Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05745/2016

THE IMMIGRATION ACTS

Heard remotely by Skype for Business	**Decision & Reasons Promulgated**
On 8 December 2020	**On 22 February 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARTIAL PAUL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Mr P Deller, Senior Home Office Presenting Officer
For the respondent: Mr A Berry, Counsel, instructed by Southwark Law Centre

DECISION AND REASONS

Introduction

1. For ease of reading I shall refer to the appellant as the Secretary of State and to the respondent as Mr Paul.

2. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Monson ("the judge"), promulgated on 2 July 2018, by which he allowed Mr Paul's appeal.

3. As will become clear, this case involves a number of unusual issues, both procedural and substantive. I wish to state at the outset my gratitude to both representatives for the assistance they have provided. Both have acted with consummate professionalism and clarity of advocacy. In particular, Mr Deller has approached this case not only with a depth of legal knowledge, but also a degree of humanity which in my judgment was entirely appropriate in the circumstances.

4. In terms of the essential and non-controversial factual background, the following can be stated at this point. Mr Paul is a citizen of St Lucia, born on 28 September 1959 and was by birth a Citizen of the United Kingdom and Colonies ("CUKC"). His parents came to the United Kingdom in 1961, leaving him in the care of his grandparents. He came to the United Kingdom on 22 January 1974, at which point he was granted indefinite leave to enter ("ILE"). He arrived in possession of a passport in which he was described as a British subject. He went to live with his parents and settled into the life of this country. He has resided here ever since.

The first procedural issue: was there a valid appeal before the First-tier Tribunal?

5. The procedural issues begin with the decision against which Mr Paul appealed to the First-tier Tribunal in the first place.

6. 12 July 2005, Mr Paul made an application for indefinite leave to remain ("ILR"), an application that, for reasons set out later in this decision, was unnecessary.

7. For reasons which the Secretary of State has been entirely unable to provide (with no criticism of Mr Deller), this application was not decided until 5 April 2016 (the decision letter is dated 4 April 2016, but the date of determination of the application itself is said to be 5 April). The decision letter provides a detailed assessment of Mr Paul's claim to satisfy relevant provisions of the Immigration Rules and with particular reference to Article 8 ECHR. Towards the end of the letter, it is stated that the decision was appealable under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

8. On the 6 April 2016, and again for reasons which remain unexplained, the Secretary of State issued a decision to remove Mr Paul (IS.151B notice), pursuant to the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). This decision was also said to attract a right of appeal, arising from regulation 26 of the 2006 Regulations. It is manifestly the case that Mr Paul's circumstances had nothing whatsoever to do with EU law.

9. Mr Paul proceeded to appeal against the latter decision, although the type of decision being appealed against was said to be one concerning human rights (the relevant box to this effect is ticked on the notice of appeal). He specifically stated that his case had nothing to do with the 2006 Regulations and was in fact based entirely on ECHR rights.

10. When the appeal came before the First-tier Tribunal, the judge took the view that the right of appeal had arisen under the statutory regime in place before the changes

brought about by the Immigration Act 2014 and the consequent changes to Part 5 of the 2002 Act. He noted the irrelevance of the 2006 Regulations to Mr Paul's case.

11. On proper analysis, and as agreed by both representatives before me, the right of appeal in fact arose under the statutory regime as amended by the 2014 Act. By virtue of article 8 of the Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015/371, article 9 of the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014 was amended. This had the effect of applying the old statutory regime to a variety of decisions made on or after 6 April 2015 where the relevant application had been made before certain dates. However, the continued effect of the safety provisions did not apply if the decision in question was "also a refusal of… a human rights claim".

12. Two questions arise as a result: first, was Mr Paul's application for ILR a human rights claim?; second, was the Secretary of State's decision refusing that application a refusal of a human rights claim?

13. It is now common ground that Mr Paul's application did indeed constitute a human rights claim. I agree. The assertion that he should be granted ILR on the basis of long residence in the United Kingdom necessarily involved the claim that he had established a private and/or family life in this country and that his removal would disproportionately interfere with that protected right. This is consistent with case-law (including MY (refusal of human rights claim) Pakistan [2020] UKUT 89 (IAC)) and the Secretary of State's own guidance as set out in "Rights of Appeal" version 10, published on the 18 December 2020, at page 10, where it is stated that applications made under paragraph 276B Immigration Rules will be considered to be what are described as "human rights applications" (the previous versions of this guidance are identical in substance).

