Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22518/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 28 August 2015	**On 8 September 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Lawrencia Aboagye
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr P Collins, instructed by David A Grand
For the respondent: MS A Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Lawrencia Aboagye, date of birth 14.11.78, is a citizen of Ghana.

2. This is the remaking of the decision in the appeal following the successful appeal of the Secretary of State against the decision of First-tier Tribunal Judge Metzer promulgated 15.1.15, allowing on Article 8 human rights grounds the claimant's appeal against the decision of the Secretary of State, dated 14.5.14, to refuse to vary leave to enter or remain and to remove her from the UK by way of directions under

section 47 of the Immigration, Asylum and Nationality Act 2006 . The First-tier Tribunal Judge heard the appeal on 16.12.14.

3. First-tier Tribunal Judge Colyer granted permission to appeal on 24.2.15.

4. Thus the matter came before me on 14.7.15 as an appeal in the Upper Tribunal. For the reasons set out in my error of law decision promulgated 31.7.15 I found such error of law in the making of the decision of the First-tier Tribunal that it should be set aside and remade.

5. In summary, I found that the judge failed to explain why relocation to Ghana would be unreasonable, or why the decision of the Secretary of State was disproportionate. The judge incorrectly focused on why the family should not leave the UK rather than asking what would happen on return. The judge also gave incorrect weight to factors in the proportionality balancing exercise and failed to address the public interest factors of section 117B of the 2002 Act. The judge also failed to address the requirements of the Immigration Rules before going on to consider family life under Article 8 ECHR and identified no compelling reasons for doing so.

6. The appeal came back before me as a resumed/continuation hearing on 28.8.15 for the remaking of the decision in the appeal. The appellant served a revised bundle comprising 302 pages, together with witness statements. I confirm that I have carefully considered all the evidence before me, including the oral evidence and submissions of the parties before reaching any of the findings or conclusions.

7. The full chronology and background is set out in Judge Metzer's decision. In essence, the claimant first had leave to enter and remain as the spouse of a student migrant. She made an application in 2010 for an EEA residence card on the basis of what was a bogus marriage to Alusine Sesay, a French national, despite remaining married to her husband Richard Aboagye. An imposter used Mr Sesay's identity card, the fraud was discovered and the application was refused. Nevertheless, the claimant was granted discretionary leave to remain outside the Rules until 31.12.13 for the express purpose of being a witness in the prosecution of the immigration fraud involving bogus marriages. It transpired through questioning of Mr Aboagye at the hearing before me that he was also involved in a bogus marriage application, claiming to be married to an EEA national. His application was also refused.

8. During the latter period of leave referred to above, on 16.7.13 the claimant made an application for leave to remain on the basis of Article 8 family life with Mr Aboagye and her children. That application and a subsequent application made on 5.12.13, which is the subject of this appeal, were refused. At the date of application the claimant, Mr Aboagye, and their children all had leave to remain. Mr Aboagye had leave to remain under an EEA Residence Card. He has now made a separate human rights application and is awaiting the decision of the Secretary of State.

9. The claimant and her family members have been in the UK for a period in excess of 10 years. Their daughter Chelsea has been in the UK since the age of 3 and is now 14 years of age. The other children were born in the UK.

10. From the witness statements and oral evidence of the claimant and Mr Aboagaye, a full note of which is with the case papers, I find the follow particularly significant. It is asserted that the family has set down significant roots in the UK and the claimant suggests that removal of Chelsea would have a significant impact with emotional harm, detrimental to their well-being. Reference is made the documents in the appeal bundle, including school reports, letters and other documents, as well as photographs. I take into account that Chelsea will have little recollection of Ghana and the younger children know only the UK, but they will have the association and support of their family in the transition to life in Ghana. It is a common feature of modern life that children frequently have to relocate, changing schools, leaving behind friends and the environment they know, when parents relocate either within the UK or abroad.

11. It is also relevant that both the claimant and Mr Aboagaye have extensive family remaining in Ghana, including parents and several siblings. I found the claimant's evidence suggesting that she had limited contact with her family not credible. She claims that she last spoke to her siblings some 6 months ago, because they are busy and all over the place. She claimed that they could not live with or receive support from any of the family because they are all over the place. She also stated that she could not return to live with her father or mother as he had sexually abused her in the past. She claimed she didn't know when her husband last had any contact with his parents.

