Upper Tribunal
(Immigration and Asylum Chamber)

Rose (Automatic deportation - Exception 3) Jamaica [2011] UKUT 00276(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 February 2011	**4 July 2011**

Before

LADY DORRIAN

SENIOR IMMIGRATION JUDGE STOREY

Between

MR BANCROFT CONSTANTINE ROSE (AKA ADRIAN ALAN MORRIS, KEVIN BANCROFT ROSE, QUINN ADAM)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellant: Dr D Samuels, Solicitor, JDS Solicitors

For the respondent: Mr A Skeikh, Home Office Presenting Officer

1. The personal scope of the safeguards against expulsion which Article 27 of 2004/38/EC (the “Citizens Directive”) affords to “family members” does not include "other family members"(OFMs).

2. Hence Exception 3 to s.32(4) and (5) of the UK Borders Act 2007 (which arises where the removal of a foreign criminal from the United Kingdom in pursuance of a deportation order would breach the rights of the foreign criminal under the EU treaties [previously “Community treaties”] cannot be invoked by OFMs.

3. However, a person who has been found to be an OFM/extended family member under the Immigration (European Economic Area) Regulations 2006 needs to be considered by the Secretary of State as a person in respect of whom the discretion to issue a residence card under regulation 17 may be exercised.

4. The result of the exercise of that discretion may be that regulations 20-21 apply to the appellant’s removal, and the decision would not be lawful without regard to them.

5. So if consideration has not been given to the exercise of the discretion, the assessment of criteria going to deportation or removal cannot be completed.

DETERMINATION AND REASONS

1. The appellant is a Jamaican national born on 12 October 1961. He came to the UK on 23 August 2002 using a British passport issued on 27 February 2002 to Adrian Alan Morris. On 2 October 2007 a fresh passport was issued to Mr. Morris who had reported the loss of his original passport. On 8 September 2009 the appellant was arrested at Gatwick airport on suspicion of possession of an improperly obtained identity document with intent contrary to section 25(1) of the Identity Cards Act 2006. On 26 September he pleaded guilty to such a charge and was sentenced to twelve months imprisonment.

2. The respondent made two separate decisions in respect of the appellant, both dated 1 April 2010. He had applied for a UK residence card based on his relationship in the UK with an EEA national, Claudette Ashley. That application was refused on the basis that it was not accepted that, in terms of the Immigration (EEA) Regulations 2006 ("the 2006 Regulations") he had established that he was in a durable relationship with Miss Ashley and thus qualified as an "extended family member" under those Regulations. It was accepted that he had established family life in the UK but it was not accepted that refusal of his application would amount to a breach of Article 8. On the same date, the respondent concluded that the appellant did not come within any of the exceptions from automatic deportation provided for under section 33 of the UK Borders Act 2007 ("the 2007 Act") and that to deport him would equally not constitute a breach of Article 8.

3. The decision letter relating to deportation does not make it clear whether the respondent's acceptance of family life for the purposes of article 8 related to life with Ms Ashley only or also with her son Giani, but from the references made therein to the appellant seeming to play the role of "de facto" father, we are satisfied that the acceptance relates to family life with both of them.

4. An appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 was refused by the First-tier Tribunal (hereafter "FTT") on 29 June 2010. A hearing in the appeal from that decision was heard in the Upper Tribunal before SIJ Ward on 8 December 2010. It is obvious that the SIJ was not assisted at that hearing either by the terms of the skeleton argument on behalf of the appellant or by the submissions made in support of them (factors which we regret to say were repeated before us). We are very conscious of the likelihood that the relevant legislative provisions were not placed before the SIJ. Moreover, the issues which were canvassed at that hearing do not seem to bear any true relationship to the way the matter was argued before the FTT. At the hearing before the FTT the focus was on the question of whether the appellant came within one of the exceptions to automatic deportation raised under section 32 of the United Kingdom Borders Act 2007 and on the effect deportation might have on the Article 8 rights of the appellant. Some consideration was also given to the effect on Article 8 of the rights of others with whom the appellant was enjoying family life. In the skeleton before the SIJ, the point raised related not to the deportation decision but to an argument that the appellant was the "extended family member" of Ms Ashley for the purpose of the 2006 Regulations and so could not be removed because of reg. 21 of those Regulations. Doing her best with the unpromising material before her, the SIJ decided that there had been a material error of law in the determination of the FTT. Fundamentally that was in relation to its assessment under Article 8. She concluded that the tribunal had not made a considered assessment of the nature of the relationship between the appellant and Ms Ashley and that, insofar as it had considered the matter, it was as an afterthought. SIJ Ward concluded that the FTT in making its assessment under Article 8 had not given sufficient regard to the Treaty rights of Ms. Ashley or of her son and had not considered the impact on

