



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/04340/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 4 June 2018

Decision & Reasons Promulgated  
On 20 June 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

FD  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Kiai, Counsel instructed by Duncan Lewis & Co Solicitors  
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Gambia born on 7 December 1972. She made an application with her children to join her spouse (the children's father), LD, the Sponsor, in the UK. The applications were made under 352A of the Immigration Rules (family reunion). The Appellant's application was refused by the ECO on 2 February 2015. Her children's applications were granted. The Appellant appealed against the decision to refuse to grant her entry clearance. Her appeal was dismissed by the First-tier Tribunal on 2 July 2015 (by First Tier Tribunal Judge Fenoughty). That decision set aside by Deputy Upper Tribunal Judge Hill QC on 6 February 2017. The matter was remitted to the First-tier Tribunal. The second appeal was dismissed by First-tier

Tribunal Judge Grimmett in a decision dated 12 May 2017, following a hearing on 10 May 2017.

2. Permission was granted to the Appellant by Upper Tribunal Judge Allen on 23 January 2018. Thus the matter came before me on 4 June 2018 in order to determine whether or not Judge Grimmett made an error of law.

*The background*

3. The Appellant and Sponsor married on 5 October 1990. They have five children together. Their oldest two children are now adults. The Sponsor came here on a student visa in 2006 and has not returned to Gambia since. The couple divorced in October 2007. They remarried (by proxy) in January 2013. The Sponsor sought asylum here in the UK in April 2013. Asylum was granted to him in October 2013. The three youngest children were granted entry clearance. They are ML (date of birth 3 April 1997), M (date of birth 21 April 1999) and A (date of birth 18 December 2003). They were with the Appellant in Gambia at the date of the application and decision. They travelled to the UK in March 2015 to join their father thus leaving their mother, the Appellant in Gambia.

*Paragraph 352A*

4. Paragraph 352A of the Immigration Rules sets out the requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the partner of a person granted refugee status and they are as follows:
  - (i) the applicant is the partner of a person who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
  - (ii) the marriage or civil partnership did not take place after the person granted refugee status left the country of their former habitual residence in order to seek asylum or the parties have been living together in a relationship akin to marriage or a civil partnership which has subsisted for two years or more before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and
  - (iii) the relationship existed before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and
  - (iv) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1(f) of the Refugee Convention if they were to seek asylum in their own right; and
  - (v) each of the parties intended to live permanently with the other as their partner and the relationship is genuine and subsisting;
  - (vi) the applicant and their partner must not be within the prohibited degree of relationship; and

- (vii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

*The Decision of the First-tier Tribunal*

5. The judge found that the Appellant could not meet the requirements of paragraph 352A (ii) of the Rules because her current marriage took place after the Sponsor's departure. In any event, the Sponsor did not leave Gambia *in order to seek asylum*, but left to become a student.
6. The judge considered Article 8 and concluded that there were no compelling circumstances. The judge accepted that the Sponsor could not return to Gambia. It continued since 2013 in this fashion. The parties knew at the time of the marriage that the Sponsor did not have leave here. The Sponsor's income was insufficient to meet the maintenance requirement of the Rules. The evidence was that he was working part-time and receiving benefit. The judge found that there was no evidence of contact from 2013; however, accepted that there were documents showing the Sponsor maintained the Appellant up to 2016. The judge found that there was no explanation for the absence of up-to date evidence of transfers. He took into account that the Appellant was living with the couple's two older daughters, neither of whom was working, and it was not clear whether funds were being sent to them. The judge found no evidence of telephone calls or communication during the last twelve months.
7. The judge noted that the Sponsor did not give evidence about contact with his wife. His evidence was that he needed her here in order to take care of the children. The judge concluded that there was no significant family life between the Appellant and the Sponsor.
8. The judge stated that it was clear from the evidence that the children here in the UK missed their mother. He took into account the evidence of bedwetting in respect of the couple's youngest daughter, A, but the judge did not find that this was caused by separation from her mother. The judge found that there was no medical evidence of continuing problems in respect of A that had arisen after her arrival here in the UK. The judge concluded that it was in A's best interests to live with both parents noting that she had been brought up by her mother. However, the judge took account that here A is in the company of her two siblings with whom she grew up in Gambia and there was no evidence that she was not coping here in the UK.
9. The judge concluded that the Appellant and the Sponsor were not "in an Article 8 relationship" because of the lack of evidence in support of this.

*The Grounds*

10. The grounds challenge the Article 8 assessment. It is argued that the judge failed to factor into the assessment the narrowness by which the Appellant failed to meet the

Rules, failed to consider the written and oral evidence of family members, including a letter from A and the Sponsor's oral evidence.

11. It is argued that the judge failed to take into account the Sponsor's evidence at the hearing that he was working part-time and short of funds. He had not been able to financially support the Appellant since 2016. The Sponsor's evidence was that he was in regular contact with the Appellant on Skype and on telephone.
12. It is argued that paragraph 352A of the Rules is to facilitate family reunion between refugees and pre-existing spouses and their children. Both marriages took place before the Sponsor claimed asylum here. His family unity was in existence when he left Gambia in 2006.
13. I heard oral submissions from both parties. Mr Tufan conceded that the decision in relation to the Appellant seemed unfair; however, he was not able to make a concession as he had no instructions to do so. He did not have a file. He relied on the reasons for refusal decision.
14. Ms Kiai referred me to the decision of First-tier Tribunal Judge Fenoughty in 2015. Although the decision was set aside by Deputy Upper Tribunal Judge Hill, she argued that it was significant that the Presenting Officer at the hearing before Judge Fenoughty indicated that it was not in dispute that the current marriage took place after the Sponsor left Gambia and that credibility was not in issue as far as the Secretary of State was concerned.