12. Neither the claimant nor Mr Aboagaye are currently employed in the UK. They are dependent on financial support from friends and a church organisation. He stated that his father is almost 80 and has had a stroke and his mother, 67, has a stomach ulcer and requires serious medication. His sisters have all moved abroad. He said he would not be able to find employment in Ghana because he had never worked there and came to the UK as a student. He said it would be difficult to find accommodation and living costs were expensive in Ghana. Contradicting his wife's evidence, he said that she does speak to them and they phone her regularly.

13. I am required by section 55 to have regard to the best interests of the children as a primary consideration, taking into account the extent of their integration into life in the UK. However, in making that assessment I have to take account of the recent case law bearing on the best interests of children, notably Zoumbas v SSHD [2013] UKSC 74, EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874, and Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC).

14. In Azimi-Moyed the Upper Tribunal in considering the case law in relation to decisions affecting children identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

> "i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

> ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
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> iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
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> v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases."

15. In Zoumbas v SSHD, the fact that the children were not British citizens and thus had no right to future education and health care in the UK, together with the assessment of other factors, did not create such a strong case for the children that their interest in remaining in the UK could have outweighed the considerations on which the Home Secretary had relied in striking the balance in the proportionality exercise. There was in that case no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo.

> "No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the UK so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knot family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred in UK society would have been predominantly in the context of the family unit."

16. It was also stated in that case that it was legitimate for the decision-maker to ask first whether it would have been proportionate to remove the parents if they had no children, and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance.

17. In EV (Philippines) & Ors, the Court of Appeal held that in answering the question whether it is in the best interests of a child to remain the longer the child has been in the UK the greater the weight that falls into one side of the scales. But, "In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hyopthesi, the applicants have no

entitlement to remain. "If it is overwhelmingly the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast, if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite."

18. The Court of Appeal pointed out at §60 that the facts of the case were a long way from those of ZH (Tanzania):

> "In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the Tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

19. At §61, the Court continued,

> "In fact the immigration judge weighed the best interests of the children as a primary consideration, and set against it the economic well-being of the country. As Maurice Kay LJ pointed out in AE (Algeria) v SSHD [2014] EWCA Civ 653, at [9] in conducting that exercise it would have been appropriate to consider the cost to the public purse in providing education to these children. In fact that was not something that the immigration judge explicitly considered. If anything, therefore, the immigration judge adopted an approach too favourable to the appellant."

20. Whilst I take account of their integration with life, and society in the UK, and the education the children have received here, fully accepting that they are doing well at school, I must also take account of the guidance in EA (Article 8 – best interests of the child) Nigeria [2011] UKUT 315, where the Upper Tribunal held that the analysis of the best interests of the children entirely through the prism of the right to education was too narrow an approach. I bear in mind that whilst the elder child has lived in the UK some 10 years from the age of 3 and the two younger children were born in the UK, they are not British citizens and have no right to residence or education in the UK except in compliance with immigration rules. As stated above, in Zoumbas v SSHD, the fact that the children were not British citizens and thus had no right to future education and health care in the UK, together with the assessment of other factors, did not create such a strong case for the children that their interest in remaining in the UK could have outweighed the considerations on which the Home Secretary had relied in striking the balance in the proportionality exercise.

21. In Mundeba (s55 & Parap 297) [2013] UKUT 88 (IAC) the Upper Tribunal held that if parents are being removed the starting point is that so should the children, unless there are reasons to the contrary.

22. In the light of the case guidance set out above, taking into account those factors identified in the evidence before me, I find that the best interests of each of the children are to remain with their parents in a single family unit, whether that is in Ghana or the UK. There is no question here of splitting the family. Put another way,

if any of the children can succeed in establishing a right to remain in the UK, then the rest of the family must also be allowed to remain. I do not find that the circumstances of any of the children either individually or collectively are such as to render their best interests to remain in the UK despite the fact, as found below, that their parents have no legitimate basis for doing so.

23. I take into account that neither the claimant nor any member of the family can meet the Immigration Rules for leave to remain on the basis of either Appendix FM or paragraph 276ADE of the Immigration Rules, as accepted by Mr Collins.

