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

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral determination given following hearing	**On 8 July 2019**
On 23 May 2019	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR L
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Goldborough, Solicitor of Julia & Rana Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AS TO ERROR OF LAW AND DIRECTIONS

1. The appellant in this case is a national of Ghana who was born on 25 June 1990. He applied for permission to remain in the UK on the basis of his Article 8 private and family life, which application was refused in September 2016.

2. The appellant appealed against this decision and but his appeal was dismissed following a hearing before First-tier Judge Kaler sitting at Taylor

House on 19 February 2018. The respondent was not represented at that hearing.

3. The appellant then appealed to the Upper Tribunal pursuant to leave which had been granted by Upper Tribunal Judge Rintoul, but following a hearing before Deputy Upper Tribunal Judge I Murray at Field House on 15 August 2018, in a decision and reasons dated 31 August 2018 and promulgated shortly afterwards, Judge Murray dismissed the appeal.

4. Both Judge Kaler and Judge Murray had relied upon a previous decision of the Court of Appeal in *MA (Pakistan)* [2016] EWCA Civ 705 which was found to have been wrongly decided by the Supreme Court in its very recent decision in *KO*.

5. For this reason the decision was reviewed by Upper Tribunal Judge Gill pursuant to Rule 46 of the Tribunal Procedure (Upper Tribunal) Rules 2008 on the basis that the law had subsequently changed.

6. The appeal was then again put before the Upper Tribunal and it came before me on 21 February 2019 when I found that Judge Kaler's decision had contained a material error of law. I made my decision orally (and it was subsequently sent to the parties in writing) and much of the foregoing and below of necessity repeats what was said in that decision. I noted that on behalf of the respondent, very fairly and entirely professionally, Mr Whitwell, Senior Home Office Presenting Officer who had represented the respondent at that hearing had stated as follows:

> "In short, Judge Kaler arguably misdirected herself at paragraph 24 with regard to *MA (Pakistan)*, when stating that she was relying on what was stated in this case to the effect that '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'. The judge seems to have misdirected herself there, and the application of that goes to paragraph 26, where the judge referred to 'whether it is in the best interests of the children that the appellant be allowed to remain in the UK *in light of his past actions and behaviour'* [Mr Whitwell's emphasis]".

7. I also noted in my error of law decision that Mr Whitwell had continued by saying as follows:

> "That is not my only concern. More importantly, at paragraph 27, the judge does not answer the question set out within Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, of whether it is reasonable for a British child to leave the UK. That is wrong, as is now clear from the decision of the Supreme Court in *KO* (which obviously the judge was unaware of) and Judge I. Murray, who also was wrong because she too made her decision (relying on *MA (Pakistan)*) prior to the decision of the Supreme Court in *KO*."

8. At the previous hearing Mr Goldborough, who represented the appellant then as he does at this hearing today informed the Tribunal that there had been some changes in circumstances concerning the appellant and the children and it was now the case that the appellant currently (that is at that stage) lives separately from the children, who continue to live with their mother, but that he did engage with all the children (of which one is his biological child and the other, it is accepted, he has a parental relationship with) and sees them on a daily basis.

9. I noted in my previous decision as to error of law that there would be no question of the mother moving to Ghana to live with the appellant together with her children and that it would be the appellant's case that in these circumstances whatever might ultimately be considered to be the effect of the Supreme Court decision in *KO* this would not be a case where it could ever be said to be "reasonable" to expect the British child (who it is conceded is a qualifying child for these purposes as it is accepted that the appellant has a parental relationship with that child) to leave the UK. However, it was appropriate to have up-to-date reports from Social Services with regard to these children, and accordingly the hearing was adjourned until today in order for reports to be before the Tribunal.

10. The Social Services reports cause this Tribunal some concern, because it is clear from these reports that the parents, that is the biological mother and this appellant, who is the biological father of one of the children and as noted above fulfils the role of a father in respect of the other, are not, certainly in the view of Social Services, ideal parents. I set out what is stated within a very detailed assessment report, what is felt by Social Services to be the "reason for Children's Services involvement and any previous history" as follows:

> "The children have been open to Children's Services since 2013 due to concerns in relation to [the mother's] ability to care for her daughter, ability to prioritise the children's needs and [the mother's] decision to expose S to contact with adults that she does not know and not following professional advice. There have been further concerns about domestic abuse within the parents' relationship, concerns of physical chastisement from [the appellant], [the appellant's] alcohol misuse, both parents' inability to prioritise the children's safety needs, poor parental mental health, lack of candidness in working with professionals and [the mother's] lack of ability to understand the consequence of her actions and her inability to prioritise [S's] health appointments. [The mother] is a former Child Looked After and there have been previous concerns about her ability to provide basic care needs to S.".

Effectively, therefore, this Tribunal s faced with a situation where the appellant while regarded as a potentially unsuitable parent is nonetheless the biological parent of one child and is exercising parental responsibility in respect of the other in circumstances where the children are qualifying

children as defined in Section 117D(1) of the 2002 Act. Accordingly, the Tribunal has to have regard to Section 117B(6) which states in terms that:

> "(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

11. Following the decision of the Supreme Court in *KO*, it might be arguable that were this a normal family it would be reasonable to expect both the parents and the children, notwithstanding the British citizenship of at least one of the children, to return to Ghana with their parents. There are however in this case two difficulties. The first is that the mother might not be able to because of her personal history, which it is neither appropriate nor necessary to go into, for the purposes of this decision; it is sufficient to note that she apparently has refugee status in this country because of that history. Secondly, and rather more importantly, in light of the involvement of Social Services in the children's life, it would not be reasonable to expect the children, one of whom at least is entitled as a British citizen to the protection that she receives from the involvement of Social Services, to leave this country to be with parents who are possibly unable to cope unaided without the assistance of Social Services in circumstances where to do so might effectively place them in danger.

12. It may be that the children's best interests would be better served were this appellant to be removed from their lives given the criticism of his methods of discipline, as expressed by Social Services. However, even if this were the case, by section 117B(6) the public interest does not require the removal of someone who has a genuine and subsisting parental relationship with a qualifying child, as this appellant has, in circumstances where it would not be reasonable to expect that child to leave the UK (and because of the need of continuing involvement by Social Services it would not be in this case). So even if it might be arguable that the best interests of the children would not necessitate the appellant remaining, by statute, the public interest does not require his removal. In these circumstances, as he has a family life in this country, and the public interest does not require his removal, it cannot be proportionate to do so. His appeal must accordingly be allowed under Article 8 and this Tribunal must so find. Accordingly, this Tribunal makes the following decision.

Notice of Decision

The decision of the First-tier Tribunal having been set aside as containing a material error of law, the appellant's appeal is allowed, under Article 8.

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 their 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:

Upper Tribunal Judge Craig Date: 30 June 2019