Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/23765/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 August 2018	**On 06 August 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

MISTY [L]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Goldborough, Solicitor, Julia & Rana Solicitors, London
For the Respondent: Mr Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana born on 25 June 1990. He appealed the respondent's decision of 23 September 2016 refusing him leave to remain in the United Kingdom on the basis of his private and family life. His appeal was heard by Judge of the First-Tier Tribunal Kaler on 19 February 2018 and was dismissed in a decision promulgated on 28 February 2018.

2. An application for permission to appeal was lodged and permission was granted by Judge of the Upper Tribunal Rintoul on 27 June 2018. The permission states that it is

arguable that the First-Tier Tribunal failed properly to evaluate the best interests of the children before weighing the public interest. It goes on to state that there does not appear to have been a proper evaluation of Section 117B(vi) of the Nationality, Immigration and Asylum Act 2002.

3. There is no Rule 24 response.

The Hearing

4. The appellant's representative submitted that the Judge did not evaluate the interests of the two children in this case. He submitted that the Judge was aware of the appellant's relationship with their mother and took note of the Social Services reports which explain the nature of their relationship and the issues going through the Social Work Department. Originally the children were in need of protection but at the date of the hearing they were no longer needing protection, they were just children in need. He submitted that the Social Work Department has been dealing with both parents. I pointed out that the appellant is only the father of one of the children.

5. The representative submitted that the Social Services Department is concerned with the whole family as a unit and when considering the best interests of the children both parents should be involved in their upbringing. He submitted that the appellant did work with the Council about the relationship and the Judge found that if the appellant is removed from the United Kingdom the whole relationship could break down, even if he only has to go to Ghana and apply to enter the United Kingdom as a spouse.

6. The representative submitted that the children in this case are of paramount consideration and this appellant is in a genuine relationship with a qualifying child. I had to point out that the child who is a British citizen and is the qualifying child, is not his child, although the other child is. The appellant's biological child has not been in the United Kingdom for seven years and is not a qualifying child.

7. The representative submitted that there is no question of this appellant being deported and it has been accepted that he has a genuine subsisting relationship with the children. He submitted that the children cannot go to Ghana and that the error of law is that the Judge did not determine the real rights of the children and that the claim should be remitted to the First-Tier Tribunal for rehearing.

8. With regard to public interest the representative submitted that removing the appellant is not necessary.

9. I pointed out that the appellant does not stay with the children and the representative stated that that is because of the tenancy agreement. Its terms state that he cannot stay there.

10. I put to the representative that this appellant has an extremely poor immigration history. He submitted that he is an overstayer and I pointed out that the Judge in this case states that separation from the children and their mother for a temporary period

would not be unreasonable. He pointed out that the Social Work Department has not said it would be detrimental to the children if he is removed from the United Kingdom but he submitted that if he is removed all the work done by the Social Work Department would be damaged and the appellant has had to do everything he can to progress his immigration matters so that the children will not lose their father.

11. The representative submitted that the Judge states that the appellant can seek entry clearance as a spouse but he is not married and does not stay with his partner. He submitted that his partner cannot go to Ghana to effect a legal marriage as she is a refugee. I suggested that he could make his application as an unmarried partner or a fiancé.

12. The representative submitted that it would be a breach of Section 117B(vi) if the appellant has to go to back to Ghana to apply to return to the United Kingdom, as he would have difficulty integrating there, and in this case entry clearance would not be automatic. He submitted that his partner would require to look after the children herself and so she would be unable to work as much and her only helper at present is the appellant. I was asked to find that there is an error of law in the Judge's decision.

13. The Presenting Officer submitted that this appellant is not living with his children or his partner. I was referred to paragraph 11 of the decision in which the Judge states that the appellant was not permitted to live with his partner as his status was not regularised and Social Services had told them they should not cohabit. He submitted that this has nothing to do with the tenancy agreement. I was asked to consider this when making my decision.

14. The Presenting Officer submitted that at paragraph 13 of the decision the Judge refers to the Child Protection Reports in the bundle and has noted that the appellant is stated to no longer be a chronic abuser of alcohol. The Judge accepts that that is the case.

15. The Presenting Officer submitted that the decision is not perfect and I was referred to paragraph 20. In this the Judge states that the appellant has a desire to establish family life with his partner and children but he does not live with them. He told the Social Workers that he would not live with his partner because of cultural reasons, until they were married. The Judge states that the respondent suggests that the appellant's stay in the United Kingdom is not conducive to the public good. He submitted that the Judge has not stated that this appellant has parental responsibility for the two children. I was referred to the case of ***SF & Others (Albania)*** [2017] UKUT 001201 (IAC) which is referred to in the grounds of application. The representative submitted that the two Albanian nationals in that case were granted leave to remain despite their precarious immigration history but the children in this present case do not have to leave the UK as their mother has leave to remain. He submitted that ***SF & Others*** is so different from this appellant's case that it is irrelevant.

