Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19806/2010

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 5th September 2013	**on 13th September 2013**

Before

UPPER TRIBUNAL JUDGE SPENCER

Between

DAVE MAURICE EBANKS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr M Adophy, solicitor, Rana & Co, Solicitors
For the respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica, born on 18th August 1973. His appeal against the decision of the respondent, made on 23rd March 2010, to remove the appellant

from the United Kingdom to Jamaica, following the refusal of his application to remain in the United Kingdom outside the immigration rules, was dismissed on human rights grounds under article 8 of the ECHR, after a hearing before First-tier Tribunal Judge T Jones, in a determination promulgated on 6th January 2011.

2. The appellant's immigration history is that he arrived in the United Kingdom as a visitor in March 2000 and was subsequently given permission to remain as a student, which expired in June 2001, after which he remained without leave. He had begun a relationship with Ms Rosalind Rosemary Ebanks in 1994 and married in Jamaica in 1995. There were two daughters of this relationship, the first of whom was born on 12th August 1994 in Jamaica and the second of whom was born on 29th September 2003 in the United Kingdom. The appellant separated from his wife in September 2007, when he went to live with another woman. This relationship subsequently came to an end, after which he went to live with his brother. His wife obtained indefinite leave to remain in the United Kingdom together with her children, as a result of being an unmarried partner of a person present and settled in the United Kingdom, which relationship came to an end in July 2010.

3. At the date of hearing before the First-tier Tribunal judge the appellant's relationship with his wife was no longer subsisting. The appellant claimed to have contact with his two daughters, asserting that he took to school and collected from school his younger daughter and then supervised her homework before returning to his brother's home. The First-tier Tribunal judge did not believe that the appellant had any contact whatsoever with his daughters. He was not satisfied of the authenticity of a letter purporting to come from the headmaster of the appellant's younger daughter's school, stating that she was collected after school on a regular basis by the appellant and did not believe that letters purporting to come from the appellant's daughters as authentic expressions of their relationship with the appellant. Accordingly the First-tier Tribunal judge was not satisfied the appellant had family life in the United Kingdom and decided that his removal would not amount to a disproportionate interference with his right to respect for his private land family life under article 8 of the ECHR.

4. The appellant sought permission to appeal on a number of grounds. The first was that the First-tier Tribunal judge applied the usual civil standard of proof, namely the balance of probabilities, whereas it was asserted the standard of proof was a lower standard more akin to the standard in asylum matters. The second ground, in effect, was that the First-tier Tribunal judge approached the assessment of the evidence in relation to family life incorrectly. It was asserted that it was inconceivable that the headmaster of the appellant's younger daughter's school was party to a contrivance to deceive. The third ground was that the First-tier Tribunal judge failed to have regard to the best interests of the children as required by section 55 of the Borders, Citizenship and Immigration Act 2009. The final ground was that the First-tier Tribunal judge failed to balance the article 8 claim and form an opinion from the perspective of his daughters as the appellant was not the sole victim of any proposed removal.

5. On 27th January 2011 Senior Immigration Judge Macleman granted permission to appeal for the following reasons:

> "IJ dismissed this appeal against refusal of leave to remain outside the Immigration Rules, argued only under Article 8 ECHR.
>
> This application points out that the IJ took the standard of proof required of the appellant to be the balance of probabilities, not the "lower standard". (This appears at paragraph 25 (not 23) of the determination.)
>
> It is generally accepted that not only in Article 3, but also in Article 8 and other ECHR cases, the lower standard of proof applies.
>
> Once it is shown that an ECHR right is interfered with, the burden of justifying that is on the SSHD. Although not mentioned in the application, the IJ appears also to have overlooked that.
>
> It may well be that in the final assessment of proportionality little turned on the burden and standard of proof, and the other points in the application might not have attracted a grant of permission, but a determination which mistakes these two matters may be difficult to sustain.
>
> (There are documents on file sent in by the appellant after the hearing, with a covering letter saying that the IJ had permitted this. The documents seem to have arrived after the determination was promulgated. The matter is not mentioned in the determination or in this application, but should be kept in mind in further procedure.)"

