Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/20867/2013
IA/21727/2013
IA/21729/2013
IA/21731/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 January 2015	**On 09 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

JAN
RAM
MASTER JN
MASTER UN
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr G Mellon,Counsel, instructed by Perry Clements Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. All four appellants are citizens of Ghana. JAN's date of birth is 3 March 1975. His wife,RAM's date of birth is 7 November 1978. Their children are JN and his date of birth is 16 June 2005 and UN and his date of birth is 22 February 2008. They also have a daughter, VN,who was born on 7 December 2011. She is not an appellant in these proceedings. She is a citizen of Ghana. I shall refer to JAN as the appellant in this decision. All the children were born in the UK.

2. The appellant entered the UK on 22 June 2001 having been issued with a valid visit visa which expired in December 2001. He travelled to Malta on 26 June 2001 and left Malta on 2 July 2001. It is not entirely clear when he re-entered the UK but it was some time between 5 July 2001 and 7 December 2001. The appellant was joined in the UK by his wife, RAM, on 2 September 2004. She had been granted a visit visa which expired on 13 January 2005. They have both overstayed since their visas expired.

3. On 1 April 2010 the appellants applied for leave to remain under Article 8 of the 1950 Convention on Human Rights. This application was refused by the Secretary of State in a decision of 9 January 2011. Following an application for judicial review the Secretary of State reconsidered the application and refused the application on 14 May 2013. The application was refused under Appendix FM and paragraph 276ADE of the Rules. The decision-maker also considered paragraph 353B of the Rules and concluded that there were no exceptional circumstances in the appellant's case to justify allowing him to remain in the UK.

4. The appellants appealed and their appeals were dismissed by Judge of the First-tier Tribunal Dennis in a decision that was promulgated on 7 July 2014 following a hearing on 25 April 2014. Permission to appeal was granted by Judge of the Upper Tribunal Chalkley on 15 December 2014. Thus the matter came before me.

The Decision of the FtT

5. The judge heard evidence from the main appellant and his wife and made the following findings:

> "11. In the reconsideration of 14 May 2013, the respondent considered the application of Appendix FM and concluded the appellants can be seen to meet its requirements and that there 'no other sufficiently compelling or compassionate circumstances to justify allowing you to remain in the in the UK' noting that the children are 'all very young and could be reasonably expected to adjust to life abroad with the support of yourself and their mother'. There do not appear to have been separate letters prepared for the minor children. As noted above, it has been asserted, and

it is accepted, per **Edgehill [2014]** that it is insufficient solely to consider an application made in 2010, as here, under the subsequently adopted Appendix FM.

12. Reliance is placed by the appellants in **ZH (Tanzania) [2011]** and **E-A Nigeria [2011]** for the premise that a primary consideration in any decision must be the best interests of the child as further mandated by section 55 of the Borders, Citizenship and Immigration Act 2009 requiring the respondent 'to safeguard and promote the welfare of children who are in the United Kingdom'. These contentions are, equally, neither challenged nor disputed. It remains to establish what their best interests may be in the totality of the circumstances presented.

13. Both parties have relied upon **E-A (Nigeria) [2011].** At paragraphs 32 and 33 thereof reference is made to the withdrawn policy DP5-96 regarding the 'seven years child concession' which, while withdrawn in 2008, is deemed to 'continue to be an important relevant factor'. Other factors then set out are the length of the residence of the child's parents without leave, whether their removal has been delayed through protracted or repetitive representations, the age of the children, whether or not the children were conceived when the parents had leave to remain and, whether those parents have a history of criminal behaviour of deception. Significantly, subsection (e) of paragraph 33 notes 'whether return to the parents' country of origin would pose extreme hardship for the children or put their health seriously at risk'.

14. I found this case of particular significance and assistance in this respect, especially so as the appellants clearly rely, and principally, on the fact that JN, having been born in 2005 has spent all of his nine years in the UK. The appellants rely on **EM (Zimbabwe) CG [2011]** for the position that the residence of a child in the United Kingdom for seven years would justify a decision to regularise his stay here 'in the absence of conduct or remains to the contrary', and it was urged that this line of thought thus creates an effective *presumption* in favour of this to render any decision to the contrary disproportionate. I am not prepared to draw that from the case, though. I accept its general premise of the significance of the fact of long or sole residence in the UK on a child.

