IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50371/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st May 2015	**On 2nd July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MR SAMUEL WESLEY-QUAISON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Bexson - Counsel
For the Respondent: Mr Clark - Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Samuel Wesley-Quaison, a citizen of Ghana, born 25th January 1984. He appeals against the decision of the Secretary of State made on 15th November 2013 to refuse to vary his leave to remain and to remove him from the United Kingdom by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The Appellant's appeal against that decision was initially heard by First-tier Tribunal Judge Sanderson on 24th June 2014 and was allowed. The Secretary of State appealed against that decision and on 10th March 2015, having

heard submissions, I found that there was a material error of law in the decision of the First-tier Tribunal and I set Judge Sanderson's decision aside with no preserved findings of fact.

2. The Appellant came to the UK in February 2012 with entry clearance as a visitor valid to 17th July 2012. On 22nd May 2012 he married a British citizen, Benedicta Wesley- Quaison, and their first child was born on 2nd February 2013. A second child was born on 15th July 2014. The Tribunal was advised by a letter from the Appellant's solicitors on 2nd March 2015 that the Appellant's wife had enrolled on an extended Human Resources Management Programme at Plymouth University which commenced on 9th February 2015 and was due to be completed in September 2017. It was accepted at the hearing before the First-tier Tribunal that the Appellant could not satisfy the Immigration Rules as set out in Appendix FM because he only had leave to remain as a visitor. Judge Sanderson found that it would be unreasonable to expect the Appellant either to take his wife and child with him back to Ghana or to travel to Ghana to make a proper application for entry clearance. I set the decision aside because I took the view that Judge Sanderson had failed to consider all the relevant evidence. In particular he had allowed the appeal under Article 8 without any consideration at all of the public interest, the need for effective immigration control in the UK or current caselaw relative to the relationship between the Immigration Rules and Article 8.

3. I heard evidence from the Appellant who adopted a statement that he had prepared for the first hearing on 13th June 2014. In that statement he says that he and his wife started to live together after he arrived in the United Kingdom. He talks of difficulties she had in her first pregnancy. She had had a previous miscarriage and other problems. She had an eclamptic fit at the time of the birth of her first child. The Appellant describes his previous employment and qualifications. He points out that his wife and son are British citizens and are permanently settled in the UK. His wife has been in employment and supporting herself and her family and was at the time the statement was written expecting their second child. He has no-one in Ghana. He has established a family and private life in the UK. He has provided letters from friends and family in support of his appeal. He submits that to remove him would give rise to a breach of his rights under Article 8 ECHR.

4. There is a bundle of documents confirming that the couple are living together.

5. In oral evidence the Appellant confirmed that his wife is working as a Customer Services Assistant at Clapham Junction and is earning around £18,000 per annum. At the time the application was made she was earning between £21,000 and £23,000 after tax. They had known each other in Ghana as children. They went to the same church. His relationship with his wife began immediately he arrived in the UK. Whilst they were both in Ghana they would talk on the phone sometimes. He had been due to marry another woman in Ghana but his fiancée broke off the relationship three months before the wedding. He had a business in Ghana and had applied to run an airline there. He came to the UK initially for his birthday celebration then he had to go to Croatia. He decided to get married. He had been going to continue his

business in Ghana but then they realised that his wife was pregnant. They were worried that she would have another miscarriage because she had had one previously and he did not want to leave her.

6. In cross-examination Mr Clark asked the Appellant why he cannot go back to Ghana to make an application for entry clearance. The Appellant said that he had a business there and the man who was running it is dead. It would take three months to make an application and he has no money or home there. He was living with his grandmother prior to coming to the UK but she died last year. He does not know where his mother is and has no other relatives or friends there. Most of his friends live abroad. He does not want to be separated from his wife and children in order to return to make a fresh application. In any event he looks after the children while his wife works.

