Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/22179/2013
IA/29969/2013
IA/29971/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 January 2014	**On 28th April 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

N--- S---- A---
J--- B---
J--- B---
(ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms Jo Wilding, Counsel, instructed by
Tower Hamlets Law Centre
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. These appeals are brought by citizens of Ghana against a decision of the First-tier Tribunal dismissing their appeal against the decision of the Secretary of State on 21 May 2013 to remove them from the United Kingdom. It is their case that removing them is contrary to their rights under the Human Rights Act 1998 and Article 8 of the European Convention on Human Rights because it would be a disproportionate interference with their private and family lives.

2. There was no anonymity order made in the First-tier Tribunal but I think that an anonymity order is appropriate in this case which is essentially about the welfare of children. For the same reasons that anonymity is preserved in the family courts

I think it essential that the anonymity of the minor appellants is preserved and consequentially the anonymity of their mother must also be preserved. I make the normal order restraining publication details in this case in a way that allows the children to be identified.

3. I do not understand the delay in promulgating this decision. A nearly completed draft Determination was prepared either at or soon after the hearing but the files seem to have been misplaced. They were brought to me this morning and the Determination was completed immediately.

4. All three appellants are citizens of Ghana. The appellant in IA 22179 2013 is the mother of the two other appellants. The minor appellants were born in 2004 and 2010 so are now aged 9 years and 3 ½ years. They have lived all their lives in the United Kingdom.

5. On 13 May 2010 the appellants applied for leave to remain. The applications were refused outside the rules on 3 May 2011. The decisions were not "immigration decisions" for the purpose of the Nationality, Immigration and Asylum Act 2002 and so did not generate a right of appeal. The applicants asked for judicial review of the decision and the respondent agreed to reconsider the decisions. It follows that although the decision complained of was not made until 21 May 2013 the application leading to the decision was made as long ago as 13 May 2010 when the immigration rules applicable to a more recent application were not in force.

6. The First-tier Tribunal directed itself correctly to have regard to Section 55 of the Borders, Citizenship and Immigration Act 2009 requiring a decision maker to have regard to the best interests of the children. However, having thus directed itself the First-tier Tribunal did not make any discernable finding on this fundamentally important part of the evidence and went on to decide that removing the entire family would be a proportionate interference with the private and family lives or family members because the principle of family unity was preserved and it is generally best for families to stay together and for small children to be with their mothers.

7. As Ms Wilding properly pointed out, my first task is to make findings about the best interests of the children. This will not necessarily determine the appeal but as their interests are a primary consideration it is an appropriate place to start. In the case of the 3½ year old who I think is the second appellant, the evidence points to it being in her best interest to stay with her sister and mother in the United Kingdom. It is the only country she knows, she is settled there and has some social contacts. As that is true for her it is very much stronger in the case of the third appellant, who has started to establish significant private and family life outside the nuclear family. She has links with the local church as indeed do the other two appellants and she attends school where apparently she is settled. Her home is in the United Kingdom, all her friendships and experience of life are there too. Clearly it is in her *best* interests to remain in the United Kingdom with her mother.

8. Because of the antiquity of the particular decision before me, this case was decided without reference to the changes in the Immigration Rules that purport to encapsulate the requirements of Article 8. Therefore, the First-tier Tribunal

correctly in my judgment conducted analysis without regard to the new Rules, but without, as I have indicated, regard to the essential premise of the best interests of the children.

9. Mr Duffy invited me to assume that it had been done properly but I can see no justification for that. The failure to make reasoned findings about the rights of children is an error of law that went to the very root of the determination. I set aside the decision of the First-tier Tribunal and make the decision again.

10. I have looked carefully at the evidence before the First-tier Tribunal with the assistance of both representatives and have seen typed notes of the evidence that was given as well as the witness statements. It was the case of the first appellant that she has no contacts anymore in Ghana. She gave details of her family but her family relationships in Ghana, she said, are at an end. There was unhappiness in her own family. She was not brought up by her mother and her relationship with her father has deteriorated to the point that she has had no contact with him of any kind for over two years. She understands that he is unemployed, that he has remarried and his wife has children and family responsibilities of her own. What would actually happen if this family were removed to Ghana is a matter of speculation, but there is absolutely nothing in the evidence to suggest for a moment that there would be any welcoming party waiting to embrace them into the family and help them settle.

11. I find it very significant that there is no father in this family. The first appellant would have to establish not only her own life in Ghana but look after her children. I do not know how she would achieve that. It is right to say that the children's father has proved deeply unsatisfactory and was violent towards the mother, and although he showed little responsibility in removing to Ghana I have little doubt that his absence was a source of some rejoicing on the part of her former partner. However he cannot be looked to for any kind of help and support.

12. Ms Wilding has emphasised the age of the oldest child. She is a young person over nine years. It is often thought that seven years residence in the United Kingdom for a child is a sort of rule of thumb figure indicating that the child is likely to have established private and family life of its own. I understand that, but this case of course is much stronger. The child is 9 and knows nowhere else. In my judgment it would be a very serious interference with her private and family life to take her from the place where she is settled to a country that she does not know at all, where there is no indication of any support outside her immediate family, no indication of how the family could be supported or how it could function. Any decision to remove her would have to be made in the hope that somehow the mother would manage. No doubt she would, because mothers do but the evidence points to the interference consequent on removal being very significant. This is true too in the case of the younger child, just not so strong.

13. I have not said very much about the first appellant because she really is the author of her own misfortune. I accept Counsel's point of the ill-treatment she experienced by the father of her children, but not too much can be made of that. People can regularise their status with the Secretary of State. There are extensive powers in appropriate cases to make decisions outside the Rule, and the fact she was unhappy and ill-treated is not of itself a reason to live in the United

Kingdom. However, nothing is said to her detriment other than her disregard for the requirements of immigration control. It is not to her credit, but allowing her to remain is not like allowing to remain a person with a penchant for serious criminal activity or other grossly discreditable behaviour.

14. When I balance the public interest in upholding immigration control against the harm that it would do to these children I have no hesitation in concluding that removal is disproportionate. If I had had to have regard to the present Rules I may well have reached a similar conclusion for the same reasons. The oldest child has established a strong private and family life, and given the absence of family support or any real prospects of her establishing herself in Ghana at more than a most basic level it would be unreasonable to expect her to go. Clearly the family should not be separated if separation can reasonably be avoided.

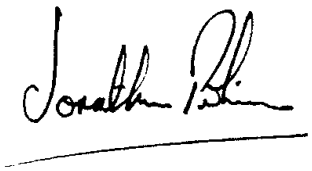
15. I am satisfied that when the best interests of the children are considered and proper regard is had for the jurisprudence, then the proper order here is to allow the appeal with reference to Article 8.

16. I set aside the decision as indicated and I substitute a decision allowing the appeals. I hope it will be understood by anybody interested in this case that the real reasons here are the welfare of the children, which I am required by statute to have specific regard.

Decision

The First-tier Tribunal erred in law. I set aside its decision and I make a decision allowing the appeals.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 25 April 2004