Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/05622/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons**
On 25 November 2014	**promulgated on 2 December 2014**

Before

The Honourable Mrs Justice Elisabeth Laing DBE
Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Orville Paul Sanchez
(No anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellant:	Mr. S. Harding of Counsel instructed by Baron Grey, Solicitors.
For the Respondent:	Mr. M. Shalliday, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Steer promulgated on 30 July 2014, dismissing the Appellant's appeal against a decision dated 16 January 2014 to remove him from the UK.

Background

2. The Appellant is a national of Jamaica born on 8 August 1979. He entered the UK on 17 December 2001 with limited leave for six months as a visitor. The Appellant overstayed. He took no steps to regularise his immigration status until he made an application for leave to remain on 8 November 2011, relying upon Article 8 of the ECHR with

reference to his relationship with Ms Zoreena Sacha Hines, a British citizen, with whom he lived, together with their son Kymani Paul Sanchez (d.o.b. 6 January 2010). Whilst the Appellant's application was pending he and Ms Hines had a further son, Jayden George Sanchez (d.o.b. 1 November 2012). Both of the Appellant's children are British citizens.

3. The application was initially refused on 7 December 2012 without a right of appeal. However, subsequent to the commencement of judicial review proceedings the Respondent agreed to reconsider the application.

4. In due course the Respondent again refused the Appellant's application for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 16 January 2014, and on the same date made the consequent decision to remove the Appellant.

5. The Appellant appealed to the IAC. The First-tier Tribunal Judge dismissed the appeal for reasons set out in her determination.

6. The Judge decided that the Appellant did not meet the requirements of the Immigration Rules - in particular paragraphs 276 ADE, 353B, and the rules in respect of leave to remain as a partner, and leave to remain as a parent, under Appendix FM - and also concluded that there were no exceptional circumstances that warranted a favourable consideration under Article 8 of the ECHR. However, she did make a number of favourable findings in respect of the fact of the Appellant's relationship with his partner and children, concluding: "*I find that the Appellant has been living permanently with Ms Hines since they moved to 69 Burns Avenue in 2009, and that they remain in a genuine and subsisting relationship*" (paragraph 18). The Judge also identified that insofar as paragraph EX.1 might be applicable, there would be no financial requirement for the Appellant to satisfy under the Rules (paragraph 19).

7. Otherwise, the Judge concluded that "*there were no "non-standard and particular features" demonstrating that removal would be unjustifiably harsh*", noting in particular that the Appellant "*spent the first 22 years of his life in Jamaica… has supported himself in the UK by cooking so could continue that occupation in Jamaica… has maternal cousins living in Jamaica who could assist with his settlement there… [and has] failed to provide any country evidence that he would be unable to find employment or accommodation in Jamaica*". The Judge also observed in respect of Ms

Hines, "*His partner has never visited Jamaica, but her mother was born there*". (See paragraph 21.)

8. In respect of the Appellant's children and section 55 of the Borders, Citizenship and Immigration Act 2009, the Judge stated:

"*In relation to section 55 of the Borders, Citizenship and Immigration Act 2009, both the Appellant's children are British. They are aged 4 years old and 14 months old, respectively. They could remain living in the UK with their British citizen mother. Alternatively, I have found that there are no insurmountable obstacles to them relocating to Jamaica with both their parents.*"

9. The Appellant sought permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Foudy on 10 October 2014.

Error of Law

10. There was some discussion during the hearing as to the construction of paragraph EX.1 of Appendix FM, and its interrelationship with the various 'routes' under Appendix FM - in particular the 'partner route' (section R-LTRP) and the 'parent route' (section R-LTRPT) which potentially apply in this case. Mr Shalliday took instructions to clarify the Respondent's position. He then accepted on behalf of the Respondent that there had been a material error of law in the Judge's approach to the Appellant's case under paragraph EX.1.

11. Section EX of Appendix FM is headed 'Exception'. Paragraph EX.1 in fact contains two exceptions: EX.1.(a) in respect of situations where the applicant has a genuine and subsisting parental relationship with a child falling within a specified category; and EX.1.(b) where the applicant has a genuine and subsisting relationship with a partner falling within a specified category. There is nothing in the wording of EX.1 or otherwise in the construction of Appendix FM which suggests that the 'parent exception' can only apply in cases where the 'parent route' is being considered, or that the 'partner exception' can only apply in cases where the 'partner route' is being considered. It is on this point that Mr Shalliday took express instructions. He confirmed that it was the Respondent's position that either of the exceptions could avail an applicant, whatever the route by which the applicant reached section EX.1. In our judgement this concession is properly made. We do not consider that there is anything in the drafting of Appendix FM that suggests any alternative construction.

12. The tests under EX.1.(a) and EX.1.(b) are different. In respect of the 'parent exception' the test is whether "*it would not be reasonable to expect the child to leave the UK*" (EX.1.(a)(ii)); in respect of the partner exception the test is whether "*there are insurmountable obstacles to family life with the partner continuing outside the UK*" (EX.1.(b)).

13. At paragraph 20 of her determination the First-tier Tribunal Judge quoting from **Gulshan [2013] UKTV 00640 (IAC)** recognised that there was a qualitative difference in these tests – "*It [- the insurmountable obstacle test -] is said to be a different and more stringent assessment than whether it would be "reasonable to expect" the applicant's partner to join them overseas… [A] significant degree of hardship or inconvenience does not amount to an insurmountable obstacle*".

