Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36567/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th September 2015	**On 2nd November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR ABDOULIE HARDING
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D. O'Callaghan of Counsel
For the Respondent: Mr L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Gambia born on 16th February 1980. He appeals against a decision of First-tier Tribunal Judge Lawrence sitting at Hatton Cross on 1st April 2015 who had dismissed the Appellant's appeal against a decision of the Respondent dated 29th August 2014. That decision was to refuse the Appellant's application for variation of leave and to remove the Appellant by way or directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. On 24th August 2007 the Appellant entered the United Kingdom as a dependant of his mother Mrs Elizabeth Harding who was the Gambian High Commissioner (now Ambassador) to the United Kingdom. As a result the Appellant was exempt from immigration control as a member of a diplomat's family. On 15th October 2008 the Appellant applied for leave to remain in the United Kingdom as a student which was granted until 31st May 2010. He was granted further leave to remain as a Tier 1 Post Study graduate valid until 23rd March 2013. On 20th March 2013 three days before that leave was due to expire he submitted an application to remain in the United Kingdom on the basis that refusal would put this country in breach of its obligations under Article 8 (right to respect for private and family life) of the Human Rights Convention to require him to leave the United Kingdom. The refusal of that application has given rise to the appeal proceedings

The November 2013 Hearing

3. The March 2013 application was refused by the Respondent on 1st May 2013 and the Appellant appealed against that decision. The appeal came before First-tier Tribunal Judge Sullivan sitting at Hatton Cross on 25th November 2013. Evidence was given to Judge Sullivan that Mrs Harding was accredited as ambassador to nine countries as well as to the United Kingdom and was away from London for a week or two almost every month. As the eldest male child of the family the Appellant oversaw the household in his mother's absence. The Appellant had two brothers living in the United Kingdom aged 24 and 31 years, they were both students. A third brother was in the Gambia.

4. Judge Sullivan was not satisfied that the Appellant had established family life in the United Kingdom for the purposes of Article 8. The Appellant was 33 years of age and in employment embarking on a business venture with a business partner. She was satisfied that the Appellant had established a private life as he had lived in the United Kingdom lawfully since August 2007. The Appellant had studied at Middlesex University and obtained a BA in Business Administration and an MSc in Management. The Respondent's decision was not in accordance with the law as the Respondent had failed to consider that the interference with the Appellant's private life was proportionate under Article 8. As this was a case in which the Judge found "particular sensitivities such that the Respondent should consider the application of Article 8 properly" she declined to consider Article 8 herself stating instead that the decision remained outstanding before the Respondent.

The Respondent's Second Decision

5. The Respondent considered the matter further on 29th August 2014 but again refused the application. The Respondent noted that the Appellant had lived in the United Kingdom for seven years and was aged 34, as such the Appellant could not satisfy the requirements of paragraph 276ADE(1) of the Immigration Rules since he had not lived continuously in the United Kingdom for at least twenty years and was over the age of 25 years. He

had failed to provide evidence that he had severed all social, cultural and family ties to Gambia. He had resided in Gambia up to the age of 27 and would have retained a knowledge of the life, language and culture of that country.

6. The Respondent considered the Appellant's application outside the Immigration Rules under Article 8. The Appellant had not shown that he and his siblings were reliant on his mother or on each other. He had been granted leave to remain in the United Kingdom in his own right as a student and was not exempt from immigration control in line with his mother as were his siblings. It was not accepted that he should be offered leave to remain purely for the reason that he was not eligible to be given exemption. Although the Appellant wished to continue his business in the United Kingdom he was unable to apply for further leave to remain under the Tier 1 Rules. There was no obligation on the United Kingdom to provide the Appellant with an opportunity to manage his business. The Appellant's family continue to own a residence in Gambia and the Appellant retained strong ties to that country. Whatever the disruption to his private life was it was proportionate to the legitimate aim of maintaining effective immigration control.

The Hearing at First Instance

7. The Appellant appealed against that decision arguing that it breached Article 8 and the matter came before Judge Lawrence on 1st April 2015 when the Appellant was represented by Counsel who appeared both before me and before Judge Sullivan. The Judge heard evidence from the Appellant's mother Mrs Harding and from the Appellant himself. It was acknowledged on behalf of the Appellant that the appeal was only under Article 8. At paragraph 9 and 10 the Judge set out the evidence and his views thereon. He wrote:

"9. The evidence before me is that the Appellant has enrolled on a course of studies at Nottingham University. He lives with his mother and siblings in London. He commutes four days a week between London and Nottingham. He is still a member of his mother's household. There is no evidence that he is pursuing his business activities. He is now a full-time student. The position has changed since 23rd March 2013 application and since the matter was previously before the Tribunal.

"10. In my view the Appellant has two options before recourse to Article 8. He could either seek leave to remain in the United Kingdom as a student or seek exemption from immigration control on the basis that he is a member of his mother's household. She is a diplomat. I have been provided evidence that his siblings, at least one of them (Muhammed Alieu Harding) enjoys exemption. This issue was raised at the hearing. Mr O'Callaghan submits that the Appellant wishes to have leave to remain in the UK in his own name. He does not wish for diplomatic exemption status for his mother who is the Gambian representative for not only the UK but ten other countries. She may

be moved by her Government or to any one of those or recalled. In either event the Appellant will be left without any rights to remain and continue with his studies. That is of course a difficulty. However to avoid this predicament if that transpires, the Appellant has the option of seeking leave to remain as a student under the Immigration Rules. His position has changed since the date of the application and the date 11th December 2013 when the Tribunal previously determined his appeal. Had the position been that the Appellant is seeking to pursue his business activities as was the evidence before the Tribunal in the previous appeal the position may well be different. He is no longer in business. He is a full-time student. He could apply to remain as a student".

8. After citing a number of authorities including **Razgar [2004] UKHL 27** the Judge concluded that the refusal to grant the Appellant leave to remain did not put the United Kingdom in breach of Article 8 and he dismissed the appeal.

The Onward Appeal

9. In his grounds of onward appeal the Appellant argued that following advice provided by the Foreign Office to the Appellant's mother the Appellant's entry clearance was amended on 15th October 2008 so as to establish that he was granted leave to remain as a student, such leave expiring on 31st May 2010. The Appellant secured a BA in Business Administration from Middlesex University in 2009 and an MSc in Management Studies in 2010. The Appellant's university studies at Nottingham University Business School concluded in September 2015. The Judge had refused the appeal on a ground not advanced by the Respondent, namely that before being able to rely upon Article 8 outside of the Immigration Rules the Appellant should either seek leave to remain in this country as a student or seek exemption from immigration control as a member of his mother's household. The Judge had only raised that issue during the course of submissions. The Judge had made no enquiries to whether the Appellant could make an application for exemption from the Immigration Rules as a member of a diplomat's household.

10. The grounds quoted from the Respondent's guidance EXM 4(b) which related to children under 18 or up to the 25th birthday if in full-time education. Applications from dependent children aged 25 or over must be referred to Diplomatic Missions and International Organisations Unit for a decision. I pause to note here that the Appellant was 27 when he entered the United Kingdom and thus his case would need to be referred to the DMIOU and Protocol Directorate of the Foreign and Commonwealth Office for a decision.

11. The grounds continued that there was no requirement that the Appellant should exhaust other potential means of remaining in this country before relying upon Article 8. He was lawfully present in the United Kingdom and was entitled before the conclusion of his last period of leave to remain to make an application for further leave to remain on Article 8 grounds.

During the course of the first instance hearing Counsel had identified scenarios where someone might prefer to enjoy Article 8 leave such as where they were had already commenced a course of study but did not wish to engage with the Tier 4 maintenance requirements or where a diplomat parent's tenure might change with little notice. These scenarios were advanced as examples but did not relate to instructions received. They were not the position of the Appellant.

