Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/06399/2016
HU/06402/2016
HU/06405/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 October 2018	**On 31 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

PETER [A] – 1st Appellant
ELFREDA [A] – 2nd Appellant
[U A] – 3rd Appellant
(Anonymity orders not made)

Appellanst

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Reid of Counsel
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are citizens of Ghana. The first Appellant, born on 20 March 1973 is married to the second Appellant, born 22nd of June 1975. The third Appellant, [UA] is

their son who was born in the United Kingdom on [~] 2008 and was thus almost 9 years old at the date of the hearing at first instance. The Appellants appeal against a decision of Judge of the First-tier Tribunal Grant sitting at Hatton Cross on 28 July 2017 in which she dismissed their appeals against decisions of the Respondent dated 9 February 2016. Those decisions were to refuse the Appellants' leave to remain in the United Kingdom under both the Immigration Rules and Article 8 (right to respect for private family life) of the European Convention on Human Rights.

2. It was common ground at the hearing before the Judge that the first and second Appellants could not succeed under the Immigration Rules as partners. The issue in the case centred on U and whether he could succeed under paragraph 276 ADE (1) (iv) of the Rules; Appendix FM section EX.1 and/or section 117B (6) of the Nationality Immigration and Asylum Act 2002. As U had lived in the United Kingdom continuously for more than seven years he was a qualifying child for the purposes of the Rules and the statute. They require the consideration of whether it is reasonable to expect a qualifying child to leave the United Kingdom. It was accepted that both U's parents had a genuine and substantial parental relationship with their son.

The Appellant's Case

3. The Appellants' case was summarised by the Judge at [2] to [6] of the determination. The first Appellant entered the United Kingdom as a student in 2001 and had leave until 2005 since when he has had no leave to be here. An appeal against refusal to grant leave on human rights grounds was dismissed by the Tribunal in 2014. The first Appellant was an experienced engineer and currently working as such earning in excess of £41,000 per annum plus overtime. He and his wife had another son, older than U, who lives in Ghana and attends a private school there. The second Appellant appears to have entered the United Kingdom illegally following the dismissal of an appeal against a refusal to issue her with a working holiday maker visa.

4. The Appellant relied on a report prepared by an independent social worker Ms Jasmine Smith who said that it was in U's best interests to remain in the United Kingdom. U was currently thriving at school and had established secure relationships with extended family members, school peers and his church. He was integrated into the British education system and it would be inappropriate to disrupt his bonds and links. The Judge referred to evidence in the Appellant's bundle from family and friends attesting to the child's close ties with his extended family including aunts and cousins in the United Kingdom.

The Decision at First Instance

5. The Judge noted that in the previous appeal dismissed in January 2014 the Tribunal had found that it was in the best interests and would promote the welfare of U to be with his parents and join his brother in Ghana. At that time U was five years old and no reason was shown why he would not be able to adjust to life in Ghana. Since then three years had passed and U was now almost 9 years old. The Judge commented at

[10] that the adults had flagrantly abused the Immigration Rules and had remained in the United Kingdom illegally. The first Appellant had been living and working illegally in United Kingdom since 2005. The Judge directed herself that U's situation should not be adversely affected by the conduct of his parents when considering his best interests. Those interests were to remain with his parents as part of a family unit and continue his education. The Judge did not accept that a move to Ghana would have the negative impact on U that the social work report indicated. U's elder brother had received an education Ghana and there was no reason why U could not be educated there as well.

6. It did not follow that the first Appellant would be unemployed upon return to Ghana since he was well equipped to provide for his family there. It was not unreasonable to expect U to relocate with his parents. It was not necessarily the case that U would suffer trauma or become psychotic. How he reacted to the move was dependent upon how his parents prepared him. That was a factor overlooked by the social worker in her assessment. U had the opportunity to make new friends. The Judge cited a number of authorities in particular **MA Pakistan [2016] EWCA Civ 705** and concluded at [16] "in carrying out the balancing exercise I take into account the wider public interest in effective immigration control".

7. There were no exceptional circumstances to merit consideration of Article 8 outside the Rules. U could be educated in the English language in Ghana and there were family there with whom the Appellants could stay upon return. Little weight should be given to the private life established by the family in the United Kingdom during the time they resided here unlawfully. She dismissed the appeal.

