Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/27992/2015**

THE IMMIGRATION ACTS

Heard at Field House
On 5 January 2018

Decision & Reasons Promulgated
On 17 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SAMUEL NANA OWUSU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr J Waithe (counsel) instructed by Bernard Wiseman Family solicitor
For the Respondent:	Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

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2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Ruth promulgated on 14 October 2016, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 6 June 1974 and is a national of Ghana. The appellant entered the UK as a visitor on 7 March 2007. That leave was extended as a voluntary worker and then as a probationary spouse until 5 February 2010. On 11 February 2010 the appellant applied for indefinite leave to remain but, because his marriage to a British citizen had broken down, that application was refused on 31st of March 2014.

4. The appellant appealed the decision of 31 March 2014. His appeal was successful to the limited extent that his application was returned to the respondent to consider the appellant's family life with his current partner and two children. On 21 July 2015 the respondent issued a fresh decision refusing the appellant's application.

The Judge's Decision

5. The Appellant appealed the decision of 21 July 2015 to the First-tier Tribunal. First-tier Tribunal Judge Ruth ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 23/10/2017 Upper Tribunal Judge Reed gave permission to appeal stating

> 1. The appellant is the father of two children and all are citizens of Ghana. As noted in the determination the children had been in the UK for over seven years (the eldest child had been in the UK for 12 years) and the issue under section 117B(6) and EX.1 (a) was the issue of reasonableness of return. It is arguable, that in the light of the length of the residence of the children and that they had been born in the UK that the Judge failed to carry out an assessment of their best interests as a primary consideration.
>
> 2. Furthermore, it is apparent from the determination that the mother of the children had limited leave in the UK but nothing has been said about the children's status and the evidence from the children related to their father's removal and not the reasonableness or otherwise of their own removal. Thus it is arguable that the decision reached did not take into account the family circumstances (see PD and others (article 8-conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC). Whilst the grounds do not expressly raise this, it is a "Robinson obvious" point and requires further consideration.

The Hearing

7. Mr Waithe, counsel for the appellant, moved the grounds of appeal. He told me before the hearing commenced that he had found some common ground with the

senior Home Office presenting officer. He provided me with a copy of the respondent's letter dated 10 August 2017 granting the appellant's partner leave to remain in the UK until 14 February 2020. He tendered letters dated 16 November and 21 December 2017 confirming that both of the appellant's children have been granted British citizenship.

8. Mr Walker told me that the grant of British citizenship to the appellant's children and the grant of further leave to remain to the appellant's partner was such a significant change in circumstances that he could no longer oppose the appeal and concedes that there is an error of law.

9. Mr Waithe asked me to set the decision aside and substitute my own decision. He told me that because the appellant's children are not just qualifying children but British citizens, the appellant now meets E-LTRPT 2.2 & 2.4 of the rules. He told me that a different approach should be taken to EX.1(a) and to section 117B(6) of the 2002 Act. He urged me to set the decision aside and substitute my own decision allowing the appeal.

Analysis

10. At [28] the Judge correctly focuses on the question of whether or not it is reasonable to expect the appellant's children to leave the UK. Between [29] and [30] he considers the evidence and concludes at [32] that

> There will be no genuinely negative consequences to their welfare as a result of the decision in this case.

11. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held (notwithstanding reservations) that when considering whether it was reasonable to remove a child from the UK under rule 276ADE(1)(iv) of the Immigration Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002, a court or tribunal should not simply focus on the child but should have regard to the wider public interest considerations, including the conduct and immigration history of the parents. It was also confirmed however that if section 117B(6) applies then "*there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal.*" It was additionally held, however, that the fact that a child had been in the UK for seven years should be given significant weight in the proportionality exercise because of its relevant to determining the nature and strength of the child's best interests and as it established as a starting point that leave should be granted unless there were powerful reasons to the contrary. The Court of Session has approved and followed the approach taken in MA (Pakistan) in the case of SA, SI, SI and TA v SSHD [2017] CSOH 117.

12. At [22] the Judge records that both of the appellant's children had made applications to register as British citizens. The Judge correctly notes that at the date

of hearing those applications remain outstanding. The children are now British citizens.

13. The Judge's assessment of reasonableness of return for the children is not sufficiently detailed. It is carried out in three short paragraphs and relies entirely on the cohesiveness of the family unit. Inadequate weight is placed on the fact that both children were born in the UK & have only ever lived in the UK. Inadequate weight is placed on the fact that both children are qualifying children. There is inadequate analysis of section 117B(6) of the 2002 Act. I therefore find that the decision is tainted by a material error of law.

