



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/23562/2014

THE IMMIGRATION ACTS

Heard at Field House

On 24 March 2015

**Decision &
Promulgated
On 5 May 2015**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MARCELINO EDUARDO LEWIS
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Holmes, Home Office Presenting Officer

For the Respondent: In person

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Cresswell promulgated on 16 December 2014 allowing the appeal of Mr Marcelino Eduardo Lewis against the decision of Secretary of State for the Home Department dated 16 May 2014 to refuse to vary leave to remain and to remove him from the United Kingdom pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006.
2. Although before me the Secretary of State is the appellant and Mr Lewis is the respondent, for the sake of consistency with the proceedings before

the First-tier Tribunal I shall refer to Mr Lewis as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of St Vincent and the Grenadines, born on 20 November 1980. He entered the United Kingdom on 7 September 2013 with six months leave as a visitor running to 7 March 2014. He came to the United Kingdom in the company of Ms Siema Yasmin Stinson, a British citizen, date of birth 27 March 1983. The Appellant and Ms Stinson were subsequently married on 24 January 2014.
4. Towards the end of the period of his leave as a visitor the Appellant attempted to make an application for variation of leave to remain, but this was initially rejected on the basis that the application was invalid. The Appellant thereafter made a valid application for variation of leave to remain which is recorded as having been made on 28 March 2014 - some three weeks after the expiry of his leave.
5. The application for leave to remain was essentially made on the basis that the Appellant's partner had experienced a number of medical difficulties and was remaining in the United Kingdom for health care - and indeed the couple in due course determined that they wanted to remain in the United Kingdom for an indefinite period.
6. The application was refused by the Secretary of State for reasons set out in a Reasons for Refusal Letter dated 16 May 2014 with reference in particular to Section R-LTRP of Appendix FM and paragraph 276ADE(1) of the Immigration Rules.
7. Between the date of the Secretary of State's decision and the appeal hearing before Judge Creswell on 11 December 2014, Ms Stinson was delivered of a child on 14 September 2014.
8. The First-tier Tribunal Judge found that the Appellant did not meet the requirements of the Immigration Rules but went on to consider the case by reference to Article 8 of the ECHR outside the express wording of the Immigration Rules, and with particular reference to the circumstances of the Appellant's child found that the proportionality balance favoured the Appellant.

9. The Secretary of State has raised a challenge to that decision with permission being granted on 4 February 2015 by First-tier Tribunal Judge Cruthers.

Consideration

10. At the hearing today I raised a preliminary point with Ms Holmes in respect of the Immigration Rules. At the date of the Secretary of State's decision it was of course the case that the Appellant had not yet become a father. In the circumstances the Secretary of State had given consideration to paragraph EX1 but had found that it was not engaged.
11. Judge Cresswell also gave consideration to the case under the Immigration Rules and in respect of the partner route says this at paragraph 13: *"The Appellant was in the UK as a visitor and was so not eligible for leave as a partner whilst in the UK."* That is a reference to paragraph E-LTRP.2.1 of Appendix FM where it states that the applicant must not be in the UK (a) as a visitor.
12. However for the reasons already given in considering the Appellant's immigration history, by the time the Appellant made a valid application for variation of leave to remain he was in fact no longer a visitor but an overstayer and was thereby not excluded from the partner route by virtue of E-LTRP.2.1(a).
13. In the circumstances it is not possible to discern on what basis the Appellant would not have met the requirements of the Rules and indeed, having looked at all of the circumstances of this case against the criteria of Section R-LTRP with particular reference to the LTRP.1.1D, it would appear that the Appellant meets the suitability criteria as well as the eligibility criteria and therefore the focus would fall on EX1.
14. In this regard, although the First-tier Tribunal Judge was not considering EX1, he made very clear findings as to the reasonableness or otherwise of expecting the Appellant's young child to leave the United Kingdom either in the company of his mother or in the company of his father alone. Those findings are entirely consistent with the approach taken by the Secretary of State in the case of **Sanade**, giving effect to the decision in **Zambrano**. Having discussed these matters with Ms Holmes this afternoon, she does not seek to suggest or urge upon me any approach inconsistent with the position adopted by the Secretary of State in **Sanade** and in the circumstances does not seek to amplify the Secretary of State's grounds of appeal as they stand.

15. In my judgement the Respondent's grounds of appeal very largely amount to a mere disagreement with the outcome of the appeal before the First-tier Tribunal and do not identify any particular error of law. If there is an error of law in this case it is that the First-tier Tribunal Judge did not recognise that the Appellant in fact qualified under the Rules and need not have resorted to Article 8 in order to succeed in his appeal.
16. In all of the circumstances it seems to me that the appropriate thing to do here is to find no material error of law in respect of the decision under Article 8 and to leave the appeal decision to stand.
17. It may be that succeeding under Article 8 rather than under the Rules will have some significance in terms of the period of leave to be granted or the particular route to settlement. That is not a matter that I have heard any argument on and is a matter that I leave to the Secretary of State with or without any representations that the Appellant might want to make as to the most appropriate form of the grant of leave. But for the moment I am satisfied that the decision of the First-tier Tribunal should stand.

Notice of Decision

18. The Secretary of State's challenge to the decision of the First-tier Tribunal is dismissed. The decision of the First-tier Tribunal stands. Mr Lewis's appeal remains allowed.
19. No anonymity direction is sought or made.

The above represents a corrected transcript of an ex tempore decision given on 24 March 2015.

Signed:

Date:

Deputy Upper Tribunal Judge I A Lewis