



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/06804/2013

THE IMMIGRATION ACTS

Heard at Field House

On 5 November 2013

Determination

Promulgated

On 25 November 2013

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

**MR CLEVELAND GEORGE MARSHALL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Rooney, Legal Representative of Walthamstow Cab

For the Respondent: Mr G Saunders, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica who was born on 21 September 1942. He is now therefore 71 years of age. He applied on 2 March 2006 for indefinite leave to remain on the basis of his length of residence in the United Kingdom. His application was refused under paragraph 276D with reference to paragraphs 276B(i)(a) and 276B(i)(b) of the Immigration

Rules. The decision to refuse his application was made on 19 February 2013. He appealed that decision but the appeal was dismissed under the Immigration Rules and under Article 8 ECHR. The removal directions were upheld also.

2. Having been granted permission to appeal that decision the matter came before me on 4 September 2013 and I found that the decision of the First-tier Tribunal Judge disclosed an error on a point of law such that the decision to dismiss the appeal would be set aside and remade. I gave directions allowing the appellant to file an updated witness statement and any further evidence, which he did and served on the respondent also.

The Documents Before Me

3. The documents before me were those that were before the First-tier Tribunal Judge. In addition I had before me a second bundle (not permitted to be lodged at the error of law hearing) and a third bundle which came to the Tribunal under cover of a letter dated 21 October 2013, both filed on behalf of the appellant.

The Appellant's Claimed Immigration History

4. Mr Marshall claims that he arrived in the United Kingdom in 1959 when he was 17 years old. He came to join his mother. He married Sigourney Newman in September 1966. They had three children together, all girls, and all were born in the United Kingdom. His three children all have children of their own. His marriage to Sigourney ended in divorce in 1982 and she died in 1993.
5. The appellant has lived with his present partner Hyacinth D'Aguilar, since about 1983. She is a British citizen by birth. They have two children, Clay who was born in February 1980 and Nathan who was born in 1991. Nathan still lives with the appellant and Mrs D'Aguilar. Nathan is the father of one child and his partner is expecting another soon.
6. Ms D'Aguilar is a book-keeper by profession but is now unable to work due to her disability as a result of two hip replacement operations. She is also waiting for knee replacement operations. The appellant receives a carer's allowance for looking after her and he is also in receipt of pension credits since 2005. His mother is still alive. She is more than 90 years old. She had a fall in May 2013 and as a result he spends every night at her home looking after her as well as some time during the day. The appellant has a sister called Claudette who is a British citizen who also looks after their mother. The appellant had a brother who was a British citizen but he died some three years ago.
7. Since arriving in the United Kingdom the appellant has never left it and he receives a partial state pension because of the national insurance contributions that he made during his working life here.

Oral Evidence Before Me

8. The appellant gave evidence and confirmed his (filed) statements to be true. He was then cross-examined by Mr Saunders. The appellant said that the list of firms that he worked for which are referred to in paragraph 2 of his statement of 11 June 2013 mostly no longer exist. While he was self-employed as a panel beater he used to buy National Insurance stamps weekly but he only used to do this sometimes. At other times he just did not pay. From 2002 he started to get more work so he paid contributions. He did not sign on and he did not want to work and claim benefits. From 1983 to 2002 he was not making enough money to make it worthwhile spending the money on making the contributions.
9. The appellant went on to explain that when he arrived in the United Kingdom his mother was already here, having arrived in 1950.
10. I then referred to a letter dated 17 August 2011 signed by the appellant to the respondent complaining about the delay in the processing of his application from 2006. The letter referred to the appellant's lifestyle having been limited for a number of years as the respondent is still holding onto the passport 'which has affected family holidays'. I asked why it would matter that the respondent still held his passport if he himself had no intention of leaving the United Kingdom. The appellant responded that his partner must have written that letter because he has never been away and commented that the furthest he has travelled in the United Kingdom is to Clacton although he had been to Wales once but he thought that was part of England!
11. There were no questions arising out of that matter.

Ms D'Aguilar's Oral Evidence

12. I then heard from Ms Hyacinth D'Aguilar who confirmed that she was born in Islington in 1955 and is a book-keeper. She was made redundant about five years ago and her health has deteriorated. She first met the appellant in 1974 and they started going out about one year later and they have been in a relationship ever since. They began living together as a couple in 1983 after their first child was born in 1980. The appellant has lived with her at her address ever since. Their second child was born in 1991 and he still lives with them. She confirmed that the appellant has always been involved with 'fixing cars, panel beating, etc.' The appellant has cared for her more or less on a full-time basis since 2009 and he spends a lot of time looking after his own mother. Ms D'Aguilar confirmed that during the time she has known the appellant he has never left the United Kingdom.
13. Cross-examined by Mr Saunders Ms D'Aguilar said that when she first met the appellant he was doing crash repairs. When asked if he was making a

living doing that she responded that he was able to put money towards housekeeping and keep their child at nursery. Ms D'Aguilar was also working at the time. She could not recall now how much he was earning then nor indeed what she herself was earning. The appellant carried on doing crash repairs until well into the 90s and it might have been as late as 2003.

14. As to Ms D'Aguilar's health she has suffered from deep vein thrombosis. She takes Warfarin and will always be on that drug.
15. Re-examined by Mr Rooney Ms D'Aguilar said that the appellant worked six days a week when he was a crash repairer.
16. Asked a few questions by me Ms D'Aguilar said that initially she rented a home and then went for the right to buy. The appellant contributed to payments for the home. They never discussed pensions and national insurance contributions. She knew that he was freelance and they have always been together. As to the letter signed by Mr Marshall complaining about the fact that the respondent had the appellant's passport as a fact the government was limiting their plans but they had no intention to go away.
17. In submissions Mr Saunders simply requested that I determine the appeal on the evidence before me. Although Mr Rooney began to address me I informed him that he did not need to do so. I announced at the hearing that I was satisfied that the appeal would be allowed.