14. Because the decision is tainted by a material error of law I set it aside.

15. Although I set the decision aside, there is sufficient material before me to substitute my own decision.

16. The undisputed facts are that the appellant has been present in the UK since 2007. His first marriage to a British citizen broke down, but he established a relationship with his partner who now has leave to remain in the UK until February 2020. The appellant and his partner have two children, born in 2004 and 2006. Those children are now British citizens.

17. The respondent's IDIs on Family Migration deals with British children at Paragraph 11.2.3. The August 2015 version states that, save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. However, it also states that "*where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer*".

18. The Upper Tribunal in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) held, considering this guidance, that even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal

19. E-LTRPT.2.2. says

The child of the applicant must be-

(a) under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;

(b) living in the UK; and

(c) a British Citizen or settled in the UK; or

(d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.

20. E-LTRPT.2.4. says

(a) The applicant must provide evidence that they have either-

(i) sole parental responsibility for the child, or that the child normally lives with them; or

(ii) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK; and

(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

21. There has been a significant change in circumstances. Both of the appellant's children are British citizens, and they live with the appellant. That means that the appellant needs the requirements of both E-LTRPT 2.2 & E-LTRPT 2.4. The appellant therefore meets the requirements of the immigration rules.

Article 8 ECHR

22. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "*what has now become the established method of analysis can therefore continue to be followed…*"

23. I have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8
(ii) If so, has the right to respect for this been interfered with
(iii) If so, was the interference in accordance with the law
(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

24. Section 117B of the 2002 Act tells me that immigration control is in the public interest. None of the factors set out in s.117B of the 2002 Act weigh against the appellant.

25. By virtue of section 117D a "qualifying child" means a person who is under the age of 18 and who— (a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more. If a child is a qualifying child for the purposes of section 117B of the 2002 Act as amended, the issue is whether it is not reasonable for that child to return.

26. The appellant's children are qualifying children, because they are British citizens. The remaining question for me is whether or not it is reasonable to the appellant's children to leave the UK.

27. In R (on the application of Mansoor) v Secretary of State for the Home Department [2011] EWHC 832 (Admin) it was said that a national enjoyed the international human right as well as the domestic human right to live and remain in their own country (para 42).

28. I remind myself of Section 55 of the Borders, Citizenship and Immigration Act 2009. In ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 Lady Hale said that "*Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child*".

29. In R(on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held that in light of the jurisprudence of the Supreme Court, courts and tribunals were not mandated to approach the proportionality exercise where the best interests of the child were in issue in any particular order such that it was an error of law for them to fail to do so:. Although it would usually be sensible to start with the child's best interests, ultimately it did not matter how the balancing exercise was conducted provided that the child's best interests were treated as a primary consideration (paras 49, 53–57 and 72). In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) in which it was held that the best interests assessment should normally be carried out at the beginning of the balancing exercise.

30. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

31. In AA v Upper Tribunal (Asylum and Immigration Chamber) [2013] CSIH 88 it was held that there was no error where significant weight had been accorded to the Claimant child's British nationality. In Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048 (IAC) the Tribunal held that Case C-34/09 Ruiz Zambrano , [2011] EUECJ C-34/09 "*now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate*

outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so".

32. The impact of the respondent's decision is either that the appellant's children will be separated from the appellant, or the appellant's children will leave the UK. The weight of reliable evidence tells me that the appellant's children will find separation from the appellant to be more than temporarily distressing. They will lose a parent. That cannot be in the best interests of the child.

33. The alternative is that the appellant's children accompany the appellant to Ghana. If they do that, then two British citizen children will be required to leave the UK.

34. The respondent produces no evidence to explain why the removal of two British citizens is justified. It is arguable that they will all be returning to their country of origin, but that argument ignores the respondent's own decision to confer British Citizenship on the appellant's children. That argument runs counter to the respondent's own IDI's.

35. As the impact of the respondent's decision would cause upheaval and distress to young British citizen children, and as on the facts as I find them to be it is not in the children's best interest to suffer such distress and upheaval, then it cannot be reasonable to expect the children to leave the UK. The appellant benefits from the terms of s.117B of the 2002 Act.

36. I therefore find that the public interest in immigration control is outweighed by the interests of the appellant's children. I therefore find that the respondent's decision is a disproportionate breach of the appellant's right to respect for family life.

37. In the light of the above conclusions, I find that the Decision appealed against would cause the United Kingdom to be in breach of the law or its obligations under the 1950 Convention.

CONCLUSION

38. The decision of the First-tier Tribunal promulgated on 14 October 2016 is tainted by a material error of law. I set it aside.

39. I substitute my own decision.

40. The appeal is allowed on article 8 ECHR grounds.

Signed Paul Doyle   Date 12 January 2017
Deputy Upper Tribunal Judge Doyle