#### *Error of Law*

15. This is an entry clearance case and the relevant date to consider is the date of the decision which is 2 February 2015. At the date of the decision the children had been granted entry clearance under the family reunion Rules; however, they were in Gambia with the Appellant where they remained until March 2015. It is not clear whether the judge appreciated that the relevant date was the date of the decision and it is clear to me that the author of the grounds of appeal did not do so.
16. In so far as the grounds challenge the assessment of Article 8 they are made out. Judge Grimmett found that the relationship between the Appellant and the Sponsor did not amount to family life for the purposes of Article 8, because of the lack of evidence. However, that finding is not sustainable. There was evidence that the Sponsor had supported his wife financially up until 2016, after the date of the decision. There was evidence before the judge that he was now short of funds and could not continue to support her whilst his children were here with him in the UK. In any event, the focus should have been on the position at the date of the decision at which time the judge was satisfied that the Sponsor was sending money to his wife and maintaining her.
17. The ECO did not accept that the marriage by proxy had taken place. The ECM maintained this concluding that she was not satisfied that the evidence established family life between the Appellant and the Sponsor. The Presenting Officer at the

hearing in 2015 accepted that the marriage had taken place. Judge Fenoughty at the first hearing in 2015 concluded that there was sufficient (albeit limited) family life between the Appellant and the Sponsor which would engage article 8. The presenting officer at that hearing accepted that the marriage had taken place in 2013. These are material factors that the Judge Grimmett should have taken into account. Whilst the decision of Judge Fenoughty was set aside, there was no reason to go behind these positive findings. It can be reasonably inferred from Judge Fenoughty's findings that his view was that the marriage was at the date of the decision genuine and subsisting. This remained unaffected by the error of law concerning the children that caused the decision to be set aside.

18. It is not the Respondent's case that the Appellant has attempted to abuse Immigration Rules relating to family reunion by entering into a marriage contrived to meet the Rules relating to family re-union. If I am wrong about that, a case on that basis has not been properly articulated. In any event, there was no good reason to depart from Judge Fenoughty's findings. There was no properly articulated case advanced by the Respondent at any stage that the Appellant and her family have been dishonest.
19. As far as paragraph 352A is concerned, a proper reading of limb (ii) would exclude the Appellant because the marriage now relied on took place after the Sponsor left Gambia. I do not accept that the Appellant cannot meet this rule because the Sponsor did not leave Gambia in 2007 *in order to seek asylum*, but this is not material to the outcome. The Appellant cannot meet the requirements of the rules.
20. I find that there is family life between the Appellant and the Sponsor so as to engage Article 8. I accept that the evidence of contact is limited in so far as they have not lived together for many years. However, the decision interferes with their family life. At the date of decision the children had been granted entry clearance under the Rules relating to family reunion, albeit they remained in Gambia. This is a material factor that should to the assessment of proportionality. On the basis that the Appellant's children were granted entry clearance under the family reunion Rules, it is in my view perverse (or at best unfair) to refuse their mother's application, in the absence of a suggestion of dishonesty and in the light of the circumstances in this case.
21. At the date of the decision the children were entitled to join their father here under the Rules relating to family reunion which facilitate family reunion between refugees and pre-existing children and spouses. The first marriage, though now ended, took place before the Sponsor fled Gambia. The second marriage took place before he was granted asylum. However one looks at the situation the Appellant was a pre-existing spouse insofar as she was married to the Sponsor before he left the country and they are still married to each other having remarried before he claimed asylum. There has been a lack of continuity (they were divorced between 2007 and 2013). Their children have a right to family reunion as granted by the ECO. However, to expect the children, particularly A, to exercise this right separately to their mother is unreasonable and unfair when they belong to the same family unit. To expect them to choose between being reunited with their father or remaining with their mother is unreasonable and contrary to their best interests which were properly found by the judge to be with both

parents. This is not determinative of the outcome, but a primary consideration when considering proportionality.

22. Whilst there is no evidence that the Appellant can speak English and the family is already a burden on the state and will become more so, I conclude that the decision is not proportionate to the interference with this family's right to family life under Article 8 and the children's right to family reunion under the Rules. I conclude that there are compelling circumstances to allow the appeal outside of the Rules under Article 8. It was not suggested in this case that the family has attempted to abuse the Rules relating to family reunion. Were there evidence that this was the case, the outcome would be different. Were there no children of this marriage, had the children been granted entry clearance under a different Rule or were the marriage not genuine and there was no family life between the Appellant and the Sponsor, I may have taken a different view. On the facts of this case, the decision to refuse entry clearance to the Appellant is contrary to the purpose and intention of the Rules relating to family reunion.
23. For all of the above reasons I conclude that the judge materially erred and I set aside the decision to dismiss the Appellant's appeal under Article 8. There was no need for a rehearing considering the issues in this case. I went on to remake the decision on the evidence that was before the First-tier Tribunal. I remake the decision and allow the Appellant's appeal under Article 8.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

*Joanna McWilliam*

Date 17 June 2018

Upper Tribunal Judge McWilliam