Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/26364/2016

THE IMMIGRATION ACTS

Heard at Piccadilly Exchange, Manchester
On 11th January 2018 and 24th January 2018

Decision & Reasons Promulgated
On 21st February 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

E N
(anonymity order made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Pratt, WTB Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant or the children in this determination identified as EN, T1, A and T2. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

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1. On 11th January 2018, I heard submissions from both parties and, for reasons set out below in a decision promulgated on 12th January 2018, I found an error of law in the decision of the First-tier Tribunal and set aside the decision to be remade.

Error of law decision

1. The appellant's human rights claim was considered by the respondent in response to the service of a s120 notice and was refused for reasons set out in a decision dated 17th November 2016. His human rights appeal was dismissed by First-tier Tribunal judge Brookfield for reasons set out in a decision promulgated on 9th October 2017.

2. The appellant sought and was granted permission to appeal on the grounds that, having found that the appellant had a genuine and subsisting relationship with his two older British Citizen sons, it was arguable the First-tier Tribunal judge had erred in law because he had then dismissed the appeal on the basis that the appellant was not the full-time carer and/or did not have sole responsibility for them. The judge did not, in terms, address s117B(6) Nationality Immigration and Asylum Act 2002. Nor did he make a clear finding whether the appellant was an illegal entrant or an overstayer and thus fell to be able to be considered under paragraph EX.1 of Appendix FM of the Immigration Rules.

3. The respondent's Rule 24 response referred to occasional visits by the two children to the appellant although the appellant's evidence that the two children spend school holidays with him was accepted by the judge.

4. Mr Bates referred to the finding by the judge that it would not be unreasonable for the children to leave the UK and/or to visit the appellant in the USA and that the findings overall were such as to fall within the reasonable range of findings to be made by a judge that did not disturb the overall conclusion that the appellant should be dismissed.

5. The decision by the judge is lengthy and sets out the evidence before him. The judge concludes the appellant is a US citizen rather than a Mozambique citizen. There has been no finding whether the appellant is an overstayer or an illegal entrant. There is no consideration by the judge of the respondent's policy in connection with British Citizen children. The decision is predicated upon a finding that the two children can visit the appellant in whichever country he goes to live in but it does not assess the reasonableness of such a course of action or

whether that is in the best interest of the children, given the finding that they spend their holidays with him.

6. The failure of the judge to consider and make findings on s117B(6), whether the appellant is or is not an illegal entrant and whether paragraph EX.1 applies and if so what the consequences of that are, is a material error of law and I set aside the decision to be remade by me.

2. I made the following directions:

   1. The respondent to file and serve the PNC.

   2. Appellant have leave to file and serve updating witness statements and any supporting documentation, including any documentation relating to passport applications, such witness statements whether by him or others to stand as evidence in chief.

3. The respondent filed and served the PNC prior to 24th January 2018. The appellant's witness statement was filed on the morning of 24th January 2018; Mr Bates did not object to its late filing and I accepted the late evidence. No other evidence was filed.

4. Mr EN attended the hearing but was not called to give oral evidence, the issues before me being matters for submission. Findings by the First-tier Tribunal judge, who heard evidence from the appellant and his ex-partner (the mother of A and T1) which were not challenged, and are preserved are as follows:

   (i) The appellant has three sons: T2 born 11 November 2011; A born 13 April 2005 and T1 born 21 January 2002.
   (ii) The appellant has a genuine and subsisting relationship with A and T1 his two older sons, who spend their school holidays with him and with whom he maintains daily contact;
   (iii) He does not have a genuine and subsisting relationship with T2.
   (iv) He is not the primary carer of and does not have sole responsibility for any of the children.

