IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04610/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 January 2015	**On 15 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

EMMANUEL OLADAPO BANJO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Al-Rashid, Counsel instructed by David A Grand
For the Respondent: Ms L Kenny, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Wiseman promulgated on 18 July 2014 dismissing the appeal of the Appellant, Mr Emmanuel Oladapo Banjo against a decision of the Respondent, the Secretary of State for the Home Department, dated 9 January 2014 to remove the Appellant from the United Kingdom.

Background

2. The Appellant is a national of Nigeria, born on 22 June 1937. His immigration history is set out in the body of the determination of the First-tier Tribunal – see in particular at paragraphs 3-10, and note the findings of fact at paragraphs 45-47. I do not propose to repeat the history in detail now, however I note in particular the following salient features.

3. The Appellant entered the United Kingdom first in June 1962 with his wife. He remained here until 3 January 1973 when he returned to Nigeria, at which point he would have been aged 35 years. Although the Respondent had not been satisfied as to the date of the Appellant's first arrival in the United Kingdom, it was accepted by the Secretary of State that by the time the Appellant left the United Kingdom in 1973 he had acquired settled status. This was because he was present in the United Kingdom on 1 January 1973 when the current immigration laws came into force (commencement of the Immigration Act 1971) and he would have been considered to be a person freely landed and settled in the United Kingdom at that date.

4. The Appellant next arrived in the United Kingdom in 2004 as a visitor returning to Nigeria after his visit. He again entered the United Kingdom on 12 June 2005 by which time he would in effect have been resident in Nigeria for a period of 32 years since his departure from the UK in 1973.

5. On 12 June 2005 the Appellant entered as a visitor with leave until 9 December 2005. A subsequent application for indefinite leave to remain was refused and an appeal was dismissed, the Appellant becoming 'appeal rights exhausted' on 11 June 2007. A further application for leave to remain was refused with no right of appeal.

6. The current application was made on 22 April 2013, relying on long residence and Article 8 of the ECHR. The application was refused on 9 January 2014 for reasons set out in a 'Reasons for Refusal Letter' ('RFRL') of that date and a decision to remove the Appellant was made on 10 January 2014 and served on 14 January 2014.

7. The Appellant appealed to the IAC. His appeal was dismissed for reasons given in the decision of First-tier Tribunal Judge Wiseman promulgated on 18 July 2014.

8. The Appellant applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Simpson on 25 November 2014.

9. A Rule 24 reply has been filed by the respondent dated 3 December 2014.

Consideration

10. The Appellant's grounds of challenge to the Upper Tribunal rely on two bases. A challenge is mounted in respect of the Immigration Rules, and a challenge is also mounted in respect of Article 8 of the ECHR.

11. So far as the challenge in respect of the Rules is concerned, that is no longer pursued before me. I pause to note that the First-tier Tribunal Judge dealt briefly with paragraph 276B of the Immigration Rules at paragraph 49 of his decision – briefly, but adequately in my judgment – stating:

> "*The fact of the matter is that the application under paragraph 276B is only being made now and sub-paragraph (v) clearly says: the applicant must not be in the UK in breach of immigration laws except any period of overstaying for a period of twenty eight days or less will be disregarded. The appellant has of course overstayed for many years so I do not believe any application based on even a historical period of lawful residence can succeed*."

12. The grounds of appeal sought to challenge the approach taken by the Judge to paragraph 276B: see grounds at paragraphs 4, 5 and 6. Such grounds did not find favour in the decision of Judge Simpson when granting permission to appeal and Mr Al-Rashid, in my judgment quite properly and realistically, does not seek to resurrect those grounds before me.

13. For completeness I should also add that the First-tier Tribunal Judge had regard to paragraph 276ADE of the Immigration Rules and found that the appellant did not satisfy the requirements thereunder – see determination at paragraph 49. No challenge has been made in respect of that assessment.

14. The second basis of the Appellant's challenge, and the one that is pursued before me, is in respect of the Judge's evaluation of Article 8.

