



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/14518/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 12 November 2018**

**Decision & Reasons
Promulgated
On 4 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**DAVIES NGURE KAMAU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Kalanda, Legal Representative, JK Immigration Legal Services

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Kenya born on 13 April 1971.
2. This appeal arises from the decision of the respondent on 24 October 2017 to refuse the appellant's application for leave to remain in the UK on the basis of his private and family life. He appealed to the First-tier Tribunal where his appeal was heard by First-tier Tribunal Judge Kaler. In a decision promulgated on 23 October 2018 the appeal was dismissed. The appellant is now appealing against that decision.

Factual Background

3. The appellant entered the UK as a visitor in 1995 and claimed asylum using a false name. His application was unsuccessful.
4. The appellant lives with his partner and children (born on 5 October 2013 and 5 May 2008), all of whom are British citizens. He has a genuine and subsisting relationship with his children. Amongst other things, he takes them to and from school and assists them with homework and other matters.
5. The appellant has committed and been convicted of a number of criminal offences, including a driving offence with nine months imprisonment in 2001, possession of criminal property resulting in 28 weeks imprisonment in 2006, and breach of a non-molestation order resulting in one day of imprisonment in 2011.
6. In his application made on 27 October 2016 for leave to remain on the basis of his family life, the appellant only disclosed the last conviction.

Decision of the Respondent

7. The respondent rejected the appellant's application under the Immigration Rules on the basis that he did not meet the suitability requirements under Section S-LTR, given his criminal history and failure to disclose this on the application.
8. The respondent rejected the appellant's claim outside the Rules on the basis, amongst other things, that separation from his British national children (who can remain in the UK with their mother) can be justified given the criminal convictions and that, alternatively, the children could, if the family so wish, relocate to Kenya where they could partake in Kenya's functioning education system.

Decision of the First-tier Tribunal

9. The judge found, firstly, that the appellant had, in his 2016 application for leave to remain, deliberately failed to disclose earlier convictions.
10. The judge also found that the appellant had not established that he had been present in the UK between April 2001 and July 2006. The judge stated at paragraph 14 that 20 years residence had not been established, and that this had been accepted by the appellant's representative.
11. The judge also found that it was undisputed that the appellant has a close relationship with his partner and children and that he cares for his children.
12. Although at paragraphs 4 and 14 of the decision the judge referred to the appellant entering the UK in 1995, at paragraph 18 the judge stated that the appellant has been in the UK without leave since 2005 and at

paragraph 27 she referred to the appellant being in the UK without leave, "save for a short period in 2005."

13. The judge considered whether the appellant satisfied the criteria of paragraph 276ADE(1) of the Immigration Rules concluded that he did not, as he had not lived continuously in the UK for at least 20 years and would not face very significant obstacles to reintegration in Kenya.
14. The judge then considered the appeal outside the Immigration Rules. He directed himself to consider Section 117B(6) of the Nationality Immigration and Asylum Act 2002 and the best interests of the appellant's children.
15. The judge set out his core findings in respect of Article 8 at paragraphs 37 to 39, where he stated:

"37. I consider the cumulative effect of this Appellant's persistent offending, his deception in using false names to make an asylum application to the Home Office, his failure to disclose all his convictions and his remaining in the UK without leave for so many (sic) years. This Appellant fails the suitability requirements to be granted leave. He is not a suitable person to be entitled to a grant to remain here. The children's best interests have been taken into account as a primary, but not the only factor. The decision to refuse the Appellant a grant of leave is proportionate.

38. The parents of these children both spent their formative years in Kenya and have maintained ties there. They could, if they (sic) wish, relocate to Kenya where there are good schools. The Appellant's partner has family there and they can be assisted in re-establishing their lives there. The Appellant's partner has some medical issues but these are not serious and the (sic) she has been discharged from hospital.