that assessment of her status as a worker in the UK exercising Treaty rights. We consider that SIJ Ward was fundamentally right in both respects. The SIJ made an order for a resumed hearing to enable the decision to be remade and concluded that, in light of the fact that two bundles, including witness statements had already been lodged, a decision could be remade without hearing further evidence. It is to the remaking of that decision we now turn.

5. SIJ Ward did not specifically preserve any findings of the FTT. That said, some of the findings of fact made by the FTT were not in dispute before us, although there was dispute about the conclusions which it might be legitimate to draw from those findings insofar as they bore on the nature of the relationship between Ms Ashley, her son and the appellant. We regard it as accepted that, in the words of the FTT, “private and family life exists between the appellant and Claudette Ashley and her son, Giani” (para 35). The tribunal did go on to say that the relationship in each case was “limited” which is a somewhat cryptic descriptor. However, whatever it precisely meant, it plainly did not mean that family life did not exist at all. In expressing itself so we think it had in mind that the evidence before it showed there to be only a limited factual content to the appellant’s family life ties. It was on that somewhat confused background that the case came before us for submissions.

6. We should record that during the submissions to us, no reference was made to any of the provisions in the 2007 Act. Reference was made to the terms of the 2006 Regulations and arguments were advanced as to the Article 8 rights, in terms of family life, of the appellant, Ms Ashley and her son. It is therefore worth setting out the basis on which it seemed to us that the matter has to be approached.

Legal framework

7. Sections 32 and 33 of the 2007 Act read as follows:

" **32 Automatic Deportation**

(1) In this section 'foreign criminal' means a person –

(a) who is not a British Citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that –

(a) the offence is specified by order of the Secretary of State under s. 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c41) (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

(4) For the purposes of s.3(5)(a) of the Immigration Act 1971 (c77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to s. 33).

(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless –

(a) he thinks that an exception under s.33 applies,

(b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or

(c) s.34(4) applies.

(7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State.

33 Exceptions

(1) Sections 32(4) and (5) –

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

(b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).

(2) Exception 1 is where removal of a foreign criminal in pursuance of the deportation order would breach –

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention.

(3) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of decision.

(4) Exception 3 is where the removal of a foreign criminal from the United Kingdom in pursuance of a deportation order would breach the rights of the foreign criminal under the Community treaties.

(5) Exception 4 ... [concerns extradition]

(6) Exception 5 ... [concerns people subject to various orders under the Mental Health Act 1983 or their equivalents in Scotland or Northern Ireland]

(6A) Exception 6 is where the Secretary of State thinks that the application of section 32(4) and (5) would contravene the United Kingdom's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (done at Warsaw on 16 th May 2005).

(7) The application of an exception -

(a) does not prevent the making of a deportation order;

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

but s.32(4) applies despite the application of Exception 1 or 4.”

8. It is also necessary to set out the provisions of the Directive and the 2006 EEA Regulations dealing with family members, mentioning first of all those dealing with close family members:

“Article 2.

Definitions

For the purposes of this Directive:

(1) ‘Union citizen’ means any person having the nationality of a Member State;

(2): 'Family member' means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage … ;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependant direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

…"

9. Regulation 7 of the 2006 Regulations specifies that:

“7 (1) …for the purposes of these Regulations the following persons shall be treated as the family members of another person –

(a)
his spouse or his civil partner;

(b)
direct descendants of his, his spouse or his civil partner who are –

(i)
under 21; or

(ii)
dependants of his, his spouse or his civil partner;

(c)
dependent direct relatives in his ascending line or that of his spouse or his civil partner;

(d)
a person who is to be treated as the family member of that other person under paragraph (3).

(2)
…

(3)
Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2),(3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.

