



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/12666/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 15 March 2018

**Decision &
Promulgated
On 11 May 2018**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MABEL VICTORIA STEWART
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer

For the Respondent: Mr J Waithe of Counsel instructed by Okafor & Co.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Clarke promulgated on 22 February 2017.
2. Although before me the Secretary of State for the Home Department is the Appellant and Ms Stewart is the Respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and Ms Stewart as the Appellant.

3. The Appellant is a citizen of Jamaica born on 3 September 1954. She entered the United Kingdom on 10 October 1998 with a visitor visa valid until 10 April 1999. It appears that she was granted further leave to remain on 11 May 2000 until 31 May 2001. On 9 July 2012 the Appellant made an application for leave to remain on the basis of long residence claiming to have resided in the United Kingdom for fourteen years. The application was refused on 27 July 2013 with no right of appeal. On 2 October 2015 the Appellant was served with a 'section 120 notice' advising her of her immigration status and liability to detention and removal from the United Kingdom. In response, by way of a letter from her representatives dated 27 October 2015, the Appellant raised issues in respect of Article 8 in particular with regard to her relationship with Mr Keith Moseley. It was said that the Appellant was in a 'common-law relationship' with Mr Moseley. Mr Moseley was born on 21 February 1949 in Barbados. I will return to the issue of his status in due course.
4. The Appellant's representations were treated as a human rights claim, which was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 17 November 2015. The RFRL gives consideration to the Appellant's application pursuant to the Immigration Rules with reference to the 'partner' rules under Appendix FM, and also with reference to the private life pursuant to paragraph 276ADE(1). Consideration was also given to whether or not there were exceptional circumstances in the case. It was determined that there were no such circumstances to warrant the grant of leave to remain outside the provisions of the Rules.
5. In considering 'family life' pursuant to Appendix FM the Respondent acknowledged that the Appellant met the 'suitability' requirements. However, the Respondent was not satisfied in respect of the requirements of either GEN.1.2 of Appendix FM with regard to the nature of the relationship with Mr Moseley, or the 'eligibility' requirements. In particular the Respondent did not accept that the Appellant had provided sufficient evidence to show that Mr Moseley was either a British citizen, or otherwise present and settled in the United Kingdom, or in the United Kingdom with refugee leave or as a person with humanitarian protection.
6. Under paragraph 276ADE(1) the Respondent did not accept that there would be very significant obstacles to the Appellant's integration into Jamaica if she were required to leave the United Kingdom because she had been born and raised there and spent the first 44 years of her life, including in particular her formative years, living there before coming to the United Kingdom. It was considered that she would therefore be familiar with the social and cultural aspects of life in Jamaica.
7. The Appellant appealed to the Immigration and Asylum Chamber. The appeal was allowed for reasons set out in the decision of Judge Clarke.

8. The Respondent applied for permission to appeal which was granted by First-tier Tribunal Judge Parkes on 6 September 2017. The grant of permission observes that the grounds argue that the Judge did not have evidence that would justify finding that the Appellant's partner had the required status in the UK. This was considered 'arguable'. The grant of permission to appeal comments:

"This was a point on which the Judge should have obtained more information both legally and factually. It may be that the Appellant's partner can demonstrate a right to reside but it is an area where proceeding on limited information is inadvisable".

9. It was indeed the status of the Appellant's partner that was the subject of particular focus before the First-tier Tribunal - and is now in turn the focus before the Upper Tribunal.
10. Nonetheless, it is to be noted that the Respondent did not accept the fact of the claimed relationship between the Appellant and Mr Moseley, irrespective of his status: see RFRL at paragraphs 12 to 17. The Respondent's decision in this regard was based in part on the fact that notwithstanding the claim that the Appellant had been in a relationship akin to marriage with Mr Moseley since 2003, neither the relationship nor Mr Moseley had featured in the application for leave to remain made by the Appellant in 2012.
11. In the current application it was said in the representatives' covering letter of 27 October 2015 that Mr Moseley *"is a person present and settled here in the United Kingdom"*. However, the only document submitted in respect of his possible status was a copy of a Barbados passport issued by the Barbados High Commission in London on 20 May 2003 valid until 19 May 2008. There was nothing in the passport that indicated that the Appellant had been granted any particular status in the United Kingdom. It was not pleaded in the covering letter that he had acquired British citizenship at any stage.
12. In support of the application Mr Moseley provided a supporting statement by way of a letter dated 15 October 2015 (Respondent's bundle before the First-tier Tribunal at Annex C1). He refers therein to his relationship with the Appellant, and also to various family networks. However, the letter is silent with regard to his own immigration history and status.
13. The RFRL, at paragraph 20, identified that the only evidence presented in support of status was Mr Moseley's expired Barbados passport. On that basis it was not accepted that the Appellant had shown that Mr Moseley had the requisite status to satisfy the eligibility requirements of ELTRP.1.2.