The Onward Appeal

8. The Appellants appealed against this decision in grounds settled by counsel who appeared at first instance and before me. The grounds made three main points. The Judge's finding that it would be reasonable to expect U to leave the United Kingdom was perverse in light of the law, guidance and evidence. The Judge failed to attach appropriate weight to the social worker's report and had failed to consider both sides of the proportionality balancing exercise. The grounds cited the Respondent's guidance to caseworkers in the Immigration Directorate Instruction - Family Migration at section 11.2.4. The longer a child resided in the United Kingdom the more the balance would begin to swing in terms of it being unreasonable to expect the child to leave United Kingdom and strong reasons would be required in order to refuse a case where there had been continuous residence in the United Kingdom of more than seven years.

9. The grounds also cited an extract from **MA Pakistan** that the starting point was that leave should be granted to a qualifying child unless there were powerful reasons to the contrary. The grounds argued that the Judge had failed to direct herself to the Respondent's own guidance. The Judge had failed to engage with the expert evidence which was the only means by which the Judge could have been able to

ascertain the views of U. The Appellant did not need to show that it was a certainty that U might suffer trauma as a result of removal only that it was more likely than not. The Judge had set the standard of proof too high when she rejected the risk of trauma as not a given. The grounds conceded that the first and second Appellant's immigration history could be taken into account when determining whether it was reasonable for U to leave the United Kingdom, but that history was not sufficiently powerful to deny the Appellants leave to remain. The Judge had failed to consider the fact that the Appellants were financially independent and had contributed to the tax system, that they spoke English and were fully integrated into the United Kingdom. The Judge had failed to properly prepare the scales when conducting the proportionality exercise.

10. Permission to appeal was initially refused by Judge of the First-tier Tribunal Andrew who found that Judge Grant had carefully considered whether or not it would be reasonable for U to leave the United Kingdom. The onward appeal was renewed to the Upper Tribunal and came before Deputy Judge of the Upper Tribunal Norton-Taylor on 30 August 2018. In granting permission to appeal he found it strongly arguable that the Judge had failed to ask herself the correct question in relation to the application of the reasonableness test namely whether powerful reasons existed to counter balance the residence factor. Citing **MT and ET [2018] UKUT 88,** Judge Norton Taylor stated that [16] of the determination arguably failed to address the point as the overall focus of the Judge's assessment appeared to be the ability of the parents to help U settle in Ghana. There was force in the assertion that the Judge had failed to adequately address the expert evidence before her. The Respondent did not reply to the grant of permission.

The Hearing Before Me

11. Counsel for the Appellant relied on her grounds arguing the Judge had failed to identify the powerful reasons required in a case where the child was a qualifying child. This was more than a disagreement with the decision. The Appellant's immigration history in **MT and ET** was worse than that of the adults in this case. In **MT and ET** the parent had not only overstayed but also committed the crime of fraud and yet that was not considered sufficient to outweigh the best interests of the child. The child was 10 years old at the time of the hearing in **MT and ET** but in the instant case U was almost 9 at the date of hearing. The availability of education in Nigeria was not a sufficient reason in **MT and ET** and the availability of education in Ghana was not therefore a sufficient reason in this case. The extended family in the United Kingdom whose existence was noted by the Judge should have been taken into account in the proportionality exercise.

12. For the Respondent it was argued there was no material error of law in the determination. The Judge knew to assess the best interests of the child and it could be clearly seen from the determination that she had done that. Those best interests would not be compromised by return to Ghana. U would be reunited with his brother who was still in Ghana. The Judge was entitled to put greater weight on the

nuclear family in Ghana rather than the extended family in the United Kingdom. The Judge was also entitled to put weight on the immigration history of the adults including their failure to regularise their stay in this country.

13. In conclusion counsel stated she was not submitting that the Judge had failed to take account of the evidence but that the Judge had failed to set the factors out on both sides starting from a point where the scales were evenly balanced. **MT and ET** was decided after the hearing in this case, but the immigration history in **MT and ET** was worse than in this case. The decision at first instance was perverse.

Findings

14. Since I heard the appeal in this case the Supreme Court have given guidance on the application of the reasonableness test when considering the position of qualifying children in the case of **KO (Nigeria) & Ors [2018] UKSC 53**. The Supreme Court emphasised the need for "a straightforward set of rules" and that the purpose of their approach in **KO** was "to narrow rather than to widen the residual area of discretionary judgment".

15. There were three appeals before the Supreme Court, one of which **NS** is particularly relevant to the issues raised in the instant appeal before me. It was not a deportation case and thus the public interest did not require the adults' removal because they had a subsisting parental relationship with the qualifying children (one of whom was more than 10 years old). The Upper Tribunal had recognised that the children would lose much if they and their parents were removed and further the children had no knowledge of life outside the United Kingdom. Their best interests were to remain in the United Kingdom. Nevertheless, the Upper Tribunal considered it outrageous for the parents to be permitted to remain in the United Kingdom.

16. At [51] of **KO** Lord Justice Carnwath (giving the judgment of the whole Court) did not consider that the Upper Tribunal's disapproval of the parents' conduct was relevant to its conclusion under section 117B (6) of the 2002 Act. The parents' conduct was only relevant to the extent that it meant that they had to leave the country. It was in that context that it had to be considered whether it was reasonable for the children to leave with them. The children's best interests would have been for the whole family to remain in the United Kingdom but in a context where the parents had to leave, the natural expectation would be that the children would go with them. Importantly he added: "there was nothing in the evidence reviewed by the Judge to suggest that [removal] would be other than reasonable". As a result, the appeal of the appellant NS was dismissed.

17. In the light of the decision in KO it is clear that the appropriate test in this case is whether there is a natural expectation that U should go with his parents. They in turn are expected to leave because they have no leave to be here. The grounds of onward appeal at paragraph 12 acknowledge that the Judge set out the factors which she believed made it reasonable for U to relocate to Ghana. At [15] the Judge stated: "having taken into account the age of U, the level of his schooling has reached, the

progress he has made, his close ties to his cousins and his integration into the British way of life, I nevertheless find that his best interests are to remain with his parents and return to Ghana as an intact family unit. I find it is not unreasonable to expect him to continue his education, family life and social and private life in Ghana where, as an added bonus, he can meet his older brother". At [20] she continued that: "U can be educated in the English language in Ghana and his parents have family in Ghana with whom I find they will be able to stay upon return to Ghana while they re-establish themselves".

18. The relevance of the poor immigration history of U's parents was relevant to the extent that it meant they would have to leave the United Kingdom. The issue was whether the natural expectation that U would go with them could be displaced. Whilst it was not relevant to consider the poor behaviour of the parents when assessing the reasonableness of expecting U, a qualifying child, to leave the United Kingdom the other factors which the Judge dealt with in some detail were highly relevant. In so far as the parents claim in their own right to remain in this country, both had flagrantly abused immigration rules and had remained here illegally. The 2nd appellant had come with an agent in 2006, having lost her appeal to enter the country legally. The first appellant had been living and working illegally in the United Kingdom since 2005. Whilst he argues that he has been in well paid employment in this country, it is important to note that the employment was illegal and his employer liable to a significant fine for employing someone with no lawful status as the Judge pointed out at [12]. It was the view of the Judge that unlawful employment counted against the first appellant not for him. That was the view she was entitled to take.

19. Even if, there is otherwise an expectation that the child will go with his parents, if the best interests of the child indicate that the child should stay in this country (as they did in NS) those best interests must still be given significant weight. In this case the Judge very carefully analysed what U's best interests were and whether he could be expected to relocate to Ghana and enjoy family life with his parents there. U was not at a critical stage in his education and there were no important public examinations to sit. He had family to help him settle in Ghana and his older brother was there. The Judge pointed out at [14] that the whole family's best interests were to be reunited as soon as possible.

20. She reminded herself at [16] that in carrying out the balancing exercise she took into account the wider public interest in effective immigration control, but I do not consider that that was relevant to her consideration under section 117B(6). There were no exceptional circumstances which merited consideration of Article 8 outside the Rules. The argument made in the grounds of onward appeal and before me that the Judge had failed to identify either strong or powerful reasons why U should not be granted leave to remain is, I find, a mere disagreement with the decision of the Judge. Her decision was neither perverse in the light of the law nor in the light of the Respondent's own guidance (which in view of its reliance on the bad behaviour of the parents is in the light of **KO**, the wrong test).

21. She attached appropriate weight to the expert evidence and had evidently considered it with some care. At [13] she pointed out a serious omission in that report that how U would react to the move to Ghana was dependent upon how his parents prepared him for that move. A Judge is not bound to simply accept the opinion of an expert witness but is entitled to consider the evidence and form their own view provided adequate reasons for any disagreement are given. The Judge gave such adequate reasons in this case.

22. The argument she failed to consider both sides of the proportionality balancing exercise is again a mere disagreement with the decision. The Judge set out in isolation U's best interests and directed herself as to the relevant issues to be weighed in the balance and the relevant amount of weight to be attached in each case, see for example [19]. I do not consider there was any material error of law in this case and I dismiss the Appellant's onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appellants' appeals dismissed

I make no anonymity order as there is no public policy reason for otherwise making such an order.

Signed this 29 October 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeals and therefore there can be no fee award.

Signed this 29 October 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge