Upper Tribunal
(Immigration and Asylum Chamber)

Nimako-Boateng (residence orders - Anton considered) [2012] UKUT 00216(IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 22 May 2012

Determination Promulgated

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Before

LORD JUSTICE McFARLANE
MR JUSTICE BLAKE, PRESIDENT
UPPER TRIBUNAL JUDGE MARTIN

Between

VANESSA NIMAKO-BOATENG (also known as ELEANOR HOLM)
and
IA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Hourigan instructed by Time Solicitors
For the Respondent: Mr G Saunders, Senior Home Office Presenting Officer

A residence order or prohibited steps order made by a judge of the family court under s.8 of the Children Act 1998 do not bind the Secretary of State for the Home Department.

The decisions of family courts in respect of the welfare and best interest of children are important sources of information for judges considering immigration appeals. If an appellant wishes to

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advance a case that the child's welfare will be jeopardised by removal because it would break up existing patterns of contact with another parent or relative, one would expect to see clear and reliable evidence submitted to that effect. See RS (immigration and family court proceedings) India [2012] UKUT 00218(IAC).

We direct that IA's name and identity be not disclosed in any report of these proceedings without leave of the Tribunal or further order.

DETERMINATION AND REASONS

Introduction

1. All members of the panel have participated in the making of this determination. The first appellant is a national of Ghana who states she was born there in November 1974. The second appellant is her daughter who we shall refer to as IA who was born in the United Kingdom on 18 May 2002 to a man called NA whose nationality and immigration status are uncertain.

2. This is the hearing of the appellants' appeal from a decision of Immigration Judge Hanratty given on the 10 November 2010. In that decision the judge dismissed their appeal from a decision of the respondent dated 28 January 2010 refusing their application for a document confirming that they had a permanent right of residence as family members of an EEA national under regulation 18 of the Immigration (European Economic Area) Regulations 2006.

3. A notice under s.120 of the Nationality Immigration and Asylum Act 2002 was served on the appellants. They appealed the decision contending they were entitled to the right of permanent residence as claimed. They subsequently abandoned this claim but contended that the removal decision that the respondent had indicated would be made against them if their appeal failed would be unlawful because it would breach their human rights under Article 8 ECHR.

4. In this roundabout way, the Article 8 ECHR question came before the Immigration Judge and he dismissed the appellants' contention that it would be contrary to their human rights if they were returned to Ghana. No immigration decision to remove the mother or daughter has yet been taken.

5. Permission to appeal was sought alleging that the Judge had made an error of law in the Article 8 assessment and permission to appeal to the Upper Tribunal was granted on a single point, namely whether the judge had properly taken account of the consequences of an order made in the Principal Registry of the Family Division.

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6. Two orders were made in proceedings that the first appellant had instituted against NA in early 2010. The first was a prohibited steps order made under s.8 of the Children Act 1989 on 27 April 2010 in the following terms:

> "the Respondent [NA] must not remove the child [IA] (date of birth 18 May 2002)..
> a) from England and Wales;
> b) from the care of the Applicant, except for such contact as the parties may agree in writing or as may be ordered by the Court;
> c) from her school…
> without the written consent of the Applicant or the consent of the Court".

7. On 27 July 2010, a judge of the same court made a residence order under s.8 of the Children Act 1989 that the child IA resides with her mother. The form of order contained a statutory warning pursuant to s. 13(i)(b) of the Children Act 1989 with the warning notice attached:

> "Where a residence Order is in force no person may ….remove the child from the United Kingdom without the written consent of every person with parental responsibility for the child or the leave of the court".

The factual background

8. The first appellant has a remarkable history of deception relating to her entry to and residence in the United Kingdom from 1998 to 2010. Her name at birth was Eleanor Holm. In 1998 she applied for a student visa that was refused. She then applied using the name Salome to come to the United Kingdom as a visitor. Her purpose was said to be to visit her then boyfriend, NA.

9. In 1999 she came to the United Kingdom but was subsequently removed. She then returned in 2001 using another assumed name Vanessa Nimako-Boateng, that has been her identity until quite recently. She was given leave to enter as an accountancy student and such leave was extended to 2002. She then remained without leave. By reason of the use of the false name and the suppression of her adverse immigration history she was and remains an illegal entrant liable to summary removal as such under the Immigration Act 1971 Schedule 2 paragraph 9 and since the expiry of her leave to remain she has also been liable to summary removal under s. 10(1) of the Immigration and Asylum Act 1999.

