



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

Appeal Number: IA/15769/2014

THE IMMIGRATION ACTS

Heard at Field House

On May 18, 2015

Determination

Promulgated

On May 19, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ORVEL DONVILLE
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Avery (Home Office Presenting Officer)

For the Respondent: Mr Gibson-Lee, Counsel, instructed by LB & Co Solicitors

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The Appellant is a citizen of Jamaica. He had been granted indefinite leave to remain in the United Kingdom on May 18, 2006 on the basis of marriage to a British citizen. On January 13, 2012 the appellant was convicted of supplying Class B drugs (cannabis) and sentenced to three years custody and made the subject of an anti social behaviour

order until November 2016. On December 12, 2012 he was served with a deportation order. He lodged an appeal on human rights grounds and on March 15, 2013 The First-tier Tribunal dismissed his appeal under the Immigration Rules but allowed his appeal on article 8 ECHR grounds. The respondent then wrote to the appellant stating her intention to revoke his indefinite leave to remain and providing him with an opportunity to submit representations. He responded on August 9, 2013 but on March 19, 2014 the respondent took a decision to revoke his indefinite leave under Section 76(1) of the 2002 Act leaving him with discretionary leave only.

3. The appellant appealed that decision on March 28, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002. The matter came before Judge of the First-tier Tribunal Ghaffar (hereinafter referred to as the "FtTJ") on September 18, 2014, and in a decision promulgated on October 3, 2014 he allowed the appeal.
4. The respondent lodged grounds of appeal on October 13, 2014 submitting the FtTJ had erred in his approach to section 76 of the 2002 Act and the guidance contained in R (on the application of Fitzroy George) (respondent) v SSHD [2014] UKSC 28. Permission to appeal was initially refused by Judge of the First-tier Tribunal Chambers on November 20, 2014. The grounds were renewed and on March 16, 2015 Deputy Upper Tribunal Judge Pickup found there was an arguable error in law given the terms of section 76 and the Supreme Court decision of Fitzroy George.
5. The matter came before me on the above date and the parties were represented as set out above. The appellant arrived late and was not present when the submissions were made.
6. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order

SUBMISSIONS ON ERROR IN LAW

7. Mr Avery submitted the FtTJ approached the issue incorrectly and placed undue weight on the issue of delay. The FtTJ should have concentrated on the provisions of Section 76 of the 2002 Act and the guidance contained in paragraph [31] of the Supreme Court decision of Fitzroy George. He submitted the FtTJ failed to address these issues and materially erred. The decision should be overturned and the appeal dismissed.
8. Mr Gibson-Lee accepted the findings of Fitzroy George but he submitted the FtTJ had considered the appellant's immigration background when considering whether the respondent had acted reasonably in exercising her discretion under Section 76 of the 2002 Act. The appellant's appeal against the deportation order had been allowed on article 8 grounds based on the adverse effect it would have on his children, if he were removed. He submitted the FtTJ made a finding that was open to him and it remained open to the

respondent to make a further decision under Section 76 if his circumstances changed.

9. Mr Avery submitted the respondent would not know if the appellant had continued to maintain contact with his children if his indefinite leave was maintained. The whole point of granting him discretionary leave was because his circumstances may change and he would have to re-apply to demonstrate the same circumstances existed otherwise the deportation order should take effect.
10. I reserved my decision.

CONSIDERATION AND FINDING ON MATERIAL ERROR OF LAW

11. The appellant had been granted indefinite leave to remain based upon his marriage to a British citizen. He now lives with her and their two children. He had been sent to prison for drug offences and the respondent took steps to deport him. He appealed that Order on the basis to remove him would breach his human rights and those of his family. As recorded at paragraph [4] of the FtTJ's determination he won his appeal on the basis his removal would "adversely affect the health and well-being of the children to such an extent as to render it disproportionate".
12. The FtTJ was aware of the provision of Section 76(1) of the 2002 Act as he set this out at paragraph [13] of his determination. In short, the respondent has the power to revoke the appellant's indefinite leave to remain if he is liable for deportation but cannot be deported for legal reasons." The FtTJ was also aware of the Supreme Court decision of Fitzroy George as he referred to the authority in paragraph [17] of his determination but he appeared to find the findings had no bearing on this appeal because the case was considering the effect of Section 5(2) of the Immigration Act 1971 whereas this appeal was not concerned with that. However, the FtTJ has overlooked the fact the Supreme Court was concerned also with the effect of section 76.
13. I accept Mr Avery's submission that the FtTJ failed to have regard to the opinion of the Supreme Court. The facts of that case were similar and importantly the Supreme Court considered the position where the appellant had not been deported because of his article 8 rights. The Supreme Court made clear

"It made perfectly good sense for the Secretary of State to be in a position to re-visit the terms of the leave... If it arises from his family connections in the United Kingdom, those may easily change. If someone in his position cannot be deported at present because to do so would infringe his article 8 rights and if indefinite leave to remain were thereupon to revive, he would remain irremovable if he turned his back on his family or they on him as may not infrequently occur"
14. The FtTJ should have considered the Supreme Court's approach to the respondent's decision. The appellant was not being asked to leave the United Kingdom. The appellant had been granted indefinite leave but he had committed a serious offence that led to him receiving a three

year sentence and a four year anti-social behaviour order. He had only avoided being deported because of his children. As long as his children rely on him that situation would not change and of course the longer he remains here the stronger his family and private life claim becomes.

15. However, the FtTJ failed to consider properly the intention of Section 76 of the 2002 Act in light of the Fitzroy George case and I am satisfied he erred in his approach in paragraph [19] of his determination. The fact the appellant was the subject of anti social behaviour order should have no bearing on his family life-it is aimed at his behaviour. The fact he is viewed as low risk again has no bearing on his family life. If he further offends then that is a separate issue. The issue of any delay is something to consider but it would not have led to this appellant losing his right to remain here as the respondent had accepted the earlier decision.
16. I therefore find the FtTJ erred when finding the respondent had acted unreasonably in seeking to revoke the appellant's indefinite leave. The respondent should not be required to locate an applicant to find out whether they are enjoying family life. The appellant broke the law and was given a second chance when his appeal was allowed against the deportation order. However the decision under section 76 is a different test and I find the ftTJ materially erred in allowing the appeal.
17. The only conclusion to this is to dismiss the appellant's appeal.

DECISION

18. There was a material error. I set aside the FtTJ's decision and remake the decision by dismissing the appellant's appeal.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT
FEE AWARD**

I make no fee award.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis