



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

Appeal Number: IA/32417/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 15 January 2016**

**Decision & Reasons Promulgated
On 21 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KEVIN KENRICK GARFIELD MILLAR

Respondent

Representation

For the Appellant: Ms. A. Broklesby Weller, Senior Home Office Presenting Officer

For the Respondent: Unrepresented

DECISION AND REASONS

1. The respondent (hereinafter “the claimant”) is a citizen of Barbados born on 26 October 1989. He entered the UK in 2003 as a child on a visitor visa to visit his mother who had been granted indefinite leave to remain in 2001. He overstayed and has remained in the UK ever since. In September 2010 he was granted discretionary leave to remain until 24 November 2013. On 23 January 2014 he applied for further leave to remain on the basis that his removal from the UK would be contrary to Article 8 ECHR.

2. This appeal arises from the decision of the appellant (hereinafter “the Secretary of State”), dated 20 June 2014, to refuse the claimant’s application made on 23 January 2014 and to remove him from the UK under Section 10 of the Immigration and Asylum Act 1999.
3. The Secretary of State refused the claimant’s application on the basis that he was unable to satisfy the suitability requirements under Section S-LTR 1.5 and S-LTR 1.6 of Appendix FM to the Immigration Rules. The reason for so finding was that since arriving in the UK in 2003 the claimant has, on a number of occasions, been cautioned or convicted in connection with a variety of offences, the most recent of which was in March 2014 when the claimant was convicted of common assault following an incident in which he bit his partner in the face and spat at her son. Previous convictions include theft (in 2008 and 2009), possession of an offensive weapon (in 2008), breach of a curfew order (in 2009), breach of a community order (in 2009), and driving a motor vehicle taken without consent and without license or insurance (2010). In addition, he has also been reprimanded by the police and given warnings by the police on other occasions. The Secretary of State also described the claimant as having been part of a street gang and having led a criminal lifestyle.
4. The claimant has a partner who is a British national and they have a son, born on 8 April 2013, who is also a British national. His partner has another son, born on 17 July 2004, from a previous relationship. The Secretary of State’s refusal decision includes a discussion of what would be in the best interests of these children and concludes that the claimant’s removal would not be disproportionate.

Decision of the First-tier Tribunal

5. The claimant appealed and his appeal was heard by First-tier Tribunal (“FtT”) Judge Gillespie. In a decision promulgated on 25 June 2015, the FtT allowed the claimant’s appeal. The FtT first considered whether the claimant met the requirements of Rule 276ADE and found that he did not. In respect of subparagraph 276ADE(1)(vi), the FtT found that there would not be very significant obstacles to his integration into Barbados given the presence in that country of his brothers and other relatives.
6. The FtT then turned to Appendix FM. It found that the claimant met the requirements under Appendix FM. The decision identified and considered two areas of contention: first, whether the claimant satisfied paragraph EX.1; and second, whether he fell for refusal under the suitability requirements.
7. In respect of paragraph EX.1, the FtT found that the claimant had a genuine and subsisting relationship with his British citizen child and that it would not be reasonable to expect this child to leave the UK. Its reasoning was as follows: the claimant’s partner is a British national who suffers from a debilitating illness and who has no connection to Barbados and whose mother and other family members are in the UK. Her eldest son is an 11

year old British citizen who has lived in the UK his entire life. In these circumstances it would not be reasonable to expect the claimant's partner or her 11 year old son to leave the UK. The claimant's son's best interests lie in living with his mother and half brother. It would therefore not be reasonable to expect him to leave the UK without them.

8. In respect of suitability under paragraphs S-LTR1.5 and S-LTR1.6, after setting out in detail the evidence before it concerning the claimant's criminal background, the FtT concluded that the presence of the claimant in the UK is not otherwise than conducive to the public good.
9. The FtT then considered Article 8 in the alternative and found that, having regard to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, the balancing exercise with respect to proportionality fell in favour of the claimant.

Grounds of Appeal and submissions

10. The Secretary of State submitted three grounds of appeal and permission was granted in respect of all three.
 - a. The first ground relates to the FtT's finding that the claimant did not fall for refusal under the suitability requirements under S-LTR 1.5 and 1.6. The grounds argue that the FtT failed to acknowledge the claimant has demonstrated a propensity to reoffend and is not reformed, that he has shown a complete disregard for the laws of the UK, has failed to take responsibility for his actions, has attempted to deceive the immigration authorities and that his presence in the UK is not conducive to the public good.
 - b. The second ground relates to the FtT's finding that it would be unreasonable to expect the claimant's child to leave the UK. The grounds contend that the fact of the child being British does not prevent him relocating to another country and he would be able to adapt to life in Barbados and that the family could relocate. It is argued that the claimant has not shown why it would be unreasonable for the child to leave the UK, rather than merely contrary to the family's wishes.
 - c. The third ground relates to the FtT's consideration of Article 8 outwith the Rules. It is argued that the FtT erred by relying on Section 117B(6) of the 2002 Act without balancing this against the other factors under Section 117B.
11. Before me, Ms Broklesby Weller reiterated the arguments made in the grounds of appeal. She argued that claimant's criminal history demonstrated a disregard for the law and too little weight had been placed on the claimant's most recent conviction which suggests a risk of violence. Accordingly, in respect of suitability, the FtT has not properly dealt with the evidence that was before it which demonstrates the claimant does not meet the suitability requirements. With regard to paragraph EX.1, Ms

Broklesby Weller repeated the points made in the grounds. She contended that nationality is not a trump card preventing relocation. She argued that the FtT had recognised the claimant would be able to reintegrate into life in Barbados and this suggests his partner and child could also do so. With regard to the partner's illness, she submitted that the FtT had not considered whether treatment would be available in Barbados.

