Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09080/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 January 2015	**On 19 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RAWLE ANDRA ALLEN
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr P Nath, Specialist Appeals Team
For the Respondent/Claimant: Mr J Chipperfield, Counsel

DECISION AND REASONS

1. The Secretary of State appeals from the decision of the First-tier Tribunal allowing on Article 8 grounds the claimant's appeal against the decision by the Secretary of State to refuse to vary his leave to remain, and to make directions for his removal from the

United Kingdom by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

2. The claimant is a national of Guyana, whose date of birth is 15 April 1979. On 14 October 2011 he applied for ILR outside the Rules. He had begun a relationship with Ms Saffire at City & Islington College in 2007 where he was a student, and she was a lecturer. Ms Saffire was South African by nationality, and was in the UK on a work permit basis. Ms Saffire had never been to Guyana, and he had never been to South Africa. All of their friends and ties were in the UK, and they wished to settle here with their son Jayden, who had been born on 4 August 2011 from their relationship. At the present time, Ms Saffire did not have settled status in the UK, but she was eligible for ILR and she was in the process of making an application.

3. The application was refused on 28 January 2014. It was accepted that he had been lawfully resident in the UK since 9 January 2005 when he was given leave to enter as a working holidaymaker. His last grant of leave to remain had been as a Tier 2 Migrant, and this leave had expired on 16 October 2011. The fact that he had resided in the UK for a period of almost nine years, and the fact that he had family here, was not reason enough to grant him ILR outside the Rules.

4. His application was considered under Appendix FM. His son was not a British citizen and had not lived in the UK continuously for at least seven years. There were no insurmountable obstacles to his family life with his son and partner continuing outside the UK. Although his son was born in the UK, as he was only 2 years old he was considered young enough to be able to adapt to life abroad with his parents. While the material quality of life in Guyana might not be to the same standard as it would be in the United Kingdom, this does not give rise to any right to remain in the UK.

The Decision of the First-tier Tribunal

5. The claimant's appeal came before Judge Majid sitting at Taylor House in the First-tier Tribunal on 1 October 2014. Mr Chipperfield of Counsel appeared on behalf of the claimant, and the respondent was represented by a Presenting Officer.

6. In his subsequent determination, the judge allowed the appeal under Article 8 ECHR, essentially for the reasons which he gave in paragraph 10. The claimant had been in the country lawfully for over nine years. The claimant was in a relationship which was subsisting, and he had a child from the relationship who should not be uprooted from this country. The claimant had developed ties in the UK and to remove him from this country would bring an unreasonable disruption to his life, and the lives of his partner and child. His partner had confirmed that she was pregnant with another child due in January 2015. They lived in a flat with two bedrooms and a reception room and she was earning about £45,000 per annum. There was no danger of the claimant and his family becoming a burden on public

funds. The claimant had told him that he had been a victim of a miscarriage of justice, and the Court of Appeal had quashed his conviction.

The Application for Permission to Appeal

7. The Secretary of State applied for permission to appeal, arguing that the judge materially erred in three main respects. Firstly, he had referred to evidence from the claimant that his child was a British national. Such evidence was in conflict with what was stated in the refusal letter, and the judge had failed to resolve the question of whether the child was a British national or not. The status of the child, whilst not a determinative factor, would clearly impact on the overall proportionality assessment.

8. The second ground of challenge was that the judge failed to have regard to relevant case law and Article 8, and to the submission of the Secretary of State in the refusal letter and at the hearing to the effect that it was in the best interests of the child to be with both parents, and that this could be realised in either Guyana, the claimant's country of origin, or in South Africa, his partner's country of origin. There was nothing to suggest the family would be unable to establish themselves in either country, albeit with some degree of hardship. The child in the instance appeal was not a British citizen: it was in his best interests to be with his parents; and he could hold no future right to remain in this country. The family life of the claimant and his family members could be continued in all its essential elements outside the UK, and it was not unreasonable to require this to happen.

9. Thirdly, the judge had failed to address the provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002 (i.e. Section 117).

The Grant of Permission to Appeal

10. On 24 November 2014 First-tier Tribunal Judge White granted permission to appeal as it was arguable that the judge had given insufficient reasons as to why any of the Immigration Rules were met; the judge had failed to make a reasoned finding regarding the nationality of the claimant's child which in turn had led the judge to fail to address in proper fashion the issue of Article 8 and where the best interests of the child lay; and the judge arguably appeared to show no adequate engagement with Part 5A of the 2002 Act ("public interest").

The Appeal Hearing

11. At the hearing of the appeal, Mr Chipperfield conceded that the decision was legally flawed. It had not been the claimant's case that his son was a British national. The judge had also not engaged with his submission that Appendix FM did not apply, as the application had been made before the introduction of the new Rules.

Reasons for Finding an Error of Law

12. I find that an error of law is made out for the reasons given in the application for permission to appeal and in the subsequent grant of permission. I do not consider that any further elaboration is required.

13. On the topic of how this decision should be remade, Mr Chipperfield tentatively submitted that this might have been an appropriate case for remittal to the Secretary of State for reconsideration, for two reasons: firstly because the claimant had now accrued ten years' lawful residence, and secondly because there was an argument that the Secretary of State had not undertaken a proper consideration of the child's welfare in the refusal letter, as she was required to do under Section 55 of the 2009 Act. However, he accepted that this was not a point which he had taken before Judge Majid, and given the child's age and status at the date of decision, I consider it is doubtful merit. The appellant's alleged accrual of ten years' lawful residence (and the fact that his partner and child now both have ILR) is potentially of greater significance. But in all the circumstances I consider that the appropriate course is for the appeal to be remitted to the First-tier Tribunal for a de novo hearing. In the interim it is open to the claimant's legal representatives to invite the Secretary of State to reconsider her decision in the light of the current state of affairs and/or for the appellant to apply for leave to remain as the partner of a person present and settled here.

Decision

14. The decision of the First-tier Tribunal contained an error of law such that the decision should be set aside and remade.

Directions

15. There will be a further hearing to remake the decision in the First-tier Tribunal at Taylor House before any judge apart from Judge Majid. None of the findings of fact made by Judge Majid shall be preserved.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed Date

Deputy Upper Tribunal Judge Monson