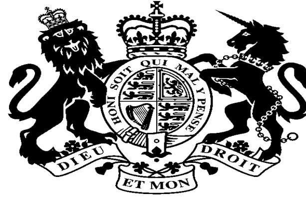

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17868/2016**

THE IMMIGRATION ACTS

Heard at Birmingham
On 2 November 2018

Decision & Reasons Promulgated:
On 16 November 2018

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ORAL FRANKLYN McKENZIE

(ANONYMITY NOT DIRECTED)

Respondent

Representation:

For the Appellant: Mr D Mills (Senior Home Office Presenting Officer)
For the Respondent: Mr O Jibowu (Counsel)

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DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made after an oral hearing of 28 July 2017 and which it sent to the parties on 31 August 2017. In making its decision the tribunal allowed the respondent's (claimant's) appeal against a decision of the Secretary of State, of 11 July 2016, refusing to grant leave to remain.

2. By way of background, the claimant, who was born on 28 September 1961, is a national of Jamaica. He entered the United Kingdom (UK) as a visitor on 16 June 2001. He then obtained various grants of further leave as a student until 30 October 2004. On 2 December 2011 he was granted discretionary leave to remain until 2 December 2014. I am not sure whether he had any form of valid leave between 30 October 2004 and 1 December 2011 but no doubt, if it is considered to be relevant, the parties will be able to address that in future proceedings. In any event, the grant of 2 December 2011 was made because the claimant had entered into a relationship with a British citizen who has a British citizen child. The claimant was subsequently granted further discretionary leave, on the same basis, until 2 February 2018. He married the person with whom he was having the relationship but, unfortunately, the marriage broke down. The Secretary of State learnt of that development and, on 19 February 2016, indicated that his leave was being curtailed so that it would expire on 23 April 2016. However, on 22 April 2016 the claimant applied for leave to remain in the UK, aided by his current legal representatives. The letter of application took a range of points based upon a range of considerations. As to the Immigration Rules it was asserted that the claimant met the requirements of paragraph 276 ADE (vi), its being argued that there would be very significant obstacles to his integration into Jamaica if he were to be returned there. Other points related to what was said to be a new subsisting relationship with one [LH], a British citizen, and his relationship with his UK based brother Mr Neville McKenzie who has health difficulties and who was said to be emotionally dependent upon him.

3. The Secretary of State explained why the application was being refused in a document headed "Reasons for Refusal" and which is dated 11 July 2016. It is clear from that document that the Secretary of State considered the question of compliance with paragraph 276 ADE of the Immigration Rules but did not consider the possible applicability of any other Immigration Rules. It is also clear that, having decided that the requirements of that rule were not satisfied, the Secretary of State undertook an examination of the case under Article 8 of the European Convention on Human Rights (ECHR) outside the rules noting that, in his view, the claimant would probably be able to find employment in Jamaica and that Ms [H] could accompany him to Jamaica if wished.

4. The hearing before the tribunal took place on 28 July 2017. The claimant was represented and gave oral evidence, as did Ms [H]. The tribunal was not assisted to the extent it should have been, because, for reasons which are not clear to me, the Secretary of State was unable to field a Presenting Officer.

5. The tribunal allowed the appeal. Such is clear from its written reasons of 26 August 2017. At the outset it identified the relevant provisions for it to consider as being paragraph 276 ADE and paragraphs S-LTR.2 to S-LTR2.3 and S-LTR3.1 of the Immigration Rules. It then summarised the claimant and Ms [H]'s evidence and the submissions made to it on the claimant's behalf. Having done that, it went on to say why it was allowing the appeal. This is what it said:

" 12. I am satisfied that the Appellant discharges the burden of proof that is upon him for the following reasons. First, there is the Appellant's evidence, which I have no reason to disbelieve, and have actually found to be credible on a balance of probabilities. He has private/family life interests which are disproportionately interfered with by the SSHD in her decision, because as the Appellant explains in his WS, he has a 'loyal clientele in the United Kingdom' (para 8). He has a 32-year old son in Jamaica (para 9). In the UK he has many family members who are British citizens (para 10). His brother Neville suffers from mental illness (para 11) and he is the Appellant is the only person he can turn to. If he was forced to return Neville would have no one (para 11). Since December 2015 he has been in a relationship with [LH]. (para 12) who herself has a career in the UK as a teacher and cannot move to Jamaica. (para 12). The Appellant's relationships were *not* created at a time when he was without LTR in this country.

13. The central features of his claim are (i) his well-established business of Carpentry in the UK, which helps him to support his 32-year old son in Jamaica; (ii) his relationship with Ms [H], which is genuine, subsisting and wholly committed on both sides, but one which would still leave her unable and unwilling to relocate to Jamaica were the Appellant to be forced to leave; and (iii) his parental relationship with the British Citizen child, *Lyyon*, who again would be unable to leave his mother and move to Jamaica, such that his consideration falls to be favourably disposed of under s.55 BCIA. The evidence in respect of this is set out above and I need not repeat it. Suffice it to say that the balance of considerations falls in favour of the Appellant.

14. The fact is that the decision in **Agyarko [2017] UKSC 11** assists the Appellant if regard is had to the 'insurmountable obstacles' undertaken in **Agyarko** (at paragraph 42) saw the Supreme Court refer to **Jeunesse**, where the Grand Chamber identified, 'a number of factors to be taken into account in assessing the proportionality under Article 8 of the removal of non-settled migrants'. (Paragraph 42). It then stated that:

> 'Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, where there were 'insurmountable obstacles' in the way of the family living in the country of origin of the non-national concerned, and whether there were factors of immigration control ….' (Paragraph 42).

