Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/45992/2013

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on**
On 6 June 2014	**On 30 June 2014**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALFRED GEORGE McLEOD

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Mr P Richardson, instructed by James, Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge K S H Miller) allowing an appeal by the applicant against a decision made on 22 October 2013 refusing his application for an extension of discretionary leave to remain in the UK. In this determination I will refer to the parties as they were before the First-tier Tribunal: the Secretary of State as the respondent and the applicant as the appellant.

Background

2. The appellant is a citizen of Jamaica born on 4 December 1977. He first entered the UK on 20 September 2000 with entry clearance as a visitor valid until 19 October 2000. On 17 October 2000 he applied for an extension and this was granted until 25 November 2001. According to the chronology his first child was born on 10 October 2002. At that stage he was in a relationship with Kadecia Bennett but that relationship was short-lived. In 2003 the appellant met and married Aleasha Roach, a British national. In 2003 he applied for leave to remain as a spouse but the application was refused although he was granted discretionary leave to remain until 2009. According to the appellant's chronology he applied for an extension of leave in 2009 and on 8 March 2012 he made a further application for an extension confirming that his relationship with Mrs Roach was no longer subsisting and that he was applying for leave as the partner of Ms Bennett. By 2012 he had had a second child with Ms Bennett born on 20 August 2007 and on 10 October 2012 a third child was born.

3. The application was refused in the respondent's decision of 22 October 2013. The application was considered firstly under the partner route but the respondent was not satisfied that it was shown that the appellant had been living with Ms Bennett in a relationship akin to marriage for at least two years prior to the date of application. Further, his claimed partner was not a British citizen nor was she presently settled in the UK. The respondent went on to consider whether para EX1 applied but, whilst it was acknowledged that he had a genuine subsisting parental relationship with his children, the application fell to be refused under the eligibility requirements of the rules.

4. The respondent then considered the decision under the parent route and under the private life provisions of para 276ADE but found that they were not met. She then went on to assess whether there were exceptional circumstances which might warrant consideration outside the requirements of the rules. The respondent noted in support of the application the fact that the children were British citizens and had been living in the UK for all their lives but the appellant had not provided any evidence indicating that he would be unable to maintain and support them from Jamaica. It was accepted that this might involve a degree of disruption of his private life but that would be proportionate to the legitimate aim of maintaining effective immigration control and be in accordance with the s.55 duties under the Borders, Citizenship and Immigration Act 2009. Having refused the application for leave to remain, the respondent went on to make a decision to remove the appellant.

5. He appealed against this decision and his appeal was heard by the First-tier Tribunal on 6 February 2014. The judge heard evidence from the appellant as well as from his partner Ms Bennett. He noted that his partner did not have British nationality. She had three years leave to remain valid until about May 2014. She had come to the UK in July 2000 as her husband was here. She had had indefinite leave to remain but

because she had used someone else's identity document that leave was removed [19]. Ms Bennett, in her evidence, confirmed that she had come to the UK in 2000 and said that she had been in a relationship with the appellant for 22 years, and had known him in Jamaica. She agreed that their relationship had been "on and off" and said that in recent times they had got back together at the end of 2009 when he had moved in and he had lived with her ever since.

6. In his conclusions, the judge said that although it was not entirely clear, it would appear that when the appellant made his application on 20 March 2009 it was on the basis of his relationship with Mrs Roach. It further appeared that no decision was made in relation to that application and by the time his solicitors wrote to the respondent in early 2012, he had separated from her and had been living with Ms Bennett for a considerable period of time. The judge said that he had no reason to doubt that the appellant had previously been in a relationship with Ms Bennett and had already had one child by her in 2002 but that relationship was interrupted by his marriage to Mrs Roach. The judge then set out his findings as follows:

