



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/14243/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Bradford

On 21st August 2017

**Decision & Reasons
Promulgated
On 11th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ALIEU BAH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mrs R Pettersen
For the Respondent: Mr Y Darbor of Queen's Park Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Jones made following a hearing at Bradford on 31st January 2017.

Background

2. The claimant is a citizen of the Gambia born on 21st February 1968. He married in the Gambia in 1990 and had five children but, from 2008, when he arrived in the UK, had no contact with them. He then lived with two other women in the UK, one of whom was European, in order, he said, to be able to stay here.

3. His wife came to the UK in 2012 but he was not aware of her arrival until he was informed of it by his sister. The couple subsequently reconciled.
4. In June 2016 he claimed asylum and was refused. He appealed to Judge Jones who found that he would not be at risk on return. Indeed, he concluded that the claimant left the Gambia purely in the hope of achieving some sort of immigration status in the UK.
5. The claimant's wife was granted status for five years, her leave expiring in May 2018. The judge accepted that although the couple were formerly estranged, they are now in a genuine relationship and indeed they now have another daughter born on 2nd May 2014.
6. The couple have had five children, but one died in a drowning accident. Two remain in the Gambia with other relatives, and three are in the UK, including the youngest one.
7. The judge considered the Immigration Rules. So far as his wife was concerned he said that he did not accept that there were insurmountable obstacles to her returning to the Gambia in respect of her medical conditions. She had leave until May 2018 but this was at the discretion of the Secretary of State.
8. He then wrote as follows:

“Moreover having said that, I do find that there are some factors here in favour of the appellant's cause in terms of the children's best interests (Section 55). They are undoubtedly to be with both parents and not see the family separated at this time, though the respondent may yet have cause to review the family's overall circumstances and will in any event do so before May 2018.

It is only against such limited circumstances that I already cause to consider the position as to whether exceptions to the Rules apply (EX.1) and whether there are exceptional circumstances outside the Rules that apply here. If in error therein I proceed further with the appeal as pleaded before me. Whilst the children are not UK nationals and have not been in the UK for such a length of time. I note also the references made to the aspects of care and support that are provided by the NHS, educational support services, and Social Services, presumably still being available if the appellant were removed.

However, notwithstanding all of Mr McBurnie's misgivings as to the appellant's capacity to tell the truth and not advance his own interest at all costs. I do accept, against the required standard, that the appellant is providing care and assistance to the children and he has a meaningful relationship with them. It is in the children's best interest to have their father's support especially as given their mother's current health problems. I find it would be in those circumstances disproportionate and contrary to their best interests if he were to be removed alone at this time, separating him from his

children and his wife. As stated the overall position as regards the family unit will doubtless be revisited by the respondent in due course”.

9. On that basis he allowed the appeal.

The Grounds of Application

10. The Secretary of State sought permission to appeal on the grounds that the judge had erred in law. The claimant could not take the benefit of paragraph EX.1 in respect of his children because they do not qualify. The judge appears not to have materially relied upon the detail of his wife’s grant of refugee status and it was noted that no copy of the determination in her case was produced; there was no evidence about why her appeal was allowed. The Secretary of State contended that the burden was upon the claimant to evidence his claim that there will be insurmountable obstacles or compelling reasons outside of the Rules in respect of his wife’s return with him to Gambia. The grant of refugee leave was not determinative of her inability to return.
11. In purportedly dealing with the appeal outside the Rules the judge appears to have considered that EX.1 applied as a freestanding exception. He had acted irrationally in appearing to place weight upon medical evidence having previously said that it was insufficient. He did not refer to the mandatory elements of Section 117B of the Nationality, Immigration and Asylum Act 2002, and did not consider whether the children could relocate to Gambia with their parents, effectively treating their best interests as determinative, contrary to numerous binding authorities.
12. Permission to appeal was granted by Judge Pedro on 25th May 2017 for the reasons stated in the grounds.

Submissions

13. Mrs Pettersen relied on her grounds and submitted that the claimant could not succeed under the Immigration Rules and appears to have regarded the children’s best interests as a trump card even though they were not qualifying children. In any event, they were not subject of a removal decision and could remain in the UK. There was no identification of exceptional circumstances such that Article 8 should be considered outside the Rules.
14. Mr Darbor submitted that the grounds amounted to a disagreement with the decision. He relied on the case of AB v SSHD [2007] EWCA Civ 1422 and submitted that there was no burden upon the claimant to in effect re-litigate his wife’s case.

Consideration of Whether there is a Material Error of Law

15. The claimant is correct to argue that there is no burden upon him to establish that his wife is no longer at risk in the Gambia. In AB at paragraph 21 the Court of Appeal said:

“It is for an appellant to establish a claim under Article 8. A third party's refugee status may be relevant to such a claim. Where an appellant asserts that there would be an insurmountable burden to that person returning to his or her country of origin, and relies on his or her established refugee status to support that proposition, in my judgment the starting point for the Tribunal should be to take it that the person concerned could not reasonably be expected to return to his or her country of origin unless it has some basis to suppose otherwise”

16. The problem here is that the judge did not in fact rely upon the grant in order to conclude that there were insurmountable obstacles to family life continuing outside the UK. Indeed, so far as she was concerned, he appeared to find that there were no such obstacles.
17. None of the children are qualifying children since they are not British citizens nor have they lived here for a period of seven years.
18. In dealing with Article 8 outside the Immigration Rules, the judge does appear to have treated the children's best interests as determinative without taking into account other factors, including those set out at paragraph 117B of the 2002 Act. Moreover, he has taken into account an irrelevant consideration, namely the fact that the Secretary of State will review the family's circumstances before May 2018 when the claimant's partner's status expires.
19. Accordingly the decision is set aside.

