

## R(AT, FF, BT) v SSHD [2017] EWHC 2714 (Admin)

### Case Summary

This judicial review in the Administrative Court concerns the unlawful removal of the Claimant AT following the unlawful refusal by the Secretary of State for the Home Department (SSHD) to accept his article 8 further submissions as a fresh claim. The SSHD's decision was procedurally unfair because AT was detained and unrepresented and the SSHD failed to give AT an opportunity to participate in the decision-making process, or to counter adverse allegations against him, or to inform him what further evidence he should put forward. The Court found that as an unrepresented detainee AT faced very real practical difficulties in obtaining proper access to the court and that if he had had access to legal representation he would have brought a judicial review and his removal would have been prevented. The case is also of interest because the SSHD was refused permission to participate in the judicial review hearing because she failed to state her case until the day before the hearing (a separate written judgment on that aspect of the case is awaited). The SSHD was ordered to bring AT back to the UK. The SSHD has not appealed the decision and AT is back in the UK. The case is not yet on Bailii – so it is linked at this resource page.

This case was brought as a result of the Public Law Project's research into whether Home Office 'removal window' policy and the short notice periods before removal adequately protect an individual's right of access to the court to challenge removal (that includes having enough time to find a lawyer who is ready, willing and able to act). We are looking for examples of cases where individuals with strong claims were unable to obtain proper access to the court before they were removed. If you are aware of any such cases then I would be grateful if you would contact me directly:

Rakesh Singh

[r.singh@publiclawproject.org.uk](mailto:r.singh@publiclawproject.org.uk)

### Background

AT is a Gambian national who last entered the UK as a student in October 2013. He was an overstayer from March 2014. He claimed asylum in September 2015. His asylum claim was refused and he became appeal rights exhausted in June 2016.

On 15 September 2016 AT was sent a notice of removal window. It said that he would not be removed for the first seven calendar days after he received the notice but after the end of that seven day period and for up to three months from the date of the notice he could be removed without further notice.

AT had failed to disclose that: he had been in a relationship with a Gambian national, FF, since March 2014; they had had a proxy marriage in the Gambia (which meant it was valid in UK law) in December 2014; they had been cohabiting since January 2015; FF was pregnant and was expecting the baby in October 2016.

On reporting to the Home Office on 26 September 2016, AT was detained and was told that he would be removed to the Gambia the next day. At that point AT, for the first time, informed the Immigration Officers of his relationship with FF. AT asked Immigration Officers to take him to the

flat he shared with FF flat to collect his belongings. The Immigration Officers witnessed that AT had belongings at the flat he shared with FF and that she was heavily pregnant.

When AT was to be removed on 27 September 2016 he protested that he could not be removed because his wife was pregnant and due to give birth. Removal was cancelled on the grounds that AT had been disruptive.

On 4 October 2016, AT and FF's son, BT was born. As FF had Indefinite Leave to Remain (ILR) at the time of his birth, BT was a British citizen.

From the time that AT received the notice of the removal window until his removal on 19 November 2016, AT was unable to obtain legal representation.

AT therefore made representations himself to the Home Office. He obtained his marriage certificate from the Gambia and his son BT's birth certificate and submitted that to the Home Office.

On 11 November 2016 the Home Office refused to accept AT's representations as a fresh human rights claim. The Home Office did not accept that AT and FF were in a genuine and subsisting relationship. The Home Office alleged that AT had told Immigration Officers that he did not live with FF and refused to believe AT and FF were in a genuine relationship they had failed to provide a well-founded pattern of documentary evidence from a variety of sources.

Following receipt of the refusal to accept a fresh claim, AT was given an appointment with a legal aid lawyer at the legal advice surgery at Brook House on 1 December 2016. However on the evening of 18 November 2016 AT was told that he would be removed the next day. AT was removed to the Gambia on 19 November 2016.

Following his removal to the Gambia AT brought a claim for judicial review challenging (1) the refusal to accept his submissions as a fresh claim (2) the lawfulness of his removal (3) the lawfulness of his detention.

### **Judgment**

In a judgment of the Administrative Court dated 31 October 2017, HHJ Walden-Smith allowed the judicial review, quashing the refusal to accept the submissions as a fresh claim, declaring that AT's removal was unlawful, declaring that his detention from the time of the refusal to accept a fresh claim was unlawful, and ordering the Home Office to use its best endeavours to return AT to the UK by 14 November 2017.

The Judge found that had AT had legal representation he would have issued a judicial review and his removal would have been prevented (para 83) and whilst she did not determine whether AT had been given sufficient notice of his removal, she found that AT had very real practical difficulty in obtaining proper access to justice in such a short time frame (para 95). The Judge found that AT had much greater difficulty in accessing representation in detention that he would have had if he had been released (para 107).

Procedural fairness requires that an affected party must have the opportunity to know both what the reasons are for making any particular decision and to challenge any adverse findings. Persons affected by decisions that interfere with their Article 8 ECHR rights must be involved to a degree

which is sufficient to provide them with the necessary protection of their interests. In this case the Court found that: the SSHD had failed to give AT a proper opportunity to provide further evidence to counter her concern that he was not in a genuine and subsisting relationship with FF (para 70); nor was he given an opportunity to counter the allegation that he said he was not living with FF and the SSHD should have undertaken further enquiries (para 72 and 77); without legal representation AT could not be expected to know what additional evidence the SSHD required from him and it ought to have been explained to AT by the SSHD (para 71); the SSHD's approach was unfair since it failed to recognise that AT was unrepresented and in detention and this meant that AT was unable to have meaningful engagement with the decision making process (para 70, 71, 83).

### **Refusal to allow the SSHD participate in the hearing**

The SSHD failed to respond to the letter before claim, failed to file an Acknowledgement of Service (AoS) and following the grant of permission failed to file detailed grounds of defence by the extended deadline granted by the Court. The SSHD filed detailed grounds of defence and a disclosure bundle the day before the substantive hearing. Where a Defendant fails to file an AoS and then fails to file detailed grounds of defence in accordance with the Court's directions or orders then it may not participate in the hearing of the judicial review. The Defendant must then apply for and be granted relief from sanction by the Court in order to participate in the hearing.

In this case the SSHD issued an application for relief from sanction on the morning of the substantive hearing. The SSHD accepted that her delay was serious and substantial and that there were not any good reasons for the delay. The SSHD argued that it would be in the public interest for her to mount a defence. The Court applying the Denton/Mitchell principles refused to grant relief from sanction and so the SSHD was not permitted to participate in the hearing. The Court found that the SSHD had placed the Claimants in an invidious position because they would either have to proceed with the substantive hearing without the opportunity to respond to what the SSHD had raised hours before the hearing that had been known about for months, or seek an adjournment which would prolong the unlawful interference with their Article 8 rights. Moreover the SSHD, by her inaction, failed to take the opportunity to engage in the judicial review process and there are no special rules for public authorities in public law cases. The hearing went ahead without the SSHD (see paras 3 to 16 of the judgment).

We await the separate detailed written judgment in respect of the refusal to grant relief from sanction.

At the date of preparing this note the SSHD has not applied for permission to appeal or applied for a stay on the judgment. The deadline for doing so was 14 November 2017.

Counsel for the Claimants is Charlotte Kilroy of Doughty Street Chambers and their solicitor is Rakesh Singh of the [Public Law Project](#).

**Rakesh Singh**

**Public Law Project**

**13 November 2017**