24. In relation to private life under paragraph 276ADE of the Immigration Rules, neither the claimant nor Mr Aboagaye can meet the requirements. The first reason they fail under this provision is that both fall foul of the suitability requirement. Their presence in the UK is not conducive to the public good because their conduct and character, in attempting to deceive the authorities by bogus EEA applications, makes it undesirable to allow them to remain in the UK. Further, they cannot demonstrate that they have lost all ties to Ghana, including family, cultural or social, or that there are very significant obstacles to their integration in Ghana. They have both spent the majority of their lives in Ghana, where they have family members.

25. In relation to the children, the oldest child Chelsea meets the 7-year threshold requirement under paragraph 276ADE, but it has to be demonstrated that it would be unreasonable to expect her to leave the UK with her family. In this regard, in addition to those matters set out elsewhere herein, I have to bear in mind that she would be returning to Ghana with her family members, to a country where the language is English and there is a functioning education system. They have no right to education or continued residence in the UK. There is no reason why Chelsea or her siblings would not be able to continue education in Ghana whilst having the full support of the rest of the family unit. In the circumstances, there is nothing to demonstrate that it would be unreasonable to expect her to leave the UK with her family.

26. The refusal decision explains that it was up to the Crown Prosecution Service to make application for the claimant to remain in the UK for the purpose of the proposed prosecution, but no such application was made and thus the need for discretionary leave to remain outside the Rules no longer applies.

27. In his submissions Mr Collins accepted that neither the claimant nor any of her family members can meet the requirements of the Immigration Rules for leave to remain. That is a highly relevant factor that must be taken into account in any Article 8 assessment. There is a route for leave to remain, but they have not been able to meet those requirements. Any Article 8 assessment has to be seen through the prism of the Immigration Rules, which form the Secretary of State's response to private and family life rights under the ECHR.

28. Before considering Article 8 family and private life outside the Rules, I have to consider whether the private and family life circumstances of the claimant and her

family members are so compelling and insufficiently recognised in the Rules so as to render the decision of the Secretary of State unjustifiably harsh so as to require, exceptionally, the appeal to be allowed outside the Rules on the basis of Article 8 ECHR. In that regard, I have taken into account the principles set out in both SS (Congo) [2015] EWCA Civ 387 and Singh v SSHD [2015] EWCA Civ 74. Whilst the Court of Appeal has held that there is no threshold or intermediary requirement of arguability before a decision maker moves to consider the second stage of consideration outside the Rules on the basis of Article 8 ECHR, whether that second stage is required will depend on whether all the issues have been adequately addressed under the Rules. In other words, there is no need to conduct a full separate examination of Article 8 outside the Rules where in the circumstances of a particular case, all issues have been addressed in the consideration under the Rules.

29. Leave to remain outside the Rules is not reserved to exceptional cases, but the Rules provide significant evidence about the relevant public interest considerations, which should be brought into account when striking the proper balance of interests under Article 8. Although the claimant could not get to the stage of consideration of EX1 under Appendix FM, the proportionality test set out therein is one of insurmountable obstacles, defined in EX2 as very significant obstacles to continuing family life outside the UK which cannot be overcome or which would entail very serious hardship for the claimant or her partner. On the evidence in this case there is nothing to demonstrate that the difficulties they would face on returning to Ghana are insurmountable or otherwise meet the requirements under Appendix FM. In the circumstances, the claimant could not meet the Rules, even if she were not subject to the suitability requirements. Neither the Rules nor Article 8 guarantee the same standard of life or education as in the UK. The family is not entitled to remain in the UK just because they have no accommodation or employment lined up for them in Ghana. Article 8 is not a shortcut to compliance with the Rules and does not represent a lower standard for those who fail to meet the Rules. Further, they must be taken to have had no legitimate expectation to remain in the UK, except in accordance with Immigration Rules, and that they would, eventually, have to return to continue their private and family life in Ghana.

30. Similarly, although both the claimant and her partner cannot reach the very significant obstacles test under paragraph 276ADE, again because of the suitability requirements, it is relevant to note that even if that stage could be reached they have failed to demonstrate that either they have lost all ties to Ghana, the older test applied in the refusal decision, or that there are very significant obstacles to integration in Ghana, taking into account their life there before coming to the UK. Mr Collins conceded this at the hearing before me.

