between 2014 to 2019, and when she was away the appellant was responsible for the twins. She would be away for between two weeks to a month.

25. As regards the arrangements with the appellant about contact it depended. Sometimes, when she went to Ghana to stay he would stay at her place with them or take them to his place. They were with him now at half term and they shared every half term. They took turns in the longer holidays such as Christmas and Easter and the summer holidays. He would have them this Christmas and she had had them last year and they shared in the longer holidays.

26. As to the effect on the children, if the appellant were required to leave the United Kingdom, she said that her older child did not have a father in his life and that had were led to a lot of things happening and he was in care. It would truly affect the twins as they had seen what had happened to their elder brother and it would affect their emotional, mental and physical health. It had been both of them from the twins' birth.

27. On cross-examination she said that although there was the reference to them residing as a family unit at that time, it was different now. She said they were together whether he lived in London or Essex and she would say that they were together. She had family in Ghana whom she visited when there. As to whether it would be a problem with visiting him with the children if he had to return, she said why would she go and visit him with the children as she had never taken them there. She was the wrong person to ask and the effect would be on the children and they knew what

they wanted. She could not impose a flight to Ghana on them as they did not want to go.

28. As well as seeing them during holidays the appellant saw them for hospital appointments, most recently two days ago, for one of the children's asthma appointments. She had registered him with the school so he got letters and emails and parents' evening also. Since COVID they had left activities for parents but previously had been to a sports day and an assembly before COVID. They were jointly responsible for the children. She agreed that she was the primary carer. As regards examples of joint decisions, one was to wait until the children were older before they would take them to Ghana. She could think of no other examples off the top of her head.

29. The appellant helped them with school work. They had tried to enrol them in mathematics and English classes. She was delaying as she wanted to see if there could be government help but he was pushing for the extra classes. He really helped in their school work and did little things, the small examples were that if she told them to do something and they disobeyed he would talk to them on the phone and they would listen to him. He had taught them basic skills such as washing and cleaning their teeth and doing shoelaces. It was not easy for one person, and when he came in it really helped.

30. The appellant had never been on the electoral role or paid council tax in Reading. As regards his financial contribution it was not much as he was not able to work at the moment but she did not mind as he helped in other respects. The last time he had helped financially was in the summer holiday when they went to him and he had got them trainers and outfits and did what he could. She was aware of his criminal record. On re-examination she said she was working as a support worker at a residential home and was studying in health and social care.

31. In his submissions Mr Melvin relied on the refusal letter and his position statement and the earlier position statement from 2020.

32. He argued that the appellant failed under the suitability test as he had offended over a lengthy period, though it was accepted there were no offences since 2018. The issue of genuine and subsisting relationship with his partner had fallen away and they had not been really residing together for some considerable time but it was accepted that he had half-term contact with the children and had at least some responsibility for them, which it was accepted was genuine.

33. As regards the Immigration Rules there was no family life outside EX.1 being maintained. He had genuine responsibility for the children but not within EX.1 as the children could visit him in Ghana regularly as it seemed the ex-partner travelled there. It was not said that the children could return to Ghana to live however.

34. Outside the Rules Mr Melvin relied on what was said in the refusal letter. The court had heard evidence that the appellant had had no valid leave since 2009 and all applications subsequent to that had been refused. There were no significant obstacles to him living in Ghana. He had come to the United Kingdom aged 36 in 2007. There were no exceptional circumstances outside his contact with the children. He had had unlawful residence at all stages so he could not meet the requirements of the Rules and there were no significant obstacles and it would not be unduly harsh for him to return to Ghana, bearing in mind his sporadic relationship with the children and it was not disproportionate to remain there from Ghana.

35. In his submissions Mr Lourdes relied on his skeleton argument and the case law put in. The most recent conviction had been in 2018 and the appellant was very remorseful. He had explained the circumstances of the most recent offence.

36. The children were qualifying children. He was not liable for deportation and had a genuine and subsisting relationship with his two British children. The evidence that they had provided gave detail as to the role he played in the children's lives. He looked after the children when his now ex-partner went abroad. The children could not be blamed for his offences. Reliance was placed on the authorities that had been put in, in particular in Beoku-Betts [2008] UKHL 39 paragraphs 20, 24, 37, 42 and 43, and MT and ET [2018] UKUT 00088 (IAC) paragraphs 29 and 34 and also in ZH [2011] UKSC 4 at paragraphs 7, 11, 13, 14, 16, 17 and 30. As regards paragraph 276ADE(1)(vi) the appellant had been in the United Kingdom for fifteen years. He had two children here. The private rights outweighed the public interest in this case and the appeal should be allowed.

37. I reserved my decision.

38. As regards eligibility, it was concluded in the decision letter that the parent eligibility requirements were not met because of doubts about the relationship with the twins. That difficulty has gone away.