15. There are, however, other matters to be considered. The first is that in the event the appeal fails, the whole family will be removed as a unit. There is no suggestion to the contrary. **Azimi-Moayed [2013]** makes it clear, however, that mere *presence* in the UK does not mean the best interests of any child necessarily are to be served remaining there. The first considerations is that his best interests are served by being with his parents, and if they are to be moved, then 'the starting point suggests that

so should dependent children who form part of their household unless there re reasons to the contrary' noting, however, that 'stability and continuity of education provisions and the benefit growing up without in the cultural norms of the society to which the belong' are to be considered. It also cites that 'seven years from age four is likely to be significant to a child than the first seven years of life'. I concur with this view, and find it entirely apposite in this case.

16. I note that despite the representations of the appellant mother that none of the children speak their native tongue (apparently Fanti) she could not explain why it was that a teacher's letter relating to JN in 2009 states that he spoke almost no English, when he first came to school, which have been produced, show him to be quit a slow developer with apparently, very limited progress over the years, though his younger brother appears to be doing better. Their sister does not yet approach school age.

17. A good deal of effort was expended by the witnesses at the hearing to suggest that despite the fact both parents have their own mothers and siblings and their families remained in Ghana, that the relatives there have limited accommodation and that it would be unreasonable to expect the appellants, a family of five, to simply move withthem. To the best of my knowledge, despite its regular appearance in arguments, I am unaware of any authority that says there must be adequate accommodation available for returnees to their own country whether provided by family or otherwise (let alone employment etc). I am satisfied, at least for the short term, arrangements could be made and note, *mutatis mutandis*, that the appellant parents come to the UK without employment or permanent accommodation, and have managed well enough here. It is not a factor which is determinative in these matters, even though chidrne may be involved.

18. Viewing the matter objectively, I find simply not obstacles, whatsoever, beyond disappointment and inconvenience were the family to be returned to their home state. I also consider that, of course, the appellant parents entered with proper visit visas but have concluded by the point of their respective second entries they had no intent to return, that they then remained in the UK in the full and certain knowledge that they had no right to do so, that they worked here in similar knowledge of its illegality and that they have, effectively, treated the immigration law as an inconvenient impendent to their effective immigration.

19. While I accept it is possible that they had difficulties with previous solicitors, there does not seem to have been any stateable basis for any actual claim to 'regularise' their stay to have been made in 2006 any more than accompanied that with the present application of April 2010. Merely

'asking to stay' is not actually a basis for granting leave to remain, and the applications were correctly refused pursuant to paragraph 322 for seeking leave under the Rules.

20. Considering the argument that the minor children meet the requirements of 276ADE I am not satisfied that this has been made out as the first requisite obliges the appellants to meet the suitability requirements of Appendix FM. Paragraph S-LTR.2.3 states that the NHS has notified the Secretary of State that charges in accordance with Regulations for overseas visitors of a total of £1000 have not been paid, and there is a note that there appears to have been unpaid the NHS charges surroundign the appellant mother. One must assume the pregnancy care and birth of all three children was on the NHS as has been their subsequent paediatric care. Nor can it simply be said that there is a flat obligation of subsection (iv), nor as an effective matter there would simply be a black-letter rule that if a child under 18 has lived in the UK for seven years than he has an inviolable right to private life here. The provision continues, significantly: 'and it would not be reasonable to expect the applicant to leave the UK'. I am satisfied in this case and on these facts and accepting the position in **Azimi-Moayed**, that it is perfectly reasonable for all three children, even the oldest, to return with their parents to Ghana. If in any casse the facts will have to be considered again with regard to proportionality of the decision to return.

21. This brings the consideration to the traditional **Razgar** approach. There seem to be very little point in considering the points raised pursuant to **MF**, **MS**, **Nagre** and **Gulshan**. I accept that the traditional analysis would be appropriate given the date of the application and, in any case, to ascertain whether there might be as claimed, a breach of the respondent's obligations to the appellants under Article 8 by these decisions.

