Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/25127/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 January 2019	**On 22 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

KOFI [O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Collins, Counsel
For the Respondent: Mr D Clarke, HOPO

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Parkes dismissing his appeal against the refusal by the Secretary of State of his application for leave to remain in the UK on the basis of his private and family life.

2. The appellant is a citizen of Ghana born on 2 December 1988. He came to the UK on 15 April 2015 with valid leave to enter as a visitor until 21 November 2015. He made an application in an attempt to regularise his stay on 20 November 2015. This was

rejected on 15 January 2016. The respondent then began enforcement action against him to which he responded on 24 June 2016, by way of making representations regarding his family and private life in the UK. His application was refused on 26 October 2016. The appellant appealed; his appeal was heard in August 2018 and the judge's decision dismissing his appeal was promulgated on 4 September 2018.

3. The appellant and his partner who is his sponsor attended the hearing and gave evidence. Together they have six children; the appellant is the father of the youngest two children.

4. The appellant said in evidence that he came to support his partner and accepted that he had overstayed. The court case his partner was involved in had been traumatic and he could not leave her. His partner and her husband separated because of the pastor. Her ex-husband is in the UK but there is a court order preventing contact with the children. His partner was on benefits and still is, some have been reduced as they are together.

5. In cross-examination his partner said that the appellant had always lived with her when he was in the UK. The relationship with her ex-husband broke down in 2013 and they separated in June that year. She lived in a refuge for a few months and when she returned to the house, it was repossessed and then she left for Milton Keynes. Her ex-husband has not seen the children since they split and after an application in 2014, there was an order denying him access.

6. The judge's findings are set out at paragraphs 17 to 29.

7. The judge said at paragraph 17 that the appellant came to the UK on a visit visa issued on the specific basis that he would leave the UK at its expiry. Since the visit visa expired the appellant has remained in the UK illegally and whilst he has made an application to the Home Office, he has not made any obvious effort to return to Ghana and the family life that he has created since then has to be seen in that light.

8. At paragraph 18 the judge accepted that there was evidence in the papers of the court case in Scotland in which the appellant's partner gave evidence. The judge said that came to end in February 2016 when the pastor was acquitted following the appeal hearing against his conviction the previous year. There was no retrial. The judge said that was over two years ago. While the appellant's partner may have required or desired support that was not a license for the appellant to ignore his legal obligations as **Jeunesse** makes clear.

9. At paragraph 19 the judge accepted that the relationship between the appellant and his partner is genuine and subsisting. The judge said it appears that the relationship has been in place since his arrival in 2015 and so has lasted for over two years. However, he found that this was undermined by the appellant's illegal status.

10. The judge accepted at paragraph 20 that all of the children, including the appellant's two children, the youngest of the six children are all British citizens. He accepted that the appellant's involvement in the lives of the children is what might be expected of an adult living in a family. He accepted that the appellant plays a role in the light of all the children and takes an active part in the life of his family. The judge said the evidence does not show that any members of the family, whether the appellant's partner or any other children, have any particular needs or difficulties or that the appellant is required in the UK to meet a specific need or issue.

11. The judge held at paragraph 21 that having a child in the UK is not a by-pass to the requirements of the Immigration Rules and does not by itself require that the parent in question has to be permitted to remain. The best interests of the children are a primary consideration. Ordinarily it is in the best interests of the children to be brought up by both parents in a stable and caring environment. For the older children that is clearly not the case here and there are circumstances where second or even third best has to do.

12. The judge found that given the appellant plays a caring role in the children's lives in a general sense, he would accept that it would be in their best interests if he remained in the UK. The judge bore in mind that the appellant's partner managed to cope in his absence and that the issue that brought him to the UK to provide support passed over two years ago.

13. At paragraph 23 the judge found that no matter what the state of the appellant's relationship with his partner and the children, he could not meet the Immigration Rules. His partner does not receive anywhere near the £18,600 required under Appendix FM of the Immigration Rules. The appellant cannot meet paragraph 276ADE(vi) as he cannot show that there would be very significant obstacles to his reintegration into Ghana given that he has family life there, and remains in contact with them and only left there three years ago.

14. The judge then considered the provisions of Section 117B of the 2002 Act in terms of the maintenance of immigration control. He found that the appellant can speak English but that is only one factor. Against that is a strong point that the appellant has established his family life when here illegally and is very clearly not financially independent. He attached little weight to his private life or the relationship with his partner established in that light.