14. Therefore, the answer to the first question is "yes".

15. The Secretary of State's guidance states that the starting point will be that a refusal of a relevant application will give rise to a right of appeal. That is clearly supportive of Mr Paul's position that the Secretary of State's decision was a refusal of his human rights claim. Further, the decision letter itself confirms that Mr Paul had asserted that his removal from the United Kingdom would breach Articles 3 and 8 ECHR. The letter expressly considers these provisions, with particular emphasis on Article 8 within the context of the relevant Immigration Rules and without. On any rational view, the Secretary of State engaged with the human rights claim and went on to refuse it in all respects. Finally, the letter expressly states that there was a right of appeal attached to the refusal of Mr Paul's application for ILR.

16. The answer to the second question is also "yes".

17. It follows that the decision to remove Mr Paul with reference to the 2006 Regulations is, and always has been, a legal red herring. Whilst the decision to remove would have been validly made under section 10 of the Immigration and Asylum Act 1999,

my conclusion that there had in any event been a refusal of a human rights claim is sufficient to dispose of the first procedural issue.

18. The fact that the judge erroneously believed that the appeal arose in the context of the old statutory regime is beside the point. There had been an appealable decision and there was a valid appeal before the First-tier Tribunal.

The decision of the First-tier Tribunal

19. The appeal was heard in June 2018. I am unclear as to why there was such a delay in Mr Paul's case coming before the First-tier Tribunal.

20. I have already addressed the judge's erroneous approach to the applicable appellate regime and need say nothing more about it.

21. The judge went on to set out Mr Paul's history. He records that in the United Kingdom in 1974, Mr Paul had three children, born in 1979, 1980, and 1982. He had worked, received medical treatment, and spent time in prison. I note that Mr Paul had been convicted in 1990 of rape, threats to kill, and assault occasioning actual bodily harm, offences for which he was sentenced to 5 years' imprisonment.

22. The judge summarised the arguments put by Mr Paul's counsel (not Mr Berry) to the effect that Mr Paul had a right of abode in the United Kingdom. It was recorded that the Home Office Presenting Officer had essentially conceded that the appeal should be allowed on this basis.

23. The judge found as a fact that Mr Paul had entered the United Kingdom on 22 January 1974 in order to join his parents here and that he had resided in this country continuously ever since. He found that Mr Paul's mother had been a CUKC and had been able to settle in this country as a result. He also found that Mr Paul himself had been a CUKC as well. With reference to the Immigration Act 1971 ("the 1971 Act") and the relevant Immigration Rules in force at the time of Mr Paul's arrival in this country, the judge ultimately concluded that Mr Paul had possessed an entry certificate and that at all material times he had had a right of abode. Accordingly, the judge found that the Secretary of State's decision was unlawful in failing to recognise this status. Under the subheading "Notice of Decision", the judge stated that "I allow this appeal" (on a correct application of the applicable statutory regime, he should have stated that the appeal succeeded on Article 8 grounds).

The second procedural issue: was the appeal abandoned?

24. I turn next to the second of the procedural complications in this case. Although the Secretary of State originally refused Mr Paul's application for ILR (thereby refusing his human rights claim at the same time), following the promulgation of the judge's decision, she subsequently decided that a grant of ILR was appropriate. The grant was made on 11 February 2019.

25. Following the grant of permission to appeal to the Upper Tribunal, a rule 24 response was provided by Mr Paul's representatives. This contained the stated position that

the grant of ILR in February 2019 resulted in the appeal being treated as abandoned. The rule 24 response was subsequently resiled from.

26. The question arises as to whether the appeal did indeed fall to be treated as abandoned pursuant to section 104(4A) of the 2002 Act by virtue of the grant of ILR.

27. As with the right of appeal issue, both representatives are now in agreement that the appeal was not to be treated as abandoned. Again, I agree. The reason for this involves me stating at this juncture my conclusion on the substantive issue in this case, namely that Mr Paul has, since his arrival in this country in January 1974, had extant ILE and that the grant of ILR was a nullity. There was no effective grant of leave and section 104(4A) of the 2002 Act did not apply. The reasons underlying my conclusion on this issue will be set out in due course.

The grounds of appeal and grant of permission

28. The grounds asserted that the judge had been wrong to conclude that Mr Paul continued to have a right of abode in the United Kingdom. It was accepted that he had acquired a right of abode as of 22 January 1979 having resided in the United Kingdom for 5 years. However, on 22 February 1979 St Lucia gained its independence with the effect that Mr Paul became a national of that country, thereby losing his right of abode in the United Kingdom. He could not have become a British citizen upon enactment of the British Nationality Act 1981 (which came into force on 1 January 1983). The grounds acknowledged that Mr Paul might still be deemed to have ILR, but the judge allowed the appeal on an erroneous basis.

29. The application for permission to appeal was made some eight months out of time, as acknowledged by the Secretary of State at the time. The explanation provided was that there appeared to be no real prospect of success initially, but that an apparent threat of legal challenge by Mr Paul prompted the late application to be made. The application then came before the First-tier Tribunal for decision. It is clear from the reasons provided by the judge considering the application that she was not extending time. However, the actual notice of decision (the conclusion stated above the horizontal line on the notice) simply stated that the application was being "refused". When the application was renewed to the Upper Tribunal, Upper Tribunal Judge Grubb correctly stated that the First-tier Tribunal had "refused" the application and there was no longer any issue relating to timeliness. Judge Grubb saw merit in the Secretary of State's grounds and duly granted permission.

30. This aspect of proceedings explains why there was yet further delay in Mr Paul's case being dealt with.

Conclusions on error of law

31. As with all material aspects of this case, Mr Deller and Mr Berry are in agreement that the judge erred in law when concluding that Mr Paul had an extant right of abode in the United Kingdom.

32. I gratefully adopt the analysis provided by Mr Berry in paragraph 9 of his first skeleton argument:

> "…he [Mr Paul] ceased to be a CUKC on 22 February 1979 when St Lucia achieved independence within the Commonwealth, see the Saint Lucia Termination of Association Order 1978 (No. 1900). He became a St Lucia citizen under the Independence Constitution of St Lucia, article 99(1). In such circumstances, there was no basis for him to retain CUKC status under the Saint Lucia Modification of Enactments Order 1978 (No. 8099), article 3. Absent CUKC status, there was no other basis for him to hold a statutory right of abode in the UK under the 1971 Act, s2 (as then in force)."

33. Thus, the premise on which the judge allowed Mr Paul's appeal was fundamentally flawed. It follows that the decision of the First-tier Tribunal must be set aside.

Re-making the decision in this case

34. It is to be noted that at this stage Mr Paul has become the appellant once more and the Secretary of State resumes her status as the respondent.

35. This case is very much confined to its own particular facts and should not be seen as providing any precedent regarding the position of other long-term residents in the United Kingdom who are citizens of Commonwealth countries.

36. I am once again in agreement with the considered position of both representatives. I conclude that Mr Paul's ILE remained "protected" by virtue of section 1(5) of the 1971 Act, notwithstanding St Lucia's independence in 1979 and the extinguishing of his right of abode in the United Kingdom. This has had the effect that the ILE continued and is extant. Mr Paul's application for ILR 2005 was therefore unnecessary and the subsequent grant of that status in 2019 was a nullity.

37. The legal route by which this conclusion has been arrived at is as follows.

38. Mr Paul's mother entered the United Kingdom in 1961, prior to the enactment of the Commonwealth Immigrants Act 1962. Thus, she entered without control or restriction as to the period she was able to reside here. On commencement of the 1971 Act on 1 January 1973, she acquired a statutory right of abode in the United Kingdom under section 2(1)(c), having been by that time ordinarily resident and settled in this country for the previous five years.