15. In granting permission to appeal Judge Simpson identified the effect of **MM (Lebanon) [2014] EWCA Civ 985** on the previous jurisprudence including in particular the case of **Gulshan**. Mr Al-Rashid acknowledges before me that the unnecessary 'intermediate step' identified in **MM (Lebanon)** was not one that had operated to the Appellant's prejudice in the circumstances of this particular case. As such he does not seek to suggest that the Judge was in error - or more particularly in material error - in considering the intermediate step at paragraph 50 of the determination. It is accepted that the Judge went on to give consideration to Article 8. However, Mr Al-Rashid submits that the judge erred in his approach to Article 8 and failed to undertake a proper or adequate **Razgar** assessment.

16. In my judgment the challenge in respect of Article 8 is in reality a disagreement with the factual assessment and evaluation of proportionality undertaken by the First-tier Tribunal Judge and does not disclose an error of law.

17. It is clear that the First-tier Tribunal Judge was influenced by adverse features of the Appellant's more recent immigration history notwithstanding the favourable findings made in respect of the substantial period of time that the Appellant had spent lawfully in the United Kingdom between 1962 and 1973 and the acceptance by the Secretary of State that the Appellant had acquired settled status by the time of his departure in 1973. The Judge was clearly alert to the historical circumstances. Similarly the Judge was clearly alert to the missed opportunity of seeking to make an application under 276B in or about 2005 at a time both when the currently worded sub-paragraph (v) was not in force and would therefore not have operated to defeat such an application, and the Appellant was in any event lawfully present in the UK.

18. A number of matters were advanced on behalf of the Appellant before the First-tier Tribunal Judge in respect of the circumstances and quality of his private and family life in the United Kingdom. The Judge rehearses all such matters at paragraph 55 of the determination. Mr Al-Rashid, who appeared before the First-tier Tribunal, acknowledges that paragraph 55 represents an accurate and complete summary of the matters advanced on the Appellant's behalf. In the circumstances it seems to me impossible to contend that the Judge was not fully alert to all matters that the Appellant wished to rely upon in the proportionality balance.

19. What is clear on the face of the determination is that the Judge considered certain aspects of the recent immigration history to be such that the imperative of maintaining effective immigration control as an aspect of public interest outweighed the positive features of the Appellant's private and family life. This was an evaluation open to him on the findings of fact that he made, findings which in themselves are not the subject of any dispute in the proceedings before me.

20. I note in particular that the Judge expressed criticisms in respect of aspects of the Appellant's recent applications at paragraphs 47 and 48 of the determination. Those paragraphs are in the following terms:

> *"47. He then of course lived in Nigeria for more than thirty years before returning with his wife I think on one short visit and then in 2005 returning for good. He had of course arrived with a visit visa which imported an obligation to return home to Nigeria but the couple did not do that but instead made an application to remain as dependants of their daughter and at the time would have had to meet the requirements of paragraph 317 of HC 395. Both the (part available) determination of Immigration Judge Davda promulgated on 20 March 2006 and that of Senior Immigration Judge Gill promulgated on 12 April 2007 made interesting reading; a number of different matters were raised during the course of those hearings and explained quite a bit about the situation in the period between 2005 and 2007. The Tribunal did I think have some difficulty in accepting that the final arrival in the United Kingdom was not with the intention of staying, but in fairness the appellants were entitled to make the application that*

they did and it was considered on its merits; it failed specifically on the issue of previous financial support for the couple in Nigeria and that really should have been the end of the matter; the appellants should simply have returned home.

48. They did not do so and there was some rather unconvincing evidence before me about what happened. The suggestion was that for a further period of years the family did not realise that the couple should have gone home even though they all knew the appeals had failed. I formed the impression that the children were intelligent and holding down good employment and I have to say that I rather felt the result of the appeal was simply not the one the family wanted and that even if simply passively, the decision was eventually made to do nothing until the respondent took any steps to remove them. Of course as in so many cases this never happened and so the family went on living happily together with grandchildren growing up and no doubt with the grandparents becoming ever more dependent both financially and in practical terms until of course sadly Mrs Banjo passed away."