10. In June 2003 she applied for a residence card as the spouse of a Dutch national Cedric Juliana (hereafter Cedric). She claimed to have married Cedric in December 2001 in Ghana and produced a passport, Ghanaian marriage certificate and employment documents in Cedric's name to support that claim. In July 2004 a five year residence card was issued on the basis of this claimed marriage. In November 2008 she procured from Barnet County Court the dissolution of this marriage on the grounds of Cedric's alleged violent behaviour towards her.

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11. In May 2009 she applied to the UKBA for permanent residence as the former spouse of Cedric. She contended that she had the retained right of residence on her divorce in November 2008 because the marriage had lasted three years and Cedric was a qualified person (in this case an EU national who was working in the United Kingdom) immediately preceding the divorce and that the material requirements of regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 were met. She contended that as she had completed a period of five years lawful residence as the spouse and former spouse of a qualified person, she was entitled to a permanent right of residence.

12. It was this application that was refused in January 2010 on the basis of an absence of supporting evidence. One month after the refusal decision NA wrote a letter to the respondent revealing the first appellant's immigration history summarised above at [8] to [11] and further disclosing that the whole EEA application was founded on a stolen Dutch passport supplied by a friend of hers and impersonation of Cedric by another friend. The letter stated that there was never any marriage to Cedric and the Ghanaian certificate was a fake one. The letter concluded:

> "I am writing this letter because I am the father of [IA] (date of birth 18/05/2002) and I am going back to Ghana to live there. I want my child to go with me to Ghana where the rest of my family are. She is trying to use my status in the Country as a British citizen to get her stay using my daughter. She and her Lawyers have been threatening me in no uncertain terms that I would loose (sic) my child if I do not help with copies of my passport which I refused".

13. According to the first appellant[1] she became aware of this letter on 7 April 2010 and it was in response to it that the proceedings were issued in the Principal Registry that led to the orders made in April and July.

14. The EEA appeal first came before the First-tier Tribunal on 7 June 2010 when it was adjourned pending further inquiries into NA's letter. At this first hearing the first appellant produced the prohibited steps order from the Principal Registry noted at [6] above.

15. By the time the appeal came to be heard in November 2010, the first appellant had admitted her history of deception outlined above and abandoned her claim to be entitled to a permanent residence document. She nevertheless contended that it would be contrary to IA's interests for her to leave the United Kingdom where she had lived all of her life and be removed to Ghana along with her mother. Reference was made to the residence order of July 2010 and the previous Home Office policy withdrawn in 2009 whereby seven years residence by a child was a presumptive basis to regularise the status of the mother, absent compelling reasons to the contrary.

[1] Draft witness statement at [15] p 31 of bundle.

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The judge's decision:

16. Having summarised the history and the submissions of the parties, and the leading guidance on Article 8 cases then available to him, the judge concluded:

> "55. Balancing all these matters in relation to the principal appellant Ms Holmes and looking at her private life (I shall come to IA later) I find that this appellant should not be in the country at all. She has employed sophisticated and deliberate deception almost certainly amounting to criminal conduct. She has certainly perverted the administration of justice. She has admitted doing so. I do recognise that she has enjoyed a private and family life in the UK. But I find in relation to her private life that has been obtained in the country by means of systematic and sophisticated deception…For this appellant to be allowed to stay in the UK applying Article 8 ECHR would indeed drive a coach and horses through effective immigration control in this country and encourage others to engage in similar abuses, which are matters to be taken into account as regards proportionality".

17. The judge then turned his attention to IA's interests. He recognised that she was the innocent victim of the first appellant's activities. She was doing reasonably well at school and had friends here. She had never been to Ghana and did not speak the local dialects. The judge accepted that IA had some contact with her father but in his letter her father had said that he wanted to return to Ghana. If IA went to Ghana she would have both parents there, and contact with her maternal grandmother and grandfather. It was in her interest to be with her mother but her mother could work and look after her in Ghana. Despite IA's wish to continue to reside in the United Kingdom, it would be unacceptable for her to be left behind and there was a balance to be performed in cases like this.

18. The judge then said:

> "59. I have given very careful and anxious consideration to the case of [IA] whom I did not hear give evidence….It is a hard thing to direct that she should leave the UK but the deception is so dreadful in this case and so cynical and well planned by her mother and by others that for the purpose of fair and effective immigration control there can be no other decision than that [IA] should go to Ghana with her mother and she should be able to see her father on an occasional basis. I have carefully applied s.55 of the UK Borders Act 2009 and the case of LD (Article 8 - best interests of the child) Zimbabwe [2010] UKUT 00278 (IAC) where Mr Justice Blake held that the interests of a child is a primary consideration. I do respectfully apply that case in the balance to be struck. This child has the benefit of a UK education, is still young and could relocate back to her mother's family in Ghana".

19. The judge considered the residence order but agreed with the respondent's submission that it and the other orders of the Principal Registry and the Barnet County Court had been obtained by deception. It was open to the court to revoke the order, thereby allowing IA to be removed in the company of her mother and accordingly the existence of the order was not a bar to a decision to remove her

under Article 8. He directed that a copy of his determination should be shown to the Principal Registry for an appropriate order to be made.

Subsequent events

20. Permission to appeal was refused by Senior Immigration Judge Clive Lane sitting as a judge of the First-tier Tribunal, who observed that the residence order was not a bar to removal and in any event could be varied, and the judge had paid very close attention to the position of the child.

21. Permission to appeal was granted in February 2011 on the basis that the existence of the residence order might make removal disproportionate. Despite two sets of subsequent directions in 2011 to the effect that the appeal could be re-made in the event that an error of law was found without hearing fresh evidence, for some reason the appeal was not listed for prompt determination.

22. On 1 February 2011 the Supreme Court delivered its landmark decision in ZH (Tanzania) [2011] UKSC 4 the implications of which have been subsequently considered by the Upper Tribunal in a sequence of cases: including Omotunde (best interest - Zambrano applied - Razgar) [2011] UKUT 247 (IAC), 25 May 2011; E-A (Article 8 - best interests) Nigeria [2011] UKUT 315 (IAC), 22 July 2011; MK (best interest of child) India [2011] UKUT 475 (IAC); and Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 48 (IAC).

23. On 4 March 2011, on being informed that the decision of Immigration Judge Hanratty was under appeal and had not been fixed for hearing, a judge of the District Registry directed that the orders of 27 April and 27 July were to continue in force. On this occasion (unlike the hearings in April and July 2010) the father attended in person. The order made further recites the fact that there were pending proceedings between mother and father about the former matrimonial home in Milton Keynes.

24. In the early part of 2012 the Tribunal was informed that criminal proceedings had been instituted against the first appellant. On 17 May 2012 the appellant appeared before the Isleworth Crown Court and pleaded guilty to three counts of a six count indictment as follows: count 1, perjury before the Family Court on 27 April 2010 when sworn as a witness; count 2, making a false statement on oath contrary to the Perjury Act in July 2008; count 3, obtaining leave to enter by deception by providing the false name of Nimako-Boateng in March 2002. Three further counts of obtaining leave by deception in October 2002, May 2004 and March 2009 were ordered to lie on the file. Sentence was adjourned for reports and the appellant has been advised to expect an immediate custodial sentence.

25. On the following day IA celebrated her 10th birthday and acquired the right to register as a British citizen under s. 3(1) of the British Nationality Act 1981.

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26. Following further directions, this case was selected as one of a group of cases raising issues about the inter-relationship between the family courts and the Upper Tribunal. We are fortunate to have the participation in this appeal of a very experienced family law judge, Lord Justice McFarlane. He drew attention to the decision of Munby J as he then was in the case of R (Anton) v SSHD [2004] EWHC 2730 (Admin/Family) [2005] 2 FLR 818 where the judge decided:

> "[33] A judge of the Family Division cannot in the exercise of his family jurisdiction grant an injunction to restrain the Secretary of State removing from the jurisdiction a child who is subject to immigration control-even if the child is a ward of court…..
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> [34] This does not mean that the family court cannot make a residence order in respect of a child who is subject to immigration control….What it does mean, however, and this is an important point, is that neither the existence of a care order, nor the existence of a residence order, nor even the fact that a child is a ward of court, can limit or confine the exercise by the Secretary of State of his powers in relation to a child who is subject to immigration control."

In support of the last observation he quoted part of the judgment of Russell LJ in Re Mohammed Arif (An Infant) [1968] Ch 643 at 662-3:

> "any lawful deportation order affecting a ward must be outside the normal position which I have mentioned already, that a ward must not leave the jurisdiction without permission of the judge; indeed, it would over-ride any existing express order of the judge in the wardship proceedings that the infant was not to depart from the jurisdiction…The wardship of infants, in my judgment, has not and could not in law have any effect on the powers and duties of the immigration authorities so as to hamper them in any way in removing the infants from the jurisdiction."

27. In advance of the hearing we drew this decision to the attention of the appellant's solicitors and the Senior Presenting Officer's Unit. In the event it seems that Time and Co failed to notify Mr Hourigan of our note, and so we gave him some time to consider the decision in the course of the hearing.

Submissions to us

28. Mr Hourigan recognised in the light of Anton, he could not advance the submission that the Immigration Judge had erred in law in his consideration of the impact of the residence order or prohibited steps order on the Article 8 decision.

29. We agree. It is clear on established authority that the order does not bind the Secretary of State. It is most unfortunate that the decision in Anton was not cited to the First-tier Tribunal or in the application for permission to appeal to the Upper Tribunal. It should be better known to immigration practitioners. We draw from it the following conclusions:

a. The prohibited steps order of 27 April 2010 was directed to the child's father NA and not to anybody else.
b. The residence order made in July 2010 did not operate as a bar on the respondent making a decision to remove IA as the family member of a person facing removal. The respondent was not a party to those proceedings and the order is not to be read as directed to the respondent.
c. In any event, the order cannot conceivably be read as a bar on a decision that in principle the appellants could be removed to Ghana and Article 8 did not prevent their removal. No removal decision had actually been made.
d. Yet further, as was pointed out to the judge below, even if the order did have some effect on the immigration decision, an application could always be made to vary it before removal was actually effected.

30. In the circumstances it is most unfortunate that permission to appeal was granted on this point. Both Judge Hanratty and Judge Clive Lane were entirely correct in their approach.

31. However, we recognise that in the light of subsequent developments in the law, some of the supporting reasoning in Anton may require revisiting. Both the Home Office and the immigration judiciary *are* concerned with an assessment of the best interests of the child affected by an administrative decision to remove either the child or a parent or other person providing care or support to the child. This is made clear by: the terms of s.55 of the UK Borders Act 2009, the decision in ZH (Tanzania) [2011] UKSC 4 and the Strasbourg case law on Article 8 such as Maslov v Austria [2008] ECHR; [2009] INLR 47 stating that immigration decision-making affecting children under 18 has to be consistent with the terms of Article 3 of the UN Convention on the Rights of the Child 1990. However, whereas in family law proceedings the welfare of the child is the paramount consideration, in immigration proceedings it is 'a primary' rather than 'the paramount' consideration and can be outweighed by other compelling rights-based factors. These include those set out in Article 8(2) ECHR namely the prevention of disorder and crime, the promotion of the economic well-being of the country and the protection of the rights of others by the maintenance of a system of immigration control see ZH (Tanzania); Lee [2011] EWCA Civ 348; see also the recent Strasbourg decisions of Nunez v Norway [2011] ECHR 1047, 11 June 2011 and Antwi v Norway [2012] ECHR 259, 14 February 2012.

32. Further, the family court is best placed to evaluate the best interests of the child in proceedings brought before it. Both the decision itself and the reasons for the outcome are material to the consideration of the Article 8 balance to be conducted by the immigration judiciary and may be a decisive consideration. Reasoned decisions of such courts are not to be ignored in immigration appeals. Indeed the problem facing immigration judges is that, although they must attach weight to the best interests of the child, in many cases they will often not be able to assess

what those interests are without the assistance of a decision of the family court. The family court has, amongst other things, procedural advantages in investigating what the child's best interests are, independent of the interests of the parent, as well as the necessary expertise in evaluating them.

33. An informed decision of the family judge on the merits and, in some cases at least, the material underlying that decision, is likely to be of value to the immigration judge. Equally the family courts may need to be informed about the immigration status and future prospects of foreign national parents and children as the prospects of a member of the family being allowed to remain may be relevant to the assessment of the best interests of a child of the family. We discuss the need for good communication between the two systems further in our ruling in the case of RS (immigration and family court proceedings) India [2012] UKUT 00218(IAC) heard on the same day.

