Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21330/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 July 2017	**On 12 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

ANDREW LENNOX ROWE
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr V Sharkey (MediVisas UK LLP)
For the Respondent: Ms J Isherwood (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant appeals against the decision of the First-tier Tribunal of 17 November 2016 dismissing his appeal against the decision to refuse his application on human rights grounds of 21 May 2015.

2. The immigration history given for the Appellant is that he entered the UK as a visitor and was granted extensions of leave as a student or student nurse until 30

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November 2003. He then overstayed his leave and next came to light when he made an application as an unmarried partner based on a same sex relationship; that was refused on 17 December 2008, and he was served notice of being present unlawfully. He left the country and returned on 1 July 2009 with entry clearance until 13 October 2011. A further application was refused outside the Rules, but on 13 December 2011 he was granted Discretionary Leave to Remain based on his relationship with his partner.

3. The application from which this appeal springs was based on the Appellant's gender preference as a gay man and his HIV status, which he relied upon as relevant to his claim that he would face very significant obstacles to integration in Jamaica and/or a disproportionate interference with his Article 8 rights. At the time of the application he made no claim based on any relationship with a "significant other".

4. The refusal letter found that the Appellant faced no very significant obstacles to integration in Jamaica given he had resided there for 27 years before entering the UK; he had the advantage of speaking the language. There were no exceptional circumstances present, as the drugs he relied on for his HIV treatment were reportedly available in Jamaica and a person would not be at risk there for reasons of their sexuality alone.

5. On 3 June 2015 the Appellant lodged a notice of appeal, noting that he had lived in the UK for 13 years, and in Jamaica for 19 rather than 27 years of his life. As shown by the Respondent's own guidance and the decision in *JR Jamaica*, a homosexual living openly would face inhuman and degrading treatment in Jamaica; his health represented a barrier to his return.

6. Before the First-tier Tribunal, the Appellant put forward a witness statement, now raising the issue of his cohabitation with his fiancé Dean Holliday with who he had been in a relationship since April 2015. Mr Holliday provided a detailed statement regarding the development and depth of their relationship.

7. In a very short decision, the First-tier Tribunal dismissed the Appellant's appeal. As to his relationship with Mr Holliday, it found that this was a "new matter" unheralded hitherto in the Appellant's application, grounds of appeal or via any one-stop notice, and accordingly it could proceed only with permission from the Respondent, which had not been forthcoming, or via an application direct to the Home Office. As to the Appellant's concerns about risks arising to him in Jamaica, that could be advanced only via the making of a protection claim. As to his case on integration otherwise, "I find the Appellant may experience difficulties but I do not find they amount to very significant obstacles."

8. Grounds of appeal argued that there had been inadequate reasoning given on the question of very significant obstacles to integration, and that there was no procedural inhibition to the partner relationship being considered on the appeal

within the scope of Rule 276ADE. Homosexuality was only one dimension of the Appellant's private life claim and its relevance to his future life in Jamaica should have been evaluated within the ambit of the present appeal.

9. In a Rule 23 notice the Secretary of State contended that the decision was lawful and the judge had been quite right to raise the absent of consent to a new issue proceeding on appeal.

10. Ms Isherwood provided me with a helpful attendance note of the hearing from Mr Henry of counsel who had represented the Secretary of State below, in which he summarised the submissions of the parties and the oral evidence, and any documents submitted at the hearing. There is no indication there that the First-tier Tribunal or Mr Henry raised the issue of consent for a new matter to be raised at the hearing.

11. For the Appellant Ms Sharkey submitted that the Appellant's relationship fell within the ambit of the grounds of appeal as it was apt for consideration under Rule 276ADE(vi) and thus consent was not required.

12. Ms Isherwood replied that the First-tier Tribunal's reasoning on integration was lawful if rather concise, and that consent to raising a new issue would not have been given if it had been sought. She acknowledged that the Home Office guidance on the giving of consent warranted consideration when the question of consent to raise a new issue arose in the First-tier Tribunal. She accepted that it was difficult to resist the conclusion that something had miscarried in the appeal so far, given that very little of the Appellant's substantive case had actually been considered below.

Findings and reasons

13. The relevant Immigration Rules are those in Rule 276ADE. I cite only the relevant passages given that no questions arise of suitability.

> "**Requirements to be met by an applicant for leave to remain on the grounds of private life**
> **276ADE**. The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant: …
> (vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there **would be very significant obstacles to the applicant's integration into** the country to which he would have to go if required to leave the UK."

14. As stated by Sales LJ in *Kamara* [2016] EWCA Civ 813, the concept of integration

"is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

15. The Nationality Immigration and Asylum Act 2002 sets out:

"**82 Right of appeal to the Tribunal**
(1) A person ("P") may appeal to the Tribunal where— …
(b) the Secretary of State has decided to refuse a human rights claim made by P,
…
84 Grounds of appeal
…
(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.
85 Matters to be considered
(1) An appeal under section 82(1) against a decision shall be treated by [the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
(2) If an appellant under section 82(1) makes a statement under section 120 , the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84 against the decision appealed against.
(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
(4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.
(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
(6) A matter is a "new matter" if—
(a) it constitutes a ground of appeal of a kind listed in section 84, and
(b) the Secretary of State has not previously considered the matter in the context of—
(i) the decision mentioned in section 82(1), or
(ii) a statement made by the appellant under section 120."