7. In his submissions Mr Clark said that the Appellant does not meet the requirements of the Immigration Rules. He came as a visitor so cannot rely on Appendix FM including paragraph EX.1 of Appendix FM. He said he would rely on the decision of the Upper Tribunal **R (on the application of Chen) v SSHD (Appendix FM) – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)** in particular paragraph 39. He submitted that the Tribunal is obliged to give weight to the public interest. It is irrelevant that the financial requirements of the Rules may be met. Little weight should be given to the Appellant's private life and indeed to the family life established in the circumstances. He submitted that **Chikwamba** is no longer applicable to the Appellant's case.

8. The submission of Miss Bexson was that to remove the Appellant would be grossly disproportionate. It might take more than three months for him to get entry clearance. The Appellant's wife's income has dropped and it is not clear that the Appellant would be able to meet the financial requirements if a fresh application had to be made. The Appellant's wife would have to stop working to look after the children. These are exceptional circumstances particularly given the young age of the children. His wife has been in employment for ten years. They have close family and friends. She has paid the course fees for her university course. The children are at nursery. She accepted that the relationship progressed very quickly to marriage and children but the Appellant has explained that. He was going to do a project in Ghana but because of his wife's problems with the pregnancy he could not do that. It is in the best interests of the children to be with both parents and it would not be in their best interests either to be separated from their father or uprooted to live in Ghana where they would lose the support of the wider family in the UK. She relied on the decision **EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41**, submitting that the separation of the family would be disproportionate. She also submitted that the Appellant has no ties to Ghana and would thus qualify for leave under paragraph 276ADE(vi). Miss Bexson submitted that the balance tips in favour of the Appellant, taking into account the fact that they are an educated couple. He has a degree. They would not be a financial burden on the state.

9. Mr Clark asked if he could make one more submission and said that he would wish to rely on the decision **Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 42 (IAC)** on the issue of 'ties' in one's country of origin**.**

My Findings

10. I have given careful consideration to all the evidence put before me in this case.

11. It is clear that the Appellant cannot rely on the provisions of Appendix FM because he was here on a visit visa and this is prohibited by paragraph E-LTRP.2.1(a). As Miss Bexson conceded it is not clear on the figures available that in their current circumstances the couple would meet the financial criteria set out in Appendix FM in any event. I therefore proceed to consider the submissions made relative to Article 8 ECHR.

12. In **Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] UKHL 27 (17 June 2004)** the court said that there are 5 questions that must be asked in considering the question of a breach of Article 8,

    (1) Is there an interference with the right to respect for private life (which includes the right to respect for physical and moral integrity) and family life?

    (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

    (3) Is that interference in accordance with the law?

    (4) Does that interference have a legitimate aim?

    (5) Is the interference proportionate in a democratic society to the legitimate aim to be achieved.

13. I accept that the couple are in a genuine relationship and that the Appellant enjoys both a family and a private life in the UK. I do not disagree with the factual analysis of the situation set out by Ms Bexson in her submissions. I accept that the couple have two children, both British citizens, whose best interests have to be considered.

14. So far as the Immigration Rules are concerned I must consider paragraph 276ADE which sets out the requirements for leave to remain in the UK on the basis of private life and states,

    '… that at the date of the application the applicant

    (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

    (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

    (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.'

(Sub-paragraph (vi) was amended relative to all decisions made after 28th July 2014 but the version above is that applicable to this case.)

15. In **Bossadi** the Tribunal said,

> "(2) The requirement set out in paragraph 276ADE (vi) (in force from 9 July 2012 to 27 July 2014) to show that a person "is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK", requires a rounded assessment as to whether a person's familial ties could result in support to him in the event of his return, an assessment taking into account both subjective and objective considerations and also consideration of what lies within the choice of a claimant to achieve."