5. The respondent in the reasons for refusal takes the view that the appellant is a US citizen. She has no record of his entry to the UK on the date of his claimed entry namely April 2000/1. The appellant's evidence is that he was born in Zambia on 28 May 1976; his father was a National of Mozambique and was awaiting travel to the USA where he had either been recognised as a refugee or was in the process of being so recognised. He and his mother travelled to the USA after his father, he thinks in 1978 when he was 2 years old. He confirms he had a Green card that he thinks described him as an "Alien resident". He has no recollection of his parents applying for him to become a naturalised US citizen and never went to any citizenship ceremony. He recalls being issued with a white passport when he was in secondary school in about 1990; when he travelled to the UK in 2000 he travelled on an Emergency Travel document which he had obtained at short notice to enable him to travel to Zimbabwe for a

funeral. After that he travelled to the UK and says he was given 6 months leave to enter as a visitor. He says that given his length of absence from the USA, his green card will have expired. His evidence was that he had tried to contact the US Embassy to see if he could get a passport but had

> "... never got anywhere. They make it very hard just to get in touch and I have never been able to get an appointment."

6. He says he contacted the Mozambique High Commission but they said that given his background they could not issue him with a passport and they could find no trace of him.

7. The extract from USCIS.gov website, accessed on 22 January 2018, on maintaining permanent residence sets out that permanent residence is lost, *inter alia,* if an individual moves to another country, intending to live there permanently or remains outside the US for an extended period of time. The extract from the website on passport information for non US travel documents, accessed on 22 January 2018 refers to two different types of US Travel document book being issued prior to 2003. A Permit to Re-Enter the US had a White cover and a Refugee Travel Document had blue cover, lighter than the navy covers of US passports. A re-entry Permit is valid for two years; a new one can be applied for after expiry but reference is made to remaining outside the US for longer than a year might lead to the loss of permanent resident status.

8. Travelling on a US issued travel document, it is unlikely the appellant would have required entry clearance to enter the UK. He would have been endorsed entry at port. In those circumstances, it seems highly unlikely that there will be a record of his entry held by the UKBA. The respondent did not submit that individuals who enter without entry clearance are nevertheless recorded on some sort of system that would enable a search to be made for entry. On the basis of this evidence I am satisfied, on the balance of probabilities that the appellant is not a US citizen. Whether he will be able to regain entry to the US is not a matter upon which I am able to reach a conclusion but I do express the opinion that, after some 17 or 18 years absence, I think it unlikely that he would regain his Green Card and thus his re-entry. That is a matter I have factored into my decision.

9. I am not able to reach a conclusion on whether the appellant is a Zambian citizen or a Mozambique citizen, in the absence of any evidence in connection with those countries and their citizenship legislation. Whatever he is, he has no personal recollection of either of those countries, having left when he was aged 2 and lived all his life either in the USA or the UK. I have factored this into my decision.

10. The appellant has the following criminal convictions:

12 July 2004	Assault occasioning ABH	caution
19 June 2006	Possession Class C (Cannabis)	£50 fine
	Assault occasioning ABH	4mths imprisonment

		suspended for 2 years; supervision requirement 12 months, unpaid work requirement
	Battery	2 months imprisonment suspended for 2 years, supervision requirement
16 October 2009	Battery	Community order 24 months, supervision requirement
3 June 2010	Failure to comply with requirements of community order	Order amended and to continue; activity requirement
8 March 2011	Failure to comply with requirements of community order	Order amended and to continue; activity requirement added.
21 July 2011	Resist or obstruct constable	Conditional discharge
	Using vehicle whilst uninsured	£300 fine, driving licence endorsed, disqualified from driving 12 months
	Driving otherwise than in accordance with license	No separate penalty
	Exceeding 30mphon restricted road	No separate penalty, licence endorsed
1 March 2017	Possessing Class A (Cocaine)	£120
	Possession Class B (Cannabis)	No separate penalty
	Possession Class A (MDMA)	No separate penalty

11. The respondent has not sought to deport the appellant because of his criminal convictions. The respondent states in her decision that the appellant does not fall for refusal under the suitability requirements although also noting that he has five convictions and that these are matters that weigh heavily against the appellant in determining whether his removal from the UK is justified. In fact, the appellant had more than five convictions at the date of the decision and since the date of the decision he has been convicted of three drugs offences for which he received a fine. But, nevertheless, the respondent does not reject the application on the basis of suitability and did not seek to resile from that before me. There was no submission that I should go behind that decision of the respondent although Mr Bates submitted I should take his convictions into account.
12. The respondent identifies T1 as an Irish citizen and the other two children as British Citizens. T1 has an Irish passport. T1 and A's mother is settled in the UK, if not a British citizen.