12. The application for permission to appeal came on the papers before First-tier Tribunal Judge Osborne on 30th June 2015. In granting permission to appeal Judge Osborne recited the grounds which had asserted that the Judge's approach resulted in the right of appeal provided by statute being nullified. The Appellant enjoyed Section 3C leave after lodging his appeal but could not then make a further Tier 4 (General) Student application for leave. An application for exemption would require an exercise of discretion.

13. Despite providing his view that the Appellant should make an application either for student leave or diplomatic exemption the Judge nonetheless went on to consider the Appellant's appeal under Article 8. It was at least arguable that the view reached by the Judge that the Appellant should make one or other of the applications before relying on Article 8 infected the Judge's consideration of the Article 8 appeal to the extent that it amounted to a material error of law. It was at least arguable that the Judge should have determined the appeal that was before him on the basis of the case which was pursued by the Appellant and the fact that the Judge failed to do so amounted to an arguable material error of law. All grounds could be argued.

14. The Respondent replied to this grant of permission on 3rd July 2015 stating that the Judge had conducted a proportionality assessment on all material matters. It was open to the Judge to take account of the options that the Appellant had in respect of alternative applications as to whether the refusal of the Appellant's application would amount to a disproportionate breach of the Appellant's Article 8 rights.

The Hearing Before Me

15. In oral submissions to me Counsel argued that evidence had been given to the Judge but not put in his determination that she had been advised by the UK Foreign Office that the Appellant should apply for leave to remain as a student (and not rely on the diplomatic exemption). Mrs Harding relied on Foreign Office advice which was why the Appellant went down the immigration route. The difficulty for the Appellant was that once a decision was made and he appealed he would have 3C leave but during the course of that 3C leave he could not make a variation application once there was an appeal. The Respondent's decision was dated 29th August 2014 but the Appellant did not become a student until September 2014. He could not therefore during the course of his 3C leave whilst he appealed against the August 2014 decision make an alternative application for leave to remain as a student on the course which he had

just begun. He was lawfully entitled to become a student but the operation of Section 3C of the Immigration Act 1971 prevented him from applying for a variation. His only remedy would be judicial review.

16. There was no requirement in the Immigration Rules to make another application under the Rules. The Judge had erred by reading into the Rules a requirement that was not there. It had taken the Respondent over a year to reconsider the matter. The Judge had not engaged with the detailed submissions relating to Article 8. That the Appellant was prevented from making an application as a student by operation of Section 3C was a factor which should have been taken into account by the Judge in the Article 8 proportionality exercise.

17. In reply the Presenting Officer relied on the Respondent's Rule 24 reply which I have summarised at paragraph 14 above. The Judge had not made a material error of law. The Appellant had other options before recourse to Article 8. Some options were more attractive than others. On the point of the Appellant's membership of his mother's household the Presenting Officer noted that the Appellant was studying at Nottingham four days per week. There was no material error in the determination.

18. In reply Counsel argued that in 2013 the Appellant was not a student. If it was said that the Appellant had options other than to apply under Article 8 those options must be real not fanciful. The Judge had not engaged with that point. If the Appellant had been granted a short period of discretionary leave he could then apply to be a student again, but the Judge did not have that in mind.

The Error of Law

19. Having heard the submissions in this case I announced my decision that I found there was an error of law in the determination such that it fell to be set aside and the appeal reheard. I now give my reasons for that decision. The Judge had not correctly carried out the proportionality exercise when assessing whether the interference with the Appellant's private life was disproportionate. Although the Judge had indicated that the Appellant should have applied under the Immigration Rules either as a student or as a member of the diplomat's household before applying for Article 8 he had nevertheless gone on to consider Article 8. The complaint is not that he had failed to consider Article 8 at all.

20. As Judge Osborne pointed out in granting permission to appeal it was at least arguable that when approaching Article 8 the Judge had in the back of his mind the consideration that it weighed against the Appellant that he had not made an application as a student or as a member of a diplomatic household before applying under Article 8. In fact the Appellant could make neither application. First of all he could not amend his application for leave to remain while he enjoyed 3C leave. Once the Respondent had taken a decision to refuse his application the Appellant could theoretically still make an application for leave to remain as a student but it would then be on the basis that he had no leave to remain (as he would have to

withdraw his notice of appeal against the Respondent's decision) and that in turn would mean he would lose any right of appeal against a subsequent adverse decision. Similarly, he could not make any application as a member of a diplomat's household because he was over the age of 25 and outside the protection given in the Guidance to Immigration Officers cited by the Appellant in the grounds of onward appeal against Judge Lawrence's decision.