15. Moreover, the court goes on to say that,

> 'The Secretary of State has not imposed a test of exceptionality in the sense that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she had defined the word 'exceptional' as already explained, as meaning circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate.' (Paragraph 60).

16. All of this falls in favour of the Appellant."

6. That was not the end of the matter because the Secretary of State applied for permission to appeal. There were three separate grounds advanced. In summary, it was asserted in Ground 1 that the tribunal had inadequately explained why it was accepting the claimant's evidence. In Ground 2 it was asserted that, clearly on the assumption that the tribunal had intended to allow the appeal on the basis that the claimant met the requirements as a partner as set out in Appendix FM to the Immigration Rules, it had failed to actually consider his ability to do so. Further, on the assumption that the tribunal was intending to allow the appeal on Article 8 ECHR grounds outside the rules, it was argued that it had not applied the correct test. Ground 3 amounted to an argument that the tribunal had failed to properly consider the mandatory public interest considerations as set out in section 117B of the Nationality, Immigration and Asylum Act 2002.

7. Permission was granted on all grounds. So, the matter was listed before the Upper Tribunal (before me) so that it could be considered, at an oral hearing, whether or not the tribunal had erred in law and, if so, what should flow from that. Representation at that hearing was as stated above and I am grateful to each representative.

8. Mr Mills maintained all three grounds. But the thrust of his submission was to the effect that it was simply unclear why the tribunal had decided to allow the appeal. It had not explained why it accepted the oral evidence or, if it had, that explanation was manifestly insufficient. It was not apparent which legal provisions it had relied upon in allowing the appeal and, therefore, it was not apparent that it had applied the correct legal tests. Mr Jibowu argued that the tribunal had been entitled to accept the oral evidence of the claimant and Ms [H] having heard from them. It was not required to specify whether it was allowing the appeal under the Immigration Rules or under Article 8 of the ECHR outside the rules so long as it properly set out its findings. Anyway, the Secretary of State had not identified anything that militated against a finding that the requirements of the Immigration Rules had been met. The section 117B factors had been dealt with in the substance of the written reasons.

9. As I informed the parties at the end of the hearing, I have decided that the decision of the tribunal involved material errors of law and that its decision, in consequence, cannot stand and has to be set aside. This is why.

10. The tribunal, as is well established, has to provide legally adequate reasons for its decision. That is not an exacting test but it is a test which has to be met.

11. In this case it was conceivable that the claimant might succeed under paragraph 276 (ADE) of the rules; that he might conceivably (though it is difficult to see this) succeed under the rules contained in Appendix FM relating to partners; or that he might succeed on Article 8 ECHR grounds outside the rules. On reading the tribunal's written reasons it is apparent that the appeal has succeeded. It must, presumably, have succeeded on one of the above bases. But it is not ascertainable from the written reasons upon which basis it has succeeded.

12. In my judgment, if the appeal was being allowed under paragraph 276 (ADE), and I do not think it was but I am not sure, it would have been necessary for the tribunal to make appropriate findings as to that, to demonstrate it had the correct legal test in mind and then to explain its reasoning as to that test. It did not do that.

13. If it was allowing the appeal under Appendix FM it was required to explain why it was doing so. There had been no express concession on the part of the Secretary of State with respect to any elements of the requirements concerning leave under the Immigration Rules as a partner. But there is no identification in the decision as to what rules or parts of rules were considered to be relevant and how it has been concluded that the requirements of any such parts were, in fact, met.

14. If, as I suspect to be the case, the tribunal was intending to allow the appeal under Article 8 of the ECHR outside the rules, it was required to say something about why and the extent to which the rules were not met and then why, nevertheless, it considered this case to be one which it was proper to allow under Article 8 outside the rules. Such would have included a consideration of relevant private and family life findings (I am not clear, for example, whether it was accepted that the claimant enjoys family life within the meaning of Article 8 with his brother in the UK), findings about the nature and depth of the relationship with Ms [H] and whether the relationship was being characterised as family life or private life (as to that I note that they do not live together or at least did not do so at the time their witness statements were prepared for the hearing before the tribunal) and a consideration of the public interest considerations as set out in section 117B of the Nationality, Immigration and Asylum Act 2002. In my judgment all of those elements were lacking here.

15. My having reached the above conclusions there is no need to say anything more. Since I have decided to set aside the tribunal's decision I have also decided that remittal is the most appropriate course of action. That is because I do not intend to preserve the tribunal's findings and I consider, since matters will be starting afresh, the First-tier Tribunal is now the appropriate forum.

16. The Secretary of State's appeal to the Upper Tribunal, then, is allowed on the basis and to the extent explained above.

Decision

The decision of the First-tier Tribunal involved the making of errors of law and is set aside. Further, the case is remitted for rehearing before a differently constituted tribunal.

Signed: Date: 12 November 2018

Upper Tribunal Judge M R Hemingway

Anonymity

I make no anonymity directions. None was made by the First-tier Tribunal, none was sought before me and there does not appear to be any particular need for anonymity.

Signed: Date: 12 November 2018

Upper Tribunal Judge M R Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed: Date: 12 November 2018

Upper Tribunal Judge M R Hemingway