(4)
Where the relevant EEA national is a student, the extended family member shall only be treated as the family member of that national under paragraph (3) if either the EEA family permit was issued under

regulation 12(2), the registration card was issued under regulation 16(5) or the residence card was issued under regulation 17(4).”

10. For OFMs/extended family members, the relevant provisions are Article 3 and regulation 8 respectively. Article 3 provides:

“1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family members by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

11. Prior to 2 June 2011, reg. 8, headed, "Extended family members", stated that:

“1. In these Regulations ‘extended family member’ means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraphs (2), (3), (4) or (5).

2. A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and –

(a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national in the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

3. A person satisfies the conditions in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national, his spouse or his civil partner.

4. A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

5. A person satisfies the conditions in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national."

Regulation 8(2)(a) has now been amended by the Immigration (European Economic Area) (Amendment) Regulations 2011 so that for "an EEA State" the words substituted are "a country other than the United Kingdom".

Analysis

12. There is no doubt on the papers before us that the appellant comes within the definition of a "foreign criminal" for the purposes of the 2007 Act. Accordingly, in terms of section 32 of that Act it is mandatory for the Secretary of State to deport him unless he comes within one of the exceptions specified in section 33.

13. On the evidence in this case there are two exceptions which arise for consideration. One is Exception 1, namely that the foregoing provisions do not apply "where removal of the foreign criminal in pursuance of the deportation order would breach (a) "a person's Convention rights". That means that in the circumstances of the present case, consideration must be given to whether deportation of the appellant would breach his own article 8 rights or those of Ms. Ashley or her son. The sole question for us in relation to this exception is therefore whether removal would constitute a breach of article 8.

The Exception 3 issue

14. The other exception is Exception 3 which arises "where the removal of the foreign criminal from the UK in pursuance of a deportation order would breach rights of the foreign criminal under the Community treaties". Given the supremacy of EU law, it is appropriate that we consider this exception first. Does this exception apply to the appellant? By virtue of s.2(1) of the European Communities Act 1972 as amended by the European Union (Amendment) Act 2008, the expression "Community treaties" [now amended to read "EU treaties"] encompasses secondary EU legislation which of course includes 2004/38/EC (the "Citizens Directive"). In turn, Article 27(1) of the Directive, read in conjunction with recital 23 affords safeguards against expulsion to both Union citizens and their family members. Article 27(1) states that "Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health…" Recital 23 states that:

"Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin."

15. But for the appellant to be able to avail himself of such EU safeguards against expulsion he would need to show that he qualified as a "family member" for Article 27.1 purposes. In our view he cannot for two main reasons.

16. As to the first reason we would accept that there are two possible views. It is at least arguable that the Article 27(1) safeguard against expulsion is intended to cover family members of all kinds including OFMs. Whilst Article 2.2 would appear to specify that for the purposes of the Directive generally 'family member' means only those persons who come within Article 2.2 (and so not to include OFMs under Article 3.2(a)) there are other provisions which appear to apply the term 'family member' to include both Article 2.2 family members and OFMs: see in particular Article 8(5), which concerns issue of registration certificates to family members and which at 8(5)(e) deals with "cases falling under Article 3(2)(a));and Article 8 (which deals with the issue of residence cards to family members and includes at Article 10(2)(e) provisions for "cases falling under Article 3(2)(a)").

17. The alternative view, which is the one we take, is that the definition given of family member in Article 2.2 (which does not extend to OFMs) is intended to be Directive-wide since the definition set out in Article 2(2) is preceded by the opening words "For the purposes of this Directive". Recital 6 likewise refers to OFMs as "those persons who are not included in the definition of family members under this Directive".

18. But even if we are wrong in taking the view that the scope of Article 27.1 does not cover OFMs, that still does not assist this appellant. This brings us to our second reason for finding that he is not covered by EU safeguards. He only comes within any provisions of the Directive by virtue of being a person in a durable relationship. But under the Directive persons in a durable relationship are not even included in the definition of OFMs: cf Article 3.2(a) and Article 3.2(b).

19. We have considered whether even though the appellant does not come within the Directive's safeguards against expulsion he might nevertheless be able to avail himself of these by virtue of the national law transposing the Directive – the 2006 Regulations. Here it does appear to us that even OFMs (extended family members) are able to invoke such safeguards. Whilst these Regulations, like the Directive, differentiate between "family members" and "extended family members" (called OFMs in the Directive), reg 8(3) expressly provides that once a person has qualified as an extended family member and has been issued with residence documentation he shall be treated as a "family member" for as long as he continues to satisfy the underlying conditions and his residence documentation has not ceased to be valid or been revoked. The significance of this extension is that reg 20(1) provides that: "The Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence, or a permanent residence card if the refusal or revocation is justified on grounds of public policy, public security or public health." And reg 17 which deals with the issue of residence cards (including to extended family members: see reg 17(4)) states at reg 17(8): "But this regulation is subject to regulation 20(1)."

20. However, the difficulty with taking the national law provisions of the 2006 Regulations as the basis for an argument that the appellant comes within Exception 3 is that the above provisions are ones that are more generous than the Directive. Article 37 of the Directive expressly allows for Member States to make more generous provision, but it remains that such provisions are not imposed by EU legislation. Hence such provisions do not amount to "rights …under the EU [previously Community] treaties" The appellant, therefore, falls outwith Exception 3. That is not to say his position under EU law is entirely irrelevant to his case but if it has relevance it can only be in the context of Exception 1.

The Exception 1 issue

21. We are back, then, to the question of whether the appellant falls within Exception 1. That requires us to determine whether his removal would breach a "person's Convention rights". Pursuant to s.6 of the Human Rights Act 1998 and related case law, the cases of Beoku-Betts and more recently ZH

(Tanzania) [2011] UKSC 4 in particular, that requires us to consider the human rights not just of the appellant but also of his partner and her son.

22. We begin by considering the relationship between the appellant and Ms Ashley. Here, it seems to us, the fact that Ms Ashley is an EEA national exercising Treaty rights means that we must first of all consider whether the appellant is able to claim any connection with her under the 2006 Regulations. In our view he can. On the evidence before us we are satisfied that he comes within the ambit of regulation 8(5) of the 2006 Regulations by virtue of his being in a durable relationship with the EEA national. Let us take this step-by-step.

23. It is not in dispute that Ms Ashley is a qualified person under reg 6 of the 2006 regulations and that she is in the UK exercising Treaty rights.

24. There is little case law on the meaning of "durable relationship", although we have derived help from the case of YB (EEA reg 17(4) –proper approach) Ivory Coast [2008] UKAIT 00062. It is clear to us that the concept is not co-terminous with "family life" within the meaning of Article 8. "Family life" may exist even if only for a short period. So the fact that the FTT accepted that the appellant had a family life relationship or family life relationships does not necessarily show that that with his partner was "durable". However, we do not need to explore the meaning of the two different provisions further because we are satisfied that on the evidence that was before the FTT, even if the appellant's relationships with his partner had limited factual content, it was one properly described as durable. We note that they had lived together since mid-to-late 2008 and it was accepted by the respondent that their relationship has indeed continued since the hearing before the FTT. There is evidence that they had made wedding plans and it is clear that these were made before his deception was discovered by the authorities. It was after his return from the aborted wedding trip that he was arrested. In addition, there are all the letters when he was in prison which seems to provide some testimony to the strength of the relationship.

25. The fact that the appellant is accordingly an "extended family member" for the purposes of the 2006 Regulations does not of itself alter his status in the UK. That is because in respect of such persons the 2006 Regulations do not impose an obligation on the respondent to confirm that they are in the UK lawfully by means of issuing them with residence documentation. Unlike the position with direct family members (dealt with in Article 2.2 of the Citizens Directive and reg. 7 of the 2006 Regulations) for whom the issue of residence documentation is mandatory, the issue to OFMs of a residence card is a matter of discretion. The Secretary of State has discretion under reg 17(4) to issue a residence permit to an extended family member of a qualified person if "in all the circumstances it appears to the Secretary of State appropriate" to do so.

26. However, the fact that in the appellant's case the Secretary of State has not yet exercised the reg. 17(4) discretion places us in a difficult position. It is not open to us to make a decision that he was entitled to a residence card. We can only exercise the reg. 17(4) discretion ourselves if the respondent had first exercised it: see FD (EEA discretion – basis of appeal) Algeria [2007] UKAIT 49 and YB (EEA reg 17(4) –proper approach) Ivory Coast [2008] UKAIT 00062.

27. As to the exercise of the reg. 17(4) discretion there are two possibilities. Either the respondent will refuse to exercise it in the appellant's favour or she will not. If she exercises it in the appellant's favour that is not necessarily sufficient to protect the appellant against expulsion: the whole of reg. 17 is "subject to regulation 20(1)" and reg. 20(1) of course still permits the expulsion of an extended family member albeit only on public policy, public security or public health grounds. But if the respondent were to decide to act under reg. 20(1) that would necessitate a fresh decision.

28. Even if the respondent decides to exercise her discretion under reg. 17(4) adversely to the appellant it remains that she would need to decide whether the EU/EEA dimension to the case required a different approach to the Article 8 ECHR issue. That is made clear by the respondent's own European Caseworker Instructions (ECIs) at 5.3. This states that if it is decided there is a durable relationship then the caseworker should proceed to a stage 3 in which:

"In relation to durable partners, provided the applicant meets the definition of a durable partner it is likely that to refuse a residence card would deter the relevant EEA national's free movement rights, given that the parties are in a long-standing and enduring relationship akin to marriage. However, the circumstances of the case should still be fully examined to come to a decision on that issue".

29. Given that the same Instructions go on to identify a stage 4 at which factors such as criminality or adverse immigration history are examined, it is clear that deterrence of a partner's free movement rights is not the only criterion, but it is nevertheless an important one. It may be that it will play an important role in the respondent's reg. 17(4) assessment. Miss Ashley and her son have lived in the UK since 2001. She obtained her present job in February 2010 and it is quite possible, as the FTT considered, that the reason the wedding was aborted and they returned to the UK was to enable her to take up this relatively well paid position. She felt that she would not be able to obtain such a well-paid job in Jamaica. She owns her home in Dagenham but would be unable to sell it at present because she would be in a situation of negative equity. In Jamaica she would have no job and no family support and she did not trust the authorities to manage her epilepsy. The main barriers as seen by her are her job, her health and her son's education. In Jamaica she would have to pay to send her son to school and for soccer practice but would be unlikely to be able to afford to do so. We also note the importance attached by the Court of Justice in the recent judgment in Case C-34/09 Zambrano 8 March 2011 to the consequences for third country national parents of the right of a minor child who is a Union citizen. At para 45 the Court stated that:

"Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

30. In the instant case, it is only the appellant who is a third-country national; Giani's mother is, like Giani, a Union citizen, but that difference scarcely weakens the significance of the boy's rights as a Union citizen. Giani has made it quite clear that he considers England, where he has lived since the age of 3, to be his home. He has friends, school and family here. Were his mother to go and live in Jamaica he would be obliged to go with her, with adverse consequences for the enjoyment of the substance of the rights attached to the status of Union citizenship.

31. Hence it seems to us that we cannot remake the decision in full. Whether or not the appellant falls within Exception 1 depends crucially on the outcome of a decision by the respondent as to whether the reg. 17(4) discretion should be exercised in the appellant's favour or not. The respondent has not as yet exercised that discretion because she did not accept that the appellant was an extended family member. We have now found that he is.

32. The fact that the decision-making process applicable to this appellant remains incomplete is sufficient for us to find that the s.32 decision was not in accordance with the law. To be in accordance he law, that decision would have needed, given that the appellant is a partner in a durable

relationship within the meaning of reg. 5 of the 2006 Regulations, to have included an assessment of whether that relationship was considered to have obstructed Ms Ashley's exercise of her Treaty rights of free movement. Such an assessment had the potential to impact heavily on the proper conduct of the Article 8 ECHR balancing exercise. In the absence of such an assessment it cannot be said that the decision has included a lawful assessment of whether the appellant fell within the Exception 1 exception.

33. To summarise our decision:

(As already found by SIJ Ward) the FTT materially erred in law; its decision has been set aside.

The decision we substitute is to allow the appeal to the extent that the matter remains outstanding before the Secretary of State to re-decide whether the appellant falls within Exception 1 of s.33 of the 2007 Act in light of the fact that the Upper Tribunal has found the appellant to be an extended family member under reg. 8(5) of the 2006 Regulations.

Signed Date

Lady Dorrian

Judge of the Upper Tribunal