16. I am unable to find in this case that the Appellant has lost ties to Ghana. He came here in 2012, having lived there prior to that. Whilst it seemed to me that the Appellant appeared in general to be a credible witness, I think it is highly unlikely that he has no-one at all in Ghana as he stated. I think it is highly unlikely that all his friends have left the country and that he has no family there. He had a business there until fairly recently and had plans for a new venture. I find that he does not meet the criteria set out in paragraph 276ADE(vi).

17. In considering Article 8 I must take account of the public interest considerations set out at s.117B of the Nationality Immigration and Asylum Act 2002, which reads,

'Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.'

18. In considering s.117 B I have borne in mind the guidance set out in **Dube (ss.117A-117D) [2015] UKUT 90 (IAC).** I note too that paragraph 4 refers to a relationship established whilst a person is in the UK unlawfully and paragraph 5 to a private life established when the person's immigration status is precarious.

19. The Tribunal said in **AM (S 117B) Malawi [2015] UKUT 260 (IAC)**

"(3) Parliament has now drawn a sharp distinction between any period of time during which a person has been in the UK "unlawfully", and any period of time during which that person's immigration status in the UK was merely "precarious".

(4) Those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. A person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave."

20. It may well be that by virtue of s 3C Of the Immigration Act 1971 and the fact that he applied for a variation of his leave on the day his visit visa was due to expire the Appellant was never in the UK 'unlawfully' but it cannot be disputed that his leave was precarious. Article 8 imposes no general obligation on a state to facilitate the choice made by a married couple to reside in it: R (Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621. I bear in mind too that in such cases a relevant factor is whether or not the family can reasonably be expected to live elsewhere. I rely on the findings in **Secretary of State for the Home Department v SS (Congo) & Ors [2015] EWCA Civ 387 (23 April 2015),** particularly the following at paragraph 39 in which the Court of Appeal set out the position under Article 8 in relation to an application for LTE on the basis of family life with a person already in the United Kingdom. They said,

> "iv) On the other hand, the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy. Article 8 has to be interpreted and applied in the light of the UN Convention on the Rights of the Child (1989): see *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] AC 144, at [26]. However, the fact that the interests of a child are in issue does not simply provide a trump card so that a child applicant for positive action to be taken by the state in the field of Article 8(1) must always have their application acceded to; see *In re E (Children)* at [12] and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, at [25] (under Article 3(1) of the UN Convention on the Rights of the Child the interests of the child are *a* primary consideration – i.e. an important matter – not *the* primary consideration). It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the state authorities in deciding what to do. The age of the child, the closeness of their relationship with the other family member in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind.
>
> v) If family life can be carried on elsewhere, it is unlikely that "a direct and immediate link" will exist between the measures requested by an applicant and his family life (*Draon*, para. [106]; *Botta v Italy* (1998) 26 EHRR 241, para. [35]), such as to provide the basis for an implied obligation upon the state under Article 8(1) to grant LTE; see also *Gül v Switzerland*, [42]. "

21. I accept that the Appellant does speak English and that his wife has been supporting him and their children financially. I accept it to be likely that the Appellant would be able to earn a living in the UK. The fact is however that at the time he married his wife and undertook and began to develop a family life in the UK, his leave to be here depended on a visit visa valid for six months which he knew would expire on 17th July 2012, less than two months after his marriage which took place only three months after he arrived in the UK. There is no evidence before me, either documentary or oral, to suggest that at the time of the decision to marry the Appellant gave any consideration at all to UK immigration law or about where they would live. I It seems that the assumption all along has been that because the Sponsor is a British citizen with a job and a family here she could not be expected to go with her husband to Ghana and nor should her children. So far as the Appellant's private life is concerned there is no doubt that his leave was precarious throughout the time of his relationship with his wife, their marriage and the births of their two children. Little weight should therefore be given to his private life here.

