Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22386/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 December 2016	**On 2 May 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NICHOLAS OHENE OBENG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: Ms F Allen of Counsel instructed by Owens Solicitors

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a citizen of Ghana. He claims to have entered the UK illegally in March 2007, aged 32, with no valid visa. In 2007 he met MA and in 2011 formed a relationship with MA. Their relationship bore a son, N, born in August 2013. MA and N have Discretionary Leave to Remain until 31 July

2018. R is a British citizen with a different father. MA now has another child, E. The claimant's relationship broke down shortly after N was born and his son lives with MA. Despite initial difficulties in agreeing access, the couple agreed through a Family Mediation in March 2015 that N would continue living with his mother and his half-sister, R, born in 2010, but would have overnight contact with his father every alternate weekend as well as seeing him during the week on two or three afternoons. On 2 April 2015 the claimant applied for leave to remain on the basis of his family life in the UK with A. In this application he stated that he had separated from MA but that even though MA only had temporary leave to remain in the UK, it was not in N's best interests for the claimant to be removed and separated from N. On 4 June 2015 the respondent refused his application on the basis that he did not qualify under the Immigration Rules and he had not shown exceptional circumstances to warrant a grant of leave outside the Rules, one reason being that his removal would not result in unjustifiably harsh consequences.

2. The claimant appealed and in a decision sent on 7 March 2016 First-tier Tribunal (FtT) Judge Lodge allowed his appeal on Article 8 grounds. The appellant (hereafter the Secretary of State or SSHD) appealed and on 20 October 2016 I issued a decision setting aside FtT Judge Lodge's decision for error of law.

3. In summary I found that the judge had erred: in conducting a simplistic assessment of the best interests of the child that did not involve a balancing of factors; in considering that denying a child the presence of his father was per se disproportionate; in failing to attach significant weight to the fact that the claimant did not meet the requirements of the Immigration Rules (see SS (Congo) [2015] EWCA Civ 387); and in failing to consider that under both s117B(4) of NIAA 2002 in relation to his private life ties and under the jurisprudence on Article 8 at large (see Rajendran (s117B – family life) [2016] UKUT 138 (IAC), little weight should be attached to relationships formed at a time when a person's immigration status is precarious. In the course of analysing the evidence before the FtT Judge I stated at [6] and [7] that:

> "6. ... I find it particularly striking that the judge appeared not to weigh in the balance at all the fact he recorded at [10] as follows:
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> '10. He was asked what he would do if the child's mother decided to return to Ghana. He said that if she went back he would stay here in the UK. He was pressed again on this point. He said he just wanted to stay here in the UK and would not return to Ghana even if the child went back with his mother'.
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> 7. By stating that it was more important for him to stay in the UK than maintain a relationship in the same country with his child, the claimant demonstrated that his relationship with his child was secondary to his own immigration concerns. His is not a case, I note, where there is no (sic) issue of him facing risk on return to Ghana."

4. Having observed that there was no particular factual dispute about the extent of the claimant's contact with his child, I decided to retain the case in the Upper Tribunal with a direction that the claimant produce a report from an independent child professional relating to the circumstances of the child (to include the child's relationship with his half-sibling).

5. In time for the resumed hearing the claimant produced a report from an independent social worker, Philip Kent, dated 24 November 2016. He visited MA and N in her house and the claimant and N in his. He noted that N had been attending nursery since September and that the claimant picks N up from nursery on Mondays, Tuesdays and Wednesdays in the afternoon and returns him to MA late afternoon. The claimant contributes £120 a month. N also spends about two weekends a month living with the claimant, however, this is a flexible arrangement. Mr Kent found that the relationship between the claimant is a loving one and that it is very important to N: R also sees the claimant as a dad:

> "[N] has a strong relationship with both parents. If he was denied a physical relationship with his father his development could be compromised. Considering his mother has had considerable difficulties in maintaining long-term relationships and his father appears to be the one constant adult male in the life of this family, Ms [MA] informed me that her other children also view [the claimant] to be their father."

6. Mr Kent concluded that it was his view, based on his observations,

> "that [N] needs his father for healthy development. [The claimant] is an important figure in [N's] life and.... it would be to his detriment if [the claimant] were to be physically removed from his life... Considering Article 8, it would seem that removing [the claimant] would be in contravention to N's rights and welfare. I therefore recommend that [the claimant] be allowed to remain in the UK."

7. The claimant also produced an updated witness statement of 9 December 2016 stating that:

> "1. At the hearing of my appeal at the [FtT] the then Officer asked me if I would return to Ghana if my son's mother were to return and I said no. I wish to state that I was extremely nervous at the hearing and this reflected in the answer that I gave. My reasoning for saying no was not because I am only interested in the UK without my son, this is far from it. Rather I thought that the question was about my son's mother and her other children moving to Ghana and since I was not married to his mother, I would remain in the UK with my son. I certainly wish to be with my son wherever he is as I am committed to be there for him as he grows up.