21. I therefore decided that the issue of whether the Respondent's decision breached this country's obligations under Article 8 should be reheard. There had been two substantive hearings already at which a great deal of evidence had been given. In the circumstances it did not appear to me to be suitable that I should remit the matter back to the First-tier to be heard again as the findings of fact were likely to be relatively narrowly based. The direction had been issued by the Tribunal when giving notice of the Upper Tribunal hearing that the parties should prepare for that hearing on the basis that if the Upper Tribunal decided to set aside the determination of the First-tier Tribunal any further evidence including supplementary oral evidence that the Upper Tribunal might need to consider if it decided to remake the decision can be so considered at that hearing. There was nothing to prevent me from proceeding to a substantive rehearing. The Appellant was in court and was able to give evidence. I was informed that the Appellant's mother due to professional commitments was unable to attend but she had given evidence on the last occasion. Insofar as there were gaps in Judge Lawrence's record of the oral evidence given by Mrs Harding that could be supplemented by information from the Appellant's Counsel Mr O'Callaghan who as I have indicated has been present at all three hearings of this case.

The Substantive Rehearing

22. The Appellant attended and gave oral testimony. He was examined and cross-examined but not re-examined. He stated that having completed his course he was expecting results in November and was expecting to pass that course. At present he was residing with his mother in Kilburn. She was at the Embassy that day. She had recently been to Ireland and had to travel to Spain in the next few weeks. In cross-examination the Appellant explained why he wanted to stay in the United Kingdom with immigration leave in his own right. He and his family (his mother and brothers) were here and they were very close. He had lost his father at the age of 16. His life here was the life he was used to. His mother's role as Ambassador was a heavy responsibility and she was a single parent. He had helped her in any way he could. Once he received his results for his MBA course he said he would want the opportunity which the natural progression of his qualifications gave him. His mother had paid for his fees.

23. In closing for the Respondent reliance was placed on the refusal letter. The Appellant was an adult who had been fortunate in having a mother who had distinguished employment. She had the financial ability to support his studies but beyond that there was nothing exceptional about this family. All of the Appellant's siblings were of the age of majority and

able to find their own way in life. There was no reason why Article 8 should be engaged in this case at all or if it was that the Respondent's decision would disproportionately interfere with the Appellant's Article 8 rights.

24. In closing for the Appellant Counsel relied on his skeleton argument which broadly followed the grounds of the onward appeal which I have summarised above (see paragraphs 9 to 11). In considering the claim under Article 8 a number of public interest matters should be taken into account. Countries should be delicate in interfering with diplomatic families; no pressures should be placed upon diplomats via their families. Gambia had a sensitive relationship with the United Kingdom having withdrawn from the Commonwealth on 2nd October 2013 as a result of which his mother was the Ambassador not the High Commissioner. His mother had confirmed she was aided by the Appellant looking after her household while she regularly travelled to Europe in her role as Ambassador to several countries; the Appellant should be allowed to enjoy his life here whilst his mother remained Ambassador. He was not seeking permanent residence in this country.

25. The Respondent had delayed reconsidering the application after it was sent back to the Respondent by Judge Sullivan. The Appellant did not fall within the Immigration Rules but the refusal letter did not engage with the issues in the case. The Appellant helped to run the household whilst his mother was abroad and she could be away for periods of time. When the Appellant came back from his studies in Nottingham he would run the household for her. His involvement aided her to get on with her professional duties. As no pressure should be put on diplomats care should be taken over how their relatives are dealt with. One could not get away from the fact that this was a diplomatic family. The Ambassador Mrs Harding would be affected by the Respondent's decision. He helped her fulfil her role. It would have helped to have had a more informed view from the Respondent on the public interest requirements of the effect on diplomatic families.

