



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/02188/2016  
IA/02189/2016  
IA/02190/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 25 July 2018

Decision & Reasons Promulgated  
On 5 September 2018

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RICHARD [A]

PHYLLIS [A]

[J O]

(No anonymity orders made)

Respondents

**Representation:**

For the Appellant: Mr Kotas

For the Respondents: Mr Jafar (Counsel)

**DECISION AND REASONS**

1. For convenience I keep the designations as they were before the First-tier Tribunal, thus, Mr Richard [A] born in 1976, Ms Phyllis [A] born in 1978 and [JO] born in 2011 are the first, second and third appellants, and the Secretary of State is the respondent.
2. The appellants are citizens of Ghana. The first and second appellants are partners, the third appellant is their child.
3. Their application for leave to remain made on family life grounds was, after sundry procedure, refused in a decision made on 18 May 2014. It was apparently not served until May 2016.
4. They appealed.

### **First-tier Hearing**

5. Following a hearing at Taylor House on 18 October 2017 Judge of the First-tier Daldry allowed the appeal on human rights grounds outside the Immigration Rules.
6. The immigration history is that the first appellant entered the UK in 2003 on a visit visa which expired in 2004. He had overstayed for some six years by the time he met the second appellant. She had leave to remain as a student valid from 2010 to 2013. The application was made when she had leave to remain. The third appellant was born during that period of leave. Two further children have been born subsequently.
7. The judge noted the appellants' case that they should qualify for leave under the provisions of paragraph 276ADE(1)(vi) of the Rules and Article 8 outside the Rules.
8. Her findings are at paragraph 10ff. She found, in summary, that they were "*well integrated in terms of life in the United Kingdom*" [10]. However, the issue was whether there would be very significant obstacles to their integration if returned to Ghana.
9. She found, inter alia, that they have familiarity with the language and culture and there is some contact with family there.
10. The judge noted that the first and second appellants have qualifications. She found it more than likely that they would be able to find work and indeed could start a cleaning business in Ghana as they wished to do in the UK.
11. Looking at the best interests of the child the judge found that these would be to remain with his parents. They would return to Ghana as a unit. There was no reason why he would not be able to integrate and be content at school and enjoy the levels of achievement that he has been experiencing in the UK.
12. The judge concluded (at [22]) that whilst it would be challenging for the appellants to return to Ghana, as they have some ties there, have qualifications and have "*demonstrated themselves to be resourceful individuals and to have a strong and loving family*

*in their nuclear family unit*” the challenges faced would not amount to very significant obstacles.

13. The judge then went on to consider the application outside the Rules. She found that removal would interfere with their private life.
14. The judge then considered the issue of delay, noting the case of **EB (Kosovo) [2008] UKHL 41**. She noted no argument to suggest that if the decision made in 2014 had been served promptly the appellants would have been any better off in terms of mounting an appeal against it. However, the effect was that the appellants had been left *“in limbo for some 4 years”* [30].
15. Noting the comments of Lord Bingham in **EB (Kosovo)** in particular that an applicant might during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier and the longer the period of delay, the more likely that was to be true, the judge found that such was the case in respect of these appellants viz *“An application was made in 2012 and was not finally decided until May 2014 but the outcome decision was not known by the appellants until May 2016 by which time they had established a significant family life, strengthened their ties with their community and established roots.”* [31]
16. The judge went on to consider Lord Bingham’s comment that a person without leave is in a very precarious situation liable to be removed at any time. A relationship entered into was likely to be tentative and imbued with a sense of impermanence but such would fade and the expectation would grow that if the authorities had intended to remove him they would have taken steps to do so.
17. The judge considered that such was applicable to the first appellant’s case. Whilst he was a long overstayer, his partner made an application for leave to remain while she had extant leave herself and she and the first appellant had started a family which had grown over the period the case had taken for the respondent to tell the appellant the outcome of the application and significant roots had been put down.
18. Finally, the judge considered section 117B of the Nationality, Immigration and Asylum Act 2002. She found that the first and second appellants have good levels of English and have been able to manage financially albeit with cash in hand work. If allowed to stay they could put their qualifications to use to secure skilled employment. Although the relationship was formed whilst the first appellant was an overstayer *“this aspect of section 117B (was) mitigated by the fact of the long delay between when the application was made and the decision communicated to the appellants.”* [33]

### **Error of Law Hearing**

19. The respondent sought permission to appeal which was refused but on renewal to the Upper Tribunal was granted on 12 June 2018.