15. The judge found at paragraph 25 that the appellant's partner is originally from Zimbabwe and has made the adaptation to living in the UK. There is no evidence to show that she could not live in Ghana.

16. At paragraph 27, so far as paragraph 117(6) is concerned, the judge found that if the appellant leaves the UK, there is no evidence that the children would be required to leave the country. Whilst the two would be challenging for his partner she managed with the four older children before the appellant came to the UK and she could not

have had any expectation that the appellant would be permitted to remain when they chose to start a family life of their own.

17. The judge found at paragraph 27 that given the manner in which the facts developed there is a strong implication that the appellant and his partner have sought to create a situation creating a fait accompli. As **Jeunesse** makes clear the Secretary of State is not obliged to accept that as the obligation is on individuals to abide by their legal obligations and in entering expressly as a visitor, the appellant and his partner could not have been under any illusion as to what those were.

18. The judge found that not only does the appellant have an adverse immigration history but the public interest in the need for the appellant to meet the financial requirement is significant. The children involved in this case are not expected to leave the UK. That they may do so if they wish to be with the appellant is a choice that they have to make but this is not inevitable. The fact that the appellant may struggle in succeeding in an out of country application does not improve his Article 8 rights, **Ekinci [2003] EWCA Civ 765** paragraph 17 and that is a decision that significantly predates the 2012 Immigration Rules changes.

19. The judge concluded by saying that the appellant can reapply for entry from Ghana. The prospects of success are not a matter for the judge in this decision and having a child in the UK is not a by-pass to the Immigration Rules themselves. He found that it has not been shown that it would be disproportionate to expect the appellant to comply with his obligations when he has sought to circumvent them.

20. The appellant was granted permission on all the three grounds submitted on his behalf. In granting permission Judge Blum highlighted one of the arguments which stated that it is arguable that at paragraph 26, the judge asked himself the wrong question when applying Section 117B(6) of the Immigration Rules as it is irrelevant whether the children would be required to leave the UK **(SR (subsisting parental relationship – S117B(6)) Pakistan [2018 UKUT 00334 (IAC)**.

21. Mr Clarke admitted that he was in some difficulty because there was a tension between the Secretary of State's policy and the case law. He said permission was granted in the light of **SR** in that the judge was in error for arguably taking into account whether the children were required to leave the UK.

22. Mr Clarke said that the Secretary of State issued a new policy guidance on 23rd January 2019. It states that where there is no expectation for a child to leave the UK, then it will not be necessary to consider reasonableness. Therefore, he cannot go behind the Home Office's policy. So, he will have to argue that the judge was not in error. He said **SR** which was decided in 2018 disagrees with their policy. He said that the new policy maintains the concept of the family split.

23. Mr Collins submitted that the new policy was not in play at the date the judge heard the appellant's appeal in August 2018.

24. Mr Collins submitted that there are six children who are all British nationals. The oldest is 14 years old then 11, 9, 3, 1½ respectively, and the youngest is 3 months old. The elder four are not the biological children of the appellant.

25. Mr Collins took me through the judge's decision which I have already set out above. He said that the decision was devoid of reasoning, merit and not rooted in authority or guidance.

26. He said that at paragraph 19 of **MA (Pakistan) [2016] EWCA Civ 705**, the Court of Appeal states that the only questions which courts and Tribunals need to ask when applying Section 117B(6) are:

    (i) Is the applicant liable to deportation? If so, Section 117B is inapplicable and is that the relevant code will usually be found in Section 117C.

    (ii) Does the applicant have a genuine and subsisting parental relationship with the child?

    (iii) Is the child a qualifying child as defined in Section 117D?

    (iv) Is it unreasonable to expect the child to leave the United Kingdom?

27. Mr Collins submitted that this approach was not disapproved by the Supreme Court in **KO (Nigeria) and Others [2018] UKSC 53**. Mr Collins said that the judge did not consider the question of reasonableness.

