



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/74729/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11 January 2016

Determination Promulgated
On 25 January 2016

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TOMMY ROLAND GAYLE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms J. Rothwell, counsel, instructed by Fisher Jones Greenwood Solicitors

For the Respondent: Mr. D. Clarke, Home Office Presenting Officer

DECISION AND REASONS

History of Appeal

1. The Appellant, who was born on 9 July 1979, is a citizen of Jamaica. He first arrived in the United Kingdom on 24 January 2002. He applied for asylum but his application was refused. On 23 December 2002 he married Michelle Gayle, who is a British citizen, and they had a son, who was born on 19 January 2004. The Appellant's relationship with his wife broke down and he started a relationship with Danielle Peak

and their son was born on 1 September 2004. The Appellant's relationship with this partner also broke down and he returned to Jamaica in August 2007.

2. He married Jessica Gayle, who is also a British citizen, in Jamaica on 18 September 2007 and he was eventually granted entry clearance as her husband on 27 February 2009. Their son was born on 17 July 2010. The Appellant separated from this second wife at the end of 2011.
3. Meanwhile, the Appellant was refused indefinite leave to remain in July 2011 but was granted discretionary leave to remain until 10 July 2014 on the basis of his contact with his children. He was refused further leave to remain on 11 November 2014. The Respondent noted that he had had further convictions on 14 September 2014 and 30 November 2014 and concluded that it would be undesirable to permit him to remain in the United Kingdom as he was a persistent offender. She also asserted that there was insufficient evidence to show that you are maintaining regular contact with you children. He appealed against this decision on 24 November 2014. First-tier Tribunal Judge Bart-Stewart dismissed his appeal in a decision promulgated on 14 July 2015 and the Appellant appealed against this decision on 27 July 2015. First-tier Tribunal Judge Nicholson granted him permission to appeal on 29 October 2015

Error of Law Hearing

4. Counsel for the Appellant relied on the fact that paragraph 10 of the IDI on *Discretionary Leave* that individuals who had been granted discretionary leave to remain before 9 July 2012 would normally continue to be dealt with under that Policy through to settlement. She also noted that this paragraph went on to state that consideration of all further leave applications would be subject to a criminality check and the application of criminality thresholds. Paragraph 2.5 then stated that a person will normally be granted six months discretionary leave to remain where he or she cannot be removed because of the United Kingdom's obligations under the European Convention on Human Rights and do not fall within the *Restrictive Leave* policy.
5. When the Respondent did undertake a criminality check in relation to his latest application for leave to remain she would have become aware that on 30 November 2011 he had been convicted on possessing cannabis, producing a controlled drug and driving whilst disqualified and without insurance and had been sentenced to a suspended 16 week period of imprisonment.
6. At paragraph 23 of her decision First-tier Tribunal Judge Bart-Stewart accepted that the transitional arrangements in the IDI applied but found that the Appellant "fell foul" of the criminality threshold. The Home Office Presenting Office relied on the fact that Schedule 1 to the Serious Crimes Act 2007 referred to the unlawful production of a controlled drug as being a serious crime. However, the Judge did not refer to this Act and she did not explain how he "fell foul" of this threshold or why, even if he did, he should not have been entitled to a further six months of discretionary leave to remain if his relationship with his children still subsisted.
7. Any such finding was also dependent upon her finding of whether the Appellant's wider circumstances had not changed because he was still in contact with his children and, therefore, it would be a breach of Article 8 of the ECHR for him to be removed to Jamaica.

8. The evidence before First-tier Tribunal Bart-Stewart indicated that he had no on-going contact with his older child, who had been taken into care. It also indicated that he had little contact with his second child. However, there was a letter from his youngest child's mother, dated 21 October 2014, at page 234 of the Appellant's Bundle, which confirmed that the Appellant had regular contact with their son. She also said that "it would be very detrimental to [her son's] upbringing and development if he didn't have regular contact and a positive relationship with his father" and that they had "a solid bond and love spending time together". In a further letter, dated 1 June 2015, she said that the Appellant saw her son every few Sundays and that it was "important for him to have a male role model in his life and to learn about his background and his culture" and that it enabled her son to have a relationship with his paternal grandmother.
9. There were also letters from the Appellant's current partner and also his mother which confirmed that the Appellant had contact with his youngest child every other Sunday. They also confirmed this in their oral evidence at the hearing. However, when First-tier Tribunal Judge Bart-Stewart reviewed the evidence in paragraphs 23 and 24 of her decision she did not refer to this further evidence or make any finding that these witnesses had not given credible evidence.
10. Instead she focused on the fact that Jessica Gayle had not attended the hearing. The Appellant had explained in his oral evidence that she was not able to do so as she had to attend a tutorial at university. In response First-tier Tribunal Judge said that "had she considered the Appellant's presence in the United Kingdom and active involvement in her son's life to be as important as claimed, I consider that she would have taken time to attend the hearing". In doing so she failed to consider the totality of the evidence before her.
11. First-tier Tribunal Judge Bart-Stewart then found in paragraph 24 that the Appellant's relationship with his son was one which could be maintained without him living in the United Kingdom. This appeared to part of her consideration of the Appellant's article 8 rights but this was not totally clear from her decision as she did not remind herself of the criteria which needed to be taken into account when considering Article 8 outside the Immigration Rules.
12. In paragraph 26 of her decision she referred in part by rehearsing the head note to *AM (Section 117B) Malawi* [2015] UKUT 260 (IAC) but then failed to apply section 117B to the facts of the Appellant's case. In particular, she did not remind herself that section 117B(6) states that "in the case of a person who is not liable to deportation, the public interest does not required the person's removal where- (a) the person is in a genuine and subsisting parental relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom.
13. Therefore, she should have considered whether the Appellant did have a genuine and subsisting parental relationship with his youngest child, who is a British citizen and, as a consequence, a qualifying child. She also failed to consider whether it would be reasonable to expect his son to leave the United Kingdom.
14. The Home Office Presenting Officer referred to paragraph 63 of *Damion Harrison (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 1736 but in my view the Judge in that case was addressing EU law not Article 8 of the ECHR.

The Home Office Presenting Officer also argued that the Appellant did not have parental responsibility for his son. However, as he was married to his son's mother, he clearly did.

15. For all of these reasons I find that First-tier Tribunal Judge Bart-Stewart did make material errors of law in her decision.

Decision

16. I set aside First-tier Tribunal Judge Bart-Stewart's decision.
17. I remit the Appellant's appeal to the First-tier Tribunal to be heard before a First-tier Tribunal Judge other than First-tier Tribunal Judge Bart-Stewart. .

Date: 18 January 2016

Nadine Finch

Upper Tribunal Judge Finch