Burden and Standard of Proof

18. It is for the appellant to prove that he meets the requirements of the Immigration Rules and the standard of proof is the civil one of the balance of probabilities.

My Findings

19. I found both the appellant and Ms D'Aguilar to be witnesses of truth. They gave their replies to questions in a straightforward manner and did not seek to embellish their stories. There is a considerable amount of supporting written evidence and the oral evidence tallied with that written evidence. It is also fair to say that there is much missing evidence which had it been provided would have proved beyond doubt the appellant's immigration history in the United Kingdom but that is not the standard of proof that applies.
20. As it is, the evidence that I have before me is far more comprehensive than that which was before the First-tier Judge. It is apparent, and accepted by the respondent, that the appellant was in the United Kingdom in 1990 and has been also from 2005. What has been produced since are national insurance records that show that contributions recorded prior to 6 April 1975 were transferred 'from clerical records' and that the total number of eligible contributions and/or credits recorded on the appellant's

account is 783. This is strongly suggestive therefore that the appellant was working and paying some contributions prior to 1975. Some further contribution credits were then recorded – those contributions being by stamped card – up until 1982/1983 but thereafter there was a gap until 2002/2003 tax year during which time no contributions were made, the reason for which the appellant explained in his evidence.

21. Although it does not prove that the appellant was here for any lengthy period of time and he could have returned to Jamaica in the interim he would have had to be in the United Kingdom at the time of conception of his children who were born in 1964, 1965 and 1967. His other children were born in 1980 and 1991. Ms D'Aguilar gave evidence that she commenced her relationship with the appellant in 1974. Proof of the births of the children has been provided by birth certificates.
22. In addition to the above there are a few statement of accounts that appear to be from credit card companies showing activity on accounts in 1996, 1997, 2000 and a bill in respect of a 'Motorola flip' (mobile phone) from 1994 and mobile phone bills from the same period. The address given for Mr Marshall is that at which he currently lives with Ms D'Aguilar.
23. One matter that concerned the First-tier Judge was a Jamaican passport said to have been issued in the appellant's name in Kingston (Jamaica) in 2005. This is strongly suggestive of the appellant's presence in Jamaica for it to have been issued. However, there is a letter from the Jamaican High Commission in London dated 14 August 2013 which confirms that Mr Marshall's (current) passport was issued on 16 June 2005 'when he applied through the High Commission to replace a previous passport, which was reportedly lost'. I conclude therefore that he was not in Jamaica at the time the new passport was issued and applied for it in London.
24. The lost passport was the one that he says he came into the country with in 1959 and would of course have long ago expired. It appears that to obtain another one he had to report his old passport as lost but he only needed to do this in 2005 when he was applying for a Certificate of Approval to enable him and Ms D'Aguilar to marry.
25. Cumulatively and applying the standard of proof of the balance of probabilities I find that the appellant has produced sufficient evidence to show that he arrived in the United Kingdom in 1959 but if I am wrong about that he had certainly arrived towards the end of 1963 or early 1964 which must have been the time at which his daughter Janet was conceived, since she was born on 5 September 1964. Additionally, on the evidence that I have heard there is no good reason to suppose that the appellant has left the United Kingdom at any time between his date of arrival and now. There is no evidence to this effect and the evidence that there is, points in the other direction.
26. Although I was not addressed on the point and I do not make a finding about it, it seems likely that the appellant would have had a right of abode

in the United Kingdom as a Citizen of the United Kingdom and Colonies (CUKC) under the British Nationality Act 1948. Although as colonies gained independence people from the newly independent countries would normally lose CUKC status and gain citizenship of the new commonwealth country the development did not affect the right to enter the UK as all commonwealth citizens, as well as CUKCs continued to be classed as British subjects. British subject status was an overarching status carrying with it the right of abode in the UK. As such a person with that right of abode was generally free from immigration control and had a right to enter, live and work in the UK.

27. Although the legislation of the 1960s restricted the general right of abode for British subjects beginning with the Commonwealth Immigrants Act 1962 I note that Jamaica achieved complete independence within the Commonwealth on 6 August 1962. Although the respondent in the notice of refusal concludes that the appellant entered the United Kingdom illegally and that he has remained in the UK without leave ever since on my findings this is not the case at all.

Conclusions

28. I conclude that for the above reasons the appellant is able to bring himself firmly within paragraphs 276A-D of the Immigration Rules. The facts as found show that he has had at least ten years' continuous lawful residence in the United Kingdom. If I am wrong about that he meets the requirements of paragraph 276B (i)(b) and (ii). There are no public interest considerations that it would be undesirable for him to be given indefinite leave to remain on the ground of long residence. He is now 71 and has strong connections to the UK. There was no evidence that he has any criminal record or that his character and conduct is such that it tells against him. Although he is not able to produce a full employment record the mere fact that he receives half a pension as a result of contributions made by him shows that he was employed or self-employed for a period and paid contributions as evidenced in the documentation produced recently. He has lived with his partner for some 30 years, one of their children still lives with them and the appellant's now very aging mother is in the United Kingdom still living here. On any view this is in any event an extremely strong Article 8 ECHR claim should I be wrong in concluding that the appellant meets the requirements of the Immigration Rules.

Decision

29. The First-tier Tribunal Judge erred for the reasons that are set out in the error of law decision and the determination is set aside. I substitute for that decision that the appellant succeeds under the Immigration Rules for the reasons given above.
30. This appeal is allowed.

31. An anonymity direction was not sought and in the particular circumstances of this appeal I see no need to make one.

Signed

Date

Upper Tribunal Judge Pinkerton