6. Thus the appeal came before me. The grounds of appeal mentioned a number of authorities but, contrary to the Senior President's Practice Statements and the express directions of the Tribunal, dated 1st August 2013, Mr Adophy, who had conducted the appeal before the First-tier Tribunal, failed to provide the Upper Tribunal with copies of the authorities relied upon. Initially he asserted that he believed that these authorities had been before the First-tier Tribunal but no mention of them was made in the determination and there were no copies in the file. Subsequently he asserted that no authorities had been produced because it was trite law that the standard if proof in article 8 cases was the same as in article 3 cases.

7. I adjourned the hearing for a short time in order to provide copies of the authorities referred to in the grounds of appeal to both parties' representatives. The first authority mentioned was LM (Article 8 – married appellant – proportionality) Jamaica [2010] UKUT 379 (IAC). That was an appeal in which the Upper Tribunal noted that in her determination dated 29th December 2009 Senior Immigration Judge Gill had concluded that there had been an error of law in the original determination and adjourned the appeal for a second stage reconsideration of the article 8 claim. Senior Immigration Judge Gill gave a number of reasons for finding there was an error of law in the determination, one of which was that the immigration judge directed himself that the appropriate standard of proof was the balance of probabilities, which she said was wrong. In re-making the decision the Upper Tribunal made no observation as to whether this was correct or not.

8. The second authority referred to was AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 407. It is apparent from reading that authority that it had nothing to do with the issue before me. The authority which Mr Adophy should have referred to was AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801 in which in paragraph 28 of his judgment, giving the judgment of the court, Sedley LJ said:

> "It follows, in our judgment, that while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the "minimum level") is not a specially high one. Once the article is engaged, the focus moves, as Lord Bingham's remaining questions indicate, to the process of justification under art. 8(2). It is this which, in all cases which engage article 8(1), will determine whether there has been a breach of the article."

9. In BK (Kosovo – Subesh) Serbia and Montenegro [2005] UKIAT 00001 the Immigration Appeal Tribunal said that it was difficult to see the scope for a standard of proof in the proportionality assessment itself, as it was essentially a balancing exercise. In paragraph 29 of its determination, however, the Tribunal presided over by the President, Ouseley J said this:

> "In finding the facts, in a non-risk assessment case, it is difficult to see why the standard of proof should be other than the normal civil standard of the balance of probabilities."

10. In EH (Palestinian, entry clearance, proportionality) Iraq [2005] UKIAT 00062 the IAT, again presided over by Ouseley J, held that the appropriate standard of proof where no risk was being assessed was the balance of probability. In paragraph 7 of the determination the Tribunal said:

> "Family relationships may or may not be a risk factor for asylum or Article 3 or 8 cases. Some Article 8 cases are concerned with the risk of a breach of human rights on return. But where the issue is whether or not family life has been established in this country for the purposes of seeing whether the interests of immigration control outweigh it, the standard of proof for its establishment is that of the balance of probabilities and not a reasonable degree of likelihood, let alone, as we have sometimes seen it, a real risk that someone was married".

11. A more recent illustration is the determination of the Tribunal in Naz (subsisting marriage - standard of proof) Pakistan [2012] UKUT 40 (IAC) in which the Tribunal, presided over by the President, Blake J, said that it was for a claimant to establish that an immigration decision would be an interference with established family life and the relevant standard for establishing the facts was the balance of probabilities. In paragraph 11 of its determination the tribunal said:

> "It is of course trite that the standard of proof of the primary facts in entry clearance claims is the ordinary civil balance. A similar standard applies in Article 8 cases, where the claimant alleges that immigration action interferes with subsisting private or family life."