34. However, in this case there was no useful material in the family court decisions to inform the immigration judge. The first appellant had lied about her identity, immigration status and marital history. The timing of the orders gave rise to the reasonable suspicion that they were obtained primarily for the purpose of production in the immigration appeal. Even if there was a dispute about the future care of IA as between parents, that was a private law dispute based on the false hypothesis that the first appellant had a right to remain. In the circumstances it generated no material of relevance to the immigration assessment.

35. Mr Hourigan next submitted that Judge Hanratty had erred in failing to assess IA's best interests and making them a primary consideration in the case.

36. We disagree. The judge plainly gave the very greatest care in considering the impact of removal of both appellants on IA's welfare and best interests. Although he did not have the guidance of the Supreme Court in ZH (Tanzania) he cited and applied LD (Article 8 – best of interest of the child) Zimbabwe [2010] UKUT 278 (IAC) to the same effect. He was entitled to conclude that the best interests of IA were to be with her mother wherever the mother was to reside. The fact that she had spent all the eight years of her young life in the United Kingdom and had started primary school was not of itself a sufficient reason to conclude that she should not be removed with her mother or that the mother's immigration status should be regularised: see MK (India) (cited above). Whilst the judge's reference to IA's ability to adapt in Ghana is not the test to be applied, for the reasons we gave in E-A (Nigeria) (cited above) we conclude that it is not an irrelevant consideration in the assessment to be undertaken.

37. Finally, Mr Hourigan submitted that the Judge had erred in the assessment of the impact of the child's removal on her relations with her father.

38. Again we disagree. Although the judge accepted that the child had some contact with her father we can find no basis for that proposition in the evidence from the

mother the judge recited at [7] to [25] of the determination. We should add that neither could Mr Hourigan. We do not have the first appellant's further statement of September 2010 that was before the judge. The appellant's solicitors have only chosen to place before us a draft witness statement of the mother (undated and unsigned) for the Principal Registry of the Family Division. There is reference in that statement to the father having contact with IA between 2007 and 2009. This statement was used to support the orders made in April 2010 in respect of which the mother has recently admitted perjury and where she persisted with a false narrative of a marriage to Mr Cedric. We can give no credence at all to anything she says there.

39. There is no independent evidence before us that the father has had contact with the child since the parent's relationship broke down. We note that the father has not applied for a contact order or made arrangements for contact with the mother between 2010 and 2012. His only appearance in the family court was in March 2011.

40. If an appellant wishes to advance a case that the child's welfare will be jeopardised by removal because it would break up existing patterns of contact with another parent or relative, one would expect to see clear and reliable evidence submitted to that effect. The burden of making out an Article 8 claim rests on the appellant, even though the respondent may have her own duty under s.55 Borders, Citizenship and Immigration Act 2009 to investigate and consider the welfare of the child.

41. The judge pointed out that the father in his February 2010 letter said he wanted to return to Ghana with IA. Although much of what is said in that letter is now accepted by the mother as true, we treat his statement of future intent with caution in the absence of any assessment of the father's credibility, his immigration and nationality status and his conduct in the United Kingdom. The first appellant contends that the father himself was involved in her deceptive conduct, but we can reach no conclusion on that. Mr Saunders could provide no information to assist us. However the judge can hardly be criticised for mentioning the only information before him as to the father's intentions with respect to IA.

42. In brief, we conclude that there was no evidence that removal of IA to Ghana would deprive her of a valuable source of parental contact and support that she presently enjoyed. There was some information that the father would return to Ghana where he has family. The father appears to have taken no steps to arrange contact with the mother or through the courts. In these circumstances there is no substance in the submission that the judge failed to properly consider and assess such evidence as there was about the father's contribution to IA's welfare.

Conclusion

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43. In our judgment no error of law has been identified in the determination of the judge. We therefore dismiss the appeal without remaking the decision.

44. We recognise that a further decision needs to be made with respect to the mother and the passage of time may have an impact on whether IA can or should now be required to return to Ghana, but that is not an issue before us today.

Signed Date

Mr Justice Blake
President of the Upper Tribunal,
Immigration and Asylum Chamber