



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

Appeal Number: AA/08582/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 28 May 2015**

**Decision & Reasons Promulgated
On 8 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

**EN
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Bassiri-Dezfouli, Counsel

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

DECISION AND REASONS

1. Children are involved in these proceedings and it is appropriate that the anonymity order made previously should continue.
2. The appellant claimed to have arrived in the United Kingdom on 14 October 1995 and claimed asylum two days thereafter. That application was refused on 7 October 1995 and he lodged an appeal against the decision. However, a letter from his then solicitors was received by the respondent on 29 January 1997 with an attached copy of a form withdrawing his asylum claim. The respondent's records indicate that the appellant was removed from the United Kingdom on 31 January 1997 but

that he appears to have re-entered the United Kingdom on an unknown date and waited until 2009 when he presented further submissions dated 2 December 2009 which are the subject of the appellant's latest refusal contained within a Reasons for Refusal Letter dated 8 October 2014.

3. The appellant's appeal was heard by Judge of First-tier Tribunal Davidson who in a decision promulgated on 25 March 2015 dismissed it on human rights grounds with particular reference to Article 8. It was on the basis that at the hearing the appellant's Counsel indicated that it was not his intention to pursue either asylum or Humanitarian Protection claims.
4. Paragraph 12 of the judge's decision recorded that there were at the hearing a number of agreed facts between the parties. The respondent accepted that the appellant has children, of whom there are four, being H born 23 October 1997, M born 17 October 2003, A born 30 January 2006 and Aa born 10 June 2010. They live with their mother; that all the children except the eldest had been in the United Kingdom since birth (the eldest having been born in the Gambia); the respondent does not dispute the children have not left the United Kingdom; all the children are in education. It was though disputed that the eldest child was in education.
5. The judge found the appellant not to be credible in relation to his asylum claim. He found that the circumstances of his arrival in 1995 and the undisputed findings of the respondent at that time detracted from the appellant's credibility in relation to this appeal. He found that the appellant was not truthful in his claim to have been in the United Kingdom continuously since 1995 and that it was "more likely" that the appellant entered the United Kingdom in 2003 because his wife said that she "brought her son" when she entered the country in 2003. Her visit visa was valid from 3 November 2002 until 13 May 2003 and she had a Gambian immigration stamp in her passport dated 23 April 2002. The judge suspected that she was pregnant with her child when entering the United Kingdom in April 2003 and that her child had been conceived in the Gambia prior to the appellant leaving. He found the appellant preceded her by a month or so. Further that the appellant has been in the United Kingdom illegally since 2003 having entered clandestinely knowing that he had no right to enter and would not be granted leave to remain in view of his previous immigration history. Further that the evidence is that the appellant and his family have been attempting to live clandestinely in the United Kingdom since 2003 based on evidence to the effect that the appellant's wife, also a Gambian national, said that the family was not registered for council tax and that all the bills of the household are in the name of her sister-in-law. The appellant had accepted that he could not make a valid in-country application to remain under the Immigration Rules and therefore submitted a request to be considered outside of the Immigration Rules on 2 December 2009 along with correspondence of 17 June 2013 and enclosures of 23 July 2014 resulting in the refusal letter before the judge dated 8 October 2014.
6. The judge then went on to consider Article 8 taking account of relevant authorities, Section 117B of the Nationality, Immigration and Asylum Act 2002 and Section 55 of the Borders, Citizenship and Immigration Act 2009.

He had subsumed within his Article 8 analysis the situation of the appellant's dependent wife and four children. The judge did not find the appellant to be a reliable witness in view of the fact that he found he had left the United Kingdom between January 1997, contrary to his evidence, and then entered the United Kingdom clandestinely and has been living illegally. He accepted that the appellant was married and had four children all born in the United Kingdom with the exception of the eldest, H. He found that neither the appellant's wife nor the children had any right to be in the United Kingdom and that the youngest three were born in National Health Service hospitals at public expense, and the eldest three had been educated from time to time at public expense without entitlement. There was little evidence that the appellant lived with his wife and children. The judge then analysed other evidence including that if removed the appellant would return to his native Gambia and that his family would in all probability be returned as a family unit with him. The appellant's wife accepted that she had extended family in that country and that there was no reason why family support could not continue if they were removed. He found the appellant to be young and healthy and that he could be expected to work to support his family upon their return. He has been in the United Kingdom at all times illegally and that the factors within Section 117B of the Nationality, Immigration and Asylum Act 2002 outweigh the respondent's respect for the appellant's family life and that it would not be disproportionate to interfere with the appellant's family life to expect him to return to the Gambia. The judge then went on to analyse the position of the children as minors within Section 55 of the Borders, Citizenship and Immigration Act 2009 taking into account various authorities including **Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)** and **EV (Philippines) [2014] EWCA Civ 874**.