16. The Presenting Officer submitted that the Judge states that the fact that the appellant has a poor immigration history, has overstayed and has offended on two occasions have to be taken into account. The Judge found that it would be proportionate for the

appellant to go back to Ghana and seek entry clearance and he submitted that there is no error of law. He submitted that if this appellant applies for entry clearance after having returned to Ghana, it is not certain that this will be granted and I was referred to paragraph 51 of the case of ***Agyarko*** [2017] UKSC 11. The Presenting Officer submitted that because it is not certain that he will get entry clearance it is appropriate for him to go back to Ghana to seek this. His immigration history has to be taken into account.

17. He submitted that the appellant's representative has stated that the appellant cannot apply to return as a spouse but the Presenting Officer submitted that an unmarried partner has the same rights as a spouse under the Immigration Rules.

18. He submitted that the sponsor cannot go to Ghana as she is a refugee in the United Kingdom but he submitted that a proxy marriage is a possibility and the appellant does not require to go to Ghana. She can remain in the United Kingdom. He submitted that the application can therefore be made.

19. He submitted that there is no evidence that the Social Services will not interfere with the appellant's situation again and he submitted that there is no error of law in the Judge's decision.

20. The representative submitted that at page 120 of the appellant's bundle Hertfordshire County Council's Children's Services state that a potential concern could be the appellant's partner's tenancy agreement being at risk as the appellant is staying more in the family home and this could impact on the tenancy. He submitted therefore that the tenancy cannot be put at risk as this could cause instability for the children. He submitted that that is why the appellant is not staying with his partner and the children.

21. He submitted that although there is no reference to Section 117 of the 2002 Act there is no question that there is a genuine relationship between the appellant and his partner and that one of the children is a qualifying child so the appellant should not be removed from the United Kingdom. I was asked to find that there are errors of law in the Judge's decision.

Decision and Reasons

22. This is an appellant with an extremely poor immigration history. I have noted the Social Work Reports and the Child Protection Order. Although the appellant is not liable to deportation there is criminality in his history and the Judge carefully considers whether it is in the best interests of the children that the appellant be allowed to remain in the United Kingdom. He notes that Social Services have not suggested that it would be detrimental for the children if the appellant were to be removed. At paragraph 28 the Judge refers to a temporary separation to enable an individual to make an application for entry clearance perhaps being disproportionate if there are no insurmountable obstacles to family life being enjoyed outside the UK but what the appellant will require to do is to place before the Secretary of State evidence that such

a temporary separation will interfere disproportionately with his protected rights and in this claim the appellant has not done so. At paragraph 29 the Judge finds that if the requirements of the Immigration Rules can be satisfied when the appellant claims from abroad for entry clearance as a spouse or an unmarried partner, temporary separation is not unreasonable.

23. At paragraph 30 the Judge gives considerable weight to the respondent's obligations to the public for the economic wellbeing of the UK and the maintenance of immigration control. He has weighed this against the interference with the appellant's, sponsor's and children's family lives and he finds that in the circumstances of this case leave to remain is not appropriate and that this applies also to the limited private life the appellant has established in the United Kingdom. The Judge points out that the children have a parent who can remain in the United Kingdom with them and that is what should happen.

24. The Judge refers to the case of ***MA (Pakistan)*** and Section 117B(vi) and the wider public interest considerations, including the conduct and immigration history of the parents. He does not find that Section 117B(vi) applies in this case. The appellant has been here since 2012 but has overstayed since 28 June 2012. The criminality in his past was dealt with by a caution and the Judge has taken this into account in the proportionality assessment.

25. The Judge has made findings and has explained these findings properly in his decision and he finds it reasonable for the appellant to return to Ghana and make an application from there. He finds that temporary separation would be reasonable.

26. The Presenting Officer gave alternatives to the partner having to go to Ghana – a proxy marriage – and pointed out that the terms are the same for married and unmarried partners coming in to the United Kingdom.

27. The Judge deals with the appellant's private life at paragraph 30 and I find that there are no material errors in law in the Judge's decision.

Notice of Decision

I uphold the decision of Immigration Judge Kaler promulgated on 28 February 2018.
There is no material error of law in this decision and the appellant's appeal therefore is dismissed under the Immigration Rules and under Article 8 of ECHR.

Signed Date 31 August 2018

Deputy Upper Tribunal Judge Murray