16. As set out above, the Appellant made a human rights claim predicated on his difficulties in integrating on a return to Jamaica because of his gender preference and health problems. By the time of the hearing, he wished to add another dimension to his arguments based on private and family life grounds, namely his relationship with Mr Holliday.

17. Ms Isherwood contends this was a "new matter", essentially on the basis that the Appellant's wish to raise a family life rather than private life argument represents a Human Rights Convention matter and is thus "a ground of appeal listed in section 84" which "the Secretary of State has not previously considered" in any context. Accordingly it could proceed only with the consent of the Respondent to the appeal. The question of consent was not raised and, having not been considered, could not be said to have been given.

18. On the other hand, Ms Sharkey argues that this was not a new matter: a section 84 ground of appeal had been raised, *viz* that the decision was unlawful when measured against section 6 of the Human Rights Act 1998 which demands compliance with the protections found within the European Convention on Human Rights, and that personal relationships were apt for consideration within the ambit of an appeal arising from a refusal of an application made under Rule 276ADE(vi).

19. I do not think it is necessary to resolve the relatively complex issues raised by those competing submissions, because the decision of the First-tier Tribunal is clearly flawed for other reasons. In short, insufficient reasons have been given for the Judge's conclusion as to the Appellant's ability to integrate back in his country of origin.

20. When one bears in mind the length of time that the Appellant has been out of Jamaica throughout his life, the limited connections he can realistically be assumed to have there, and his sexual identity, there was clearly a substantial case to be considered as to whether he would be able to negotiate life in Jamaica in the sense of being an "insider", to use the parlance of Sales LJ in *Kamara*.

21. In the proceedings that culminated in the decision of the Court of Appeal in *JR Jamaica* [2014] EWCA Civ 477, the Secretary of State conceded before the First-tier Tribunal that a homosexual who wished to live openly as such would be at risk of inhuman and degrading treatment upon return to Jamaica. That concession does not necessarily bind her in other cases, but it plainly demonstrates that a gay man will not necessarily find it possible to integrate there. It is no answer to such a claim to baldly state that it can proceed only via the making of a protection claim. That route might be appropriate for a person who maintains that their fears reach the persecution threshold in Jamaica, but risks of physical harm and discrimination must also be relevant to the possibility of integration and to the assessment of the proportionality of the interference with a removee's private life.

22. The authorities recognise that reasons must be given for both the determination of the appeal and the material findings of fact upon which that decision is based and they must be provided in sufficient detail to "enable the reader to know what conclusion the decision maker has reached on the principal controversial issues": see Lord Bridge in *Save Britain's Heritage v No 1 Poultry Ltd* [1991] 1 WLR 153. The brief rejection of the Appellant's case in this respect in the Tribunal below does not meet this standard.

23. Accordingly the appeal should be reheard.

24. As to the question of the Appellant's relationship with Mr Holliday, doubtless his representatives will take advantage of the learning process that this appeal has enabled in order to ensure that this is properly raised as an issue that the Tribunal should consider. An Appellant who fails to give adequate notice of a critical new issue clearly courts the possibility of their appeal miscarrying given the strictures of section 85 of the NIAA 2002. It is open to the Appellant to raise this relationship via a section 120 "one stop notice" at which point the Secretary of State will have to consider whether or not to consent to the matter being raised.

25. The Secretary of State's guidance *Rights of appeal Version 3.0* addressing this issue (attached) makes it clear that a Presenting Officer faced with a post-decision development that arguably constitutes a "new matter" should make "every effort" to ensure that the matter receives consideration before a hearing, seeking an adjournment if necessary:

> "If a 'new matter' is raised before an appeal hearing, for example in the grounds of appeal, the SSHD should try to consider the matter before the appeal hearing. Every effort should be made to consider and decide the new matter before the appeal hearing so that consent can be given and the tribunal can consider all matters relating to that appellant in a single appeal.
> ...
> In order to make best use of tribunal resources, an adjournment should be sought for the SSHD to consider the new matter. Where possible, a single appeal should consider all matters that have been raised by the appellant."

26. Guidance of this nature should be brought to the attention of the First-tier Tribunal by the Secretary of State, see Lord Wilson in *Mandalia* [2015] UKSC 59 at 19:

> "irrespective of whether the specialist judge might reasonably be expected himself to have been aware of it, the Home Office Presenting Officer clearly failed to discharge his duty to draw it to the tribunal's attention as policy of the agency which was at least arguably relevant …."

27. This is not an appeal where there are meaningful findings upon which the Upper Tribunal can build, and thus it is allowed to the extent that it is remitted to the First-tier Tribunal for hearing afresh.

Decision:

The decision of the First-tier Tribunal contain material errors of law. The appeal is remitted for hearing afresh.

Signed: Date: 7 July 2017

Deputy Upper Tribunal Judge Symes