Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31741/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 30 September 2015	**On 16 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ARCHER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR WINSTON DERICK EVELYN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Julie Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms Francesca Clarke, Counsel instructed by Fadiga and Co.

DETERMINATION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge Carroll) allowing the respondent's appeal against a decision taken on 22 July 2014 refusing his application for leave to remain under Articles 3 and 8 of the Human Rights Convention. The application was made on 4 June 2014.

Introduction

3. The respondent entered the UK as a visitor on 15 October 2000 with leave to enter for six months. He resided with one of his sons, Marvin Evelyn, in London between October 2000 and February 2007 but then had a stroke and was admitted to hospital. He has been in a number of different residential and nursing homes since June 2007. The respondent is now estranged from the son with whom he lived from 2000-2007 but is supported by his other son in the UK, Asha Evelyn. He has two other children in Jamaica (Carlos and Winsome). All of the children are adults.

4. The Secretary of State accepted the respondent's identity and nationality but concluded that the requirements of Appendix FM of the Immigration Rules ("the Rules") were not met and appropriate medical care and treatment was available in Jamaica. The respondent could live with his children in Jamaica. Removal would not breach the obligations of the UK under Articles 3 and 8 on medical grounds. It was accepted that the respondent would require a medical escort to accompany him to Jamaica and the options for where he would be housed would need to have been considered beforehand to ensure that his care needs would be met on return to Jamaica.

The Appeal

5. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Taylor House on 20 April 2015. He was represented by Ms Clarke. The First-tier Tribunal found that the respondent had been in the UK since October 2000 and had little contact with his children in Jamaica. He enjoyed contact in the UK with his son, Asha Evelyn, his grandchildren and his daughter in law, Paulette Evelyn. He had lived in Hill House nursing home since March 2012 and was visited regularly by his family. He was diagnosed with prostate cancer in 2011 and was wheelchair bound. He was blind in one eye and had significant speech difficulties. His physical difficulties would mean that he would have the greatest difficulties in accessing medical provision.

6. The respondent had lost meaningful ties to Jamaica. He had proved that there were very significant obstacles to his integration into Jamaica and the appeal was allowed under paragraph 276ADE (vi) of the Rules. The immigration decision was dated 28 July 2014; the date when the revised paragraph 276ADE came into force.

The Appeal to the Upper Tribunal

7. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law in finding that the

respondent had lost meaningful ties to Jamaica because the judge failed to make an objective assessment of the reasonableness of renewal of family ties, as required by Bossadi [2015] UKUT 42 (IAC). The decision was made on 22 July 2014 and the previous requirement of "no ties" was in force. The error of law was therefore material.

8. Permission to appeal was granted by First-tier Tribunal Judge Heynes on 8 July 2015 on the basis that it was arguable that the judge had applied the wrong version of the Rules.

9. In a rule 24 response dated 28 July 2015, Ms Clarke submitted that the judge did not make a material error of law. The subjective evidence was not disputed and the judge considered relevant objective evidence. The Secretary of State applied the later version of the Rules in the decision letter. Bossadi could be distinguished because the suitability requirement does not apply to the respondent – his presence in the UK was never deemed or regarded as not conducive to the public good. The respondent does have two children in Jamaica but the evidence showed that the ties were remote and abstract rather than a continued connection. It was open to the judge to find that there would be no familial support in Jamaica.

10. Thus, the appeal came before me

Discussion

11. Ms Isherwood submitted that there was no finding on Article 8 outside the Rules. The relevant date is the date of decision; 22 July 2014. The respondent has never had any right to reside in the UK. He has family in Jamaica and is reliant upon public funds. There is medical provision in Jamaica. The respondent has never had any entitlement to reside in the UK – just a choice. To find that the respondent has lost ties in Jamaica there must be a rounded assessment.

12. Ms Clarke submitted that the judge relied upon the witness statement of the respondent and the evidence from Asha Evelyn. A continued connection to life in the country of origin was required to dismiss the appeal under paragraph 276ADE. The respondent left Jamaica 14 years ago and there is limited communication with the children in Jamaica – a text on his last birthday and a card in 2014. There are exceptional circumstances creating unjustifiable hardship. The respondent has close bonds in the UK. He suffered a stroke soon after coming to the UK and a rounded assessment has been made. Any error is not material because another Tribunal would come to the same decision. The objective evidence showed that the treatment available was at a distance or was not available. The children in Jamaica are in their thirties and forties; they are married and leading independent lives. There has been no contact with the children since 2014.

13. Ms Isherwood submitted in reply that healthcare for disabled people is universally available in Jamaica. All of the medical evidence is from the first half of 2014. There is still no rounded assessment and the respondent cannot simply choose where he wishes to live. If the matter were to be

considered outside the Rules then the judge would have to consider sections 117A-117D of the 2002 Act.

14. It is common ground between the parties that the judge erred in law by applying the wrong version of paragraph 276ADE of the Rules. The correct version was the version in force from 9 July 2012 to 27 July 2014. That error is material because the judge applied the wrong legal test to the evidence before the First-tier Tribunal. Had the judge applied the correct test then, following Bossadi, a rounded assessment would have been required as to whether the respondent's familial ties in Jamaica could result in support to him in the event of his return, an assessment taking into account both subjective and objective considerations and also consideration of what lies within the choice of the respondent to achieve.

15. None of that has been considered within the decision of the First-tier Tribunal because the judge was considering the facts within the context of a wholly different test. The findings of fact cannot be stretched to accommodate the consideration required under the previous version of paragraph 276ADE – the required assessment is simply not present. It is also worth noting that the decision is very brief given the complexity of the issues in this appeal. The submissions by both parties reveal issues arising from the evidence, particularly in relation to family ties in Jamaica and availability of medical and social care in Jamaica, that have not been adequately addressed in the decision.

16. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under the Rules involved the making of an error of law and its decision cannot stand.

Decision

17. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the error of law infects the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

18. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed Date 15 October 2015

Deputy Upper Tribunal Judge Archer