26. The Appellant was placed in a difficult position because of what the Foreign Office had told his mother. He will be left in a weaker position than his brothers who were advised to apply as members of the diplomatic household. The Foreign Office advice to Mrs Harding had been that the Appellant should go down the student route. As a result the Appellant had made his first application (in 2008) because of that advice. The other three siblings had been allowed to be in the United Kingdom because they had the appropriate diplomatic exemption. If the Appellant had also gone down that path he to would have acquired exempt status. When he came in (in August 2007) he was exempt but the following year he was advised to become a student.

27. Where the dependent is over 25 discretion has to be exercised. There was no time limit on exempt status so the Appellant could have been here until his mother the Ambassador left the United Kingdom permanently. She had not been given that advice (to apply for leave to remain for her other

children) in any other category. It was inappropriate to separate him. His brother had entered the United Kingdom since the Appellant had entered and had received diplomatic exemption. Application was made for an anonymity order as notice of the proceedings had been reported back in the Gambia and incorrect information had been put out that the Ambassador was having difficulties. The Appellant was not claiming asylum but the proceedings had been misconstrued as if he was.

Findings

28. In this case it is accepted that the Appellant cannot meet the requirements of paragraph 276ADE. He has not been in the United Kingdom for more than twenty years and he is over the age of 25. He must therefore rely on the provisions of Article 8 outside the Immigration Rules. He must show that there are compelling or compassionate circumstances such that his application should be allowed outside the Rules, due weight being given to the fact that he cannot meet the Rules. The Appellant argues that the only reason why he is in this position is because his mother was advised approximately a year after the Appellant entered the United Kingdom that the Appellant should apply for any further leave to remain in this country through the Immigration Rules rather than continue to rely on the special exemption status which is given to family members of diplomats.

29. I do not consider that this evidence is particularly controversial. The Appellant had entered the United Kingdom at the age of 27 which meant that his case would have to be specifically considered by both the Respondent and the Foreign Office as he fell outside the normal parameters for guidance on exempt family members. It is clear from the guidance contained in 4.2 EXM 4(b) that exemption for overage dependants, that is to say in this case persons over the age of 25, are looked at particularly carefully by a specific unit, a Protocol Directorate of the Foreign Office, for a decision.

30. I appreciate the Appellant's argument that the specifics of the approach of the British Government to a situation such as this were not included in the second refusal letter, (the one issued after Judge Sullivan "remitted" the matter back to the Respondent). It is clear from the tenor of the exemption guidance that exemption status for over 25s is a matter for specific consideration on a case by case basis and dependent on the particular facts of the case. It is not for me to speculate on the motives of the Foreign Office but it is difficult to avoid the conclusion that the Ambassador received the advice she did in 2008 (that her son should apply for status under the Immigration Rules rather than through a diplomatic exemption) was that the authorities at the time did not wish to make a decision outside the guidance in the Appellant's favour. The Appellant's argument is that whatever their motives, the effect of the advice he received was that he lost a right which he would otherwise have had. That is to say he gave up his diplomatic status and instead went into the immigration system where ultimately he was unsuccessful.

31. I do not accept that argument. The exemption provisions for those dependants over 25 require that they must show that they are indeed dependants and it is not at all clear that the Appellant could have shown that status in 2008 because he was by then a 28 year old man with an ability to work and provide for himself (he reported that he had ambitions to run a business). Secondly, the provisions of the exemption state that an exempt vignette (i.e. certification that the person is entitled to the exemption) should be granted valid for five years or for the length of the posting, whichever is the shorter. Clearly in this case the length of the posting has been substantially longer than five years, but in any event the Appellant would only have been entitled to an exempt vignette for up to five years. At some point the Appellant would have had to have sought leave under the Rules. I accept the argument that by the time the appeal came before Judge Lawrence the Appellant was not entitled to apply for exemption as the member of a diplomat's family, but I do not draw the inference from that, that as a result, the refusal of the Appellant's application was disproportionate under Article 8.