14. On appeal Mr Moseley provided a witness statement in support of the Appellant's case which again primarily focused on the nature of his relationship with the Appellant and their respective circumstances in the United Kingdom. Little was said as to his immigration status: the statement offers no more than the following: *"That I have been residing in the United Kingdom since 1960."* (paragraph 2).
15. During the hearing, however, it appears that he gave his date of entry to the United Kingdom as being 1966. Paragraph 7 of the Decision of the First-tier Tribunal refers to his evidence as being that *"he was brought over to the UK from Barbados as a child by an aunt on her passport in 1966 when his country was a colony"*.
16. During the course of discussion and argument before me, Mr Waithe, who had also appeared before the First-tier Tribunal, acknowledged that Mr Moseley had indeed referred to 1966 as being his date of entry to the United Kingdom during the proceedings before the First-tier Tribunal. Although Mr Waithe accepts that the witness said this, he suggests that the witness must have been in error: the Appellant now seeks to produce a further document that suggests that Mr Moseley may have entered the United Kingdom in 1961. The document is an expired Barbados passport in the name of Velda Moseley issued in London on 19 July 1972. At page 31 of the passport there is an endorsement to indicate that the bearer had previously travelled on 3 May 1961 on a previously held passport. Mr Waithe indicated that he was now instructed that this was the aunt with whom the Appellant had come to the United Kingdom, and, there being no other date of travel indicated on the document, that it was to be inferred that Mr Mosley had entered on 3 May 1961.
17. Be that as it may, in my judgement this 'new' evidence as to possible entry in 1961, is not pertinent at the 'error of law' stage. Nor does the new evidence in itself establish Mr Moseley's present status in the United Kingdom.
18. The First-tier Tribunal Judge set out the evidence and her findings in respect of the status of Mr Moseley at paragraphs 7-11 of her Decision in the following terms:
 7. *We had a discussion as to the immigration status of Mr Moseley. He told us that he was brought over to the UK from Barbados as a child by an aunt on her passport in 1966 when his country was a colony. His parents were in the UK and attained citizenship simply by entering the UK and he was brought by an aunt. He was told of his naturalisation by the governor of Oxford prison in 1986.*

8. *The only identification he has is an old Barbadian passport a copy of the relevant page is in the Respondent's bundle. I heard of how he applied for his citizenship documents again but there was a fire in the records department and the papers were destroyed.*
 9. *It is unfortunate that I was not provided with objective evidence as to the situation before the Immigration Act 1971 came into force for Barbadian nationals coming to the UK as British subjects.*
 10. *I referred to the definition section Rule 6 of the Immigration Rules during the course of the submissions and on reading what is 'settled status' I am satisfied that for the purposes of this appeal Mr Moseley has settled status because he has lived in the UK continuously since his arrival in 1966 and not leaving to the UK at all since his arrival. Rule 6 reads that the person must be free from any restriction on the period for which he may remain and he is ordinarily resident in the UK without having entered or remained in breach of the immigration laws.*
 11. *I accept that on a balance of probabilities Mr Moseley is most likely to be settled if not a British citizen."*
19. In my judgment the reasoning therein - to be found at paragraph 10 - is unsatisfactory.
 20. It is not remotely determinative of either citizenship or settled status that a person "*has lived in the UK continuously since his arrival*" - even if that arrival were as long ago as 1966 (or 1960 or 1961) - and has not left the country since arriving. There may be many cases where individuals have remained without any sort of authority for substantial periods of time. The mere remaining, or the mere presence, for substantial periods of time is not reliably indicative of, or sustainably determinative of status - albeit that it might give a strong foundation in an application for regularisation where necessary.
 21. I am satisfied that the reasoning of the First-tier Tribunal Judge on this point is unsustainable and thereby flawed to an extent that it amounts to an error of law.
 22. The error in this regard was clearly material to the outcome of the appeal. The First-tier Tribunal Judge essentially appears to conclude that the Appellant met the requirements of Appendix FM on the basis of the finding as to the status of Mr Moseley - as well as being satisfied in respect of the Appellant's relationship with Mr Moseley. (I note that the Judge's finding -

“the Appellant and Mr Moseley have been in a relationship since around 2003” (paragraph 6) - is not challenged.)

