Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06085/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th December 2017	**On 18th January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR S K K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Knorr, instructed by Wilson Solicitors LLP
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Ghana, appealed to the First-tier Tribunal against a decision of the Secretary of State made on 4th February 2016 to refuse his application for leave to remain in the UK on the basis of his private and family life. First-tier Tribunal Judge Bartlett dismissed the Appellant's appeal. The Appellant's application to the First-tier Tribunal for Permission to Appeal was refused. A renewed application to the Upper Tribunal was granted by Upper Tribunal Judge McWilliam on 15th September 2017 on the basis that it was arguable that the judge erred in

concluding that there was no family life between the Appellant and his brother.

2. The background to this appeal is that the Appellant entered the UK on 23rd October 2000 with a student visa. His application for further leave to remain as a student was refused by the Respondent on 4th September 2002 and a subsequent application for indefinite leave to remain and leave to remain were refused in 2003. The Appellant made an application for leave to remain as a student in September 2005 but it appears that that was refused on 11th January 2012. On 7th September 2015 the Appellant applied for leave to remain on the basis of his family and private life and the refusal of that application is the subject of this appeal.

3. The Appellant claims that he met his wife in Ghana in 1997 and that she visited him in the UK once a year between 2003 until 2008 when she remained in the UK. They married in the UK in 2009 when neither had leave to remain and they have since had two children who at the date of the hearing in the First-tier Tribunal were aged 4 and 2. It was also the Appellant's case that he has a close relationship with his brother T with whom he resided in Ghana prior to both coming to the UK and residing in their parents. T now lives with his parents and the Appellant claims that he visits his parents' home two to three times a week to help out with his brother who has mental health issues.

4. The First-tier Tribunal Judge heard the Appellant's appeal and that of his brother on the same day. The First-tier Tribunal Judge allowed T's appeal on asylum grounds. I was informed by the parties that the Secretary of State had sought permission to appeal against that decision but permission had been refused by the First-tier Tribunal and by the Upper Tribunal. At the hearing before me Mr Tarlow indicated that it was not intended to challenge that decision any further. He also indicated that, if an error of law was found, the Secretary of State would consent to the decision in T's successful appeal being considered in the remaking of the Appellant's appeal.

The Grounds of Appeal

5. The Grounds of Appeal put forward four grounds challenging the decision of the First-tier Tribunal as amplified at the hearing.

6. The first ground contends that the judge erred in finding that there is no family life between the Appellant and his brother. Ms Knorr relied on paragraph 18 of **Huang [2007] 2 AC 167** and submitted that the judge erred in focusing heavily on whether the practical support provided by the Appellant could be provided by others and did not focus enough on the emotional relationship and the background to the relationship between the Appellant and his brother. In her submission the nature of the relationship between the Appellant and his brother is not in dispute and if that relationship is looked at in the context of a normal relationship between two adult siblings the question is whether that amounts to more than

normal emotional ties. She referred to paragraph 13 of the grounds and to T's witness statement indicating that he has no friends and that he treats his brother as his friend. She submitted that the judge erred at paragraph 29 of the decision in saying that she did not accept that T is "dependent on the Appellant to the extent required to create a family life for the purposes of Article 8 ECHR". Ms Knorr submitted that the judge took the wrong approach to the assessment of family life and that the reasons for not accepting that the family life between the Appellant and his brother were not sustainable. In her submission the judge took into account factors that were not relevant to the quality of the current relationship between T and the Appellant. She submitted that factors taken into account in the assessment of family life were matters that would go to proportionality rather than to the assessment of family life. In her submission the judge failed to give sufficient consideration to the history of this relationship and failed to take into account that the brother has been dependent on the Appellant for 23 years; that they lived together in Ghana after the Appellant came to the UK; that the Appellant looked after T for six years in Ghana and delayed coming to the UK on a student visa until T was able to come, and that they both came in October 2000.

7. Ms Knorr pointed out that the Appellant lived with his parents and T until he moved back to live with his own family. In her submission the Appellant is one of four people in T's life, he has had a long-term relationship with him and that that history had not been properly considered. She submitted that the judge's conclusion at paragraph 30 that she did not accept that, if the Appellant and the family returned to Ghana, this "would have a devastating affect" on T. She submitted that this is contrary to the evidence at C290 of the Appellant's bundle contained in a medical report in relation to T which sets out his diagnosis of paranoid schizophrenia and obsessive compulsive disorder and states at 9.1 "Family plays a significant role in supporting [T}.

