



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20225/2019 (V)

THE IMMIGRATION ACTS

Heard at : Manchester Civil Justice Centre
On : 12 November 2021

Decision & Reasons Promulgated
On: 29 November 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DONOVAN BENT

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer

For the Respondent: Ms S Alban, instructed by Seren Legal Practice

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was Microsoft Teams. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing
2. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Bent's appeal against the decision to refuse his human rights claim.

3. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Bent as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.
4. The appellant is a citizen of Jamaica, born on 10 June 1955. He entered the UK on 13 November 2017 on a family visit visa, valid until 10 November 2019.
5. On 4 October 2019 the appellant made a human rights claim on the basis of his private life, relying in particular upon his ancestry ties in the UK, his strong family ties with his two sons, step-daughter, step-son and seven grandchildren and four step-grandchildren, his lack of ties to Jamaica in particular since losing his wife in March 2014, his medical condition and his inability to care for himself without a carer and inability to find a carer in Jamaica.
6. The appellant's application was refused on 25 November 2019 on the grounds that he did not meet the requirements of Appendix FM or paragraph 276ADE(1) of the immigration rules on the basis of family and private life. The respondent did not accept that the appellant would face very significant obstacles to integration if he returned to Jamaica or that there were exceptional circumstances justifying a grant of leave outside the immigration rules on wider Article 8 grounds.
7. The appellant appealed against that decision. His appeal was initially heard by First-tier Tribunal Judge Agnew on 3 March 2020 and was dismissed in a decision promulgated on 10 March 2020. Permission to appeal against that decision was granted to the appellant on the basis of a challenge to the judge's findings on 'very significant obstacles to integration' in Jamaica.
8. Following a Notice dated 10 July 2020 in which Resident Judge of the First-tier Tribunal Campbell advised the parties of his proposal to set aside Judge Agnew's decision on the grounds of her failure to include within her Article 8 balancing exercise a consideration of the dependant relative immigration rules in paragraph 317, and in view of the lack of any objection to that course, the decision was set aside under Rule 35 of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014.
9. The appellant's appeal was then heard on 5 March 2021 by a different judge, First-tier Tribunal Judge Herwald, who allowed the appeal in a decision promulgated on 7 April 2021.
10. The Secretary of State sought permission to appeal Judge Herwald's decision on two grounds: firstly that the judge had erred in law by failing to apply the principles in Devaseelan [2002] UKIAT 00702 in relation to the decision of the previous Tribunal; and secondly that there was a failure to provide adequate reasons for considering the respondent's decision to be disproportionate.
11. Permission to appeal was granted in the First-tier Tribunal on both grounds and the matter then came before me for a remote hearing conducted through Microsoft Teams.

12. At the hearing, Mr Diwnycz withdrew the first ground and conceded that it had been raised in error, the Set Aside decision of Resident Judge Campbell having been overlooked. Mr Diwnycz accepted that if the judge who had granted permission had seen that Set Aside decision, it was unlikely that permission would have been granted.

13. In light of Mr Diwnycz's concession I saw no need to hear further from the parties and I dismissed the Secretary of State's appeal and upheld Judge Herwald's decision. Clearly, the principles in Devaseelan did not apply in circumstances where the original Tribunal's decision had been set aside in its entirety, as in this case. As for the second ground, it is written in terms of a re-arguing of the Secretary of State's case rather than in terms of any proper challenge to the judge's decision and is thus nothing more than a disagreement with Judge Herwald's decision. Judge Herwald clearly had regard to all relevant matters and gave full and proper reasons for concluding as he did. The decision he reached was one which was entirely open to him on the evidence before him.

DECISION

14. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring the decision to be set aside. The Secretary of State's appeal is dismissed. The decision of the First-tier Tribunal allowing the appellant's appeal therefore stands.

Costs

15. Ms Alban made an application for a wasted costs order against the Secretary of State, requesting that the appellant be awarded costs of £500 for the legal expenses incurred in resisting the appeal.

16. Having considered the relevant cases of Cancino (costs - First-tier Tribunal - new powers) [2015] UKFTT 00059, Awuah and others (Wasted Costs Orders-HOPOs-Tribunal powers) [2017] UKFTT 00555, Thapa and Others (costs: general principles: s.9review) [2018] UKUT 00054 and the 3 Presidential Guidance Notes on Costs: 1/2014, 1/2015 and 2/2018, it seems to me that the appropriate order being requested ought to be that under Rule 9(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 rather than a wasted costs order under Rule 9(2)(a).

17. Whilst Mr Diwnycz properly conceded that the first ground of appeal relying upon the case of Devaseelan was misconceived, I accept his explanation that the grounds were drafted without sight of the decision of Resident Judge Campbell and that the error was inadvertent and not wilful. There was, in any event, a second, independent ground of appeal which, although not actively pursued by Mr Diwnycz and not upheld by myself, was nevertheless one which was open to the respondent to raise. Accordingly I do not consider that the respondent acted unreasonably in bringing, defending or conducting proceedings for the purposes of Rule 9(2)(b) and I make no costs order against the respondent.

Signed: *S Kebede*
Upper Tribunal Judge Kebede

Dated: 12 November 2021