22. As British citizens the Appellant's children are qualifying children and so come within the terms of s.176B(6)(a). I must therefore consider whether it would be reasonable to expect the children to leave the United Kingdom. The starting point is that it is in their best interests to be with both parents. I accept that the children have extended family in the UK. Their mother originally came from Ghana so the country would not be totally strange to her. She may well have integrated into the UK but she is accustomed to the culture in Ghana as is the Appellant. The children are very young, the older being not yet two and a half years old. It is difficult to conclude that

it is unreasonable to expect the children to leave the UK with both parents and live in Ghana or indeed that it is unreasonable to expect their mother to do so, especially in the circumstances that the Appellant and Sponsor knew each other in Ghana before coming here separately. I have no evidence of the Appellant's former business in Ghana other than a bare assertion that the man who was running it has died and I have already said that I do not accept that he has no contacts, friends or family there. I do not consider that there are any insurmountable obstacles to his wife living with him in Ghana or that there are any exceptional or compassionate family circumstances that would assist in tipping the balance of proportionality in favour of the Appellant and warrant a grant of leave outwith the Immigration Rules. The Sponsor has recently enrolled on a course but I must take into account that she did this while her husband's appeal against a decision to remove him was pending and when she was perfectly aware that there was no guarantee that he would allowed to remain here.

23. I therefore find that the Appellant has not established that there need be any interference with his family life if he had to leave the UK as the family could move together to Ghana. In the event that his wife chose not to accompany him it seems to me that the interference would in all the circumstances be proportionate to the need for effective immigration control in the UK.

24. The other factor in this case, which was greatly relied upon by the Secretary of State, was the possibility of the Appellant returning to Ghana to seek entry clearance through the proper channels by making an application to return to the UK as a partner under the Immigration Rules. I have found that it would not be unreasonable for the whole family to go to Ghana but in the event that the Appellant's wife chose not to go discussion of the interference to family life that the making of a fresh application would necessitate may be relevant.

25. Miss Bexson relied on the decision **Chikwamba v Secretary of State for the Home Department [2008] UKHL 40** in which the House of Lords noted the then extant policy of the Respondent that :

> "A person who claims that he will not qualify for entry clearance under the rules is not in any better position than a person who does qualify under the rules—he is still expected to apply for entry clearance…"

Lord Brown in the House of Lords said,

> "I am far from suggesting that the Secretary of State should routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."

26. In **Chen,** a recent decision of this Tribunal, it was said,

> "(i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in

> which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40."
>
> (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das) v SSHD [2011] EWHC 2070 (Admin))."

27. Mr Clark relied in particular on paragraph 39 in which Judge Gill said:

> "In my judgement, if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted *and* that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was 'precarious'. In other words, in the former case, it would be easier to show that the individual's circumstances fall within the minority envisaged by the House of Lords in **Huang** or the exceptions referred to in judgments of the ECtHR than in the latter case. However, it all depends on the facts."

28. The Appellant does not meet the Immigration Rules. He entered into a marriage and family life in the UK at a time when he was aware that he had very limited leave to remain here and would have to apply for a grant of leave. For the reasons set out above I do not accept that he has no ties to Ghana or that he knows no one there. His children are very young and there is extended family in the UK to assist his wife. I accept that if the Appellant had to go to Ghana to make an application there would be an interference with their family life and I accept that it may interfere with the Sponsor's course. It was put to me that it might interfere with her employment as the Appellant looks after the children but I do not give great weight to that in all the circumstances. I must take into account that the Appellant made the decision to marry and initiate a family life in this country having obtained leave to come as a visitor for a limited period. Having done so he was bound by the legal requirements applicable to all who whilst in the UK with only limited leave wish to marry a British citizen.

29. I find therefore that it would not be disproportionate to the need for effective immigration control to expect the Appellant to return to Ghana to make an application through the proper channels.

Notice of Decision

The appeal is dismissed under the Immigration rules and on human rights grounds.

No anonymity direction is made.

Signed Date: 29th June 2015

N A Baird
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

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

Signed Date: 29th June 2015

N A Baird
Deputy Judge of the Upper Tribunal