8. Ms Knorr submitted that both of the Appellant's parents have British citizenship as does his younger brother J who attends university in Middlesex. She submitted that the evidence shows that the Appellant is a significant source of emotional and social support for T who talks to his brother or his parents when he is feeling low in mood. She submitted that the evidence shows that the Appellant is able to motivate T and get him out of the house to attend social occasions like parties or going to church and help him to adapt to social situations by role playing and conversations. She referred to the medical report which concludes that T is able to function in his current state only with the significant support he receives from family members who live in the UK. In her submission this matter was not fully considered the judge. She also submitted that the judge had failed to take into account her own finding in the Appellant's brother's appeal at paragraph 19 that the Appellant's brother's behaviour was "difficult to manage". In her submission the Appellant's brother has a cocoon of support and each family member plays a different role and even then the family struggle to manage him. Therefore in her submission there was no basis for the judge's finding that other family members could

fill the gap left by the Appellant. She submitted that the witnesses were not asked about this in oral evidence. She submitted that any error was material because the judge failed to properly appreciate the importance of that relationship and that would have infected the proportionality assessment.

9. Ms Knorr accepted that factors set out in the decision could be taken into account, but submitted that without a full appreciation of the true nature of the relationship a proper balancing exercise could not be undertaken.

10. Ms Knorr submitted that there was no basis for the judge's alternative finding at paragraph 32 that the Appellant could visit the UK if he was removed because the prospect of him being granted a visa (even if he could afford it) was very slim in light of his background in the UK. She pointed out also that as a refugee T could not visit Ghana. Therefore in her submission removing the Appellant would lead to a permanent separation between the Appellant and his brother and this would have a significant impact on both of them. She submitted that the situation of the other brother J was different because he is a British citizen and is studying abroad and will return and the evidence in T's appeal was that he counted the days until J returned and therefore this was a not a fair comparison.

Discussion and conclusions

11. In undertaking the assessment as to whether the Appellant and his brother amounts to a family life under Article 8 the judge acknowledged that these were two adult siblings who are dependent on each other [29]. At paragraph 29 the judge accepted that T suffers from severe paranoid schizophrenia and OCD and that he is receiving treatment and that he lives with his parents in the family home. The judge found that T's parents provide the majority of his day-to-day care and support and acknowledged that T has a good relationship with the Appellant. The judge acknowledged that the Appellant supports T with his personal hygiene encouraging him to attend appointments and encouraging him to carry out activities such as laundry. The judge recognised that these tasks require a considerable amount of persuasion over a substantial period of time because of the issues T faces. The judge accepted that T and the Appellant's wife have a good relationship and that he can communicate with her. The judge found that T is a vulnerable individual, he has never had friends and is reliant on family in way that other adults are not.

12. Ms Knorr did not point to any significant piece of evidence omitted by the judge in consideration of this issue. The judge considered all relevant factors and all relevant evidence before concluding that she did not accept that T is dependent on the Appellant to the extent required to create a family life for the purposes of Article 8 [29]. The judge referred to the Appellant's visiting his parents' home two or three times a week and accepted that he carries out "a valued role to [T]".

13. I do not accept Ms Knorr's submission that, in considering whether the nature of the relationship between the Appellant and T is such as to amount to family life under Article 8, the judge was precluded from considering T's overall circumstances in terms of his support from other family members as these are relevant considerations in that assessment. The judge did consider the medical evidence and the evidence in relation to the role played by the parents. The judge also considered the role played by J who is currently studying for a medical degree outside of the UK. This was all relevant evidence and relevant factors that the judge was entitled to consider in deciding whether the relationship between the Appellant and T amounts to family life within Article 8. I do not accept Ms Knorr's submission that the judge failed to take into account the background to this relationship. The judge noted all of the oral evidence. The judge was fully aware of the background to the relationship between the Appellant and his brother. Ms Knorr did not point to any evidence ignored by the judge and she failed to establish that the judge's conclusions on the evidence reached the threshold of perversity.

14. In any event the judge made alternative findings at paragraph 32 where she assessed proportionality in the event that there was a family life between the Appellant and his brother. The judge took into account the fact that the Respondent's decision is in accordance with the Immigration Rules. The judge considered proportionality and looked at the Appellant's assertion that he believed that he had lawful leave to remain in the UK. The judge rejected that evidence saying that if the Appellant believed that he had lawful leave to remain in the UK then there was no reason to make other applications. In my view the judge undertook a proper assessment of proportionality at paragraph 32. Again it is not clear what it could be said the judge failed to take into account in undertaking that proportionality assessment.

15. Accordingly in my view the judge reached findings open to her in relation to the issue of family life between the Appellant and T and in the alternative findings. The judge considered all relevant factors in assessing proportionality whether or not the Appellant's relationship amounted to family life or private life.

16. It is contended in the second ground of appeal that the judge erred in her approach to the issue of the Appellant's status in the UK. In the Grounds of Appeal and at the hearing before me Ms Knorr acknowledged that it did not appear that the Appellant had any period of leave under Section 3C of the Immigration Act 1971. She relied on Lord Reed's statement in **Agyarko [2017] UKSC 11** that; "One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to the ability to maintain a family life in the UK and in which a less stringent approach might therefore be appropriate" [53].