32. I do not accept the argument that there are particular sensitivities in this case such that the Appellant's application should be given some form of exceptional treatment or otherwise looked at with any particular degree of sensitivity over and above the duty already placed on the Tribunal in a human rights appeal. That Gambia is no longer a member of the Commonwealth appears to have little relevance to the case. In giving the Appellant's mother the advice they did in 2008 (that the Appellant should apply under the immigration route if he wished to remain in this country), the Foreign Office would appear to be making it clear to her that they did not consider that withdrawal of the exemption status gave rise to any difficulties or public interest considerations. Had that been the case it appears implausible that the Foreign Office would have given the advice which they did.

33. As a result in carrying out the balancing act, I do not find that any weight is to be attached to the Appellant's argument that he and his mother were in some way misinformed or misled by the Foreign Office or that the Appellant has lost some form of status which he otherwise would have had but for the information and/or advice given by the Foreign Office in 2008.

34. The issue in this case is simply whether the Appellant can succeed under Article 8 outside the Rules. The Appellant has established a private life in this country but I agree with Judge Sullivan, he has not established a family life over and above or beyond normal emotional ties. When in the household (and not away studying) he assists his mother with the running of the household as and when her duties call her away. I accept that given the number of countries she is Ambassador to she will be away for significant periods of time. However, the Appellant's siblings are themselves all over the age of 18 and much of the running of the household will in fact be merely the Appellant looking after himself whilst his mother is away. That the Appellant from time to time assists his mother by relieving her of one consideration (how to run the household)

while she is away does not amount to more than the normal emotional ties between a mother and son.

35. Having found that the Appellant has established a private life, particularly given that he has been resident in this country for seven years and has studied here successfully, the next question is whether the Respondent's decision would interfere with that private life. I find that it would. Although the Appellant, judging by his evidence to me, appears to have no very clear plans for the future and on the papers it has been indicated in the past that at some point he proposes to return to the Gambia, his enforced removal at this stage would interfere with the private life he has built up. That interference would be in accordance with the legitimate aim of immigration control and since the Appellant has completed his studies there is now no reason why he cannot return to the Gambia, there being no further studies for him to undertake.

36. The issue comes down to whether the interference with the Appellant's private life is proportionate to the legitimate aim pursued. On the one side of the balance I give weight to the fact that the Appellant cannot succeed under the Immigration Rules, as a result of which compelling and/or compassionate reasons are required for the Appellant to show that the interference will be disproportionate. On the other side of the balance the Appellant's leave to remain has been precarious throughout. Since he was granted leave to remain as a student he could have no expectation that that leave to remain would be made permanent. I have dealt at some length with his argument that he should have been exempt from leave to remain. In view of my findings on that issue no weight can be given on the Appellant's side of the scales to the argument that he should have had exempt status.

37. The Appellant is a healthy adult male with a substantial number of qualifications. He could return to the Gambia and use his qualifications to establish a business there or otherwise engage in employment. There are no compelling or compassionate circumstances in this case such that the Appellant's appeal should be allowed outside the Immigration Rules. I therefore dismiss the Appellant's appeal against the Respondent's decision to refuse to vary leave to remain and to remove the Appellant.

38. An application was made in closing for an anonymity order on the basis that these proceedings were being misrepresented/misreported in the Gambia. There may sometimes be a risk that court proceedings are misreported, indeed it is not unknown for such matters to happen in the United Kingdom to the frustration of Judges and other court users. However that of itself is not a sufficient pretext to rebut the presumption that there should be open justice. No evidence was given to me that anyone is at risk of harm as a result of unfounded rumours based on inaccurate reporting of these proceedings, nor do I see any reason why the Ambassador Mrs Harding should be in a difficult position with her Government or anyone else as there has been no criticism whatsoever of her in any of these proceedings.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision in this case by dismissing the Appellant's appeal against the Respondent's decisions.

Appeal dismissed.

I make no anonymity order in this case (see above).

Signed this 30th day of October 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 30th day of October 2015

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Deputy Upper Tribunal Judge Woodcraft