20. At the error of law hearing before me Mr Kotas noted that the sole point taken by the judge in allowing the appeal outside the Rules was delay. Whilst such might be a factor it should not be looked at in isolation. There was nothing, such as the child reaching a crucial period in his education that made it exceptional. Having found that there were no very significant obstacles to integration in Ghana she had failed to give adequate reasons why the appellants' circumstances were exceptional or compelling. He asked me to set aside the decision and remake it by dismissing it.
21. Mr Jafar's submission was that the judge had been entitled to apply the rationale of **EB (Kosovo)** to the facts of the case, in particular the consequences on family life. The first appellant had been liable to be removed at any time; three children had been born to the couple; ties had been made deeper. Thus, it was more than delay, it was the consequences of delay. Mr Jafar accepted that the first appellant's status throughout had been unlawful. However, the judge had considered that and found, nonetheless, that it was outweighed by the other factors. He asked me to uphold the decision.
22. I reserved my decision. The parties indicated that there would be no further evidence or submissions.

### **Consideration**

23. No issue is taken with the decision that the appellants do not satisfy the Rules. The issue is the decision to allow the appeal outside the Rules.
24. In this case the application for leave to remain was made on 24 September 2012. As the judge noted (at [3]) this was refused in a decision dated 22 October 2013. Judicial review proceedings were instituted but these were withdrawn as the case was reconsidered. A further refusal letter was made on 18 May 2014. That decision was apparently not served until May 2016.
25. The judge whilst emphasising the period after the May 2014 decision nonetheless considered that the appellants had been left in limbo for four years.
26. I consider that the judge's approach to the assessment of delay was flawed. The initial decision was made on 22 October 2013 scarcely a year after the application. That the decision was not finally made until May 2014, the respondent having agreed to reconsider, the period from September 2012 to May 2014 cannot be regarded as amounting to protracted delay.
27. There is no explanation why no action was taken to serve the decision of May 2014 for two years.
28. The issue is the effect of the delay.
29. The judge considered that the four year period (September 2012 to May 2016) allowed for the private life ties to deepen. However, this is a case where the first appellant had

overstayed for many years and entered a relationship and had a child when here unlawfully. He had no expectation of a grant of leave. It appears that his partner was aware of his unlawful situation. Family life was established in the full knowledge that his stay in the UK was unlawful. The appellant in **EB (Kosovo)** (where the delay in making a decision was four and a half years) was in a very different position, being an asylum seeker.

30. The fundamental problem with the judge's decision in my view is that she failed to have regard to section 117B(4), requiring that "*little weight*" should be given to a private or family life established by a person at a time when he is in the UK unlawfully.
31. All the judge said is: "*I accept that the relationship was formed while Mr [A] was an overstayer. However, I find this aspect of S117B to be mitigated by the long delay between when the application was made and the decision communicated to the appellants*" [33]. The judge did not cite section 117B(4) nor say that she had regard to the section as regards the weight to the first appellant's private and family life established when he was here unlawfully.
32. In considering whether there were exceptional circumstances it is necessary to know the weight to be attached to each side of the balance. It is essential to appreciate and apply the statutory requirement to apply "*little weight*" to the first appellant's private and family life developed while unlawfully in the UK. In not referring to or applying this requirement the judge materially erred such that the decision must be set aside.
33. I proceed to remake the decision.
34. The consideration of Article 8 outside the Rules is a proportionality evaluation i.e a balance of public interest factors. Some factors are heavily weighted. The most obvious example is the public policy in immigration control. The weight depends on the legislative and factual context. Whether someone is in the UK unlawfully or temporarily and the reason for that circumstance will affect the weight to the public interest in removal and the weight to be given to family and/or private life. It is also appropriate to give weight when considering the proportionality of interference with Article 8 outside the Rules to factors that have been identified by the Strasbourg court, for example, the effect of protracted delay.
35. In this case the first appellant has shown disregard for the immigration laws by remaining unlawfully for many years and I accord his private and family life "*little weight*" as required. The appellants cannot satisfy the Rules. He has spent the vast majority of his life in Ghana as has his partner. The unchallenged findings are that there are no very significant obstacles to integration into Ghana. His partner is not a British citizen who has always lived here. Rather she has only been in the UK since 2010 and had temporary leave. Despite his unlawful status the second appellant knowingly went ahead with the relationship with him and they decided to have a child. The child is not a "*qualifying child*" and is still young. As for delay, for the reasons indicated above, I do not find that the two year period between the application and

decision is significant. Looked at in its totality I do not consider that the four year period amounts to protracted delay. In that regard I find it does not assist the first and second appellant that it was not indicated that any effort was made to chase up a decision on their application.

36. I conclude that the strength of the public policy in immigration control in this case is not outweighed by the strength of the Article 8 claim such that there is a positive obligation on the state to permit the appellants to remain in the UK.

**Notice of Decision**

The decision of the First-tier Tribunal showed material error of law. It is set aside and remade as follows:-

The appeals are dismissed.

No anonymity orders made.

Signed

Date: 29 August 2018

Upper Tribunal Judge Conway