In that appeal the First-tier Tribunal judge had found that the appellant's case just reached the low threshold. In paragraph 13 of its determination the Tribunal said it could not be sure what the judge meant by a relatively low standard of proof and a low threshold. The Tribunal said that the case was neither one for the application of the criminal standard nor the lower standard or reasonable likelihood applied in asylum claims. The judge should have asked himself simply whether it was more probable than not that the parties intended to live together as husband and wife and that the matrimonial relationship was subsisting.

12. In principle there is no reason why the position should be different in in-country appeals. I take the view that Mr Adophy was confusing the low threshold which describes what is required to be shown in order to engage article 8 with the standard of proof, which applies to proving the necessary elements.

13. By way of illustration in J v Secretary of State for the Home Department [2005] EWCA Civ 629, where the Court of Appeal was concerned with the risk of suicide under article 3 of the ECHR, the Court of Appeal said that the article 3 threshold was particularly high as it was a foreign case and it was even higher where the alleged inhuman treatment was not the direct or indirect responsibility of the public authorities or the receiving State but resulted from some naturally occurring illness, whether physical or mental. Nonetheless the standard of proof remained whether there was a real risk of a breach of article 3.

14. Similarly in medical cases such as in N v Secretary of State for the Home Department [2005] UKHL 31, in which the House of Lords held that article 3 imposed no 'medical care' obligation on contracting states even where in the absence of medical treatment the life of the would-be immigrant would be significantly shortened, absent exceptional circumstances such as occurred in the case of D v United Kingdom (1997) 24 EHRR 425, in which the applicant was in the final stage of a terminal illness and had no prospect of medical care or family support on expulsion to St Kitts. Notwithstanding that the threshold for the engagement of article 3 in such cases was extremely high, nonetheless the standard of proof remained that of a reasonable likelihood or a real risk.#

15. In KR (Iraq) v Secretary of State for the Home Department [2007] EWCA Civ 514 the Court of Appeal expressed the view that for article 8 to be engaged in a risk of suicide case it had to be shown that the appellant's removal would exposed him to a real risk of suicide. Mention of this led Mr Adophy to argue that this demonstrated that the standard of proof in all article 8 cases was the lower standard. I take the view that where the same facts are relied upon in seeking to establish a breach of article 8 as are or could be relied upon to establish a breach of article 3, it would be anomalous for different standards of proof to apply. As pointed out above in BK Ouseley J excluded risk assessment cases from those cases where the standard of proof was on a balance of probabilities. The short answer to Mr Adophy's point is that this was not a medical or risk of suicide case.

16. In these circumstances in requiring the appellant to establish the ingredients of the family life that he claimed on a balance of probabilities, the First-tier Tribunal judge did not make an error on a point of law.

17. I raised with the parties' representatives the issue of whether or not the fact that the appellant was the biological father of his daughters was sufficient to establish family life between the appellant and his daughters. In paragraph 32 of its judgment in Gull v Switzerland – 23218/94 – Chamber Judgment [1996] ECHR 5 the Court said:

> "The Court reiterates that it follows from the concept of family on which Article 8 (art. 8) is based that a child born of a marital union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life" (see the Berrehab v. the Netherlands judgment of 21 June 1988, series A no. 138, p. 14, para. 21, and the Hokkanen v. Finland judgment of 23 September 1994, Series A no. 299-A, p. 19, para. 54) which subsequent events cannot break save in exceptional circumstances."

18. I take the view that the First-tier Tribunal judge was wrong to find that family life did not exist between the appellant and his daughters. If it were the case, however, that the appellant ceased to have any contact whatsoever with his daughters then it would follow that notwithstanding his biological relationship it could not be said by any reasonable First-tier Tribunal judge, that even requiring the respondent to establish that the appellant's removal would not be disproportionate on a balance of probabilities, it would be a disproportionate interference with his right to respect for his family life or that of his daughters for the appellant to be removed from the United Kingdom, having regard to the fact that he has been unlawfully in the United Kingdom since 2001, that on the finding of the First-tier Tribunal judge he has no family life other than biological ties to his two daughters with whom he has no contact and the weight to be afforded to the public interest in the maintenance of effective immigration control, in order to safeguard the economic well being of the country and protect the rights and freedoms of others.