2. I am also committed to my son's half-siblings who see me as a father figure. I have been playing a vital role in the life of R, who is my son's half-sister. R spends time with me on a regular basis and she now calls me 'Dad'."

8. At the resumed hearing before me Ms Allen said that the claimant was entitled to rely on Article 8 because there was no provision in the Rules for parents of children with limited leave. The claimant's case had sharply to be distinguished from cases where the family unit could be expected to leave the UK together. There was no suggestion MA and her three children including N should uproot themselves and go to Ghana. She and the claimant do not live together and do not have a relationship.

9. So the issue was whether it was proportionate to separate father from son when it was in the latter's best interests to have his father in his life. Hence, issues such as whether the child's best interests lay here or in Ghana given linguistic, cultural and family support networks were irrelevant. The SSHD's refusal letter completely failed to consider the claimant's relationship with N. It was especially important in the claimant's case to recall the guidance given by the Supreme Court to the effect that a parent's immigration wrongdoings are not to be visited on the child. The independent social worker report bore out that the claimant had been a constant figure in N's life since he was born and that to remove the claimant could risk N's development. Contact could not be maintained in any real sense if the claimant is removed to Ghana. Sections 117A-D of the NIAA 2002 contained very few considerations relevant to the claimant's case: the claimant spoke English; he was not financially independent as he was reliant on friends here; he was relying on family life, not private life; N is not a qualifying child. Any contact with N is very dependent on MA's co-operation; the current arrangements were agreed only after Family Mediation. The claimant was not asking for ILR, just leave to coincide with N's which ran until July 2018. The claimant was also an important figure in the life of R, N's half-sibling and would be for E.

10. Ms Fijiwala said that the SSHD's refusal decision was proportionate. It was accepted in this case that the claimant enjoyed family life with N, but that still left the issue of proportionality. As regards the best interests of the child, clearly it is best if a child is brought up by both parents but N's primary carer has always been MA and he had always lived his mother's home. N has important relationships with two half-siblings.

11. It was against this background, submitted Ms Fijiwala, that the public interest considerations had to be weighed. The claimant could not meet the requirements of the Rules; he had an appalling immigration history: he had never made application to regularise his stay until N was born. The claimant's purported explanation in his updated witness statement as to why he had said he would remain in the UK if MA and her son went to Ghana made no sense. Whilst s117(4) and (5) only required little weight in certain circumstances to be attached to a person's private life, the precarious nature of immigration status was also relevant to family life and it was a

factor that the claimant had begun his relationship with MA when his immigration status was precarious. The claimant was not financially independent and if he provides money to MA for N it was not his money. If the claimant remains in the UK he would be a burden on the state: he had provided no specific explanation of how he covers his accommodation and day-to-day expenses. Whilst of course indirect contact with his child from Ghana would not be the best option for the child, MA had been to Ghana and contact could be maintained through Skype etc. MA only has DLR so there was a real possibility she may have to return to Ghana in any event. There were no compelling circumstances in the claimant's case.

12. In response, Ms Allen reiterated points she made earlier, explaining that this was a case in which the SSHD accepts that the child would remain in the UK. If MA and N are not granted further leave to remain after July 2018, the claimant accepts he should not get further leave.

My Decision

The Rules

13. It is accepted by Ms Allen that the claimant does not meet the requirements of the Rules but she avers that this is because the Rules have a lacuna in that they do not cover the situation of fathers of children who have limited leave. It is not clear to me why this should be regarded as a lacuna. The contents of the Rules is a matter of policy for the executive and parliament and if they fail to incorporate Article 8 safeguards in every respect, the Human Rights Act 1998 functions to protect their situation.

Best interests of the child

14. The claimant's case is predominantly put on the footing that his removal would be disproportionate because it would be contrary to the best interests of his son, N. Ms Allen contends that because the claimant's case is not one in which there is any issue of the child being expected to accompany the father to his country of origin (Ghana), – it is not a case where one considers the relative strengths of linguistic, cultural and familial ties in the country of origin as compared to the UK. I consider she is right about that, but that does not mean I accept that the decision was disproportionate.

15. In assessing the best interests of N, I would accept that considered overall his best interests are on balance to have his father remain in the UK as part of his life. That has been confirmed by the recent report from the independent social worker, Mr Kent. It is a remiss of Mr Kent to attempt at the end of his report to venture his own opinion of what the Human Rights Act entails in the claimant's case; his opinion was sought as to the child's welfare, not his own views about how the law should be applied and interpreted. Nevertheless, I am prepared to treat this as a lapse of judgment that has not undermined the reliability of his factual observations and his evaluation of N's circumstances. In his opinion N's development would be

negatively affected by the claimant's departure and N would lose the only stable father figure in his life presently.

