



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/12207/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28 October 2015

Decision & Reasons Promulgated
On 26 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAVID JAMESON
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr M Muitulu (Just and Brown Solicitors)
For the Respondent: Ms A Everett (Presenting Officer)

DECISION AND REASONS

1. This is the appeal of David Jameson, a citizen of St Lucia born 21 March 1972, originally against the decision of the Respondent of 25 February 2014 to issue removal directions against him under section 47 of the Immigration Asylum and Nationality Act 2006 having refused his application for further leave to remain, and now with permission to appeal against the decision of the First-tier Tribunal which dismissed that appeal.

2. He had applied for further leave to remain on 29 January 2014 on the basis of his family life in this country, with his wife [EJ] born 16 March 1971, and their children [MJ], born 2 February 1999 and [KJ], born 2 March 2008, all nationals of St Lucia, the children having been born here; his wife had two sons from an earlier relationship, [D] and [M], born 3 February 1995 and 18 April 1996, who had lived in St Lucia between 1997 and 1999, now British citizens both, as was their natural father. Mr Jameson arrived here in August 2005 with a view to visiting [EJ] and [MJ], who were themselves present in this country to see [EJ]'s sons [D] and [M], who their mother felt were being subjected to abuse: she had found it difficult to subsequently return to St Lucia absent resolution of this situation. She also had a granddaughter, five months old, and a British citizen. She had applied for leave to remain on 27 March 2012.
3. He had overstayed alongside her, working to support the family, and she had been later granted shared custody of the boys. They continued to need the support from him. In January 2014 the boys' father [ML] had required [M] to leave the family home. [M] was an outstanding student who had performed exceptionally well at school, and was then working with a view to taking a number of examinations in May or June 2014, and was a promising athlete whose accomplishments in shot put and basketball caused his teachers to believe that he had the ability to achieve great success and compete at the highest level. The Appellant was an active member of the Seventh Day Adventist Church who assisted elderly church members who were unable to attend because of age or infirmity. He had studied courses in English and Mathematics and was now on a three-year course studying renewable energy, and believed he could make a valuable contribution to this country.
4. The First-tier Tribunal commended the Appellant for his candour, exemplified by his freely identifying the substantial numbers of siblings they had in St Lucia, and so determined the appeal on the basis of the factual history advanced by him. The decision to dismiss the appeal under the Rules was because the Appellant did not qualify under the partner route as his wife was lacked the settled status required to be a Sponsor under Appendix FM, and under the parent route because the couple were in an extant relationship; as to their private life, there were no insurmountable obstacles to the Appellant's relocation to St Lucia given that he retained family connections in St Lucia, where he would be able to speak the language, and where he had lived until the age of 33. Outside the Rules, the First-tier Tribunal accepted that there was no interference likely to occur with the parties' family life, as it was more likely than not that the family would return abroad together. The connections between the Appellant and his wife's adult children were moderate and any financial dependency they had developed with him was quite recent. On a return to St Lucia, the family unit would have the advantage of both adults' numerous siblings on which to rely, and any connections with the community in this country, including the church and their work here, had been established on a precarious basis.
5. The critical factor in the appeal was the best interests of Malachi who had been here from just under the age of six until the present date, when (at the time of the First-tier Tribunal hearing) he was set to be taking his GCSE examinations in June 2015; Kandi

had lived here since her birth on 2 March 2008. The Judge did not accept that it would be unreasonable to expect Malachi to return abroad to make a new life with his family in their own country, given there was no independent documentary evidence relating to his progress at school, his prospects of success in his GCSEs bearing in mind his likely achievements in this country weighed against the possibility of equivalent qualifications being attained in St Lucia, and the sporting opportunities there; and there was no evidence as to whether a single year set back in his education caused by an interruption in his studies would have any real significance to him in the long run. The children would have the advantage of an extended family to help them assimilate there. None of this was to punish the children for parental wrong-doing, a matter of which they were innocent: rather the decision reflected a return to the status quo that should and would have prevailed were it not for their parents' transgression of the Immigration Rules in this country.

6. The Appellant's grounds of appeal challenged this decision on the basis that the First-tier Tribunal had not considered Malachi's degree of integration in this country, failed to take the views of the children into express account, failed to assess the interests of the Appellant's wife's adult children who were still part of the family unit, and failed to consider the contribution the family had made to the community in the United Kingdom. The First-tier Tribunal having originally refused permission to appeal, Judge McWilliam of the Upper Tribunal granted permission on 18 May 2015 on the basis that it was arguable that inadequate consideration had been given to the question of reasonableness.
7. At the hearing before me, Mr Muitulu made submissions consistent with grounds of appeal; for the Secretary of State Ms Everett accepted that this was an appeal that could have been determined either way, but maintained that there was enough reasoning to support the outcome chosen by the First-tier Tribunal which had not erred in law.

Findings and reasons

8. A consideration of immigration appeals involving the right to private and family life outside the Immigration Rules must give central attention to the statutory considerations identified in 117B of the Nationality Immigration and Asylum Act 2002 addressing the public interest considerations applicable in all such cases, which sets out:
 - “(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child (has lived in the United Kingdom for a continuous period of seven years or more), and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.”
9. Christopher Clarke LJ stated in *EV (Philippines)* [2014] EWCA Civ 874:

“34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.”

10. Alongside him Lewison LJ stated at [60] that

“... none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world.”

11. Overall the decision of the First-tier Tribunal is an impressively detailed one, and the thought processes that led it to its conclusions are set out extensively. There is nothing within it that is inconsistent with the guidance just cited from *EV Philippines*. It can certainly not be criticised for any inadequacy of reasons or failure to take relevant considerations into account. I note that the First-tier Tribunal began by making a provisional conclusion as to proportionality at paragraph 39, which focuses on the circumstances of the Appellant and his limited ties with this country, before proceeding to decide whether Malachi's own length of residence and connections here displaced “the provisional balance arrived at”. There is nothing objectionable in so doing: as Lord Hodge stated in *Zoumbas* [2013] UKSC 74 at [25], “It was legitimate for the decision-maker to ask ... first whether it would have been

proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance”.

12. Once the decision is read as a whole, it becomes clear that the true concern of the First-tier Tribunal regarding the best interests assessment was the paucity of evidence before it which would assist in evaluating where the best interests of both Malachi and his younger sister truly lay, the Judge expressing his concerns as to the lack of evidence in several respects: regarding the Appellant's likely progress at school in his (then) imminent GCSEs, differences between the education systems of the United Kingdom and St Lucia, and his actual achievements and the likely consequences of switching from the education system of the former to the latter. The burden of proof is on an Appellant in immigration appeals generally: it was not suggested before me that this was a case where the First-tier Tribunal should have exercised its case management powers to augment the available evidence, a possibility discussed in *MK (section 55 – Tribunal options)* [2015] UKUT 223 (IAC).
13. Certainly this is an appeal that might have been determined in favour of the Appellant given his son's length of residence here. However, different Tribunals may come to different conclusions on similar evidence. Mr Muitulu indicated at the hearing, when I raised the First-tier Tribunal's concern as to a lack of evidence with him, that it was his understanding that the Appellants had provided significant evidence to the Secretary of State that may not have been before the First-tier Tribunal: if that is right, then the Home Office will have to look at the case again before any further action is taken. But the Immigration and Asylum Chambers of the First-tier and Upper Tribunal can only determine appeals on the basis of the material before them.

Decision:

The decision of the First-tier Tribunal did not contain a material error of law.

The appeal is dismissed



Deputy Upper Tribunal Judge Symes
Signed:

Date: 2 November 2015