14. However, paragraphs 20 and 24 of the determination demonstrate that the First-tier Tribunal Judge did not have regard to EX.1(a), and otherwise only considered the children's position by reference to 'insurmountable obstacles'. The Judge did not consider whether it would be 'reasonable to expect' the children to leave the UK. The context was that the Judge, was satisfied that it was appropriate to consider EX.1 because the Appellant otherwise met the requirements of the partner route. The Judge's error was thereafter to focus only on the 'partner exception' and not also to evaluate the 'parent exception', by reference to the reasonableness of expecting the children to leave the UK.

15. As noted above, Mr Shalliday realistically conceded that this amounted to a material error of law.

16. We pause to note that had it been necessary we would have been minded to conclude that the Judge had conducted an inadequate assessment of the children's best interests. Although she referred to section 55 at paragraph 24 of the determination, all that then follows is some short observation as to the age of the children and the possibility of their remaining in the UK notwithstanding the removal of their father, or relocating with their mother to Jamaica. There is no attempt to evaluate or otherwise make any finding in respect of whether either such arrangement would be in the children's best interests, compared with, for example, remaining in the UK with both their father and their mother.

17. Be that as it may, in light of the Respondent's concession in respect of paragraph EX.1, we find that the First-tier Tribunal Judge erred in law by not properly directing himself in accordance with the Rules. The decision of the First-tier Tribunal is set aside accordingly.

Re-making the Decision

18. Neither representative considered it was necessary for the Tribunal to hear any further evidence in the appeal, or for the appeal to be remitted to the First-tier Tribunal. We endorse that approach. The findings of fact in respect of the Appellant's relationship with Ms Hines and their cohabitation since 2009 were not challenged. They are an agreed premise for the further consideration of this appeal.

19. Mr Shalliday invited the Tribunal to conclude that the decision of the Respondent had not been in accordance with the law and that accordingly the Tribunal should in effect remit the matter to the Respondent to determine the outstanding application in accordance with the law. Mr Harding invited the Tribunal to determine the appeal substantively under the Rules.

20. On the basis of the unchallenged findings of the First-tier Tribunal Judge – and save in one regard which we address below - there is now no controversy that the Appellant is able to 'reach' EX.1 via the partner route: R-LTRP.1.1.(d). Mr Shalliday did not dispute that the Appellant met the eligibility requirements at E—LTRP.1.2-1.12 and 2.1. It was also accepted that the Appellant met the suitability requirements, save with the possible exception of S-LTR.1.6 by reference to the fact that he had been convicted on 15 October 2010 of possession of a Class A drug and fined £250. Mr Shalliday also conceded that it would not be reasonable to expect the children to quit the UK.

21. Mr Shalliday argued that the discretion under S-LTR.1.6, had not been considered by the Respondent, and in such a circumstance it should not be exercised for the first time by the Tribunal: see **Ukus (discretion: when reviewable) [2012] UKUT 307**.

22. We note from the RFRL dated 16 January 2014 that the Respondent's decision-maker clearly had it in mind that the Appellant had been convicted of a criminal offence on 15 October 2010. It is expressly referred to at the foot of the first page of the RFRL.

23. It is also to be noted that when setting out consideration under both the 'partner route' and the 'parent route' the Respondent referred to the suitability requirements stating, respectively: "*It is considered that your application will not fall for refusal under the suitability requirements of Appendix FM*", and "*Your case will not fall for refusal under suitability requirements of Appendix FM*".

24. We add, parenthetically, that it seems to us no very great surprise that the Respondent would not have concluded that the Appellant's offending, which was the subject way of a £250 fine, over three years before the decision, did not indicate in short, that the Appellant's presence in the UK was not conducive to the public good. Of greater significance, however, in the context of the arguments before us, is that in, our judgement, Mr Shalliday's submission (that the Respondent has not given consideration to this matter) is unsustainable. It is clear that the decision-maker had regard to the Appellant's offending and found it did not justify defeating his application; regard was had to the 'suitability requirements', necessarily including S-LTR.1.6. It is also apparent that 'suitability' was not an issue relied upon by the Respondent before the First-tier Tribunal.

25. Accordingly, we find that the Appellant has demonstrated on a balance of probabilities that he meets the requirements of each of R-LTRP.1.1 (a), (b) and (d). In respect of RLTRP.1.1.(d), and for the avoidance of any doubt, we accept the decision-maker's initial concession that the Appellant's application did not fall for refusal under the suitability requirements as properly made; the Appellant meets the applicable eligibility requirements (as was the finding iof the First-tier Tribunal); and paragraph EX.1.(a) is satisfied (as is now conceded by Mr Shalliday).

26. In this latter respect, and generally, for the avoidance of any doubt we have had regard to section 55 of the 2009 Act. We consider that the best interests of the children are served by remaining with both of their parents in the UK. We recognise, however, that 'best interests' is only a starting point for any consideration under either the Rules or Article 8 of the ECHR.

27. Again for the avoidance of any doubt, we have noted the provisions of sections 117A–D of the Nationality Immigration and Asylum Act 2002, as amended by the Immigration Act 2014. Because we have found that this appeal is to be allowed under the Immigration Rules, we have not embarked on a relevant assessment pursuant to 117A(1). So the various public interest considerations there specified do not apply directly –

although we recognise that to a very large extent they have informed the balance that Appendix FM seeks to strike.

28. In conclusion, the Respondent's decision was not in accordance with the Immigration Rules. The Appellant met the requirements of Appendix FM, section R-LTRP.1.1.(a), (b) and (d), and further leave to remain should have been granted pursuant to D-LTRP.1.2 accordingly.

Notice of Decision

29. The decision of the First-tier Tribunal Judge involved a material error of law and is set aside.

30. We re-make the decision in the appeal. The appeal is allowed under the Immigration Rules.

Deputy Judge of the Upper Tribunal I. A. Lewis 1 December 2014