> "25. Although both the Appellant and Ms Bennett describe their relationship as having been "on and off", it would seem that it has been sufficiently "on" for them to have a second child, J, in 2007 and a third child, N, in 2012. There are some documents, in joint names, from 2008 and 2010, and I am prepared to accept that they have probably lived together since 2010, two years prior to the application.
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> 26. Although I am sceptical and do not accept that the Appellant has no ties in Jamaica, under Section 55 of the 2009 Act, I have to consider the welfare of the children. The eldest, D, is now 11 years old, whilst J is aged 6. Children tend to be highly adaptable and I suspect that they would be able to re-adjust to living in Jamaica. However, the fact is that the children are British citizens, and I have to take this into account.
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> 27. Although I find that the case is finely balanced, it would seem that the Respondent took an inordinate period of time, to decide the Appellant's application for an extension of leave, made in 2009, and that, had a decision been made within a reasonable period of time, the case of the Appellant would have been considerably weaker. However, D and J are now five years older, and having regards to their interest, I do not consider it appropriate for the Appellant to be removed and for them to be either separated from him, or forced to leave this country where obviously they have developed all sorts of relationships.
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> 28. Finally, I note that the position of Ms Bennett continues to be uncertain. However, the lack of urgency with which the Appellant has been pursued does not give me any confidence that the Respondent would resolve her position in the near future. This again, can serve only to harm the welfare of the children, leaving them uncertain as to where their future home is to be."
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> 29. It is accordingly with some considerable reluctance, that I have to allow this appeal.

The Grounds and Submissions

7. In lengthy grounds the respondent argued that the judge had erred in law by failing to consider the merits of the appeal under the Immigration Rules and in the alternative whether there were any compelling circumstances warranting granting the appellant leave outside the rules. It is further argued that the judge failed to give adequate consideration to the respondent's legitimate interest in maintaining effective immigration control, to assess properly the issue of insurmountable obstacles to family life continuing outside the UK, particularly having noted that the children were at an age when they were adaptable, to apply the income threshold in the article 8 assessment, failed to take into account Azimi–Moayed and others (Decision affecting children; onward appeals) [2013] UKUT 197, or to consider the issue of delay in accordance with the guidance set out by Lord Bingham in EB (Kosovo) v SSHD [2008] UKHL 41.

8. Mr Nath adopted these grounds in his submissions arguing that the assessment of article 8 had not been properly carried out in the light of the authorities of MF (Nigeria) [2013] EWCA Civ 1192, Nagre [2013] EWHC 720 (Admin) and Gulshan [2013] UKUT 640. When the grounds were looked at cumulatively the judge had failed to carry out a proper assessment of proportionality. He submitted that his conclusions were set out very briefly and he should have given more consideration to the specific circumstances of the children and the nature and the extent of the relationship between the appellant and his partner. There had been no adequate assessment of the public interest and in particular the legitimate aim of immigration control.

9. Mr Richardson relied on the Court of Appeal judgement in Edgehill [2014] EWCA (Civ) 402, submitting that the application had been made before the new rules had taken effect and on this basis the judge could not be criticized for failing to follow Nagre and Gulshan. He was entitled to approach article 8 under the general jurisprudence rather than taking the more limited approach mandated by MF (Nigeria). Further, he argued that it was clear from the judge's conclusions that he had been well aware of the public interest in relation to immigration control. The judge had said at [29] that it was with some considerable reluctance that he allowed the appeal. He had regarded the case as finely balanced [27] and had been sceptical about the claim that the appellant had no ties in Jamaica [26]. This was a case involving three children aged 11 ½, 6 ½, and 1. The judge had been right to regard their best interests as a primary consideration.

10. He submitted that there was no substance in the ground relating to insurmountable obstacles as the substance of the case was based on the appellant's relationship with his children. No issue had been raised at the hearing about the financial requirements of the rules but in any event they would not be determinative. The children were British and the judge was entitled to give weight to that factor. It was not suggested that this was a case where the delay was determinative but again it was a matter the judge was properly entitled to take into account. In summary, Mr

Richardson submitted that the judge had reached a decision properly open to him and had not erred in law.