12. Mr Millar was unrepresented. His response was to make submission to the effect that he is a reformed character and has no ties to Barbados. His partner was present and asked to address the court, which I permitted. She described her health difficulties and support she receives from the claimant.

Consideration

13. For the reasons set out below, I find that the FtT has not erred in law and that its decision shall stand.

Ground 1: Approach to S-LTR 1.5 and 1.6

14. S-LTR 1.5 and 1.6 provide as follows:

S-LTR 1.5: The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law.

S-LTR 1.6: The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR 1.3 to 1.5), character, associations, or other reasons, make it undesirable to allow them to remain in the United Kingdom.

15. It is evident from the decision that before reaching a conclusion in respect of S-LTR 1.5 and 1.6 the FtT undertook a comprehensive and detailed analysis of the claimant's criminal history. At paragraph [4] of the decision the FtT set out, in table form, a list of the claimant's criminal history, including matters where no police action was taken, covering the period from 2006 until 2014. Ms Broklesby Weller did not argue that any relevant criminal activity was omitted from this table. At paragraph [23] the FtT stated that it attached "weight of some substance" to the matters listed in this table.
16. The FtT also considered in some detail the evidence pertaining to the claimant's involvement in a criminal gang and that the position of the police had shifted to now stating that there was no evidence of gang involvement. The FtT stated that had the police still maintained the claimant was involved - or had been involved - in gangs his appeal would have had little prospect of succeeding. At paragraph [24] the FtT analysed the claimant's cautions and convictions and at paragraph [25] his connections to family members with criminal records. The FtT then, at

paragraph [27], considered the nature of the convictions, noting, *inter alia*, that save for the most recent they concerned activities in the claimant's youth, none of which were sufficiently serious to warrant imprisonment. The FtT at paragraph [27] considered the claimant's most recent offence, describing it as a relatively petty domestic dispute which attracted no more than a supervision requirement.

17. At paragraph [29] the FtT made the following findings: the claimant has not caused serious harm to any person by his offending; by his cessation of offending in public he has shown he is not a persistent offender; he has not shown a particular disregard for the law and settled down for a period of three years without offending; the domestic incident for which he was convicted in 2014 was an isolated and petty incident and there is no suggestion of ongoing risk to his partner or the children; the suspicions of past serious criminality are not proven; and the allegations of gang involvement have been abandoned.
18. The FtT's analysis of the claimant's criminal history and involvement, at paragraphs [26] - [29] of the decision, is cogent and comprehensive. No material evidence has been ignored and it is clear that the FtT has engaged with, and analysed, all the relevant evidence that was before it and drawn conclusions based on that evidence.
19. The grounds of appeal make a number of assertions about the claimant which are contrary to the FtT's findings, such as that he has a propensity to re-offend, he is not reformed, and that he has no regard for the law. However, these amount to no more than a disagreement with the FtT as to what conclusions should be drawn from the evidence about the claimant's criminal history. I am satisfied that it was open to the FtT, based on the evidence before it, to conclude, *inter alia*, that the claimant has not caused serious harm, is not a persistent offender and is not involved in gangs; and that having made such findings it was open to the FtT to find that the claimant did not fall for refusal under S-LTR 1.5 and 1.6. Another judge may have taken a different view as to what the evidence shows in respect of the claimant's propensity to re-offend and his respect for the law, given in particular the extent of his criminal history and that his most recent offence was in 2014, but the FtT's findings were not inconsistent with, and were open to it, based on the evidence, which I am satisfied has been carefully and properly considered, and therefore I find that this ground of appeal does not have any merit.

Ground 2: Paragraph EX.1 of Appendix FM

20. The issue before the FtT was whether it would be reasonable to expect the claimant's son to leave the UK. The Secretary of State contends that the claimant's son's British nationality should not be treated as a trump card preventing his relocation.
21. There are strong reasons, as set out by the FtT, as to why it would not be reasonable to expect the child to leave the UK. The FtT found that the

claimant's son's best interests are to remain with his mother and step brother and that it would not be reasonable to separate him from them. This has not been challenged by the Secretary of State. The question therefore arises as to whether the mother and step son could relocate to Barbados with the claimant's son. The FtT gave clear reasons why it would not be reasonable to expect them to do so. Firstly, they are not from, and have no connection to, Barbados. Secondly, the claimant's step son, who is 11, has lived his whole life in the UK. Thirdly, the claimant's partner has an illness the FtT describes as debilitating, a description the Secretary of State has not challenged. Given these circumstances it was clearly open to the FtT to find that it would not be reasonable to expect the claimant's son to leave the UK and it is not the case the FtT has treated the child's nationality as a "trump card". Accordingly, there was no error of law in the FtT finding that it would not be reasonable to expect the claimant's son to leave the UK.

Ground 3: Article 8 and Section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

22. Having found that the FtT has not made a material error of law in respect of its decision under the Immigration Rules, it is unnecessary for me to consider the Secretary of State's ground of appeal concerning the FtT's decision (given in the alternative) under Article 8 outside the Rules. However, for completeness, I note that the approach taken by the FtT to Section 117B(6) was consistent with *Treebhawon and others (section 117B(6))* [2015] UKUT 00674 (IAC).

Notice of Decision

- a. The appeal is dismissed.
- b. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.
- c. No anonymity order is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 21 January 2016