



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

Appeal Number: HU/12233/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28<sup>th</sup> February 2018**

**Decision & Reasons  
Promulgated  
On 22<sup>nd</sup> March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ROBERTS**

**Between**

**MISS N.V.R.P.  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Alhadi of Stevjeme & Co Solicitors

For the Respondent: Ms Fujiwala, Senior Home Office Presenting Officer

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

An anonymity direction was not made by the First-tier Tribunal. However as part of the evidence in this case relates to the Appellant's minor child, it is appropriate to direct anonymity.

**DECISION AND REASONS**

1. The Appellant, a citizen of St Vincent and Grenadines (born [ ] 1983), appeals with permission against the decision of a First-tier Tribunal (Judge Skehan) dismissing her appeal against the Respondent's refusal of 28<sup>th</sup> April 2016 to grant her leave to remain on account of her Article 8 ECHR family/private life rights.

### **Background**

2. The Appellant's immigration history is as follows:
  - (i) she entered the UK on 2nd August 2003, in possession of a two year visa as a working holidaymaker valid until 1<sup>st</sup> August 2005;
  - (ii) on 25<sup>th</sup> July 2005, the Appellant made an application for leave to remain which was refused with a right of appeal. The subsequent appeal was dismissed and by 7<sup>th</sup> December 2005 her appeal rights were exhausted;
  - (iii) on 28<sup>th</sup> September 2012 the Appellant made an application for leave to remain as an unmarried partner. That application was refused with no right of appeal;
  - (iv) on 20<sup>th</sup> August 2014 the Appellant was served with notice as a person liable for removal;
  - (v) on 24<sup>th</sup> October 2014 the Home Office conducted a further review of the case and found no basis to grant leave to remain;
  - (vi) on 8<sup>th</sup> January 2016 the Appellant was served with a notice as a person liable to removal together with a Statement of Additional Grounds;
  - (vii) the Secretary of State made a decision dated 28<sup>th</sup> April 2016 refusing the Appellant's Article 8 ECHR human rights claim. The refusal contained a right of appeal. It is that refusal which forms the basis of the present appeal before me.
3. The Appellant's claim under Article 8 centred on her relationship with her partner Mr L.A.J., a Jamaican national. On [ ] 2016 the Appellant gave birth to a child; the father of the child is L.A.J.

### **First-tier Tribunal Hearing**

4. Obviously by the time of the hearing before the First-tier Tribunal the parameters of the Appellant's claim had widened. Events had moved on since the date of the Secretary of State's decision. It was said that L.A.J. has indefinite leave to remain in the UK and thus the Appellant's child was entitled to be recognised as a British child and to be granted a British passport.
5. In his decision at [24] the judge said the following:

"While [L.A.J.] claims that he has permanent right to remain within the UK, I have seen no documentary evidence to support that contention. I note however that [L.A.J.] claims his documentary evidence, in the

form of his old passport, is currently in the possession of the respondent. The respondent has confirmed that it does hold [L.A.J.'s] passport but is unable to produce it to the court. The circumstances are far from ideal. However, I find it unusual that the appellant is unable to provide any further information or correspondence to support [L.A.J.'s] immigration status. The burden of proof falls upon the appellant and she has not been able to provide any supporting evidence to prove [L.A.J.'s] immigration status."

6. At [25], the judge then said:

"... The baby's interests in the absence of any evidence to the contrary clearly rests with remaining with his mother and ideally both parents. I have not seen sufficient evidence to persuade me that it was more likely than not that the appellant's son is entitled to a British passport."

7. Having made those findings, the judge went on to consider the Appellant's Article 8 claim on the basis that her child was not a British citizen and therefore made no factual assessment into whether it would be reasonable to expect the child to relocate with his mother to St Vincent and Grenadines. The judge went on to dismiss the appeal.

8. Permission to appeal the FtT's decision was sought on the grounds that the judge had failed to consider and make findings on material evidence. This was supported by reference to [24]. It was said that there had been provided to the Tribunal as part of the Appellant's bundle a copy of L.A.J.'s passport showing the grant of indefinite leave to remain to him. Therefore, there was documentary evidence provided which the judge had failed to acknowledge.