17. The judge considered the evidence before her in relation to this issue. The judge said at paragraph 32:

> "The Appellant's position is that he did not receive the refusal letter in 2012 and for many years he thought he had leave to remain in the United Kingdom. Over the years the Appellant has made numerous applications for leave to remain in the United Kingdom and all of these have been refused. I do not accept that the Appellant genuinely believed that he had lawful leave to remain in the United Kingdom, if he did there was no reason to make the other applications".

18. Ms Knorr contended that the judge did not give adequate reasons for this finding. She submitted that, in assessing this matter, the judge failed to deal with the Appellant's evidence as to why he made numerous applications and failed to take account the fact that the Appellant gave up the job that he had held for ten years in 2015 upon receipt of the Section 120 notice at which point he realised that he did not have permission to work in the UK. However the judge does not need to deal with every element of the evidence. The judge considered the Appellant's explanation as to why he made numerous applications but decided that the making of these applications were an indication that the Appellant knew that he did not have leave to remain or continued extant leave to remain in the UK. In my view this was a conclusion she was entitled to reach on the evidence before her and she gave sufficient reason for reaching this conclusion.

19. It is contended in the third ground of appeal that the judge failed to take into account relevant considerations in terms of some of her conclusions as to the evidence. It is contended that there was no reason for rejecting the Appellant's evidence that it was culturally inappropriate for him to care for his 90 year old grandmother in Ghana and there was no evidence to suggest that his wife would be able to take on this role. It is contended that there was no evidential basis for the assertion that the church in the UK would continue to support the Appellant on return to Ghana. It is contended that the judge failed to take account of the fact that the Appellant's grandmother lives in a one bedroomed house in a village 30 miles from the nearest city and the Appellant would not be able to find a job in that situation. It is further asserted that the judge erred in finding that the Appellant could find a job in three to six months without taking into account the Appellant's evidence that finding work in such a short period required a support network that was not available to him in Ghana.

20. However at paragraph 23 the judge found that she did not accept that the Appellant's parents would stop supporting him simply because he had to leave the UK. The Appellant's mother has already been supporting the Appellant from her NHS pension and in my view, in the absence of evidence to the contrary, there was no reason for the judge to ask why his mother or the church would not continue to support him if he returned to Ghana. The judge found, as she was entitled to, that the Appellant's grandmother lives in Ghana in accommodation she owns and that the Appellant and his family would be able to stay with her at least initially and could care for her that the Appellant and/or his wife could care for his grandmother during such period. This was in the context of the fact that

the Appellant has been educated to university level, has work experience in the UK and the judge's conclusion that the Appellant will be able to find employment in Ghana. These conclusions were open to the judge on the evidence before her. This ground has not been made out.

21. It is contended in the fourth ground of appeal that the judge failed to make proper assessment under Section 117B of the Nationality, Immigration and Asylum Act 2002. It is contended that, because the Appellant worked for fourteen years in the UK until 2010 including a period of ten years at an insurance company working his way up to become an account executive, he is confident that he could obtain employment in the UK if his immigration matters were to be resolved and it is asserted that he would be financially independent then. However, in assessing Section 117B the judge must, as directed by the wording of Section 117B, take into account current circumstances. The judge was therefore entitled to find that the Appellant is not financially independent as he is dependent upon his family and church [26]. The judge accepted that the Appellant can speak English and assessed whether the Appellant's wife and children are qualifying spouse or children. The judge took into account that the Appellant and his wife decided to marry when the Appellant was in the UK without any leave and his wife was in the UK as a visitor. These were all conclusions open to the judge on the evidence before her in her assessment of Section 117B. No error has been disclosed in the judge's approach to Section 117B.

22. In conclusion, for the reasons set out above, I find that the judge looked at all material factors in reaching her conclusions. The judge was entitled to take into account in assessing the relationship between the Appellant and his brother that his brother lives with his parents and that the key relationship and the majority of work is undertaken by his parents. The finding that the Appellant has not established a family life with his brother within the terms of Article 8 was open to the judge on the specific evidence. I accept Mr Tarlow's submission that this challenge amounts to a disagreement with the First-tier Tribunal finding. Whilst the judge acknowledged the important role played by the Appellant in his relationship with his brother it was open to the judge to conclude that this was not sufficient to amount to family life.

23. In all of the circumstances and on the basis of the reasons set out above I find that the Grounds of Appeal have not been made out. The judge made a sustainable decision open to her on the basis of the evidence. There is no material error of law in the judge's decision.

Notice of Decision

The decision of the First-tier Tribunal Judge does not contain a material error of law.

The decision of the First-tier Tribunal shall stand.

An anonymity direction is made.

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: 16th January 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed and therefore there can be no fee award.

Signed Date: 16th January 2018

Deputy Upper Tribunal Judge Grimes