IAC-AH-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17404/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 18 August 2022	**On the 08 September 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

Derrick Osei Owusu
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Fazli, counsel instructed by Adam Bernard Solicitors
For the Respondent: Ms S Lecointe, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the remaking of an appeal decision regarding the decision of the Secretary of State dated 16 October 2019 to refuse the appellant's human rights application.

Anonymity

2. No direction has been made previously, and there is no reason for one now.

Background

3. The appellant, now aged twenty-five, is a national of Ghana who entered the United Kingdom at the age of fourteen, with an EEA Family Permit on 30 January 2011. Hitherto he had, between 2006 and 2010, made several unsuccessful applications for a Family Permit. He was granted an EEA residence card as a direct family member of his mother, which was valid until 7 October 2016. He applied, unsuccessfully, for a permanent residence card which was refused on 24 February 2017. His second application was rejected on 3 January 2018.

4. On 11 July 2019, the appellant applied for leave to remain on human rights grounds, based solely on the family and private life which he had established in the United Kingdom, and it is the refusal of that application which is the subject of this appeal.

5. In a decision dated 16 October 2019, the Secretary of State refused the appellant's human rights claim. It suffices to say that the respondent did not accept that any of the requirements of paragraph 276ADE (1) were met and that she considered that there were no exceptional circumstances which would render the decision disproportionate.

The decision of the First-tier Tribunal

6. First-tier Tribunal Judge Young-Harry dismissed the appeal in a decision promulgated on 18 February 2020. Permission to appeal was granted by First-tier Tribunal Judge Grant on 18 May 2020. The decision of Judge Young-Harry was set aside following an error of law hearing on 24 May 2022.

The hearing

7. On 18 August 2022, I heard oral evidence from the appellant, who was extensively cross-examined by Ms Lecointe. His mother also attended the hearing and while she was willing to be cross-examined, she was obviously crippled by pain and Ms Lecointe stated that she had no need to cross-examine her. For his part, Mr Fazli stated that he could refer to his instructions taken earlier in the day.

8. Both parties made submissions. Ms Lecointe relied upon the decision of 16 October 2019 which she accepted contained minimal reasoning and made the following points, in summary. The appellant could not satisfy the Rules and he could continue his private life in Ghana. The appellant has an uncle in Ghana and while this uncle is not able to accommodate him it was within the appellant's remit to seek employment. There was no evidence to show that the appellant was not capable of seeking employment and no enquiries have been made regarding gaining employment in Ghana. The appellant's mother could support him in Ghana by giving him some assistance until he is independent. There was no evidence to support the claim that the appellant was badly advised in the past and therefore there

was no historic unfairness. The factors in section 117B were relevant, including that the appellant remained unlawfully in the UK.

9. Ms Lecointe did not address the reference in the papers to the appellant being in a relationship as Mr Fazli stated that the appellant was not relying on it, it being a new matter. As for the delay in the appellant obtaining entry clearance, Ms Lecointe argued that the decisions were correct at the time based on the evidence considered and that different evidence affected the decision to grant entry.

10. Mr Fazli confirmed that the human rights claim concerned an article 8 claim outside the Rules, based on the appellant's family and private life. In summary, he emphasised that the appellant continued to be dependent upon his mother and this amounted to more than normal family ties. The public interest was weakened significantly by the repeated refusal to issue the appellant a family permit and the effect this had on the appellant to this day. The unfairness complained of concerned the respondent's conduct rather than that of a previous representative. It was the error of the appellant's mother to naturalise and thus put the appellant's immigration status into jeopardy. Had the appellant been granted entry in 2006 or shortly thereafter he would have obtained permanent residency along with his mother and by this stage would also have met the private life requirements of the Rules having spent half his life in the UK.

Decision on remaking

11. In reaching this decision I have taken all the evidence before me into consideration along with the submissions made by both representatives. There was no issue as to the credibility of the account provided by the appellant and his mother, which is set out in their detailed witness statements. The appellant's oral evidence was wholly consistent with the written evidence.

12. The appellant was born in Ghana in 1996 and lived there with his mother until 2006 when she moved to the United Kingdom to be with her then husband, a union citizen. An application was made for an EEA Family Permit in 2006 and this was refused on the basis that the appellant was not related as claimed to his mother. Three further applications were made between 2007 and 2010 which were refused for the same reason. In her witness statement, the appellant's mother explains why she did not appeal the first three refusals of a Family Permit. In essence, she says that she and her former husband were not represented, and they thought they would succeed with a new application. It was only upon seeing a lawyer in 2010, that they appealed, on legal advice. Before the appeal was heard, the ECO reviewed the decision and granted the appellant entry clearance as an EEA family member. The appellant entered the United Kingdom in January 2011, then aged fourteen and was issued with a residence card, valid until 2016. I heard that the only new evidence provided by the sponsor for the appellant's appeal were photographs of her with the appellant.

13. In 2014, the appellant's mother naturalised as a British citizen, without legal advice and not realising that this would prevent the appellant from acquiring a right of permanent residence once his residence card expired in October 2016.

14. The appellant did not initially realise that he had lost his right of residence as his first application for a permanent residence card was not refused for this reason. He applied again in December 2017 and the decision explained that he no longer had a right of residence. On legal advice, a third application was made, without success. Following which the appellant made the current human rights application, on 11 July 2019.