13. Both T1 and A live in and have lived all their lives in the UK with their mother.

Discussion

14. In terms of the Immigration Rules, the appellant is not excluded on suitability grounds. He is separated from his earlier partners. He does not meet the eligibility criteria for leave to remain as a partner. The general criteria to be met by the appellant and the specific criteria to be met for eligibility as a parent are set out in Appendix FM GEN.1; E-LTRPT.2.2-2.4 and 3.1-3.2 and EX1 must apply[i]. EN meets the suitability criteria.

15. He is an overstayer and has a genuine and subsisting relationship with a British Citizen child and a child settled in the UK; he is in the UK and the two children with whom he has a genuine and subsisting relationship have been living continuously in the UK for more than 7 years; their mother is settled in the UK; he is not in a genuine and subsisting relationship with their mother and he does not live with their mother; the children live with her. He has direct staying contact with the children as agreed with their mother.

16. The two children spend their holidays with him. The very fact that they spend such lengthy periods of time with him is evidence that he takes and is taking an active role in the children's upbringing. There is no evidence that such a role will or is likely to cease within the foreseeable future.

17. The two children are at school in the UK. They have never lived anywhere other than the UK. It cannot possibly be successfully asserted that the best interests of the children are anything other than that they remain in the UK living with their mother and with the extensive staying contact that they currently have with their father, the appellant. It would be unreasonable and unduly harsh to expect the children to leave the UK and it would be unreasonable and unduly harsh for them to lose the lengthy periods of contact that they have with their father.

18. The appellant is not the subject of a deportation order. Part 13 of the Immigration Rules does not apply.

19. It is plain that EN meets E.LTRPT.2.2 – 2.4., 3.1-3.2 and EX.1(a). Of course, this appeal is not an appeal against a decision that he does not meet the criteria set out in the Immigration Rules but is an appeal against a decision to refuse his human rights claim. EN meets the criteria of the Immigration Rules. S117B Nationality, Immigration and Asylum Act 2002 sets out the considerations to be taken account of when considering a human rights appeal. S117C of the 2002 Act does not apply. Mr Bates submits that I should have regard to EN's convictions. In considering this submission and the effect on the appeal it is important to bear in mind that EN meets the criteria in the Immigration Rules and, taking account of the considerations set out in s117B of the 2002 Act, the public interest in his removal from the UK is minimal. The convictions do not over-ride the acceptance by the respondent that EN meets the suitability criteria.

20. In these circumstances, there can be no other finding but that EN succeeds in his appeal.

21. Of course, should there be any further convictions the respondent may take a different view on EN's suitability and deportation action may ensue. But for now and on the basis of the evidence before me, the removal of EN would be a disproportionate interference in his family life and that of his two older children and a breach of Article 8.

Conclusion

The First-tier Tribunal made an error of law and I set aside the decision of the First-tier Tribunal;

I allow the appeal of EN.

Date 19th February 2018

Upper Tribunal Judge Coker

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[i] E-LTRPT.2.2. The child of the applicant must be-

(a) under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;

(b) living in the UK; and

(c) a British Citizen or settled in the UK; or

(d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.

E-LTRPT.2.3. Either-

(a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK), and the applicant must not be eligible to apply for leave to remain as a partner under this Appendix; or

(b) the parent or carer with whom the child normally lives must be-

(i) a British Citizen in the UK or settled in the UK;

(ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and

(iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

E-LTRPT.2.4.

(a) The applicant must provide evidence that they have either-

(i) sole parental responsibility for the child, or that the child normally lives with them; or

(ii) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK; and

(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

E-LTRPT.3.1. The applicant must not be in the UK-

(a) as a visitor; or

(b) with valid leave granted for a period of 6 months or less, unless that leave was granted pending the outcome of family court or divorce proceedings;

E-LTRPT.3.2. The applicant must not be in the UK –

(a) on immigration bail, unless:

(i) the Secretary of State is satisfied that the applicant arrived in the UK more than 6 months prior to the date of application; and

(ii) paragraph EX.1. applies; or

(b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph EX.1. applies.

EX.1. This paragraph applies if

1. (a)

(i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK;