



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/00877/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 8th February 2018**

**Decision & Reasons
Promulgated
On 6th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**POA
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Record, Chambers of C. Record

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by POA, who is a child and a citizen of Ghana, against a decision of Judge Kaler to dismiss his appeal against refusal of his application for entry clearance to the United Kingdom as the stepson of a British citizen. The appeal as it was constituted before Judge Kaler, included an appeal by POA's mother to whom I shall refer as 'BOT'.
2. The application of POA was considered by the Respondent under paragraph 297 of the Immigration Rules. This required proof that the

husband of BOT was the 'parent' of POA. It also included a requirement that BOT had had sole responsibility for his upbringing.

3. In considering the application under the Rules, Judge Kaler concluded that BOT had met all the requirements of the relevant Rule for admission to the United Kingdom and allowed her appeal on this basis. She then considered POA's appeal under paragraph 297 of the Immigration Rules and concluded that BOT had not had sole responsibility for his upbringing. This was due to the fact that POA continued to have fortnightly contact with his biological father in Ghana. Finally, the judge considered POA's appeal under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and concluded that the decision to exclude him from the United Kingdom was proportionate for the reasons that are quoted at paragraph 12 (below).
4. The Grounds of Appeal argue that (a) the term 'parent' under paragraph 297 should be construed so as to include a 'stepparent' (and thus to include the husband of BOT) and (b) the mere fact that POA's biological father had contact with him ought not to have stood in the way of a finding that POA's mother had had sole responsibility for his upbringing, especially given the fact that his biological father was content for him to live with BOT and her husband in the United Kingdom.
5. Permission to appeal was granted by Upper Tribunal Judge Kebede on 18th October 2017 in the following terms:

"The Appellant, a citizen of Ghana, appealed against the Respondent's decision to refuse his application for entry clearance to join his stepfather in the UK together with his mother. First-tier Tribunal Judge Kaler dismissed the appeal. The Appellant applied for entry clearance together with his mother to join the Sponsor, his mother's husband and his stepfather, leaving his father behind in Ghana. Judge Kaler allowed the appeal of the Appellant's mother but dismissed the Appellant's appeal. As far as I am aware the Respondent has not sought to challenge the decision in respect of mother's appeal. Given the decision in the Appellant's mother's appeal and the questions that this raises, in particular that stated at paragraph 28 of the grounds, I find arguable merit in the grounds raising Article 8 considerations. The first two grounds are of less arguable merit, but I do not exclude them. All grounds may be argued."

6. Paragraph 28 of the grounds, to which Judge Kebede referred, reads as follows:

'The effect of the IJ determination is that the mother would be forced to choose between living with her husband and living with her child.'

The first two grounds (those which Judge Kebede considered had less merit) were the ones to which I have already alluded, namely, that the definition of a 'parent' ought to be extended under the Rules to include a 'stepparent', and the fact that POA continued to have contact with his

biological father in Ghana ought not to have precluded a finding of 'sole responsibility' for his upbringing by BOT.

7. It is easy to lose sight of the fact that since 5th April 2015 the Tribunal has been confined to hearing appeals from refusal of applications based upon the private and family life on the sole ground that the original decision is unlawful under Section 6 of the Human Rights Act 1998. It follows that POA was required to establish that refusal of his application for entry clearance is contrary to his right to respect for private and family life under Article 8 of the 1951 European Convention of Human Rights and Fundamental Freedoms. Where an application is made under Appendix FM of the Immigration Rules, fulfilment of its requirements is usually regarded as sufficient to demonstrate that the applicant has also established a right to enter or remain in the UK under Article 8. This is because the stated aim of Appendix FM is to strike the appropriate balance between private and public interests (see GEN.1.1 of Appendix FM). In other cases, however, fulfilment of the requirements of the relevant Immigration Rule is merely a factor to be considered in the overall assessment of the applicant's rights under Article 8. This is because Article 8 does not impose a general obligation upon the signatory state to respect the choice by family members of the country in which to enjoy family life. (**Abdulaziz and Others v United Kingdom** [1985] ECHR 7). In short, Article 8 simply imposes an obligation upon a signatory state to permit family life within its territory where it cannot reasonably be expected to be enjoyed elsewhere.
8. It follows from the above that the question of whether the definition of a 'parent' under the Immigration Rules includes a 'stepparent' was wholly immaterial to the Article 8 assessment that the judge was required to undertake. This is because the concept of a 'stepparent' is one that focuses upon the relationship of the person with one or other of the biological parents of the child, whereas the critical question for Article 8 purposes is whether the person has a genuine and subsisting relationship with the child akin to that of a parent. I therefore hold that the judge did not make a material error of law in this regard.
9. As far as the second ground is concerned, it seems to me to have been within the reasonable parameters of the concept of 'sole responsibility' for the judge to have found that fortnightly contact between POA and his biological father amounted to participation in his upbringing and that it was not therefore the sole responsibility of BOT.
10. However, for the reasons that I have previously given, neither of these matters was critical to the question of whether the exclusion of POA from the United Kingdom is contrary to his rights under Article 8 of the Convention. Rather, they were simply factors to be considered within an overall assessment under Article 8 and the principles I summarised at paragraph 7 (above). However, before I turn to consider the judge's approach to that assessment, it is first necessary to consider whether the fact that the appeal of BOT was allowed is one that carries with it the necessary implication that her marital relationship with the Sponsor could