15. It was submitted on the appellant's behalf that he continued to have a family life with his mother in the UK, as well as a private life. Ms Lecointe did not argue otherwise. I accept that submission for the following reasons. While the appellant's mother left the appellant in Ghana, aged ten, to join her husband in the United Kingdom, she made every effort to bring the appellant, financially support and visit him during the four years it took for entry clearance to be granted. After arriving in the UK, the appellant lived with his mother, stepfather and stepbrother until his parents divorced in 2013. Apart from a short period of remaining with his stepfather after the divorce, the appellant lived with his mother thereafter.

16. The appellant and his mother are dependent upon one another in different ways. The appellant, who owing to his immigration status is unable to work or study, is reliant on his mother for accommodation, food, and clothing, as well as for the cost of legal advice. Whereas the appellant provides support to his mother who suffers from serious dysmenorrhoea, on a monthly basis. The appellant takes care of his mother each month, in that he cooks, shops, and ensures she eats and takes her medication. This illness has resulted in the appellant's mother losing her employment on more than one occasion, most recently with Iceland. The appellant's mother speaks of the emotional support she has received from the appellant, particularly after the divorce. The appellant describes feeling isolated and trapped owing to his status and not wishing to socialise with his peers. During the hearing he confirmed that the separation from his mother aged ten had affected his emotional state. His mother confirms that the appellant lives an isolated life in that he is always at home and states that she would be 'broken' were he to have to leave after all the sacrifices she has made for him to be in the UK.

17. In *Kugathas* [2003] INLR 170 the Court of Appeal said that, to establish that family life exists, it is necessary to show that there is a real, committed or effective support between adult family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In *Uddin* [2020] EWCA Civ 338, it was said that the existence of family life depends on the substance of the relationship, not the form and that whether family life exists after a child turns 18, is a

question of fact, with no presumption either way. At {36}, the following guidance was given.

> 'Continued cohabitation will be a highly material factor to be taken into account and while not determinative, a young adult still cohabiting with a family beyond the attainment of majority is likely to be indicative of the continued bonds of effective, real or committed support that underpin a family life.

18. The appellant has lived with his mother since birth, with the exception of the four years when he was denied a family permit on the basis that they were not related. The evidence before me was of an isolated and emotionally scarred young man who has been dependent upon his mother emotionally and practically from birth to the present day. In turn, his mother is dependent upon the appellant for practical support, particularly when she is suffering from her medical issues. I am satisfied that family life has persisted beyond the appellant's eighteenth birthday.

19. In assessing the proportionality of the decision to refuse the appellant's human right claim, the starting point is that the appellant does not meet the requirements of Appendix FM, and this is a weighty factor on the public interest side of the balancing exercise.

20. I am required to have regard to the public interest considerations in assessing this Article 8 claim. Relevant in this case, is that the maintenance of effective immigration control is in the public interest, and the appellant is present with the UK without leave and has been for some years. While he speaks English and he is financially independent of the state, these are neutral factors, at best. In addition, while the appellant is presently in the UK without leave, it is not the case that his private life was established when he was here unlawfully however, it was established when his immigration status was precarious and thus, I have applied little weight to it. In any event, the appellant is relying on his family life with his mother as opposed to his private life. The decision to refuse his human rights claim will have the effect of permanently severing the appellant's family life with his mother. The decision itself was lawful and made in pursuance of a legitimate aim, that being the maintenance of an effective immigration control.

21. In considering proportionality, I have carried out the required balancing exercise. On the one hand, the appellant's immigration status was precarious, in that he had an EEA residence card for a five-year period and, in addition he has remained in the UK without leave thereafter. He does not meet any of the requirements in Appendix FM. On the appellant's side of the scale, he continues to be substantially dependent upon his mother notwithstanding his age. His relationship with his mother is close and has been forged by adversity including their separation from one another when he was at a young age and his mother's medical condition.

22. While it was not argued that there were very serious obstacles to his integration, I accept that it would be difficult for the appellant to start afresh in Ghana after 11 years absence and having spent his adult years in

the United Kingdom and included this in my consideration. The evidence before me was of there being no-one in Ghana who could provide support or accommodation. Indeed, the appellant's oral evidence was that the only relative he was in contact with was an uncle who lived with his own family in a rural setting who had asked the appellant to send funds to him. The appellant's mother has lost work because of her condition, is not currently able to work, and thus is not in a position to support the appellant financially in Ghana, even temporarily.

23. I consider that the public interest in the appellant's proposed removal to Ghana is significantly weakened by the repeated refusal of his applications for a family permit. That the fourth decision was swiftly reversed once an appeal was lodged underlines the unfairness experienced by the appellant and his mother. I do not accept the submission that the respondent was justified in refusing the applications on the basis that the appellant was not related to his mother. Evidence of the relationship in the form of a birth certificate was provided with each application and that should have sufficed in the absence of evidence of forgery. Furthermore, this is not a case where DNA evidence was subsequently provided. The only additional evidence provided with the appeal were family photographs. The effect of the respondent's conduct was that it deprived the then minor appellant of being able to join his mother in the United Kingdom from 2006 onwards and had he been able to do so, he would have been able to obtain permanent residence when she did. Furthermore, the appellant suffered emotionally owing to his age at the time when these decisions were made, and I accept that the preceding circumstances amounts to historic unfairness in the decision-making process.

24. I conclude that the appellant's circumstances outweigh the public interest considerations. It follows that the respondent's decision to refuse the appellant leave to remain on human rights grounds was disproportionate.

Notice of Decision

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed: T Kamara Date: 25 August 2022

Upper Tribunal Judge Kamara

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee may have been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable for the following reason. The appellant succeeded at appeal on the same facts and evidence put forward in his human rights application.

Signed: T Kamara Date: 25 August 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email