31. As held in SS(Congo), I am required to give the Rules greater weight than merely as a starting point for consideration of Article 8 proportionality. Although a test of exceptionality does not apply in every case, the Court of Appeal stated at §33 "..it is accurate to stay that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for a grant of LTR outside the new Rules in Appendix FM." The Court of

Appeal went on to state that whilst a requirement of very compelling circumstances or exceptionality is not a requirement, a requirement of compelling circumstances gives appropriate weight to the focused consideration of public interest factors under Appendix FM.

32. On the facts of this case, notwithstanding the circumstances of the children, I am not satisfied that there are any compelling circumstances in this case to justify consideration of family life outside the Immigration Rules on the basis of Article 8 ECHR.

33. However, even if I went on to consider Article 8 outside the Rules, in the Razgar proportionality balancing exercise between on the one hand the rights of the claimant and her family members and on the other the legitimate and necessary aim of protecting the economic well-being of the UK through immigration control I would be required to take account of section 117B of the 2002 Act. In particular I have to take account of the following factors: that immigration control is in the public interest; that it is in the public interest that persons who seek to remain in the UK are financially independent, which the claimant and her family are not; and that little weight should be given to any private life developed in the UK whilst the immigration status of the claimant and her family members was entirely precarious. I would also have to add to the weight of public interest factors balanced against the rights of the claimant and her family members that both she and her husband have engaged in fraudulent criminal conduct such that their presence in the UK is not conducive to the public good. Whilst section 117B(6) provides that the public interest does not require the removal of a person where there is a genuine and subsisting parental relationship with a qualifying child, and that Chelsea is a qualifying child because she has lived in the UK for a continuous period of 7 years or more, and it would not be reasonable to expect the child to leave the UK. That is the same test as under 276ADE. In AM (S117B) Malawi [2015] UKUT 0260 (IAC), the Upper Tribunal held that this question must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin, citing EV (Philippines), and it is not a question that needs to be posed and answered in relation to each child more than once. I have already addressed this question and concluded that it would be reasonable to expect the children, including Chelsea, to accompany their parents to Ghana, where those parents have no right to remain in the UK and are to be removed.

34. There are, therefore, very significant public interest considerations weighing in the balance against the desires of the claimant and her family to remain in the UK, where they have been now for some 10 years or so.

35. To be added to the above, there are the considerations from the best interest of the children cases set out above. None of the family is a British citizen and none have any right to remain or be educated in or financially supported by the UK. None meet the requirements of the Immigration Rules. There would be a very significant cost to the public purse in allowing this family to remain in the UK. The conduct of the parents should not be visited as a punishment on the children, but their conduct strongly tips

the balance in favour of removal of the parents. Where the parents should be removed the starting point for consideration of the children is that they should accompany their parents back to Ghana, unless there are compelling circumstances why any one or more of those children should not be removed along with their parents. I have given full account to their integration into life in the UK and that three of the four are in full-time education in the UK. I take account of the disruption there will be at being removed from schooling and returning or going to Ghana where they have never lived. On the other hand education in English is available for them in Ghana, where they have a wide family network from both maternal and paternal families, compared with the UK where they have no family members. I also bear in mind the education and qualifications the parents have both obtained whilst studying in the UK, which will stand them in good stead on returning to Ghana. I have in particular given careful consideration to the factors set out at §35 of EV (Philippines), including the length of time they have been in the UK, particularly Chelsea; the stage of education reached by Chelsea, now in secondary school; their lack of familiarity with Ghana; and that they are not going to have linguistic, medical or other particular or special difficulties in adapting to life in Ghana. Weighing all these matters, together with all those urged upon me in Mr Collins oral submissions, I find that if an Article 8 ECHR assessment were to be carried out outside the Rules, the decision of the Secretary of State would be found to be entirely proportionate and not disproportionate to the collective or individual rights of the claimant and her family members.

Conclusion and decision:

36. For the reasons set out herein, the appeal must be dismissed on all grounds.

Signed
Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. The First-tier Tribunal did not make an order. No submissions were made on the issue. Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed
Deputy Upper Tribunal Judge Pickup

Dated