22. I am prepared to accept that a family life exists in the UK as between the four appellants and toddler, VN. Equally, I am prepared to accept that all for them have established a form of private life here, but that private life has been established here in the sure and certain knowledge it was in violation of immigration law. Indeed, with regard to the parents, it would be courteous to say it had been 'casually disregarded', but I believe that the actual fact of the matter is that it has been consciously and wilfully flouted and ignored as inconvenient. Even were I to afford the greater weight to the purported attempt to 'regularise' their presence in 2006, I would have to note there was no basis for it, it was never effected and it appears that fraud was contemplated. It took another four years for an actual approach to be made. In my considered opinion this militates strongly against the balance of proportionate here. Likewise, although all three children have been born here, and even JN was evidently conceived

here immediately on his mother's entry, this was not with parents with any right of residence – though his mother was here temporarily as a visitor at the time the appellant father has been here illicitly for thirteen years and the appellant mother for ten. Objectively, these were long years before any attempt was made to regularise their stay, and when this was not prosecuted, there were many long years, again, before any further effort was made. Even so, their efforts whether were not made with any prospect of success or any stateable claim of right to remain. I have not found the appellant parents to be entirely forthright in their evidence, selecting and interpreting it to their advantage, which is not surprising, but I am not informed of any actual history of criminal behaviour or other deception. Thus while I conclude there is a viable family life in the United Kingdom as between them, I am obliged to conclude that their private life here has a very tenuous foundation indeed.

23. I have no difficulty in concluding that there would be no breach of their family life were the entire family to be returned as a unit to Ghana. I do accept that this return would constitute an effective breach of that private life though, again, it must be noted that it is an anticipated consequence of their illegal entry and stay which cannot come as any surprise to the appellants, at least to the adults.

24. Thus, while I find no breach with regard to family life, if I were deemed to have erred in this, and accepting that a breach would occur of the tenuous private life, I proceed with the **Razgar** analysis to conclude that the process he followed is a lawful one and that the ends sought to be achieved thereby in respect of maintaining the economic integrity of the United Kingdom and the maintenance and enforcement of an effective immigration law and policy as being conducive to the public ... are proper state aims.

25. It comes, then to the crux of the appeal, and that is whether the decision to return is proportionate. Here, the burden shifts to the respondent. Having considered the matter carefully, I am satisfied that the respondent has carried the burden of proof in this respect. Firstly, as noted above, I do not find that there is any breach of family life and therefore the analysis is irrelevant as to that aspect, but had it been applied, the same principles as are here set out in respect to private life apply, equally, to any consideration of family life. I am satisfied that the history of the parents militate against any view that their continued presence in the United Kingdom is a proportionate response, whether based on their own history or merits, or, as it appears now to be the case, in the hope that the physical presence of the children here would be sufficient to 'tilt the balance'. It has been judicially noted that parents are not to be seen using their children for such purposes, a point in which I strongly concur.

Nonetheless, their best interests are primary consideration and must be carefully reviewed.

26. I accept that the preliminary premise is that the best interests of the child are served by maintaining the family unit with the parents. As, for the reasons stated above, the parents may be expected to be moreover, it falls, therefore that the best interests of the children are to be removed with them. I must then consider whether that removal creates a disproportionate interference with the children's private life. It must be remembered that all of these children are quite young. They remain principally focused on their family. I am satisfied it is more likely than not that with both parents being native Ghanaians and the note about JN's lack of English, that the Ghanaian customs, language and culture must have been adequately introduced to them from an early age. Again, given their youth, I am confident that they would readily adapt to life in Ghana without difficulty or impediment. I note in particular, that even though JN is 9, he will not have spent seven years past the age of 4 here in the United Kingdom, and I accept that this is an important distinction. I am particularly swayed by the fact that the return of the entire family to Ghana, despite the complaint about inadequate accommodation awaiting them, does not constitute 'extreme hardship' for the children, nor is there anything put before me to suggest that their health would be seriously at risk. There is a notation that JN carries a particular blood type or condition, but this is couple with the assurance that this is of no moment and that nothing needs to be done with respect to it.

27. Thus, and for the foregoing reasons, I have concluded that the respondent has demonstrated on the balance of probabilities that the decision now appealed is proportionat as to all appellants with respect both to their private lives and to their family life, were the same to be held to have been breached in some unspecified manner by their collective return to Ghana. This means, inevitably that even if I were to accept that the minor children have established a private life under para 276ADE, I am satisfied that the decision to return them would, nonetheless, be proportionate and that it is not in any sense unreasonable to expect them to return with their parents to what is, after all, their country of nationality if not immediate experience."