39. It is clear that, as is accepted, the children are British citizens under the age of 18 and therefore the requirements of E-LTRPT.2.2 are met. As regards 2.3, though the appellant does not have sole parental responsibility for the children, the parent with whom they live is settled in the United Kingdom and is not the applicant's partner and the applicant is not eligible to apply for leave to remain as a partner since the relationship has broken down. As regards 2.4, though the appellant does not have sole parental responsibility for the children, he does have direct access to them as agreed with their mother and has provided evidence, as I am satisfied, that he is taking and intends to continue to take an active role in the children's upbringing. It is abundantly clear from the oral evidence that the appellant has had a continuing and strong relationship with his sons since they were born although he has never lived with them all the time but he sees them regularly and has a clearly qualitative involvement in their lives such as to satisfy this requirement of the Rules. As regards the

immigration status requirement, the appellant is not in the United Kingdom as a visitor or with valid leave nor is he on immigration bail. He is however in breach of immigration laws and as a consequence can only be saved if paragraph EX.1 applies. EX.1 applies if the applicant has a genuine and subsisting parental relationship with a child who is under the age of 18, is in the United Kingdom, is a British citizen and, taking into account the best interests of the child as a primary consideration it would not be reasonable to expect them to leave the United Kingdom.

40. I consider these requirements to be met. As I have set out above I am satisfied as to the genuineness and subsistence of the parental relationship with the children, they are both under 18 in the United Kingdom and are British citizens. It is common ground that it would not be reasonable to expect them to leave to the United Kingdom.

41. This is equally applicable to the financial requirements under E-LTRPT.4.1. Though the appellant is not able to maintain and accommodate himself and any dependants without recourse to public funds adequately, again in my conclusion EX.1 applies. There are no issues with the English language requirement.

42. Accordingly I conclude that the appellant satisfies the eligibility requirements of R-LTRPT requirements for limited leave to remain as a parent.

43. As regards suitability, it was concluded in the refusal letter that the appellant is deemed not to be conducive to the public good because of his criminal record of six convictions, having convicted six offences of theft, two miscellaneous offences, one drug offence and one offence against the person between 2009 and 2018.

44. The appellant cannot be saved by EX.1 with regard to suitability. Section EX is limited to covering exceptions to certain eligibility requirements of leave to remain as a partner or parent. I consider that the Secretary of State properly concluded that the appellant's case comes within S-LTR.1.6. There are a number of offences over a relatively short period, although I bear in mind that the appellant had not been convicted of any offences in the last four years, nevertheless, these are relevant and material matters which in my view entail refusal on grounds of suitability.

45. Nor do I consider that the appellant can succeed with regard to the issue of insurmountable obstacles to returning to Ghana. Though he has been out of that country for some fifteen years, it is right to point out, as Mr Melvin did, that he was aged 36 when he came to the United Kingdom and though it appears he has not been back to Ghana subsequently, by that age he must have become sufficiently well-versed in the real life in Ghana as to not make his return a very significant obstacle though it is clear that he would experience some difficulties on return.

46. The final issue however is that of Article 8 outside the Rules. As was pointed out in the decision letter, under paragraph GEN.3.2 of Appendix FM, it is necessary to consider whether there were any exceptional circumstances which would render refusal a breach of Article 8 because it would result in unjustifiably harsh consequences for the appellant, his partner and a relevant child or another family member taking into account the best interest of any relevant child as a primary consideration. In this regard it is important also to bear in mind paragraph 117B(6) of the Nationality, Immigration and Asylum Act 2002 which makes it clear that in a case such as this of a person who is not liable to deportation, the public interest does not require the person's removal where they have a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom.

47. As noted above, I accept the genuineness and subsistence of the parental relationship the appellant has with his twin sons. Nor do I consider that it would be reasonable to expect the children to leave the United Kingdom, and indeed that is common ground. It is therefore clear that under section 117B(6) the public interest does not, on my findings, require the appellant's removal.

48. Insofar as it is necessary beyond that to address the test in GEN.3.2 of Appendix FM, I consider that there would be unjustifiably harsh consequences for the children and in refusal of the appellant's claim his removal to Ghana.

49. It is clear, as set out above, that he has a close bond with his twin sons, sees them regularly and is heavily involved in their lives as he has been from the time of their birth. I also find credible the evidence that bearing in mind their mother's vulnerability there has been in the past a real risk and may be in the future that the difficulty she was experiencing in managing them, coping with them at the same time as working and studying place an excessive burden on her and the fear of losing them to Social Services must hang over her and indeed over them and over the appellant. I accept the evidence of both the appellant and his ex-partner that the impact upon the children would not just be harsh but unjustifiably harsh.

Notice of Decision

50. Accordingly though the appeal fails on other bases, it is allowed under Article 8 outside the Rules.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 24th November 2022

Upper Tribunal Judge Allen