Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31822/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 August 2015	**On 19 August 2015**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RANDOLPH ADJEI DONKOR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

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

DECISION AND REASONS

1. The appellant in this case is the Secretary of State and the respondent is Mr Randolph Adjei Donkor. I shall refer to the respondent as the appellant as he was before the First-tier Tribunal. He is a citizen of Ghana and his date of birth is 10 April 1974. He has three family members who are dependent on his appeal. They are also citizens of Ghana. They are his partner, Juliana Asare (date of birth 28 February 1981) and their two children, Nicholas Adjei (date of birth 26 March 2006) and Stephen Adjei

(date of birth 10 August 2009). Both children were born here and have lived here all their lives.

2. The appellant made an application for leave to remain in the UK and that application was refused by the Secretary of State in a decision of 24 July 2014. The appellant appealed and his appeal was allowed under Article 8 by Designated Judge Taylor in a decision that was promulgated on 12 January 2015. Permission to appeal was granted to the Secretary of State on 20 February 2015.

3. The appellant came to the UK initially as a student on 4 September 2002. He made a number of successful applications for leave following this until 31 July 2009. His last application for leave to remain as a student in 2009 was refused and his appeal was dismissed by Judge of the First-tier Tribunal Beech and he became appeal rights exhausted on 21 July 2010. The appellant's partner, Juliana Asare, came to the UK on 7 December 2001 as a visitor. She has since overstayed.

4. The First-tier Tribunal heard evidence from Mr Sammy Duah, the appellant and Ms Juliana Asare and he accepted the evidence finding the appellant and the witnesses to be credible.

5. The first ground of appeal maintains that the judge failed to properly apply the guidance in Devaseelan (Second Appeals – ECHR –Extra Territorial Effect) Sri Lanka [2002] UKAIT 00702 relating to a previous determination of First-tier Tribunal Judge Beech in 2009. Judge Taylor made credibility findings at paragraphs 29, 30 and 31 of the determination. In relation to the Devaseelan point he stated as follows at paragraph 31:

> "I have also taken note, as a starting point (following Devaseelan), of the decision of Immigration Judge Beech promulgated on 11 December 2009 when he dismissed the appellant's claims for further leave to remain as a student and in respect of Article 8. But Judge Beech's dismissal of human rights was cursory and, indeed, at paragraph 22 of his determination he stated that 'human rights were not raised by the appellant'. This present case being based entirely on human rights issues I am satisfied that I do not need to consider that aspect of Judge Beech's decision. Judge Beech based his decision on the technical evidence that was before him in relation to the student leave application and I am satisfied that there is nothing of substance in that decision which, today, needs even to be taken as a starting point."

6. From the Record of Proceedings it is clear that the Presenting Officer before Judge Taylor raised Devaseelan and submitted that it applied in this case because the appellant had not raised Human Rights based on family life before Judge Beech in 2009 whilst his evidence before Judge Taylor was that in 2009 he was enjoying family life here with his partner and at least their eldest child.

7. Judge Beech's decision was based on a technicality. She did not make any adverse credibility findings. In fact she accepted the appellant's evidence but he was not able to meet the requirements of the then Immigration Rules relating to students. The fact is that that appeal before Judge Beech was under the Immigration Rules, as they then were, relating to students. There was no obligation on the appellant at that time to raise an Article 8 claim. I do not consider that the Devaseelan principle bites here because the appellant's wife and children were not relevant to the issues before the Judge Beech. In any event, the evidence that the appellant and his partner are together and that they have two children together and as such they are a family unit was at no time challenged by the Secretary of State at the hearing before Judge Taylor. The issue is what weight Judge Taylor should have placed on the fact that the appellant did not appeal on Human Rights grounds in 2009. It is clear from the determination that he did not consider that the matter was significant and he gave adequate reasons explaining why he accepted the appellant's evidence. In any event, the appeal was allowed on the basis of the appellant's eldest child and in my view did not turn wholly on credibility. There is no merit in ground 1.

8. I will turn now to ground 2. The judge allowed the appellant's appeal under Article 8. The judge concluded that appellant's eldest son, Nicholas, who was aged 8 at the hearing before the judge, met the requirements of paragraph 276ADE (1) (iv) because it would be unreasonable to expect him to leave the UK (see [35]). There is no specific challenge to this finding in the grounds. The child was not an appellant, but the judge's decision to allow their father's appeal under article 8, must be considered in the context of the fact that his removal would result in removal of the whole family, and in regards to Nicholas, this would be contrary to the Secretary of State's own rules.

9. The grounds challenge the judge's findings in relation to reasonableness in the context of section 117B (6) of the 2002 Act. It is the same test as that in 267ADE (1) (iv) and had already been answered in relation to the eldest child. The issue is whether or not the question was answered by the judge in the proper context of whether it would be reasonable to expect Nicholas to follow his parents (because they had no right to remain to their country of origin (see AM (S 117B) Malawi [2015] UKUT 260 (IAC). The judge properly directed himself in relation to section 117B of the 2002 at paragraph 38 and I am satisfied that he properly factored it into the assessment of reasonableness and proportionality. He focused primarily on section 117B (6), but as reasonableness in this context was determinative of the appeal, he cannot be criticised for this.

10. Seven years is a significant period of time as recognised in the Immigration Rules, case law and now primary legislation. The judge gave adequate reasons for finding that removal of Nicholas would be unreasonable and I refer specifically to paragraph 39 (iv), (v), (vi) and (vii). The judge found that Nicholas had a private life which extended outside his immediate family unit and removal of both children from school would disrupt their lives with potentially serious adverse affect. These findings

are not challenged in the grounds which were not expanded upon by Mr Walker.

11. I accept that the decision is generous and it is possible that another judge may have lawfully concluded that removal of both children would be reasonable; nevertheless, it was open to Judge Taylor to allow the appeal on the evidence before him. He made adequate findings which are grounded in the evidence. The grounds amount to a disagreement with these findings and do not disclose an error of law.

Notice of Decision

For the above reasons the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal to allow the appeal is maintained.

No anonymity direction is made.

Signed Joanna McWilliam Date 14 August 2015

Upper Tribunal Judge McWilliam