Further Submissions

20. Mrs Pettersen submitted that the judge had found that the claimant was not credible in relation to his asylum claim and none of his findings have been subsequently challenged. He could not succeed within the Immigration Rules, having arrived in the UK as a visitor. She did not suggest that the children leave the UK but the couple could reasonably separate and live apart as they had done in the past and he could make the necessary application to join them from the Gambia.
21. Mr Darbor submitted that, whilst he accepted that the claimant could not succeed under paragraphs EX.1 and 2, he could succeed under the Immigration Rules with respect to family reunion, paragraph 352A. At the relevant time, when the sponsor was granted refugee status, the couple were married. They had never divorced.
22. It was plainly in the children's best interests to have their father live with them. He referred me to the letter from the older child's primary school which gives details of the claimant's wife's low mood, depression, anxiety and isolation. She does not sleep or eat well and is diabetic. She also has pains in her hands and knees. The family outreach worker stated that she had been told that the wife wanted the claimant's support and he in turn wanted the right to a family life. There were also a large number of photographs showing the family together.

Findings and Conclusions

23. Paragraph 352A sets out the requirements to be met by a person seeking leave to enter or remain in the UK as the partner of a person granted refugee status. Inter alia, the paragraph requires that each of the parties intends to live permanently with the other as their spouse or civil partner and the marriage is subsisting. It is quite clear that when the claimant's partner arrived in the UK the couple were estranged. Indeed, the claimant admits in his witness statement that he never called his wife following the tragic death of their son in a drowning accident. He said that he kept avoiding her after she came to the UK in 2012 and it was only after his relationship with the European woman broke down that he informed his wife about it and sought her forgiveness.
24. I conclude that the claimant did not satisfy paragraph 352A of the Immigration Rules at the time of his wife's arrival in the UK and her subsequent claim for asylum.
25. The claimant cannot successfully navigate through to paragraph EX.1 and EX.2 and has made no application for leave to remain under paragraph 352A, although if he were to be removed, given the present reconciliation, he could apply under paragraph 352A for leave to enter from the Gambia.
26. The claimant is not eligible for limited leave to remain as a partner under Section E-LTRP because his only leave was as a visitor and, since that leave expired, he has been in the UK in breach of immigration laws.
27. The question therefore remains as to whether there are compelling circumstances such as to require a grant of leave.
28. The claimant's strongest argument is that his wife has refugee status and therefore cannot enjoy family life with him in the Gambia. The Immigration Judge accepted that the couple were now in a genuine and subsisting relationship; this was both his evidence and that of his wife. His children will remain in the UK until at least May 2018 and he enjoys family life with them as well as his wife.
29. There is no evidence about the basis upon which the claimant's wife was granted asylum. The determination allowing her appeal has not been produced. She has leave to remain for a further eight months. There is no basis to go behind that grant and to assume that she could return to the Gambia with him at this stage.
30. On the other hand, the original skeleton argument concedes that there has been a change of government in the Gambia on 21st January 2017. No attempt appears to have been made to bring the older children to the UK. In these circumstances the grant of refugee leave per se is insufficient to establish that there are insurmountable obstacles to family life continuing outside the UK.

31. His removal would be a clear interference with his right to family life but lawful since he does not meet the requirements of the Immigration Rules and in pursuit of a legitimate aim.
32. So far as the public interest considerations are concerned, the maintenance of effective immigration controls is in the public interest and this claimant has shown complete disregard for those controls. He has an appalling immigration history. He overstayed his initial visa, appears to have made a series of attempts to form other relationships which could have led to a grant of leave, and then made a late asylum claim which had no basis. He has made no application to remain with his wife as the partner of a person with refugee status despite having had ample opportunity to do so.
33. I have no information about the claimant's command of English or his economic activity. His private life has, since 2008, been enjoyed whilst he has been in the UK unlawfully. He cannot take advantage of paragraph 117B(6).
34. The best interests of the children are clearly a prime consideration. Whilst it is clearly in the children's best interest to be with both their parents, and it is accepted that the couple are living together at present, it would appear that as late as May 2014, when his daughter was born his address was different from his wife's address. The only documentary evidence dated from September 2016. He was clearly alive to all possible routes to remaining in the UK and yet did not make any application on the basis of his wife's status. Moreover, the letter from [School], which sets out the claimant's wife's difficulties, makes no reference to him being supportive. Indeed, the letter only refers to the limited support from a couple of local friends who drop off and pick the children up.
35. Importantly the claimant has two children who are not in the UK. He said that they had fled to Senegal due to harassment by the security services but his claim has been disbelieved. I conclude that his children are still in the Gambia.
36. Taking account of all of the above circumstances, whilst it is always in a child's best interests to be with both parents, in this particular case those best interests should not determine the outcome of this appeal.

Notice of Decision

37. The original judge erred in law. His decision has been set aside. It is re-made as follows. The claimant's appeal is dismissed.

No anonymity direction is made.

Signed

Deborah Taylor

Deputy Upper Tribunal Judge Taylor
September 2017

Date 11