Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05138/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 27th February 2018	**On 27th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

LAMIN [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Hussain of Equity Law Chambers
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Dearden made following a hearing at Bradford on 19th July 2017.

2. The appellant is a citizen of Gambia born in 1966. He applied to come to the UK to join his wife and children here but was refused on 8th January 2016 on the grounds that he had previously used false documents to enter the UK and had contrived in a significant way to frustrate the intentions of the Immigration Rules by overstaying, using deception and multiple identities, and making frivolous applications.

3. The Immigration Judge recorded that the appellant came to the UK as a visitor in August 2000 and then overstayed his visa, remaining without leave until 15th August 2005. He made two unsuccessful applications to remain following which he attempted, on two separate occasions, in 2005, to re-enter the UK using false documents. In March 2007 he again attempted to re-enter using a false Gambian passport and in the same month was removed from the UK. Since then he has been in the Gambia.

4. When he made the present application he failed to disclose the three occasions of attempted entry, filing a statement before the judge, apologising for his dishonesty.

5. The judge recorded that Mrs [S] lives with her four children, aged 24, 23, 17 and 11, and she has two jobs. She works as a packer in a fruit factory and additionally has a cleaning job bringing her total income to approximately £24,000 per year. Two of the children are British citizens.

6. The judge stated that Section 15 of the 2014 Immigration Act reduced the rights of appeal available in Section 82 of the 2002 Act and said that the starting point for the decision in relation to human rights was whether the appellant had the ability to meet the Immigration Rules. He recorded the representative's submissions, accepted that there was family life in this case and wrote as follows:

> "One of the factors which is very important in assessing whether the Article 8 appeal should be allowed outside the Rules, is the fact that the appellant cannot comply with the Immigration Rules, for reasons previously stated. It is only a small number of cases of a compelling nature which can succeed under Article 8 which cannot succeed under the Rules. The appellant's immigration history is abysmal and whilst any father wants to be with his children, I cannot identify any compelling circumstances which warrant this appeal being allowed outside the Rules. The appellant is the author of his own misfortune".

7. On that basis he dismissed the appeal.

8. The appellant sought permission to appeal on the grounds that the judge had erred in law in his assessment of Article 8.

9. On 23rd October 2017 Judge Bird granted permission stating that the judge had arguably not properly carried out a balancing exercise and had failed to apply and consider the Supreme Court's decision in Agyarko and Others [2017] UKSC 11.

Submissions

10. Mrs Pettersen submitted that, whilst the Entry Clearance Officer may have been wrong to refuse the application under paragraph 320(11), given that it has been over ten years since the appellant was removed, because he had not come to the Tribunal with clean hands, in not disclosing the previous deceit, the judge was entitled to reach the conclusion which he did. She accepted that the judge had not properly reflected the law when he referred to only a small number of compelling cases which could succeed under Article 8, and that, had he directed himself differently, he might

have reached a different conclusion. Nevertheless, she submitted that the decision was sustainable.

Consideration of whether there is a Material Error of Law

11. I disagree with Mrs Pettersen's submissions.

12. There is no reference in this determination to the considerable factors in the appellant's favour when assessing the proportionality of the Entry Clearance Officer's decision, namely the very lengthy separation which he has had from his family, and the best interests of the minor children who have been without their father for ten years. The Supreme Court in Agyarko has made it clear that there is no test of exceptionality as such, and that the task of the decision-maker is to determine a fair balance between the public interest and the individual interest of those involved. It is not apparent that this is what the judge has done. Moreover, in referring to a small number of cases of a compelling nature which could succeed under Article 8 he did not properly reflect his duty to apply the test of proportionality.

13. The decision of the judge is set aside.

14. Since the sponsor was present it was possible to hear oral evidence from her and to re-make the decision.

15. The sponsor told me that she has been with her husband since 1993. She speaks to him every day, as do the children. Her youngest child has just started secondary school and her second youngest is studying in college. She found it very difficult managing without him, bringing up the children and holding down two jobs. She did visit him in 2016 but apart from that has not seen her husband since March 2007.

Further Submissions

16. Mrs Pettersen acknowledged that there may have been financial reasons why the sponsor has only visited the Gambia once. Nevertheless, she submitted that there was no reason why she herself should not move there. In any event, the children have been without their father for a good many years and family life could continue as it had done through the daily telephone calls. The appellant's efforts to return the UK had been undermined by his failure to set out his full history.

17. Mr Hussain asked me to allow the appeal submitting that the proportionality balance was clearly in his favour given the very lengthy absence from the UK and its effect on the children.

Findings and Conclusions

18. The appellant had a very poor immigration history until his removal from the UK in 2007. He then compounded matters by failing to disclose his previous deception in the present application. I have a statement from him apologising for his dishonesty and explaining that he was desperate because his wife and children were in the UK.

19. Clearly the appellant's past conduct and his present errors are strong evidence in the respondent's favour in arguing that his continued exclusion from the UK is proportionate.

20. However, against that, is the evidence of the clear adverse effect of his absence on the two minor children who are both British citizens. The sponsor's evidence was not questioned by Mrs Pettersen who did not seek to make any attack upon her credibility. The strength of the family life here is not disputed.

21. I accept that the children speak to their father every day. I also accept the evidence in their letters that they miss him very much and want him to be part of their lives on a daily basis. The older child also states how difficult it has been for his mother and indeed that was very apparent at the hearing. She has held down two jobs and brought up the children alone. That is a considerable achievement and it has taken its toll.

22. The best interests of the children are clearly to be with their father, not only because of their relationship with him, but also because his presence will substantially mitigate the strains upon his wife.

23. I accept the appellant's apology and his explanation that his motivation has always been just to be with his family. That is not to excuse his deceit but it does explain his motivation.

24. He has been out of the UK for eleven years. Had he been the subject of a deportation order he would now be in a position to apply for it to be revoked. Although Mrs Pettersen submitted that he could make another application, given the very lengthy separation which has already occurred, this would not be a proportionate response in these circumstances.

25. My starting point is whether the appellant meets the requirements of the relevant Immigration Rules.

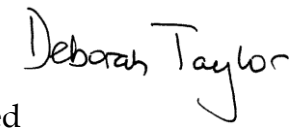
26. The appellant meets the substantive requirements of the Rules in relation to spouses, there being no challenge to the subsistence of this marriage or to the sponsor's ability to meet the financial requirements of the Rules. Whilst the appellant's previous immigration history would have justified a refusal of entry clearance under paragraph 320(11) in the past, there comes a point when past mistakes are outweighed by other factors. Of course in this case the appellant made a further mistake in not disclosing his history, but that in itself is not sufficient to outweigh the other factors in his favour.

27. It would not be reasonable to expect the two British children, both of whom have never been to Gambia and who are at an important stage in their education in the UK, to go and ive there. They enjoy family life with their brothers who live in the same household, which would be severed if half of them lived in Gambia.

Notice of Decision

28. The original judge erred in law. His decision is set aside. It is re-made as follows. The appellant's appeal is allowed.

No anonymity direction is made.



Signed Date 19 March 2018

Deputy Upper Tribunal Judge Taylor