



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02410/2016**

THE IMMIGRATION ACTS

**Heard at Bradford
On 20 October 2017**

**Decision & Reasons Promulgated
On 18 December 2017**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR PASAINEY KANYI

(ANONYMITY NOT DIRECTED)

Respondent

Representation:

For the Appellant: Mr M Diwnycz (Senior Home Office Presenting Officer)

Respondent: Mr Ceesay (Legal Representative)

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal from a decision of the First-tier Tribunal (Judge Ince hereinafter "the Judge") whereupon the claimant's appeal against the Secretary of State's decision of 8 January 2016 refusing to grant him leave to remain in the United Kingdom under Article 8 of the European Convention on Human Rights (ECHR) was allowed.
2. For the reasons set out below I have decided to set aside the Judge's decision because the making of it involved the making of an error of law. However, in remaking the decision I too have allowed the claimant's appeal against the Secretary of State's decision.
3. The claimant was born on 7 August 1997. He is a national of Gambia. He has a brother called Modou who is lawfully resident in the UK. He has a sister, Bintou who resides in the USA albeit that she once spent some time in the UK as a student.
4. According to the evidence given to the Judge by the appellant and Modou, the claimant previously lived in the family home in Ghana with his father and various other relatives. His mother passed away in 2012. By that time Modou was already resident in the UK but, upon his mother's passing, he travelled to Ghana. He says he discovered that his father was not properly looking after the claimant. So, on return to the UK, Modou started sending money to the claimant. But the claimant struggled to cope without his mother and sought a visit visa, which was granted, enabling him to come to the UK. He arrived on 30 July 2013 and was, at that time, aged 15 years. Since his arrival he has lived with Modou and Modou's family. Prior to the expiry of his visit visa he was granted discretionary leave to remain until 7 August 2015 (the date he turned 18). Prior to the expiry of that leave he applied for further leave and it was that application which led to the refusal of 8 January 2016 and ultimately to the appeal before the Judge.
5. The Judge found the oral evidence concerning in particular, the close relationship between the claimant and Modou to be persuasive. He found that the claimant could not bring himself within the scope of the Immigration Rules (it does not seem to have been argued that he could) but allowed the appeal under Article 8 outside the Rules. In explaining why he was doing so he referred to and set out the content of Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002. He then said this;

"29. I pause there to note that: the Appellant speaks English (he gave his evidence in such); he is financially independent, on account of his brother's support and his own earnings; he has never been in the UK unlawfully and that I do not consider that his immigration status has been "precarious" merely because he has only been here with limited leave, since he has always had the right to apply to extend that leave and to appeal any adverse decision if he made such an application in time, which he has."

6. He then referred to various well-known authorities including Razgar [2004] UKHL 27 and said that he was satisfied that both family and private life in the UK had been established by the claimant. In explaining why he thought it would not be proportionate to require the claimant to leave the UK he said this;

“35. The crucial factors in this case are that the Appellant is not leading a life independent of his brother Modou – he is still financially dependent upon him for accommodation and food, as well as being emotionally dependent upon him. In essence Modou has taken on the role of parent due to their mother’s death and their father’s neglect, a role which the Respondent acknowledged when giving the Appellant DLR in 2014. I further note and accept Modou’s assessment that he considers the Appellant still to be a “minor” since he still requires support. On that basis I consider that the Appellant still enjoys family life with his brother notwithstanding that he is now an adult. It follows that he also has private life, with both his footballing activities and his studies.

36. I further consider that it is clear that the Appellant’s removal would seriously interfere with that right. He would be leaving behind his only current close family (he being estranged from his father, who I find neglected him when he was in Gambia and who has continued to show no interest in him following his move to the UK – I rely upon Modou’s evidence that their father has never specifically enquired about the Appellant in all the telephone conversations since he came to the UK), in particular his brother, who stepped into the role of parent following their mother’s death and who continues to give the Appellant significant emotional and financial support. Given the nature and closeness of their relationship during the past three years I do not consider that contact by modern methods of communication or visits by his family to Gambia would negate the fact that there would be serious interference with that right.

37. It is equally clear that the Appellant’s removal is lawful and for a legitimate purpose. The question before me is whether the Appellant’s removal is proportionate.

38. Against the Appellant is the fact that he has no right to remain in the UK under the Immigrations Rules. I also take account of the public interest requirements of section 117B – it is in the public interest to maintain effective immigration controls. However, as stated above, the Appellant speaks English fluently, he is financially independent, he has never been in the UK unlawfully and his immigration status has not been “precarious”.

39. I note the Respondent’s argument that the Appellant would be able to return to live in his father’s home in Gambia, but consider that this is not necessarily a correct assumption. Whilst it appears that Fatou still lives there, the last information (from Modou’s visit in March 2015) is that the house is also occupied by strangers. Moreover, in view of the father’s manifest disinterest in the Appellant since he came to the UK, it cannot be assumed that the father would agree to the Appellant living there.

40. I also note that the Appellant is now over 18 and has educational qualifications and some construction skills which could be utilised by him to obtain employment in Gambia. However, it is also the case that he has never lived by himself independently.

41. In his favour, I note the reasons why he came to the UK, namely because his father neglected him following the death of his mother, and that he has since then, predominantly as a child, established a strong family life with his brother, his brother's family, his aunt, his half-sister and a number of cousins. Essentially, this is the only family life he now has. I do not consider that his father has any interest in him or in re-establishing any relationship with him and any relationship he may re-establish with Fatou would be, in my judgment, no substitute to the family life that he now has.

