Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30747/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 July 2017	**On 18 July 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

JOHN SUNDAY AYINE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss D Ofei-Kwatia of Counsel instructed by Ronik Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana born on 20 November 1980. He arrived in this country as a visitor in 2002 with leave to remain until 20 June 2003. He subsequently overstayed. On 27 October 2014 he applied for leave to

remain on the basis of his relationship with a British citizen, the sponsor, and her two children from a previous relationship.

2. The respondent considered that the appellant's relationship with his partner did not qualify under the Rules as they had not been living together in a relationship akin to marriage for at least two years prior to the date of application. Reference was made to GEN.1.2. of Appendix FM. The appellant said he and his partner had been living together since February 2013, but despite a request being made for further evidence, the Secretary of State was not satisfied that the appellant had adduced evidence that he qualified for leave to remain as a partner as defined. The Secretary of State noted the appellant did not have sole parental responsibility for the stepchildren. A point was also taken that the appellant was not taking any active role in the lives of his stepchildren, relying on a report received from the children's school which stated he was not listed as an emergency contact for either of the children, and that none of the teachers was aware of a man dropping off or collecting the children.

3. The appellant appealed. The appellant was represented by Counsel (not Miss Ofei-Kwatia), but there was no Presenting Officer for the respondent.

4. Having set out the respective cases of the parties the First-tier Judge dealt with what is really the principle issue in this case in that it was contended that the appellant should have been dealt with as the spouse of the sponsor and not her partner because of a customary marriage in Ghana. The judge dealt with the issue of the appellant's relationship in the following extract from her determination:

> "19. It is the appellant's case that he is the sponsor's 'spouse'. He seeks to rely on a customary marriage which is said to have taken place on 22nd February 2014. However, on the evidence before me, the appellant has failed to satisfy me on the balance of probabilities that he is legally married to the sponsor or that the customary marriage relied on in fact took place. Although the appellant's bundle includes some evidence relating to the purported registration of the customary marriage, it does not include the marriage certificate itself. The reasons for refusal letter refers to the appellant having provided a customary marriage certificate but this in fact appears to be a document evidencing the purported registration of the marriage and not a marriage certificate. The statutory declarations now relied on by the appellant are dated February and March 2014. The appellant's application was made on 17th November 2014. If these documents are authentic and existed at least eight months before the date of application, I would have expected the appellant to provide them to the respondent with the application. Furthermore, the statutory declaration refers to the marriage ceremony taking place in Accra and states that 'dowry was paid

in full and all other customary rites in terms of drinks and libation were performed after which prayers were said by the principal members of both families to seal the marriage and the couple were declared husband and wife.' However, the appellant has failed to provide any photographic evidence in respect of this ceremony or any evidence to confirm the payment of a dowry. It was also the appellant's oral evidence that both of his parents are dead and that he had no close relations living in Ghana which undermines the statement in the statutory declaration that the ceremony was attended by the principal members of both families. It is for the appellant to provide sufficient evidence to prove that he is legally married in Ghana and to satisfy me that the documents that have been provided are genuine and can be relied on. He has failed to do so. I therefore find that the appellant has failed to establish that the sponsor is his 'spouse' for the purposes of GEN 1.2.(i).

20. In his application form, the appellant stated that he started living together with the sponsor on 11th February 2013. The application form is dated 17th November 2014. The appellant and the sponsor were not therefore living together in a relationship akin to marriage for at least two years prior to the date of application and so the appellant is unable to bring himself with a GEN 1.2(iv). The fact that the sponsor does not meet the definition of 'partner' as provided for by GEN 1.2 means that the appellant cannot qualify for leave to remain under Section R-LTRP."

5. The judge then found that the appellant did not qualify for leave to remain under the Rules, nor that there were very significant obstacles to his integration into Ghana.

6. The judge then turned to consider Article 8 outside the Rules and accepted that the appellant enjoyed a private life and arguably a family life in the United Kingdom, and that Article 8 was engaged. The determination concludes as follows:

"23. In conducting any balancing exercise under Article 8, there is a duty upon me under Section 55 of the Borders, Citizenship and Immigration Act 2009 to treat the best interests of any child affected by my consideration as a primary consideration. In this case, I must have regard to the sponsor's two children, who are aged eight and eleven. I did not receive any oral or written evidence from the children in respect of their feelings towards the appellant and how they would feel about him no longer being a part of their household. However, I am willing to accept that they are fond of the appellant and have become accustomed to him featuring in their lives. Nevertheless, the appellant is not their father and I am told that the children continue to see their biological father approximately three times a month and that

they maintain contact with their biological father by telephone. I also take into account the fact that they could maintain contact with the appellant if he returned to Ghana using modern forms of communication and could possibly visit him there in the future. I was told that the appellant takes and collects them from school each day. This was also the evidence of the sponsor. However, the sponsor said that she is no longer in employment and I find that she would be available to escort her own children to and from school if the appellant were no longer living with her. I also take into account the fact that the children are still relatively young and I find that they are likely to adjust without any significant difficulty to a change in the composition of their household, just as they did when the appellant first moved in with them in February 2013. I find that it is in the best interests of the children to continue to live with their mother and to continue to maintain their relationship with their biological father.

