



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA235922014

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Birmingham
On 27th May 2016**

**Decision & Reasons
Promulgated
On 8th June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**MARLON IAN O'NEIL MALCOLM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Vokes of Counsel instructed by Purnells Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against the decision of Judge Obhi of the First-tier Tribunal (the FTT) promulgated on 8th July 2015.

2. The Appellant is a male Jamaican citizen born 6th April 1979 who applied for further leave to remain in the United Kingdom. The Respondent refused the application on 15th May 2014 and made a decision to remove the Appellant.
3. The reasons given for refusing the application were that the Appellant had previously been granted discretionary leave to remain on the basis of his family life with his British partner and his active role in the upbringing of her three British children. That relationship had broken down and the Appellant no longer played any role in the upbringing of the children, and therefore the Respondent decided that there had been a material change in circumstances and the Appellant no longer qualified for leave to remain.
4. The appeal was heard by the FTT on 24th June 2015. The appeal was based upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules. The FTT noted that the Appellant was in a new relationship with a British citizen and that he and his new partner had a child born on 22nd January 2015.
5. The FTT noted that the Appellant had a previous conviction for wounding which resulted in 28 months' imprisonment and that the Appellant had previously successfully appealed against the decision to make a deportation order. The FTT did not have a copy of the previous FTT decision.
6. The FTT balanced the private and family life of the Appellant against the public interest in relation to the safety of the public at large, and the importance of maintaining a fair and efficient immigration policy and decided to dismiss the appeal on the basis that the Respondent's decision to refuse the Appellant's application for leave to remain was proportionate.
7. The Appellant applied for permission to appeal to the Upper Tribunal and initially permission to appeal was refused.
8. The Appellant renewed the application relying in summary on three grounds which are summarised below.
9. Firstly it was contended that the FTT had acted unfairly and had erred in law in not considering the determination of the FTT promulgated on 21st September 2012, in which the Appellant's appeal against the making of the deportation order was allowed. Counsel who dealt with the appeal before the FTT was unaware that this determination was not within the bundle of documents provided to the FTT, as it was in Counsel's bundle. It was contended that the previous determination should have been the starting point in the decision making process following the guidelines in Devaseelan [2002] UKIAT 000702.
10. Secondly it was contended that the FTT had erred in assessing the best interests of the child and the FTT had no evidential basis for making a

finding that the Appellant's history of parenting was poor, and therefore concluding that the likelihood of him remaining an involved parent was not high.

11. Thirdly it was contended that the FTT had erred by failing to consider section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). The Appellant was the father of a British child, and therefore the FTT should have considered whether it would be reasonable to expect the child to leave the United Kingdom.
12. Permission to appeal was granted by Upper Tribunal Judge McWilliam. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 contending in summary that the FTT had directed itself appropriately and had not erred in law.
13. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision must be set aside.

Oral Submissions

14. Mr Mills accepted at the commencement of the hearing that the FTT had materially erred in law by failing to consider section 117B(6) of the 2002 Act.
15. Mr Vokes submitted that the FTT had also erred by failing to consider the determination which had allowed the appeal against the making of the deportation order and by making findings in relation to the Appellant's parenting without there being any evidential basis for those findings.
16. Mr Mills submitted that the FTT was entitled to make findings in relation to the Appellant's parenting, and had not erred in failing to consider the previous determination, as the appeal had been allowed based upon the Appellant's relationship with a previous partner and her children, and it was accepted that that relationship had ended, and the Appellant was now in a new relationship.

My Conclusions and Reasons

17. I announced at the hearing that the FTT had erred in law and the decision must be set aside.
18. I agreed with both representatives, that the FTT had materially erred by failing to consider section 117B(6). There was specific reference to this point in the skeleton argument that was before the FTT. It was accepted that the Appellant was the father of a British child, and therefore the FTT should have considered whether there was a genuine and subsisting parental relationship, and whether it would not be reasonable to expect the child to leave the United Kingdom.

19. I also found that the FTT erred materially by making findings on matters that had been covered in the previous determination, without having had sight of that previous determination. I should mention that the Tribunal file does not include the bundle of documents submitted on behalf of the Appellant and which were before the FTT, although there is a copy of the skeleton argument. In my view the FTT erred in paragraph 15 by concluding that no details had been given about the Appellant's offence, and the Appellant had provided no explanation or detail. There were details, together with the explanation given by the Appellant, in the previous determination.
20. The FTT erred by finding in paragraph 15;

"In the absence of information my starting point is the offence, which was clearly serious, and the period of imprisonment which further confirms this."
21. The previous determination referred to the relatively low risk posed by the Appellant and the fact that the offence was an isolated, albeit serious, offence of violence, and found that the Respondent's decision was not justified or proportionate.
22. I accept that the relationship considered by the previous Tribunal was not the relationship that the FTT was being asked to consider in the appeal against the Respondent's decision dated 15th May 2014. However the previous determination should have been the starting point according to the principles in Devaseelan, and the FTT has made findings on matters which were dealt with in the previous determination.
23. I find that for these reasons, with the main error being the failure to consider section 117B(6), the decision of the FTT is unsafe and must be set aside with no findings preserved. It is therefore not necessary to go on and consider the submission that the FTT erred in making findings as to the Appellant's parenting abilities.
24. Both representatives agreed, that because no findings could be preserved, it would be appropriate to remit the appeal back to the FTT to be heard afresh.
25. I have considered paragraph 7 of the Senior President's Practice Statements, and find that it is appropriate to remit the appeal back to the FTT because of the nature and extent of judicial fact-finding that will be necessary in order for this decision to be remade.
26. The appeal will be heard at the FTT Birmingham Hearing Centre, and the parties will be advised of the time and date in due course. The appeal is to be heard by an FTT judge other than Judge Obhi.
27. If either party seeks to rely upon documentary evidence that has not already been served, that evidence must be served upon the FTT and the other party no later than fourteen days prior to the next hearing date.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal with no findings of fact preserved.

Anonymity

There was no application made for anonymity and no anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

31st May 2016

TO THE RESPONDENT

FEE AWARD

The issue of any fee award will need to be considered by the First-tier Tribunal.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

31st May 2016