42. I also note that, in the opinion of his brother (which I see no reason no to place weight upon) the Appellant is not yet ready to live independently and repeat that, given the disinterest of his father, it cannot be assumed that he would be able to go back and live in the former family home.

43. I note that during his time here the Appellant has developed a strong private life, engaging with the community (playing for a local youth football team) and doing well in his studies. He has no criminal record (although this is the minimum that is to be expected of visitors to our shores).

44. In addition, the Appellant speaks fluent English, he would be able to support himself financially, and he has always had leave to be in the UK during his time here in the UK. I therefore place significant weight upon the strong family and private life that he has developed, which was in part, approved by the Respondent as she granted him DLR.

45. I consider that the question before me (bearing in mind the strong compassionate circumstances surrounding the Appellant's arrival in the UK; the neglect of him by his father; his strong emotional reliance upon his brother and the fact that his only close family is here in the UK) is that: is it disproportionate to remove the Appellant to Gambia where a very uncertain future awaits him? Bearing all the above factors in mind I conclude that the Respondent has failed to discharge the burden of proof upon her to demonstrate that his removal would not be disproportionate.

46. I therefore allow the appeal under Article 8."

7. The Secretary of State, in seeking permission to appeal, argued that the Judge had erred in failing to apply a "compelling circumstances" test with respect to Article 8 outside the Rules. It was also said that the Judge had erred in failing to conclude that the claimant's immigration status had been "precarious" during the time that the family and private life had developed. Reference was made, in that context, to the interpretation of the word "precarious" as explained in AM (S 117b) Malawi [2015] UKUT 0260 (IAC). Since permission to appeal was granted the case was listed for a hearing before the Upper Tribunal (before me) so that it could be considered whether the Judge had erred in law and if so, what should flow from that. Directions also made provision for me to go onto re-make the decision in the event of the Judge's decision being set aside.
8. I heard submissions from each representative as to the error of law issue. Having heard from them I concluded that, whilst the Judge's decision is a

most careful and thorough one there was an error of law which was capable of impacting upon the outcome.

9. In that context, I agree with the Secretary of State that following Treebhawon and others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 00013 (IAC) the claimant was required to demonstrate that there were, in his case, compelling circumstances such as to justify the allowing of the appeal under Article 8 outside the Rules. The Judge did not expressly remind himself of that and I do not feel able to simply assume that he had it in mind. Further, notwithstanding what appears to be cogent reasoning, I am not satisfied that if he had reminded himself as to the requirement for compelling circumstances the outcome would nevertheless have been inevitable. So, I informed the parties that I would set aside the decision.
10. Matters moved on to remaking. My having set aside the decision it was necessary for me to have regard to the circumstances as they were as at the date of the hearing before me. There had, indeed, been a development of some significance in that it was said the claimant had cemented a relationship with one Lisa Williams, a British citizen, and that the couple now had a British citizen child. At my request Mr Ceesay helpfully prepared a handwritten statement from the claimant and one from Ms Williams addressing their relationship. I was also provided with a copy of the birth certificate relating to the couple's child. That documentation was admitted by me pursuant to Rule 15(2) of the Upper Tribunal Rules.
11. I then heard oral evidence from the claimant. He told me that he now lives with Ms Williams, their seven-week-old child and her daughter from a previous relationship. They had been living together since 1 June 2017. Previously the claimant had been residing with Modou. Initially the relationship was of a casual nature but had become more serious. When Ms Williams became pregnant the claimant was initially "in shock" but had adapted. The claimant was now in employment. Ms Williams said that the two had first met in November of 2016. They became "partners" once she had discovered that she was pregnant.
12. I then heard submissions from the representatives. Mr Diwnycz said that the Secretary of State had been "overtaken by events". He said he would accept that the claimant is the father of a British citizen child. He did not make any further submissions. Mr Ceesay argued that there were "compelling circumstances".
13. Although I did decide to set aside the Judge's decision I did not interfere with the factual findings. So, there remains the strong relationship the claimant has with Modou. But there is also his relationship with Ms Williams which I accept is a genuine and subsisting one. Mr Diwnycz did not seek to challenge the genuineness of the relationship. I accept that the claimant does now have a British citizen child. Again, there was no challenge as to that from Mr Diwnycz.

14. Mr Ceesay has not specifically directed me to any Article 8-related immigration rules in respect of which he now says the appeal should succeed. So I have looked at matters outside the rules. I am satisfied that there are compelling circumstances in this case such as to justify the allowing of the appeal outside the rules. That is based upon the cumulative effect of the claimant's unusually strong relationship with his brother Modou, his genuine and subsisting relationship with Ms Williams, his British citizen child and his membership of a family unit including Ms Williams own child. I also attach weight to the fact that Mr Diwnycz did not seek to persuade me otherwise.

15. So, in remaking the decision, I allow the claimant's appeal on Article 8 grounds.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside. In remaking the decision I allow the claimant's appeal against the Secretary of State's decision of 8 January 2016 on Article 8 grounds.

I make no anonymity direction. None was sought before me.

Signed

**M R Hemingway
Judge of the Upper Tribunal**

Dated

18 December 2017

**To the Respondent
Fee award**

I make no fee award.

Signed

**M R Hemingway
Judge of the Upper Tribunal**

Dated

18 December 2017