39. Mr Paul entered this country as the minor child of parents settled in United Kingdom. At that time, section 1(5) of the 1971 Act read as follows:

> "(5). The rules [the Immigration Rules] shall be so framed that Commonwealth citizens settled in the United Kingdom at the coming into force of this Act and their wives and children are not, by virtue of anything in the rules, any less free to come into and go from the United Kingdom and if this Act had not been passed."

40. Section 1(5) had the effect of preserving for Mr Paul the freedom from restrictions and time limits arising out of the Commonwealth Immigrants Act 1962, as amended by the 1968 Act of the same name. This was because both Mr Paul's parents were

residing in the United Kingdom at the point of his admittance, his mother was a Commonwealth citizen, and he was under 16 years of age. Therefore, no provisions of the Immigration Rules from 1973 onwards could reduce the benefits consequent upon the initial grant of ILE to Mr Paul. This legal status and protection arose by operation of law (i.e. the 1971 Act) and not as a result of a permissive act by the executive.

41. Section 1(5) remained in force as at the date of St Lucia's independence in 1979. In this way, that provision was, as Mr Berry put it, "always speaking" to Mr Paul's circumstances and the loss of the right of abode in 1979 did not also result in him losing the statutory protections afforded by section 1(5). Indeed, as a citizen of St Lucia, Mr Paul remained a Commonwealth citizen and the beneficiary of the statutory protection. In short, he remained in the United Kingdom lawfully, albeit as a person subject to immigration control (which she had not been whilst enjoying the right of abode for the very brief period in 1979).

42. By virtue of section 1 of the Immigration Act 1988, section 1(5) of the 1971 Act was repealed. However, article 3 of the Immigration Act 1988 (Commencement No.1) Order 1988/1133, provided that those wives and children of a Commonwealth citizen settled in the United Kingdom on 1 January 1973 who had come to this country after that citizen and who had already been benefiting from the protection offered by section 1(5) would continue to do so. It is accepted by both parties that this ongoing protective measure applied to Mr Paul. I agree.

43. In this way (which I have somewhat foreshortened here, intending no disrespect to the research and lucid exposition provided by Mr Berry and ultimately supported by Mr Deller, who has applied his own considerable knowledge to the issue), the conclusion is reached that Mr Paul has resided lawfully in the United Kingdom with ILE since his arrival here on 22 January 1974.

44. There are two important consequences of this. First, it is accepted by Mr Deller that the decision of 5 April 2016 refusing to grant Mr Paul ILR and at the same time refusing his human rights claim is unlawful under section 6 of the Human Rights Act 1998 on one or other of two bases: either it is not in accordance with the law under Article 8(2) because Mr Paul already had ILE and there are no grounds on which to remove him pursuant to the refusal of the claim; alternatively, the decision is a disproportionate interference with Mr Paul's obvious private life (and possibly family life) in the United Kingdom.

45. The second agreed consequence is that the purported grant of ILR in February 2019 was a nullity as Mr Paul already had ILE. The fact that Mr Paul had mistakenly believed that he needed to apply for ILR makes no difference to this. In this way, the abandonment provision under section 104(4A) of the NIAA 2002 is not triggered because there has been no legally effective grant of leave.

46. Bringing these very unusual circumstances together, I conclude that the respondent's refusal of the human rights claim constitutes a disproportionate interference with Mr

Paul's private life, as protected by Article 8. The decision is therefore unlawful under section 6 of the Human Rights Act 1998.

47. On this basis, Mr Paul succeeds in his appeal.

48. Following a discussion with the representatives at the hearing on the issue of outcomes, it was thought that the most appropriate action to be taken by the Secretary of State in light of my findings and conclusions would be to issue Mr Paul with a no time limit biometric residence permit or to endorse a passport to like effect. I have no power to order this, but I would expect the Secretary of State to adopt the appropriate measures to remedy the situation in which Mr Paul has found himself.

Notice of Decision

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

50. I set aside the decision of the First-tier Tribunal.

51. I re-make the decision by allowing Mr Paul's appeal on Article 8 ECHR grounds.

Signed: *H Norton-Taylor* **Date: 5 February 2021**

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award of £140.00.

Signed: *H Norton-Taylor* **Date: 5 February 2021**

Upper Tribunal Judge Norton-Taylor