16. At the same time, the claimant's departure would not wholly nullify the child's best interests. N would continue to be in the same house and be brought up by the same primary carer he has now, his mother, MA. The claimant has never been involved in N's life as a father in a nuclear family, living in the same household and sharing the primary care of the child nor has the claimant ever been a parent going out to work to support his family. Although he presently gives £120 a month, that is not money he has earned, simply money friends have given to him. Hence, although N's best interests would be impaired by the claimant's departure, they would not be nullified and in the most basic respects, in terms of provision to him of primary care in a stable household, would be unaffected.

17. This qualified finding as regards N's best interests must now be carried over into the assessment of the proportionality of the decision to remove the claimant. It is shown in this case that the claimant enjoys family life with his son within the meaning of Article 8 and that the decision to remove him is an interference with this family life.

18. In assessing proportionality, I take into account in the claimant's favour that he has lived in the UK for over eight years, speaks English and has a network of friends. From the account he has given of his history he may have held valid hopes he could study in the UK as an engineer but that did not happen because of his brother's death. I also take into account in his favour that even though his relationship with MA has broken down he has retained contact with their son, N and has developed a loving relationship with him and he has regular contact with N several days a week and on alternative weekends that also involves N staying with him. I accept that if the claimant is removed, N's development will be negatively affected. Also, weighing in the claimant's favour is that he has sought to take an interest in MA's two other children, the oldest, R, who calls him dad.

19. I consider, however, that these factors are heavily outweighed by factors counting against the claimant. The claimant has a poor immigration history and did not take steps to regularise his position until several years after he arrived in the UK illegally. He did enjoy family life for a period of time with MA but that relationship was entered into when he knew his immigration status was precarious. The claimant is not financially independent.

20. This is not a case where the other parent of the child concerned has citizenship or settled status in the UK. MA has DLR until August 2018 and she does have a B C daughter, but her own immigration status is precarious and it cannot be assumed her leave will be extended further. Put another way, the claimant's strength of connections with the UK is weak and on the mother's side they are also contingent.

21. I have already found that on balance the best interests of the child, N, lay with having the claimant continue to be part of his life, but as already noted, N's best

interests will continue in most respects to be unaffected because he will still have the same primary carer and live in the same household. As regards the claimant's feelings for N, I am entirely satisfied they are genuine and the independent social worker has vouchsafed the strength of the claimant's bond with N. At the same time, I cannot ignore that in the wider scheme of things, the claimant was quite clear at the time of the hearing before the FtT judge in November 2015 that even if N went with his mother to Ghana he (the claimant) would seek to stay in the UK. In an updated witness statement the claimant has sought to explain this statement by saying that it was said out of nervousness and because he thought the question was about MA and the other children moving to Ghana. However, that interpretation is inconsistent with the record of his evidence made by the FtT judge and it is quite clear from the Record of Proceedings that the claimant was being asked about the scenario of MS going to Ghana with N.

22. As regards the claimant's ties with R and the newborn E, E is clearly too small to see the claimant as a father figure. I am prepared to accept that R, however, does see him as a father figure, but it is equally clear that the claimant has very limited possibilities for spending time with her as he does not live with her and when he has N with him R is not with them. Although the claimant asserts in his updated witness statement that "R spends time with me on a regular basis" there is no mention of that in the independent social worker's report and no suggestion by the claimant hitherto that he had any contact with R except when dropping N back home or picking him up.

23. Ms Allen has submitted that this appeal is not concerned with the situation where the child involved could reasonably be expected to accompany the claimant to his country of origin or that the mother could reasonably be expected to return to live near the claimant so that he could continue to enjoy the same contact and access arrangements he has presently. That is correct, but it is a relevant consideration nonetheless that if the mother of the child concerned believes it is central to the child's best interests that he continue close contact with the claimant, then, it is open to her to return to Ghana to ensure that, and indeed she has no legitimate expectation of remaining in the UK for more than another year or so. She is a national of Ghana and has been back to Ghana for a visit in the recent past.

24. Weighing all relevant factors for and against the claimant, I conclude that the decision of the SSHD was a proportionate one and that it would not be contrary to his Article 8 rights to remove him to Ghana.

To conclude:

It has already been found that the FtT judge materially erred in law and his decision has been set aside.

The decision I re-make is to dismiss the claimant's appeal.

No anonymity direction is made.

Signed Date: 28 April 2017

Dr H H Storey
Judge of the Upper Tribunal