23. Moreover at paragraph 13 in stating *“I would have allowed the appeal outside the Immigration Rules ...”*, the Judge is plainly influenced by her observation that Mr Moseley is *“likely to be a British citizen”*.
24. I do not accept that the Judge’s error is ‘saved’ by the very brief consideration given to paragraph 276ADE(1)(vi) at paragraph 12 of the Decision. Reference is made to the Appellant’s age – dubiously characterised as elderly at the age of only 62 - and the absence of family ties to Jamaica: in my judgment substantially more would have needed to have been considered in this regard before reaching a satisfactorily sustainable conclusion as to ‘very significant obstacles to integration’.
25. It is to be noted that these proceedings have taken some time to come to this stage by reason of having previously been adjourned in December 2017 in order to obtain further evidence.
26. The appeal was listed before Upper Tribunal Judge Zucker on 8 December 2017 and it was indicated that Mr Moseley’s mother had two British passports which were at her home and which could be located and submitted. Directions were issued by the Tribunal accordingly that such documents and copies of the relevant pages of the passports were to be filed and served by 22 December 2017 - and it was recorded in this regard that the Respondent did not object to the production of the passports. It was also said that the originals should be produced at the resumed hearing which in due course was listed in February 2018. It seems to me that it is reasonable to infer that what was in mind at that stage was that the production of Mr Moseley’s mother’s passports might provide a quick and easy answer to the question of his own status such that any error on the part of the First-tier Tribunal Judge might be seen as ultimately not being material, and that it would be feasible to reach a satisfactory resolution in the proceedings expediently. (Again I note that any ‘new’ evidence would not in itself be relevant to identifying an error of law – albeit might be relevant to materiality of any error.)
27. However it transpires that the documents thus produced pursuant to the Direction did not greatly assist the Respondent in consideration of the status of Mr Moseley because they were very far from determinative. The documents were filed under cover of letter dated 18 December 2017; they included a valid and an expired British passport, as well as Mr Moseley’s birth certificate. The current British passport gives the bearer’s name as ‘Marjorie Small’; the expired passport which was seemingly issued in the United Kingdom in February 1969 is in the name ‘Marjorie Eudora Small Moseley’. This prompted the Respondent to seek further information from

the Appellant's representatives: there has been produced an exchange of emails, including an email from the Secretary of State seeking an adjournment of the listed hearing on 2 February 2018. That hearing was indeed adjourned until the present date. In the meantime, under cover of letter dated 9 March 2018 received at the Tribunal on 12 March 2018 some further documentation was provided on behalf of the Appellant by way of the marriage certificate of Mr Moseley's mother to Mr Leon Small on 22 January 1966 at the register office in Southwark. It is suggested elsewhere that Mr Small is the Appellant's father. Some national insurance records in respect of Mr Moseley were also provided - but these do not establish either his immigration status or his nationality status.

28. As things stood before me, the materials that have been filed since the direction of Judge Zucker have not been considered by the Respondent to be such as to warrant making any concession in the appeal as to Mr Moseley's status.
29. Mr Waithe attended the hearing today armed with a considerable bundle of materials, in particular the Constitution of Barbados from which he had initially wanted to try and demonstrate that the Appellant's partner's status must be that of a British citizen. Mr Wilding for his part has provided a copy of the Barbados Independence Act 1966, and both parties have referred me to various provisions in the Immigration Act 1971, in particular Section 2 and Schedule 2. At one point Mr Waithe also wanted to refer me to Schedule 1, but in due course it was not necessary to give consideration to it.
30. After very considerable exploration and discussion of the issues it became common ground that the reality was that considerably more would be required by way of both fact-finding and legal submissions to establish not only the potential legal framework within which it might be shown that Mr Moseley had acquired some sort of status in the United Kingdom - or indeed British citizenship - but also by way of establishing the relevant facts to support any such contention. As such, Mr Moseley's status not being readily demonstrable before me, it was common ground that the Tribunal could not conclude that the errors on the part of the First-tier Tribunal Judge could be said to be immaterial. It follows that the decision in the appeal requires to be set aside, and requires to be remade by way of a further hearing before a differently constituted First-tier Tribunal with all issues at large.
31. In this context sight should not be lost of the fact that this is not Mr Moseley's appeal, but that of Ms Stewart. Her circumstances, whilst interlinked with the circumstances of Mr Moseley, have further dimensions to them and it may well be that there are aspects of her case that require further consideration irrespective of any conclusion that may be made in respect of Mr Moseley's position. I do not wish in any way to be

prescriptive as to the matters that should be considered by the next Tribunal: however, in light of the discussions before me it may be helpful to set out something by way of exploration as to the matters that the parties are likely to wish to address - although it is ultimately up to the parties to present the case as they see fit, and in turn it is up to the next Judge to determine on what basis he or she may wish to evaluate and determine the appeal.