21. The element of remaining notwithstanding an adverse immigration decision is factored into later considerations of the First-tier Tribunal Judge which I will come to in due course. For the moment it is to be noted that those passages just quoted indicate the Judge's careful consideration of the immigration history and of the personal circumstances of the Appellant, including making express note of the family life enjoyed between the Appellant, his children and grandchildren. This is not a case where it can be said that the Judge was not alert to any of the positive features of the Appellant's case that were being advanced on his behalf.

22. At paragraph 49 the Judge has made reference to the missed opportunity of making an application in 2005 and acknowledges that "*it is one more matter to simply bring into account when considering Article 8*".

23. At paragraph 53 the Judge again makes reference to the circumstance that "*[t]he appellant should have returned home when he was still in his middle sixties*" following the rejection of the application under paragraph 317. This is further echoed at paragraph 54 of the determination where the Judge states: "*It should not improve the position of the appellant today to simply say that he has overstayed for many years and is now 77 and in a much weaker position overall and should be allowed to stay on that basis; it was argued that the requirements of immigration control must prevail.*"

24. I have already made reference to paragraph 55 in which the positive features advanced on behalf of the Appellant are set out. In my judgment the inclusion of this paragraph in the determination clearly indicates that the Judge gave full recognition to those positive features of the Appellant's case. That particular paragraph concludes with the sentence "*All of these factors would make his removal now disproportionate under Article 8(2)*". Mr Al-Rashid has seized upon this sentence as indicating that the Judge appears to be making a favourable finding on proportionality and

underscores this observation by reference to Judge Simpson's comments at paragraph 3(d) of the grant of permission to appeal.

25. Ms Kenny makes the submission that the final sentence at paragraph 55 is no more than a recitation of the submissions made by Mr Al-Rashid, the opening sentence of the paragraph making it clear that the judge is having regard to those submissions within that paragraph. I accept Ms Kenny's submission. Even if this were not the case, in the alternative it seems to me that the final sentence of paragraph 55 can only sensibly be read as indicating favourable factors to go into a proportionality balance and cannot sensibly be read as a conclusion on the case inconsistent with the subsequently stated conclusion in the following paragraphs and in the section of the determination under the heading "*Decision*".

26. The history of the Appellant overstaying and remaining notwithstanding an adverse immigration decision is again referenced at paragraph 57 of the determination.

27. The Judge then reaches his conclusion at paragraph 58 in these terms:

> "*For these reasons (and giving full weight to all the matters urged on his behalf) I find his removal to be entirely proportionate under Article 8(2) in the overall interests of immigration control and the general interests of others (including for example inevitable future use of the national health service)*."

28. At paragraph 59 of the determination the Judge goes on to consider the circumstances if the Appellant were to seek to avail himself of an application to return as a dependent relative, but emphasises that the Appellant "*cannot be permitted... in effect to simply bypass these requirements*" of immigration control by remaining in the United Kingdom.

29. In my judgment the reasoning of the First-tier Tribunal Judge is clear and adequate.

30. I reach the conclusion that the Appellant has not identified any error of law in the approach of the First-tier Tribunal Judge, but understandably disagrees with the outcome. This is not a basis upon which I am able to interfere with the decision of the First-tier Tribunal Judge. The Judge has come to an evaluation open to him on the evidence and adequately and clearly reasoned. In all those circumstances I find no error of law. The decision of the First-tier Tribunal stands. The appeal of the Appellant is dismissed.

Notice of Decision

31. The decision of the First-tier Tribunal contained no error of law and stands.

32. The Appellant's appeal is dismissed.

The above represents a corrected transcript of an ex tempore decision given at the hearing on 6 January 2015.

Deputy Judge of the Upper Tribunal I. A. Lewis Dated: 14 January 2015