Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42948/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th December 2014	**On 8th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MR MOMODOU MALICK WILLIAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Cole, Counsel, instructed by Westkin Associates
For the Respondent: Miss J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Gambia who application to be allowed to remain here under Article 8 ECHR was dismissed in a determination by First-tier Tribunal Judge Kaler promulgated on 26th September 2014.

Grounds of application were made. Permission to appeal was granted by First-tier Tribunal Judge Osborne who noted :-

> "The judge appears to have put considerable weight upon the fact that there was no evidence from the children nor were they present at the hearing. This was despite the fact that this was contrary to the Appellant's own evidence and a letter from his estranged wife (but with whom he continues to live) which points to it being in the interests of the welfare of the children for the father to remain – this is recorded at paragraph 17 of the determination."

2. Thus the matter came before me on the above date.

3. It is fair to say that much of the grounds of application contend that the Appellant received a lack of proper legal advice from those then acting for him resulting in the fact that his children did not attend the hearing or provide any written evidence for the judge to consider. As it transpires there are emails from his former solicitors disputing this but as I pointed out to the parties the issue of whether the solicitors dealt with the matter appropriately is not one for me to determine. The issue for the Tribunal is to ascertain whether or not the judge made an error in law.

4. For the Appellant Mr Cole relied on his skeleton argument. It was important to note that the Appellant's application for further leave was made in 2010 and was granted until 30th September 2012 after a successful appeal. The appeal was granted on Article 8 based on the relationship between the applicant and his children and at the First-tier Tribunal both parties agreed that this determination was a starting point in the judge's consideration following **Devaseelan [2002] UKIAT 00702**.

5. The first ground of application was that the judge's findings that there had been a deterioration in the relationship between the applicant and his children, in the absence of evidence on this point, amounted to an error in law. This finding was despite the applicant's own evidence and a letter from his estranged wife which pointed towards it being in the interest of the welfare of the children for the father to remain. The judge's conclusions were further undermined by her finding that the parties, namely both parents and children still lived at the same address. There was no evidence from the applicant's wife to the effect that his relationship with his children had deteriorated. In all the circumstances the judge's finding that there had been a fundamental change in the relationship between the two children and their father with whom they live, in the absence of live evidence, amounted to an error in law. Furthermore, it amounted to a failure to give proper reasons given the documentary evidence of a parental relationship submitted with the application.

6. It was also said that in terms of section 117B of the 2002 Act the judge did not consider section 117B(6) which stated that someone who was not liable to deportation the public interest did not require the person's

removal where that person had a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. Further grounds are put forward.

7. Before me Mr Cole amplified on his submissions. The starting point was that there had been a strong relationship with the children in 2010. It was important to note that they still lived at the same address. There was a note from the school that there was no evidence that the Appellant did not care for the children. This was very much the evidence given by the Appellant.

8. In all the circumstances I was asked to set the decision aside and remit the case to the First-tier Tribunal.

9. For the Home Office Miss Isherwood said that there was no material error in law. The problem for the judge was a lack of evidence. It was the Appellant's responsibility to ensure that his witnesses attended the Tribunal. The judge was correct to say that she did not have any up-to-date evidence from the Appellant's children as to the relationship with their father (paragraph 17). She noted that neither child attended the hearing and there was no current statement from them (paragraph 18). She had gone on to consider the best interests of the child as a primary consideration. I was invited to find that there was no error in law and that the decision should stand.

Conclusions

10. The starting point for the judge was the previous determination from Judge Cockerill who found that the Appellant enjoyed family life with his children and that he enjoyed a close and warm relationship with them and provided a great deal of practical support with their education. The judge noted that there was a lacuna in the evidence in that neither of the children attended the Tribunal or offered written evidence about their relationship with their father.

11. However it seems to me it was important for the judge to look at the whole circumstances of the family and I have concluded that she did not do so. She found that the relationship the Appellant had with his children was not as close now as it had been in 2010 but as Mr Cole pointed out, there was no evidence which justified such a finding. It goes against the findings made in 2010 and it goes against what the Appellant says in his statement at paragraph 16 when he indicates he has a strong bond with his children. If the judge was going to make a finding that the bond with the children was not as close as it had been, then she was bound to take into account the evidence of the Appellant which stated to the contrary and not to take account of that evidence amounts to a material error in law. If any inference was to be taken from the fact that the family was still living together then, allied to the supportive letter from the Appellant's wife, it

seems to me that a reasonable inference was that the Appellant did indeed continue to have a strong bond with his children.

12. The failure by the judge to properly consider the evidence before her amounted to a material error in law. As a result it is necessary to set the decision aside and for this appeal to be heard afresh. The determination of the First-tier Tribunal is therefore set aside in its entirety. No findings of the First-tier Tribunal are to stand. Under section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal.

Decision

13. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

14. I set aside the decision.

15. I remit the appeal to the First-tier Tribunal.

Signed Date 6th January 2015

Deputy Upper Tribunal Judge J G Macdonald