19. In these circumstances the determining issue in this appeal relates to the question of whether or not the First-tier Tribunal judge was entitled to find that the appellant had no relationship whatsoever with his daughters. Mr Adophy's submissions before me, in effect, were that there was ample evidence before the First-tier Tribunal judge to satisfy himself that there was an existing relationship between the appellant and his daughters. It is the case, however, that the First-tier Tribunal judge gave reasons for disbelieving the account of the appellant and his wife. He gave reasons for not accepting the letter from the head teacher of the school which was attended by the appellant's younger daughter and gave reasons for not accepting the authenticity of the letters purporting to come from the appellant's daughters. The real issue therefore is whether the First-tier Tribunal judge was perverse in refusing to accept the evidence relied upon by the appellant or whether the reasons which he gave were incapable of justifying the conclusions which he reached.

20. In paragraph 29 of his determination the First-tier Tribunal judge said that understandably the respondent was caused concern, given a paucity of information

provided with the application to support any form of relationship as between the appellant and his wife, let alone the children. He said that at the hearing the appellant claimed he collected his younger daughter each day, taking her to school, returning and living in his wife's property during the school day and then collecting this younger child at the end of the school day, seeing to it that she had done her homework before leaving for his brother's home. In paragraph 30 he said he found that evidence was undermined by his wife's evidence. She had alluded to the appellant being around so as to see the children, seeing them sometimes five days a week and taking the younger one sometimes to school and otherwise taking them to the park and fairground. He went on to say that he did not find the appellant or his wife credible and that the claims were a blatant attempt to mislead him at the hearing.

21. He did not accept the appellant's wife was a credible witness. He noted her account was very vague when she was asked what further details she might have placed before him in writing. She appeared very hesitant when it was explained to her that in the absence of the Presenting Officer there would be a number of additional questions to be put to her at the hearing. In paragraph 32 he said while he could accept that someone might be nervous, her evidence – to say the least – countermanded that which had gone before from the appellant. She was reluctant to allude to the circumstances in which she presently enjoyed indefinite leave to remain in the United Kingdom with her children. It was put to him at one point initially and perhaps mistakenly that they were British citizens, which was not the case. He said even though she might have been a reluctant witness she had no viable explanation as to why the appellant's brother's name would be on one of the children's birth certificates. This was a reference to the fact that the appellant's brother was named as the father of the younger child on her birth certificate. The First-tier Tribunal judge said that the brother personally attended on the Registrar of Births Death and Marriages attesting to the accuracy of the document. The appellant's wife had no basis of explanation.

22. In paragraph 33 he said it was clear that the appellant's wife's relationship which brought about the grant of leave would appear to have lasted for long after the respondent's decision was made. He noted that she said that the relationship had ended in July 2010 whereas the appellant, who told him he only knew what he had been told by his wife, said that the relations ended in April 2010, the grant of unlimited leave being made in March 2010. He found that a rather surprising comment for the appellant to make, saying he was only aware of what he had been told, since it had been his evidence up to that point that he was a regular visitor to the house, staying in the house throughout the day while his younger daughter was at school. Equally he did not appear to be able to correctly recite the name of his wife's former partner, despite the appellant claiming to spend his days there in their home, when taking his younger child to and from school. He said if the appellant had any contact with the children, applying the appropriate standard, he would have expected him to have been aware of more of what was going on within the household in which the children lived.

23. In paragraph 30 of his determination the First-tier Tribunal judge made reference to the letter from the head teacher of the younger daughter's school, dated 18th October 2010. He said that did not allude to the child being taken to school but being collected after school on a regular basis by the appellant. He said the writer of the letter was not available as a witness to confirm any of the contents of it, or how he knew the appellant. He said he did not find the appellant to be a credible witness and did not accept the account of how he had procured the letter from the school principal in all the circumstances.

