



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18253/2015

THE IMMIGRATION ACTS

Heard at Field House
On 3rd November 2017

Decision & Reasons Promulgated
On 7th December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR. ADRIAN ALEXIA SMITH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss Z Ahmad, Home Office Presenting Officer
For the Respondent: Mr T Hodson, Counsel instructed by Elder Rahimi Solicitors

DECISION AND REASONS

1. The appellant before me, is the Secretary of State for the Home Department. However, for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to Mr. Smith as the appellant and the Secretary of State as the respondent.
2. The appellant is a Jamaican national who appealed to the First-tier Tribunal ("FtT") against a decision of the respondent dated 29th April 2015 refusing his application for indefinite leave to remain in the UK on the basis of his family and private life. The appellant's immigration history is set out at paragraphs [4] and [5] of the decision of

the FfT Judge Greasley and I do not repeat it here. At paragraphs [6] to [9] of his decision, the Judge sets out the respondent's reasons for refusing the application. At paragraphs [11] to [28] of the decision, the Judge sets out the evidence. His findings and conclusions are to be found at paragraphs [31] to [34] of the decision. At paragraphs [31] and [32], the Judge states:

"31. ...I find that the appeal must be allowed under the immigration rules and specifically Appendix FM in relation to the partner route. I am satisfied that both the suitability and eligibility criteria within Appendix FM are both engaged and satisfied. I do accept, on balance, that there is credible and consistent evidence that both the appellant and his partner Alicia are in a genuine and subsisting relationship akin to marriage, even though they have had their problems from time to time. I accept that Alicia is a British Citizen, having considered her original British passport.

32. I accept that the parties are living together and intend to do so permanently in the United Kingdom. I also accept that there is credible evidence, emanating both from the appellant and Alicia's mother, explaining [sic] the circumstances as to why the partner is unable to attend the appeal hearing and give [sic] oral evidence. She has, nonetheless, provided the details which I find remains consistent with [sic] the oral evidence that I have received from both the appellant and Alicia's mother."

3. The Judge concluded, at [33], that the appeal must be allowed in relation to the provisions of Appendix FM in relation to the partner route. The Judge also accepted that there is credible evidence that the appellant is the biological father of the two children.
4. The respondent contends that in reaching his decision, the Judge failed to make any findings in respect of the exceptions set out at E.X.1(b) and EX.2 of Appendix FM. That is, the Judge failed to consider whether there would be any insurmountable obstacles to family life between the appellant and his partner continuing outside the UK, and if there are any such insurmountable obstacles, what they are. The Judge therefore erred in failing to consider a material issue.

5. Permission to appeal was granted by FfT Judge Kelly on 22nd August 2017. The matter comes before me to consider whether or not the decision of the FfT Judge involved the making of a material error of law, and if the decision is set aside, to re-make the decision. At the conclusion of the hearing before me, I informed the parties that I allow the appeal and that I shall remit the matter for hearing before the FfT. I informed the parties that I would give my full decision in writing. This I now do.
6. At the hearing before me, Miss Ahmad relied upon the grounds of appeal. She submits that put simply, in order to succeed in the claim under the immigration rules, the Judge had to be satisfied that the requirements of the exception set out at EX.1.(b) of Appendix FM, was met. That is, the appellant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, and there are insurmountable obstacles to family life with that partner continuing outside the UK. She submits that although the Judge found that the appellant has a genuine and subsisting relationship with a partner who is a British Citizen, the Judge failed to address whether there are insurmountable obstacles to family life with that partner continuing outside the UK
7. In reply, Mr. Hodson relied upon the appellant's rule 24 response dated 1st November 2017. He submits that while the FfT Judge may not have made an express finding, it is nevertheless *Robinson obvious* that it would not be reasonable to expect either child to leave the UK and live in Jamaica, on the findings made by the Judge. The children were both born in the UK, and have lived here continuously. The eldest was 11 years old at the time of the hearing and the youngest, 6 years old.
8. It is common ground between the parties that in order to succeed in an application under the immigration rules, the appellant would have had to have satisfied the FfT Judge that he meets the requirements of paragraph EX.1 of Appendix FM. It is right to say that the Judge refers to Appendix FM of the Immigration Rules and made findings in favour of the appellant particularly with regard to his relationship with his partner, and the two children. The Judge's overall conclusions are to be found at paragraphs [31] to [34] of the decision, but nowhere in those paragraphs does the

Judge deal with the additional requirements of paragraph EX.1 of Appendix FM. It is useful to set out the requirements of paragraph EX.1

EX.1. This paragraph applies if

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

9. Whether or not the requirements of the exception to certain eligibility requirements for leave to remain as a partner or parent were met, was crucial to the decision. The F&T Judge states, at [31] and [33], that the appeal must be allowed in relation to the partner route. The Judge found that the appellant and his wife are in a genuine and subsisting relationship akin to marriage and that the appellant’s partner is a British Citizen. The Judge also found that the appellant is the biological father of the two children. Insofar as the Judge allowed the appeal under the partner route, the Judge fails to address the additional requirement of paragraph E.X.1(b). That is, whether there are insurmountable obstacles to family life with that partner continuing outside

the UK. Insofar as the appellant's claim is based upon his right to a family and private life with his children, the Judge fails to address the requirement of paragraph E.X.1(a)(ii). That is, taking into account their best interests as a primary consideration, it would not be reasonable to expect the children to leave the UK. I reject the submission by Mr Hodson that I can infer from the decision and the other findings made, that the Judge of the FtT resolved those matters by inference, in favour of the appellant.

10. It would be open to the Judge to allow the appeal on the basis that the applicant has a genuine and subsisting relationship with a partner who is a British citizen, but that is subject to the additional requirement that there are insurmountable obstacles to family life with that partner continuing outside the UK. In my judgment, that is a matter that is not either expressly or by inference, dealt with by the decision of the FtT Judge. There is therefore, as Mr Hodson quite rightly in my judgment accepts, a gap in the findings that are made by the FtT Judge. I do not accept that that gap can be filled by inferences to be drawn from the decision.
11. In my judgement, the decision of the FtT is infected by a material error of law. It seems to me that the most appropriate course in those circumstances is for the matter to be remitted back to the FtT for those matters to be properly considered. There is no reason why the findings that were made by the FtT Judge in relation to the relationship both with the appellant's partner, and his children, should not be preserved. Miss Ahmad did not seek to persuade me to the contrary.

Notice of Decision

18. The appeal is allowed and the decision of FtT Judge Greasley is set aside.
19. The appeal is remitted to the First-tier Tribunal for a fresh hearing of the appeal.
20. No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Mandalia

Date

28th November 2017

TO THE RESPONDENT
FEE AWARD

The appeal before me has been allowed and the appeal is remitted to the FfT. In the circumstances, I set aside the fee award made by FfT Judge Greasley.

Signed

Date

28th November 2017

Deputy Upper Tribunal Judge Mandalia