9. Permission having been granted, the matter now comes before me to determine whether the decision of the First-tier Tribunal contained such error that it must be set aside and be remade.

### **Error of Law Hearing**

10. Before me Ms Fujiwala appeared for the Respondent and Mr Alhadi for the Appellant.

11. At the outset of the proceedings Ms Fujiwala confirmed that the issue noted by the FtTJ at [25] is fully resolved. The Appellant's child is a British citizen and a passport has now been issued to him. In fact, Mr Alhadi produced the passport.

12. Following on from that, Ms Fujiwala conceded that the FtTJ had erred in his decision. She submitted that the decision should therefore be set aside and remitted to the First-tier Tribunal for a full rehearing on this basis.

13. The Appellant's appeal was brought on the basis that the Secretary of State's decision seeking to remove her as an overstayer would be unlawful on account of her Article 8 ECHR rights. By the time the appeal came before the FtTJ in October 2017, events had moved on and the Appellant's

child had been born. Ms Fujiwala submitted that if I accepted that the FtTJ had erred in his factual assessment at [25], and had a proper finding been made concerning the child's British citizenship, then it would have been incumbent upon the FtTJ to proceed to consider the Appellant's claim by reference to EX1(a) of Appendix FM to the Rules. The judge would then have had to engage in a fact finding analysis of whether it would be reasonable to expect a British child to leave the United Kingdom with his mother.

14. The FtTJ had not conducted that proper assessment of the evidence, because he had proceeded on the mistaken premise that the child's nationality was indeterminate. Therefore, the decision should be set aside and remitted to the First-tier Tribunal for a proper fact-finding analysis to be carried out.
15. Mr Alhadi on behalf of the Appellant submitted that as the Respondent had conceded that the FtTJ had erred by making a factual error, I should simply remake the decision allowing the appeal outright. He submitted that all the available evidence had been before the FtT, and that the FtTJ's findings at [25] provided sufficient evidence to enable me to allow the appeal outright (see first sentence quoted at paragraph 6 above). He did accept that should I find an error of law and decide that the matter must be reheard, then it was appropriate that it be reheard in the First-tier Tribunal.

## **Discussion**

16. Firstly, I am satisfied that the decision of the FtTJ contains a material error requiring it to be set aside and remade.
17. It is clear that the FtTJ's decision is premised on a material error of fact. As the grounds seeking permission point out and as accepted by Ms Fujiwala, there was before the FtTJ a copy of the Appellant's partner's passport showing a grant of indefinite leave to remain to him. The judge was therefore in factual error at [24].
18. That error in my judgment affects the whole of the decision. Had the judge properly evaluated the evidence and taken the copy passport into account, then he would no doubt have recognised that the Appellant's son is entitled to be recognised as a British child. That changes the focus of the enquiry and the judicial fact finding exercise. The question before the judge shifts to whether or not Article 8 by reference to Appendix FM of the Rules applies, and to the issues set out in paragraph EX1(a) therein.
19. I find, despite Mr Alhadi urging me otherwise, that there has been no meaningful fact-finding exercise showing that proper consideration has been given to the above point. Indeed, Mr Alhadi was unable to demonstrate to me anywhere within the decision that this point had been covered.

20. I find therefore that I am satisfied that the FtTJ decision contains material error of law. I see no alternative other than to set aside the decision in its entirety because it is infected by an incorrect factual matrix. The decision will now need to be remade with fresh findings of fact being made. It is appropriate, on account of the amount of judicial fact-finding necessary, that this decision be remade in the First-tier Tribunal.

**Notice of Decision**

The decision of the First-tier Tribunal promulgated on 25<sup>th</sup> October 2017 is hereby set aside. The matter is remitted to the First-tier Tribunal for a full rehearing (not Judge Skehan).

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  
2018

C E Roberts

Date

21

March

Deputy Upper Tribunal Judge Roberts