24. In the grounds of appeal Mr Adophy claimed that it was inconceivable that the principal was part of a contrivance to deceive. The appellant bore the burden of proof, however, of establishing the authenticity of the letter in accordance with the determination of the Tribunal in Tanveer Ahmed (document unreliable and forged) Pakistan* [2002] UKIAT 00439 and the finding by the First-tier Tribunal judge that he could not rely upon the authenticity of the letter did not imply that the person said to be the writer was party to any conspiracy.

25. In relation to the letters purporting to come from the two children, in paragraph 34 of his determination the First-tier Tribunal judge said that there were two letters said to be from the children. They were not addressed or dated. He said one had the body of a note written and appeared to have then had a child's signature appended to it. He said having regard to the ages of the children it was difficult to understand why they were not able to attend the proceedings. There was no evidence before him as to any ongoing gifts, cards, telephone or text communication, or other tokens of endearment as between the appellant and his children. Moreover he noted the documentation that the appellant otherwise relied upon, as regards supportive testimonials from two others, dated from 2008 - that indeed remained the case in respect of correspondence (2008) from his brother Matthew. It was said that the appellant's relationship with another woman from September 2007 came to an end in March 2010 when he had moved in once more with his brother. He said he attached little weight to the letters from the children, given his credibility findings in relation to the appellant and his wife, the manner in which the letters appeared to have been written and the absence of the children and the absence of supportive witnesses.

26. In my view these reasons were properly open to the First-tier Tribunal judge. I note the statement by Upper Tribunal Judge Macleman, in granting permission to appeal, that the other points in the application apart from the point about the standard of proof, might not have attracted a grant of permission to appeal. Had he been aware of the authorities to which I have referred it is unlikely that he would have granted permission.

27. The position therefore is that the First-tier Tribunal judge found the appellant and his wife to be wholly unreliable witnesses, leading to the conclusion, expressed in paragraph 30 of his determination, that he did not accept the appellant's claim that he enjoyed any relationship with his children. I take the view that it cannot be said that no reasonable First-tier Tribunal judge could have reached the same conclusions as the First-tier Tribunal judge in this appeal.

28. So far as the best interests of the children are concerned in the absence of any contact whatsoever between the appellant and his children no question of consideration of their best interests under section 55 of the Borders, Citizenship and Immigration Act 2009 arose.

29. The final point made by Mr Adophy was in relation to paragraph 395C of HC 395, which was not referred to in the grounds of appeal, namely that the Fist-tier Tribunal judge failed to deal with paragraph 395C. It is apparent from reading the determination, however, that, as pointed out by Mr Melvin, this submission is without foundation. In paragraph 12 of the determination the First-tier Tribunal judge, in dealing with the letter of refusal, said that further consideration was given to paragraph 395C of HC 395, as amended. In paragraph 26 the First-tier Tribunal judge said that he doubted the relevance of paragraph 395C, as the appellant had been present in the United Kingdom without any lawful leave but for the avoidance of doubt, if he were in error in that regard he would nonetheless, having heard the appeal, subscribe in the round to the reasons, analysis and conclusions of the respondent thereupon for like reasons himself.

30. It is plain that the First-tier Tribunal judge did consider paragraph 395C and decided that the discretion of the respondent should not have been exercised differently.

31. For the sake of completeness I should say that Mr Adophy made no submissions in relation to any documents which may have been sent to the First-tier Tribunal after the promulgation of the determination, referred to in the grant of permission to appeal.

32. The First-tier Tribunal judge did not make an error of law in his determination of the appeal and therefore his determination dismissing the appeal on human rights grounds under article 8 of the ECHR shall stand.

Signed Dated

P A Spencer
Judge of the Upper Tribunal