The Grounds of Appeal and Oral Submissions

6. The first ground of appeal argues that the decision of the Secretary of State is not in accordance with the law because the decision-maker relied upon the appellant's failure to meet the requirements in paragraph 276ADE(iii) as a material consideration and the application was made before Appendix FM. The appellant relied on he judgment in **Edgehill [2014] EWCA Civ 402,** with particular reference to paragraph

33. The judge erred because he should have allowed the appeal because the decision is not lawful.

7. The second ground of appeal argues that the judge did not properly apply paragraph 276ADE(i) in assessing the appeals of the two children. Their mother had failed to pay a NHS charge for the care associated with the birth of the two children. The judge found that the children could not meet the requirements of 276ADE because they do not meet the suitability requirements because they failed to pay an NHS charge. There was no evidence that the children themselves had failed to pay a charge or that they could even by held liable for the charge.

8. The third ground of appeal argues that the judge did not properly evaluate the private life claims of the main appellant and his wife. There is an analysis of the reasonableness or otherwise of expecting the children to leave the UK in the light of the parents' removal but no distinct prior proportionality assessment relating to the parents' private life. The appellant had been in the UK for thirteen years and his wife ten.

9. The fourth ground argues that that the judge did not properly assess the children's best interests in accordance with **Zoumbas v SSHD [2013] UKSC 74** in which it was decided that in precariousness cases a child must not be blamed for matters for which he or she is not responsible. The First-tier Tribunal did not conducted an assessment, failed to have regard to the evidence before it relating to the consequence of removal and it applied the wrong threshold (one of extreme hardship) when evaluating the conditions to which the children would be sent rather than adopting a holistic assessment and deciding whether removal would be reasonable.

10. I heard oral submissions from both parties. Miss Mellon argued that 276ADE(iii) was material to the decision of the Secretary of State. Her submissions were in the context of the grounds of appeal and the main thrust of her argument in relation to the children was that the judge had failed to take into account evidence. I asked her to explain to me what evidence the judge had not taken into account and I gave her time in order to consider that question. In her submission the judge had failed to consider the length of residence in the UK, their friendships and their education here. In her view the entire thrust of the judge's decision was about their parents and his negative view of them.

11. Mr Wilding made submissions in the context of the Rule 24 response on 18 December 2014 in which he argued that the decision was in accordance with the law and was lawful and sustainable.

Conclusions

12. There is no merit in ground 1. The failure to satisfy 276ADE(iii)was not material to the decision of the Secretary of State and ground 1 is without merit. The decision-maker took into account that the appellant had entered the UK in 2001, that he had overtstayed and that he could not establish that he had no social or cultural ties to Ghana. The decision-maker considered paragraph 353B of the Rules and gave consideration to whether or not there were exceptional circumstances, noting that the appellant and his wife had lived in Ghana for the vast majority of their lives. It is stated in the Reasons for Refusal Letter that consideration had been given to all these circumstances (paragraph 353B for the Immigration Rules) individually and together. In the circumstances I do not accept that the decision is not in accordance with the law. It appears that the judge did not determine this issue, but this was not a material error of law. There was no other reason put forward by the appellant in the permission application or in oral submissions to support the assesrtion that the decision is not in accordance with the law.

13. In my view grounds 2 and 4 should be dealt with together and they are without merit. The judge properly identified his task that was to make a finding in relation to the children's best interests and he took into account the evidence. The judge properly found that is the best interests of the children to remain with their parents and that this was the starting point. I reject the submission that the relevant factors were not taken into account and that the judge failed to make a holistic assessment. The judge attached much weight to the precarious status of the parents but this did not impact on the assessment of the best interests assessment (but it is relevant consideration in relation to proportionality).

14. I have taken into account the comments of Mr Justice Mann in **SS (Nigeria) v SSHD [2013] EWCA Civ 550** which are as follows:

> "The circumstances in which the Tribunal will require further inquiries to be made, or evidence to be obtained, are likely to be extremely rare. In the vast majority of cases the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision-maker by the individual concerned. The decision-maker would then make such additional inquiries as might appear to him or her to be appropriate. The scope for the Tribunal to require, much less indulge in, further inquiries of its own seems to me to be extremely limited, almost to the extent that I find it hard to imagine when, or how, it could do so."