39. Despite the fact that it is in the best interests of the children that their father be part of their continuing family life, I conclude that there are countervailing reasons that prevail. The children have the benefit of one loving parent who is a British Citizen. It would not be unreasonable for this family to enjoy family life in Kenya if that is their wish."

Grounds of Appeal and Submissions

16. The grounds of appeal submit that the judge erred in law by finding that the appellant entered the UK as a visitor in 2005 when in fact he entered in 1995; by stating that the appellant had a short period of leave in 2005, when in fact he did not have leave to remain; and by stating that the appellant had re-entered the UK in November 1999, when the appellant had not left the UK since 1995.
17. At the error of law hearing, Ms Kalanda elaborated upon the grounds of appeal. She submitted that the decision should not stand because it is based on a mistake of fact concerning the date when the appellant entered the UK that the judge had assessed article 8 ECHR under the

misapprehension that the appellant had been in the UK for around 13, rather than 23, years.

18. She also argued (although it is not in the grounds of appeal) that the evidence did not support the judge's finding that the appellant had not established he was in the UK between 2001 and 2006. She described this as an "assumption". She stated that the appellant faces difficulty proving his length of residence as he is unable to obtain his GP records without his passport, which is held by the Home Office. She asserted that the appellant should not be held responsible for this.
19. Mr Whitwell submitted that the reason the appellant appears to have difficulty establishing his length of residence is that he has used different aliases. He noted that the appellant had accepted that he made an asylum claim using a false name.
20. Mr Whitwell accepted that the judge had incorrectly referred to the appellant entering the UK in 2005 (and having leave at this time) but argued that this is not material to the assessment under Article 8, given the criminal history which is not challenged.

Analysis

21. The judge made several mis-statements of fact in the decision. She referred to the appellant being in the UK since 2005, when the evidence indicates that he entered the UK in 1995. She referred to the appellant having a short period of leave in 2005, when there was no such leave at that time. And she stated that the appellant re-entered the UK in 1999, when this does not appear to have been the case.
22. However, although the decision can be criticised for being sloppy, read as a whole it is apparent that the judge appreciated - and more importantly, carried out her assessment of the appellant's private and family life claim on the basis - that the appellant entered the UK in 1995. At paragraphs 4 and 14, for example, she referred to the appellant entering the UK in 1995; and at paragraph 11(i) she mentioned that the appellant entered the UK at the age of 24, which is consistent with him entering in 1995. It is also clear from the decision that the judge did not believe that the appellant first entered the UK in 2005, as at paragraph 12 she referred to four criminal offences occurring in 2001.
23. When reading the decision as a whole I am satisfied that the judge approached the analysis from the starting point that the appellant entered the UK in 1995, and therefore in my view the grounds of appeal cannot succeed.
24. However, even if I am wrong and the judge erred by undertaking the assessment of the appellant's case on the basis that he entered the UK in 2005, rather than 1995, the error was not material.

25. Firstly, such an error would not change the position as to whether the appellant satisfied the 20 year residence period under paragraph 276ADE(1) of the Immigration Rules as it is clear that the appellant falls for refusal under the suitability criteria (sections S-LTR.2.2(b) and S-LTR.1.6) given the unchallenged finding that he deliberately did not disclose five convictions on his application and that he has committed six criminal offences, three of which resulted in imprisonment. Moreover, the judge found that the appellant had not established residence between 2001 and 2006. In the absence of evidence to establish residence during this period, this finding was open to the judge.
26. Secondly, given the substantial weight the judge was required to give to the public interest in the appellant's removal (as a consequence of both his criminal convictions and his failing to disclose the convictions on the application for leave to remain), I am in no doubt that the judge would have reached the same conclusion as to the proportionality of the appellant's removal irrespective of whether she believed he entered the UK in 1995 or in 2005.
27. The appeal is therefore dismissed.

Notice of Decision

28. The decision of the First-tier Tribunal does not contain a material error of law and stands.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 3 December 2018