7. The judge found at paragraph 51 of his decision that the best interests of the younger children in this case are that they remain with their parents in the family unit and rejected the suggestion of the appellant and his wife that their best interests remain in the United Kingdom education system because the standard of education is superior to that in the Gambia. He weighed all the factors against the countervailing consideration that it was in their best interests to remain with their parents. He took account of the younger three children's private lives and the position of the elder child, H, whom he found to have been in the United Kingdom for some twelve years. Whilst the appellant gave evidence that she was in full-time education at a college, there was no independent evidence to corroborate this and in light of evidence to the effect that the appellant and his wife were in receipt of child tax credit for only three of the children he concluded that that was an indicator, particularly when coupled with his findings of the appellant being unreliable in his evidence that he was not in full-time education.
8. The appellant sought permission to appeal. This was granted by Judge of the First-tier Tribunal Saffer on 16 April 2015. At paragraph 4 of his reasons for so doing he stated:-

- “4. I am satisfied that it is arguable that M is entitled to be registered as a British citizen by virtue of Section 1(4) British Nationality Act 1981 and that this has not been considered within the Section 55 assessment. It is arguable that there is a knock-on effect to the rest of the family’s Article 8 rights. All grounds may be argued.”

Thus the appeal came before me today.

9. Mrs Bassiri-Dezfouli relied on the grounds seeking permission to appeal arguing that the judge failed to adequately consider what was in the child M’s best interest beyond remaining with his parents. M was born in the United Kingdom on 17 October 2003 and is nearly 12 years old and has lived in this country all his life. He has never left the United Kingdom. The Tribunal failed to give sufficient consideration to his entitlement to register as a British citizen under Section 1(4) of the British Nationality Act 1981 having been born in the United Kingdom on or after 1 January 1983; being 10 years of age or over and having spent no more than 90 days outside the United Kingdom in each of the first ten years of his life and that he is of good character. M would have severe difficulties in adjusting to life in the Gambia and lawfulness of residence is an irrelevant factor for this provision. Further the appellant’s elder daughter H, who was born in the Gambia, came to the United Kingdom in 2002 when she was only 4 years old. She is 17 years old. She has lived in the United Kingdom continuously for a period of over thirteen years and is entitled to residence under the Immigration Rules and particularly Rule 276ADE and Section EX. Residence of over seven years with children well integrated into the educational system in the United Kingdom was an indicator that the welfare of the children favours regularisation of the status of mother and children. She also submitted that the judge had failed to take into consideration guidance given by the President of the Upper Tribunal in the case of **JL and Others (Section 55 duty) Nigeria [2014] UKUT 00547 (IAC)**. She urged me to accept that because the judge had concentrated too much on the appellant’s lack of credibility he had failed to consider individually the private lives of the children and had failed to take into account documents within the appellant’s bundle including school reports. Furthermore he has incorrectly applied the authority of **EV (Philippines)** particularly concluding that none of the children are British citizens. In any event the appellant’s children have been in the United Kingdom longer than those within the authority of **EV (Philippines)**.
10. Contrary to this Mr Walker argued that the judge had properly applied the authority of **EV (Philippines)** and that it was always the position that the appellant and his family had tenuous status within the United Kingdom. The judge had not materially erred and cannot be criticised for failing to consider the “mere possibility” that M is entitled to register as a British citizen. The fact of the matter is that he had not so registered either at the time of decision or hearing.
11. I have deliberately set out in some detail the content of the judge’s decision. There was ample justification for his adverse credibility findings and indeed these were not challenged within the appellant’s grounds of appeal to the Upper Tribunal. The factual matrix is therefore not in

dispute. Contrary to Mrs Bassiri-Dezfouli submissions the judge has taken into account the information from the children's schools. At paragraph 10 of his decision he sets out the appellant's evidence and at paragraph 11 confirms that he has both read and considered it. Indeed that becomes clear from the informed findings made later in his decision.

12. Whilst the judge had considered M's best interest in the context of remaining with his parents he has also taken account M's time spent in the United Kingdom and concludes that like his siblings he has a private life that one would expect the school children of his age. The judge can hardly be criticised for failing to give sufficient weight or consideration to the fact that M is entitled to register as a British citizen under the British Nationality Act of 1981. The facts of the case were that this had not happened. It is not for the judge to deal in speculation.
13. The judge has fully considered H's position at paragraph 53 of his decision. He has taken account of the issues that fell to be considered under Rule 276ADE. However the reality of H's position is in these proceedings that of a dependant upon her father's Article 8 claim.
14. The judge had subsumed within his analysis of Article 8 all appropriate and necessary considerations in relation to the children including those demanded by Section 55 of the Borders, Citizenship and Immigration Act 2009. Appropriate case law has been applied and he has looked at this appeal on an individual basis and has not materially erred, as is asserted, by making no direct reference to the authority of **JL and Others (Section 55 Duty) Nigeria [2014] UKUT 00517 (IAC)**.
15. The judge had carefully analysed the position of the appellant, his dependent wife and children and carried out the balancing exercise that was required of him taking all factors into account including the best interests of the children, Section 117B of the Nationality, Immigration and Asylum Act 2002 and Section 55 of the Borders, Citizenship and Immigration Act 2009. The judge has provided reasoning which is legally adequate and which takes proper account not only of the evidence that was before him but also relevant statute and case law. The conclusions that he has come to were open to be made on that evidence. The grounds seeking permission to appeal are no more than an argument or dispute with findings that were open to be made on the individual facts of this appeal.

Conclusions

16. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
17. I do not set aside the decision.

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

Dated: 5 June 2015

Deputy Upper Tribunal Judge Appleyard