28. Mr Collins said that UTJ Blum granted permission on the basis of **SR**. Headnote 2 of **SR** states

> *"The question of whether it would be reasonable to expect a child to leave the United Kingdom ('UK') in Section 117B(6) of the 2002 Act does not necessarily require a consideration of whether the child will in fact or practice leave the UK. Rather, it poses a straightforward question: would it be reasonable 'to expect' the child to leave the UK?"*

29. Mr Collins said that paragraph 50 of **SR** explains the reasons behind headnote 2. UTJ Plimmer who decided **SR** said at paragraph 50 that the 2018 IDI appears to indicate that Section 117B(6) has "no application" to the case as it only applies where the effect of the decision would "necessitate the qualifying child in question also having to leave the UK". UTJ Plimmer rejected the argument that Section 117B(6) was of no application to the case as it was unnecessary to consider Article 8 outside the Rules. In her judgment this aspect of the 2018 IDI provides untenable construction of the plain and ordinary meaning of EX.1 and Section 117B(6). She said the wording in EX.1 is reflected within Section 117B(6) and insofar as the guidance in the 2018 IDI provides the SSHD's position on the correct approach to Section 117B(6)(b). UTJ Plimmer set out her reasons at paragraphs 51 to 53 which led to headnote 2.

30. Mr Collins submitted that their case is how it can be remotely argued that a 15-year old child who is not a Ghanaian with a different father can leave the UK. The same argument can be said in respect of the partner who is from Zimbabwe and is not a

Ghanaian. Mr Collins submitted that on the evidence this case should be allowed, particularly in the light of the unchallenged findings.

31. I find, as submitted by Mr Clarke, that there is a tension between the policy guidance issued by the Secretary of State in January 2019 and the decision in **SR**. **SR** states in headnote 2 that the question of whether it would not be reasonable to expect a child to leave the UK in Section 117B(6) of the 2002 Act does not necessarily require a consideration of whether the child will in fact or practice leave the UK. Rather, it poses a straightforward question: would it be reasonable to expect the child to leave the UK.

32. I find that the judge did not ask himself this question and therefore failed to consider whether it would be reasonable to expect the child to leave the UK. Consequently, I find that at paragraph 26 the judge erred in law in finding that there was no evidence that the children would be required to leave the UK. That was the wrong consideration.

33. The judge heard the appellant's appeal in August 2018 and his decision was promulgated on 31 August 2018. **SR** which was heard on 14 August 2018 was promulgated on 5 September 2018. Therefore, the judge in the instant case would not have been aware of the decision in **SR**. The judge would also not have been aware of the respondent's policy guidance which was issued in 2019. However, the judge would have been aware of **MA (Pakistan)** in which the Court of Appeal set out the questions which courts and Tribunals needed to ask when applying Section 117B(6). As submitted by Mr. Collins, this approach was not disapproved by the Supreme Court in **KO (Nigeria).** I find that because the judge asked himself the wrong question, he failed to apply the relevant case law.

34. I accept that there is a tension between the Secretary of State's policy issued in 2019 January and the decision in **SR**. However, I prefer to follow headnote 2 of **SR** for the reasons set out in paragraphs 51 to 53.

35. For those reasons I find that the judge's decision cannot stand. As I am of the view that no further evidence is required in this matter, I have decided to remake the decision.

36. The findings of fact made by the judge have not been challenged by the respondent. The appellant came to the UK lawfully as a visitor and prior to the expiry of his visit visa, he made an application to remain in the UK. The application was rejected and he overstayed his leave.

37. The judge accepted that the appellant's partner was involved in a court case in Scotland which was quite traumatic to her and which ended in her ex-husband being acquitted following the appeal hearing against his conviction. The judge also accepted that the relationship between the appellant and his partner was genuine

and subsisting and that it had been in place since his arrival in 2015 and so had lasted for over two years.

38. The judge accepted that all the six children including the appellant's two children are British citizens. The appellant plays a role in the lives of all the children and takes an active part in the life of the family. Given that the appellant plays a caring role in the children's lives, the judge accepted that it would be in their best interests if he remained in the UK.

39. The question therefore that I have to ask in relation to Section 117B(6) is whether it is unreasonable to expect the children to leave the UK. At paragraph 20 of **MA** the Court of Appeal held in relation to the four questions they asked at paragraph 19 that if the answer to the first question is no, and to the other three questions is yes, the conclusion must be that Article 8 is infringed.

40. The appellant in this case is not liable to deportation. He does have a genuine and subsisting parental relationship with the children. All six children, including the appellant's two children, are British nationals and therefore qualifying children as defined in Section 117D. In the light of the ages of the children, and the findings of fact made by the judge, I find that it is not reasonable to expect the children to leave the UK in order to maintain their relationship with the appellant. In particular the older four children are not Ghanaian with a different father and the appellant's partner is from Zimbabwe and is not Ghanaian.

41. I allow the appellant's appeal.

No anonymity direction is made.

Signed Date: 18 February 2019

Deputy Upper Tribunal Judge Eshun