Assessment of whether there is an Error of Law

11. The issue before me at this stage of the appeal is whether the judge erred in law such that his decision should be set aside. It is clear that the judge accepted that the appellant was the father of three children from his relationship with Ms Bennett. The oldest child is now 11 and there are two younger children aged 6 and 1. He accepted that the relationship had been "on and off" but also that they had probably lived together since 2010, two years prior to the application. Ms Bennett had had indefinite leave to remain but in the light of the fact that she used someone else's identity document that was removed and she now has limited leave to remain based on her relationship with her children. The judge accepted that the three children were British citizens and that an application for an extension of leave had been made in 2009. That fact appears to be in dispute between the parties but the judge accepted the appellant's evidence on that issue.

12. Having found that there was genuine and subsisting family life between the appellant, Ms Bennett and the three children, it was for the judge to assess whether the appellant's removal would be proportionate to a legitimate aim. Mr Nath submitted that the judge erred by failing to follow the guidance set out in MF (Nigeria) and in subsequent cases such as Nagre and Gulshan, whereas Mr Richardson argued that in the light of the Court of Appeal judgment in Edgehill the judge cannot be faulted for in effect carrying out an assessment of proportionality under the principles set out in Huang [2007] UKHL 11 and EB (Kosovo) without considering the matter within the framework of the amended Immigration Rules. The judgment in Edgehill sits uneasily with the Court of Appeal judgment in Haleemudeen [2014] EWCA Civ 558 where the Court proceeded on the assumption that applications before the amended rules came into force would, at least under article 8, be considered under the new rules. However, in the particular circumstances of this appeal, I do not think that this issue affects the outcome.

13. The judge did not refer in terms to MF (Nigeria) and the subsequent cases and his the conclusions are set out quite succinctly, but on the other hand it is difficult to see how the welfare of three British children aged between 11 and 1 could be anything other than an exceptional or compassionate circumstance which would give rise to the need to consider article 8, whether under the approach set out in MF (Nigeria) or generally.

14. It is argued that the judge failed to give consideration to the respondent's legitimate interests in maintaining effective immigration control, but the phraseology used by the judge, highlighted by Mr Richardson in his submissions, satisfies me that he was clearly aware of the balance he had to strike. In any event, the judge recorded when setting out the background facts, that the respondent had had regard to the duty under s.55 of the 2009 Act and, when considering proportionality, he referred to the

legitimate aim of maintaining effective immigration control. I do not accept that the judge did not have those factors in mind when setting out his conclusions. The ground relating to insurmountable obstacles has limited, if any, bearing on the issue as under para EX1 when considering children, the issue is whether there is a genuine and subsisting relationship and whether it is reasonable to expect the children to leave the UK. Those factors were clearly in the judge's mind.

15. Issues relating to the income threshold were not raised at the hearing, but in any event, they would lead into a consideration of para EX1 and more generally how the balance should be struck in circumstances where the requirements of the rules were not met. The grounds also refer to the guidance in Azimi-Moayed and in particular to [13] and the factors set out there, but again there is no reason to believe that the judge was not fully aware of those provisions. Finally, on the issue of delay, there is no reason to believe that the judge regarded that as determinative; he was entitled to comment on the delay in making a decision, having found that an application had been made in 2009. His comment that at that stage the case would have been considerably weaker is consistent with the point being made by Lord Bingham in EB (Kosovo) that a delay may strengthen a claim based on private and family life.

16. In summary I am satisfied that on the particular facts of this appeal the judge reached a decision properly open to him, and that when the decision is read as a whole, it is clear why he took the view that removal would be disproportionate to a legitimate aim, particularly taking in to account the fact that the welfare of the three children of the family was a primary consideration.

Decision

17. For these reasons, I am not satisfied that the First-tier Tribunal erred in law and this appeal by the respondent is therefore dismissed.

Signed Date

Upper Tribunal Judge Latter 27 June 2014