24. In considering the proportionality of the appellant's removal, I must also have regard to the public interest factors set out in Section 117B of the Nationality, Immigration and Asylum Act. Section 117B(1) confirms that the maintenance of effective immigration control is in the public interest. The appellant came to this country in 2002 as a visitor and he has remained here illegally ever since. I find that he has shown a blatant disregard for the immigration laws of this country and that this must weigh heavily against him. In respect of Section 117B(2) I accept that the appellant speaks English. However, the case of **AM (s117B)** Malawi [2015] UKUT 0260 makes it clear that this is a neutral factor in any consideration of proportionality under Article 8. The appellant is not financially independent and I note that the sponsor confirmed that she was now reliant on benefits. I was not provided with any evidence to suggest that the appellant is skilled or qualified in any particular field of work and I am therefore unable to conclude that he would gain employment without difficulty if he were granted leave to remain.

25. Section 117B(4) provides that little weight should be given to a private life or a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom illegally. In this case, the appellant has been in the United Kingdom illegally for the duration of his relationship with the sponsor. I therefore attach little weight to his relationship with her. I also take into account the case of **Rajendran** [2016] UKUT 138 which confirms that although Section 117B(4) refers to private life and not to family life, when assessing the weight to be attached to any family life, the unlawfulness of an applicant's stay in this country is something that can nevertheless be taken into account under established

Article 8 principles. The appellant and the sponsor have chosen to embark upon a relationship in the full knowledge that the appellant has no right to be here. Any hardship or emotional distress caused by the appellant's removal is therefore entirely of their own making.

26. Section 117(6) provides that in the case of a person who is not liable to deportation, the public interest does not require the person's removal where the person has 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. It is the appellant's case that he meets this requirement. I do not agree. I accept that the sponsor's children are qualifying children by virtue of their British citizenship and I also accept that it would not be reasonable to require them to leave the United Kingdom. However, I find that the appellant does not enjoy a 'parental' relationship with the children. I have considered the recent case of **R (on the application of RK) v SSHD (s117B(6)); "parental relationship" IJR** [2016] 00031 which acknowledges that a parental relationship may be enjoyed by someone who is not a child's biological or adopted parent and may be enjoyed by more than two people. I particularly note that at paragraph 45 of the judgement, Upper Tribunal Judge Grubb recognises that a step-parent or partner of the primary carer of a child when a family has split after separation or divorce of the parents may in certain circumstances fall within this category. However, notwithstanding the fact that the appellant has been living as part of the same household as the sponsor's children for more than three years, the appellant has failed to satisfy me that his relationship to those children is properly categorised as a 'parental' one. I note that the children continue to see their biological father on a regular basis. I have not been provided with any evidence to suggest that the appellant is involved in taking any major decisions in respect of their care and upbringing. He is also not contributing towards their upbringing financially. The fact that he may take the children to school and pick them up is not enough to amount to a 'parental relationship'. I have also not been provided with any evidence from the children themselves to suggest that they view the appellant as a father figure. Although a letter dated 4th November 2016 shows that the children's school has apologised to the sponsor for disclosing information to the respondent without gaining her prior consent, the school has not provided any evidence to contradict the factual information given in the e-mail of 13th May 2015 that is relied on by the respondent in the reasons for refusal letter, or to suggest that the appellant attends parents evenings or other school events or to confirm that he is on their records as an emergency contact or that he has ever been seen to escort the children to and from school. On the

basis of all of the information before me, I find that the appellant does not have a 'parental relationship' to the sponsor's children for the purposes of Section 117B(6) and that he is therefore unable to benefit from this provision.

7. For all the reasons given, I conclude that the appellant does not meet the requirements of the Immigration Rule and that there is no basis for allowing his appeal under Article 8 outside the Rules. Of course, there is nothing to prevent him from submitting an application for entry clearance in the future if he is able to meet the relevant requirements of the Immigration Rules. The appeal is dismissed."

8. There was an application for permission to appeal. On 31 May 2017 permission to appeal was granted on the first and second of the grounds. It was found to be arguable that the judge had not correctly applied the law to the facts in relation to the customary marriage by proxy of the appellant. In relation to ground 2 it was arguable that when considering whether the appellant met the Immigration Rules for the purpose of proportionality in consideration of Article 8, that the appellant and his sponsor had been living together in a relationship akin to marriage for over two years at the date of hearing.

9. Counsel argued that the judge had erred in finding that the appellant was not married to the sponsor in paragraphs 19 and 20 of the Rules. There was a marriage certificate which had been before the Home Office. The procedures complied with the legal requirements in Ghana. The Ghana customary marriage registration certificate was the only officially obtainable documentation/certification of a valid customary marriage having taken place in Ghana. The Secretary of State appeared to have accepted the customary marriage and there was no reason to go behind the documents relied upon. Counsel sought to rely on matters on which permission had not been granted. She acknowledged that the grounds had not articulated the point but she had "plugged the gap" as she put it. However I saw no reason to allow such points to be raised at the hearing in all the circumstances. However, she did argue the point which was raised in ground 2 on which permission had been granted – as of the date of the hearing the parties had been living together for three years and this could be taken into account under Article 8.