15. It would seem that **Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)** and **SS (Nigeria)** effectively overrule the comments of Justice Thornton QC in **Tinizaray, R (on the application of) v SSHD [2011] EWHC 1850 (Admin)** that decision-makers could not solely rely on

information volunteered by a parent, particularly if that information was incomplete. Instead the decision maker had a duty to seek further information.

16. The main thrust of Miss Mellon's argument is that he failed to make a holistic assessment and consider relevant factors, namely the children's education, the length of time they have been here and their friends here. The evidence before the First-tier Tribunal in relation to the best interests of the children was minimal. There was before the First-tier Tribunal witness statements from the adult appellants in which they state their children were born here and have never lived anywhere else. They have made friends at school and were involved with the church and within the local community. In addition they have family here. There were school reports relating to the children before the First-tier Tribunal. In oral evidence the adult appellants' evidence was that their relatives in Ghana had limited accommodation and as such it would be unreasonable to expect them to move in with them. The judge found that at least for the short term adequate arrangements could be made. It is clear from the final sentence of [17] that he took the accommodation difficulties into account but did not find them to be determinative or indeed as significant as the appellants' evidence suggested.

17. The appellant's evidence is that he lost his job in Ghana and that is why he decided to stay here. It is a fact that the family has been here for a lengthy period and for children seven years is seen as significant by the both the Home Office and case law. The judge recognised this at [14], [15] and again at [26]. It is clear in my view that the judge recognised that this was a weighty consideration in the appellant's favour. The judge was aware that both the children were at school (see [10]) and he took into account the school records in the appellant's bundle (see [16]). The judge found that the children were all quite young and focused on their family and they would readily adapt to life in Ghana without difficulty or impediment and these were findings that were open to him on the evidence.

18. I was not referred to any evidence that was before the First-tier Tribunal which would establish that the children had formed significant ties outside the family home. Both the children are still relatively young and at the date of the decision before the First-tier Tribunal they were both attending primary school. There was evidence from the appellant's brother, EN, that the children are close to their cousins, but they have family in Ghana. The judge did not accept that the children do not speak Fanti. The adult appellants could have provided more evidence to assist the Tribunal but chose not to do so. The decision that the judge reached in relation to the best interest of the children was one that was open to him on the limited evidence and his decision is not irrational or perverse.

19. The judge understood that paragraph 276ADE(iv) required him to consider reasonableness and he concluded at [17] and [20] that it would be reasonable to expect the children to leave the UK. In relation to the suitability issue, it is not material whether the judge erred in this respect as he made a discrete finding in

relation to reasonableness (it is accepted in ground 3 of the grounds of appeal that the judge conducted an analysis of reasonableness). The judge did not apply an extreme hardship threshold as asserted in the grounds. He referred to extreme hardship in the context of **E-A (Article 8 –best interests of child) Nigeria [2011] UKUT 315 (IAC)** at [13] and again at [26], again in the same context. Having read the decision as a whole the judge did not apply the wrong test to the material issues which were the best interests of the children and reasonableness in the context of 276ADE(iv).

20. There is no merit in ground 3. The judge found that all of the appellants have a private life here and he correctly identified that proportionality was the derminative issue. He put into the balance the length of time the appellant and his wife had been here and he concluded that their private life here had a "very tenuous foundation". He recognised that they have an Article 8 right independently from their children (see [25]). The judge was obliged to consider the precarious nature of the adult appellants' status here. Their witness statements were brief on the issue of their private lives here as distinct from that of their children. It is clear from the evidence that they have family and friends here and that they are involved with the church but they also have family in Ghana and in my view these are all factors that the judge took into account. Beyond the length of time that they have been here there was no cogent or persuasive evidence of a significant private life. Indeed Miss Mellon did not point to any in submissions. The balancing exercise conducted by the judge was reasoned and in my view it is lawful and sustainable.

21. I make an anonymity direction in the light of the children in this appeal.

Notice of Decision

There is no material error of law and the decision to dismiss the appeal under Article 8 is maintained.

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 Joanna McWilliam Date 6 February 2015

Deputy Upper Tribunal Judge McWilliam

TO THE RESPONDENT

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

Signed Joanna McWilliam Date 6 February 2015

Deputy Upper Tribunal Judge McWilliam