not reasonably be expected to be enjoyed outside the United Kingdom. In my view it did not.

11. For the reasons considered at paragraph 7 (above), fulfilment of the requirements for entry clearance under Appendix FM is usually treated as also establishing a right to enter the United Kingdom under Article 8 of the Convention. However, the fact that it is the policy of the Secretary of State to grant leave to enter to those who are able to meet the suitability and eligibility requirements of Appendix FM does not in my judgement inevitably lead to the conclusion that their family life cannot reasonably be enjoyed elsewhere. I therefore reject Ms Record's submission that such a finding was implicit in the judge's decision to allow the appeal of BOT. For the same reason, I also conclude that the judge's decision in the appeal of BOT did not have any significant bearing upon the question of whether POA's rights under Article 8 were infringed by his exclusion from the United Kingdom.
12. The judge's assessment of POA's Article 8 claim is contained within paragraphs 16 and 17 of her decision:

"16. I bear in mind the five tests in **Razgar [2004] UKHL 27**. Family life has not been established in the UK. The Appellants wish to live here with the Sponsor. Presently family life with him is being enjoyed through modern means of communication and visits by the Sponsor. The decision does interfere with the right to establish family life in the UK, but the parties do not have an unfettered right as to where family life may be enjoyed. The Sponsor's origins are in Ghana. The decision is lawful as it is made in accordance with the Immigration Rules. It is in pursuance of the legitimate aim of maintaining a fair but firm policy of immigration control. In assessing the balance between the public interest and the rights of the Appellants under Article 8(2), I have kept in mind the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002.

17. The second Appellant has a father in Ghana who has not abrogated his responsibilities. The Sponsor and the first Appellant have chosen to enjoy family life in the UK with the second Appellant, but it has not been demonstrated that it would be unreasonable for family life to be enjoyed in Ghana. The Sponsor is originally from Ghana and he travels there often. I do not find that there are any factors that tilt the balance of proportionality in the second Appellant's favour."

The above reasoning might equally have been applied to BOT. However, given the concession made by the Secretary of State in GEN.1.1 of Appendix FM, I can understand why the judge felt constrained to allow her appeal. This does not however lessen the cogency of her reasoning in dismissing the appeal of POA. It was in my view open to the judge to conclude that the Sponsor, BOT, and POA, could all reasonably be expected to enjoy their family life in Ghana, with the added benefit that POA would continue to enjoy his fortnightly contact with his biological father. It was not therefore the case, as suggested at paragraph 28 of the

Grounds of Appeal, that BOT would have to choose between living with her husband and her son.

13. It is also said in the Grounds of Appeal that the dynamics of this particular family are by no means unusual amongst second families. However, neither are the problems to which they gave rise. Such problems are in my judgement primarily a matter for the parties themselves to resolve, and there cannot be any legitimate expectation that they will be resolved at the expense of immigration controls that are designed to preserve the economic well being of the country.

Notice of Decision

The appeal is dismissed.

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 his 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

Date: 2nd March 2018

Deputy Upper Tribunal Judge Kelly

TO THE RESPONDENT FEE AWARD

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

Signed

Date: 2nd March 2018

Deputy Upper Tribunal Judge Kelly