10. Mr Clarke submitted that the argument about the customary marriage ignored the reasoning of the judge who had not found the documentary evidence reliable on the balance of probabilities. It was not the case that the refusal letter accepted the validity of the marriage, and indeed it was implied that the requirements were not met – if it had been accepted that the parties were married, then the decision would have been worded differently.

11. The judge's reasoning in paragraph 19 was comprehensive. Reference was made to **NA (Customary marriage and divorce – evidence) Ghana [2009] UKAIT 00009**. In paragraph 16 the expert had stated that the best evidence was "from witnesses who were present at these informal events to confirm they took place." Any error in respect of the description of the document by the First-tier Judge was immaterial. In paragraph 19, however, the judge had made very significant credibility findings. Statutory declarations in February and March 2014 postdated the appellant's application and the judge was entitled to make the comments she had done about them. The burden lay on the appellant as established in **NA (Ghana)**. There was no evidence about the dowry and she had not erred in referring to the death of the appellant's parents, particularly as the appellant's father's signature appeared to feature on the document at pages 22 to 23 of the bundle which is described as a statutory declaration. Mr Clarke sought to make an additional point by reference to paragraph 5 of **NA (Ghana)** where it had been said that a valid customary marriage could only be validly contracted between two Ghanaian citizens and both parties must have capacity to marry.

12. In reply Counsel submitted that she had had no notice of the point about customary marriages needing to be contracted between two Ghanaian citizens, and it was not a good point as it had subsequently been found to be wrong. There were attempts to go behind a properly issued certificate.

13. At the conclusion of the submissions I reserved my decision. I have carefully considered all the material before me. I remind myself that I can only interfere with the decision of the judge if it was materially flawed in law.

14. In this case the grounds were limited as I have said by the First-tier Tribunal to grounds 1 and 2.

15. The principal issue is the question of the validity of the marriage. The problem with the appellant's submission is that it is quite clear that the burden of proof rests on the party relying on the marriage as is said in **NA (Ghana)** and the judge correctly addressed herself on the burden and standard of proof. I am not satisfied that any error in the description of the certificate by the judge was in any way material. The point made by the judge about the statutory declarations was a perfectly proper one. The judge was further entitled to comment that there was no photographic evidence in respect of the ceremony or any evidence to confirm the payment of a dowry. There was the odd feature that prayers were said by the principal members of both families when it was the appellant's evidence that both of his parents were dead and that he had no close relations living in Ghana. Mr Clarke pointed to the document in the appellant's bundle which appeared to feature the signature of the appellant's father. This does not appear to be a point directly relied upon by the judge, but it does nothing to undermine the judge's conclusions and observations. It was open to the judge to find there was insufficient

evidence to prove that the appellant was legally married in Ghana and that the documents provided were genuine and could be relied upon.

16. It followed from these findings that the appellant could not meet the definition of partner under the Rules as the judge states.

17. Permission was granted in respect of ground 2 on the basis that it was arguable that:

> "when considering whether the appellant met the Immigration Rules for the purpose of proportionality in consideration of Article 8, that the appellant and his sponsor had been living together in a relationship akin to marriage for over two years at the date of hearing."

18. It was pointed out that the judge had accepted in paragraph 26 that the appellant had been living as part of the same household as the sponsor's children for more than three years.

19. It is quite clear that the judge recognised that her duty was to look at matters as at the date of the hearing. In conducting the balancing exercise the judge took into account all relevant matters. She comments that she had no written or oral evidence from the children but accepted they were fond of the appellant. She accepted that the appellant continued to see their biological father some three times a month. Contact was maintained with him by telephone. Contact could also be maintained with the appellant, and as she comments in paragraph 27 of her decision, there was nothing to prevent him from applying for entry clearance if appropriate. It is plain that the judge gave careful consideration to the best interests of the children.

20. There were significant countervailing factors in the case as the judge points out by reference to the statutory considerations set out in Section 117B of the Nationality, Immigration and Asylum Act 2002. She was entitled to find that the appellant had shown a blatant disregard for the immigration laws which must weigh heavily against him. The appellant had been in the UK illegally for the duration of his relationship with the sponsor. The parties had chosen to embark upon a relationship in the full knowledge that the appellant had no right to be in the United Kingdom.

21. The judge in paragraph 26 of her determination found that the appellant did not have a genuine and subsisting parental relationship with the children and she was entitled to conclude that the relationship was not properly categorised as a parental one in all the circumstances. Permission to appeal in respect of this issue (which had been raised in ground 4) was not granted and I see no reason to open up argument on the grounds on which permission was not granted. I do not find that the judge erred in concluding that the appellant did not make out a case under the Rules. The balancing exercise under Article 8 had to be taken in the

light of the statutory considerations to which the judge alludes in paragraphs 24 and 25 of the decision.

22. For the reasons I have given I am not satisfied that the decision of the First-tier Judge was materially flawed in law. The appeal is dismissed.

23. The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 18 July 2017

G Warr, Judge of the Upper Tribunal