32. Insofar as Mr Moseley's status may continue to be an issue - see further below - it is to be noted that as things stand there is an absence of any direct evidence that he currently enjoys any particular grant of leave. It follows that if he has a case at all it is on the basis of having acquired undocumented indefinite leave to remain, or British citizenship by some means. Matters are complicated by the fact that it is unclear as to at what point in time he might be considered possibly to have obtained British citizenship.
33. In discussion of the Barbados Independence Act 1966, it was accepted on the part of the Secretary of State that the Appellant as a person born in Barbados prior to independence would immediately prior to independence have been a citizen of the United Kingdom and Colonies. At the point of independence, pursuant to section 2 of the Barbados Independence Act 1966, the Appellant would have ceased to be such a citizen (section 2(2)) unless he retained citizenship by virtue of section 3. There is presently no evidence to suggest that he was a person who retained citizenship of the United Kingdom and Colonies - the evidence points in the direction of him having ceased to be a citizen of the United Kingdom and Colonies on 30 November 1966 and to have become a citizen of Barbados on that day. This is consistent with, and perhaps underscored by, the fact that he obtained a Barbados passport in 2003.
34. However even in this regard it is suggested that he obtained the passport notwithstanding that he had at some earlier point renounced his citizenship of Barbados. But the evidence for renunciation is unclear. Moreover, Article 7 of the Constitution of Barbados, which deals with renunciation of citizenship, suggests that any such renunciation will not take effect if the renouncer fails to acquire a new citizenship within six months. The fact that the Appellant was able to obtain a Barbados passport after his supposed renunciation of citizenship might be thought powerfully to indicate that he did not obtain any alternative citizenship - and therefore did not become a British citizen. In this regard - as noted in the decision of the First-tier Tribunal - it was Mr Moseley's understanding that he might have become a British citizen by way of naturalisation in 1986.
35. Careful consideration may need to be given to the ways in which citizenship can be acquired under the British Nationality Act 1981 - and

indeed under the preceding legislation if it is suggested that Mr Moseley might have acquired his citizenship at any time prior to the commencement of that Act in 1983. It would appear on its face that the relevant provisions might be section 6 (naturalisation), section 10 (upon renunciation of being a citizen of the United Kingdom and Colonies), and section 11 (acquisition at commencement). Section 10 appears on its face to be an unlikely provision in circumstances where during the pendency of the 1981 Act the Appellant does not appear to have been a citizen of the United Kingdom and Colonies having ceased to be so in 1966.

36. Consideration may perhaps also have to be given not only to the fact that Mr Moseley obtained a Barbados passport at a time when he claims he had acquired British citizenship and renounced his Barbados citizenship, but to the fact that the Appellant made an application in 2012 without referring to Mr Moseley - notwithstanding having been in a relationship with him, on the Judge's findings, for nine years. It might be thought - and it may require some exploration - that this suggests that in 2012 there was some considerable doubt as to Mr Moseley's status such that it was not considered appropriate to apply for leave as his partner.
37. The matter is complex. In the circumstances the hope and expectation is that the case will be listed appropriately.
38. Since the giving of the above reasons there has been considerable focus in the media on the so-called Windrush generation and their children. The Secretary of State has made announcements to the effect that such persons who may have acquired rights to remain in the UK but have not regularised their status, or who have struggled to provide proof, may have their cases reviewed by special task force duly appointed. It may be that Mr Moseley falls to benefit from such an approach. No doubt the Appellant's representatives will be alert to this, and will act accordingly. Of course in the event that this leads to a favourable resolution of Mr Moseley's status, the Respondent may wish to review the decision in the Appellant's case. The Tribunal should be kept informed by the parties of any relevant developments - particularly if it is to be suggested that the proceedings before the Tribunal should be adjourned in the meantime.

Notice of Decision

39. There was material error of law in the decision of the First-tier Tribunal. The decision is set aside.
40. The decision in the appeal is to be remade before the First-tier Tribunal with all issues at large by any Judge other than First-tier Tribunal Judge Clarke.

41. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **8 May 2018**

Deputy Upper Tribunal Judge I A Lewis