Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12267/2018

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 1 October 2018	On 23 October 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

OLADELE MICHAEL SOLANKE
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D Revill instructed by UK Migration Lawyers Ltd.
For the Respondent: Mr T Wilding Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Fox who in a decision promulgated on 8 August 2018 dismissed the appellant's appeal on human rights grounds.

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Background

2. The appellant, a citizen of Nigeria, was born on 26 September 1988. On 23 July 2003 the appellant was granted entry clearance as a visitor. On 25 January 2012 the appellant was encountered by the police and issued with an enforcement notice as an overstay and subsequently convicted of possessing a Class B drug.
3. On 12 October 2012 the appellant married in the United Kingdom and on p;7 August 2013 applied for leave to remain pursuant to article 8 ECHR. The application was refused but allowed on appeal on 1 May 2015.
4. On 17 November 2016 the appellant was convicted of possession with intent to supply a Class A and Class B drug and sentenced to a total of 3 years imprisonment. On 21 January 2017 the respondent issued a notice of decision to deport although on 6 April 2017 the appellant was granted discretionary leave to remain valid to 6 October 2017. On 6 October 2017 the appellant applied for leave to remain pursuant to article 8 ECHR which was refused by the respondent.
5. A decision to deport the appellant from the United Kingdom was made in a notice dated 25 May 2018. The appellant sought to appeal the rejection of his human rights submissions relying on article 8 ECHR and section 55 Borders Citizenship and Immigration Act 2009.
6. The Judge sets out an issue that arose during the proceedings together with the evidence made available and submissions before setting out findings of fact from [83] of the decision under challenge.
7. The Judge, in accordance with the Devaseelan principles, commenced consideration of the merits of the appeal with a decision of an earlier tribunal but found that matters had moved on since that decision, especially as the appellant had received a significant custodial sentence for drug related offences.
8. The Judge has serious reservations about the credibility of the appellant and his wife leading to it being concluded at [101] that it was not accepted that family life existed between the appellant and his children as claimed. The Judge's conclusions set out at [119 – 129] are in the following terms:

> "119. Based upon the findings as stated above I apply the facts to the law. Firstly I consider the appeal in the context of Article 8 ECHR as codified by the respondent. There is no dispute that the appellant falls for consideration in accordance with Rule 398(b). For the reasons stated above I do not accept that the appellant has a genuine and subsisting parental relationship with the children.
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> 120. By his own evidence he has failed to engage with the partners family unit and he has merely sought to demonstrate an intention to engage with family life in the future. This is unconvincing when one considers the significant period of "lost opportunity" and the obvious

motivation that the appellant has for making such assertions at present.

121. If I am wrong about this it would not be unduly harsh for the children to live separately from the appellant. The 3 eldest children enjoy family life with their biological father and an amicable association prevails between the partner and father to facilitate contact with the father and extended family members.

122. In relation to the 2 youngest children the appellant's conduct as particularised above goes beyond whether it would be unduly harsh for the children to remain in the UK without the appellant. The available evidence demonstrates that it would be beneficial for the children if the appellant was required to reside separately from the children. This appears to be the position according to the evidence at page G2 of the appellant's bundle.

123. With regard to the partners relationship with the appellant the relationship was formed at a time when the appellant's immigration status was unlawful and precarious. For the same reasons it would not be unduly harsh to expect the partner to live without the appellant. On the contrary it is reckless at best to attempt to integrate the appellant into the partners family unit when the available evidence is considered in the round. The partners protestations amount to no more than the convenience of childcare arrangements. Something more than this must be shown to defeat the public interest in the appellants deportation.

124. There is no suggestion that the partner and children are expected to leave the UK and therefore the respondent's decision does not interfere with article 8 ECHR in that context; Robinson considered.

125. In addition the appellant has not been lawfully resident in the UK for the majority of his life. He entered the UK in 2003 as a visitor under the direction and control of his parents. He remained in the UK unlawfully and took no steps to regularise his immigration status when it was brought to his attention in 2008. He subsequently relied upon the partner and children to regularise his immigration status following enforcement action in 2012.

126. There is no reliable evidence of significant obstacles to his reintegration in Nigeria. By his own evidence he has made no effort to trace his parents and he has failed to demonstrate that he has lost ties with Nigeria as claimed. Nor is there any reliable evidence to demonstrate that he has made efforts to trace his sister who allegedly relocated to Kent. As stated above I do not accept that the appellant has lost ties with Nigeria as claimed.

127. These findings are also relevant to section 117C of the 2002 Act and the assessment of proportionality in accordance with Article 8 ECHR; Hesham Ali applied. The appellant has also

failed to demonstrate very compelling circumstances to outweigh the public interest in his deportation.

128. For the reason stated above I accept the family life exists between the appellant and the partner. However any interference is proportionate to the legitimate aim pursued; economic well-being of the country and the prevention of disorder and crime.

129. If I am wrong to find that family life does not exist between the appellant and the children any interference with article 8 ECHR is proportionate for the same reasons."

9. The appellant sought permission to appeal claiming the Judge went behind a concession made by the respondent who accepted that the appellant has a genuine and subsisting parental relationship with his children which is stated, at least, to be a concession of family life with the two children the appellant is the biological father of. The appellant asserts the finding of the Judge at [101] and [118] that the appellant does not enjoy family life with any of the children was not open to him in the absence of any application by the respondent to withdraw the concession. Ground 2 claims impermissible departure from the findings of the earlier First-Tier Tribunal Judge who allowed the appellant's appeal against the removal direction at the time the appellant was not subject to deportation, but who found the appellant played an important and valuable part within the family unit and that it was preferable for the children to remain with both parents. Ground 3 asserts the Judge denied the appellant a fair hearing and that the finding at [122] is said to be based upon evidence at page G2 of the appellant's bundle which is a letter stating that a release address proposed by the appellant was approved by the National Probation Services which was different from the one given as the sponsor's current address. It is argued it was not open for the Judge to conclude from that evidence alone that living separate from the appellant will be beneficial for the children as there was no evidence as to whether the sponsor's home address had been assessed as a possible release address or what the outcome of such an assessment would be. It is asserted neither the appellant nor sponsor was asked to comment upon the issue of whether the appellant could safely reside in the family home and nor was this issue raised by the respondent.

10. Permission to appeal was granted by another judge of the First-Tier Tribunal on 23 August 2018.

Error of law

11. At [122] of the impugned decision the Judge makes a specific finding that in light of the appellant's conduct it would not be unduly harsh for the children to remain in the United Kingdom without the appellant. Paragraph 399(a)(ii)(b) requires consideration of whether it will be unduly harsh for the children to remain in the United Kingdom if the appellant is to be deported. The undue harshness test is also applicable to 399(b)(iii) of the Immigration Rules.

12. The conclusion by the Judge that the separation of the appellant from the family unit would not be unduly harsh deals with the core issue of the appellant's inability to succeed under the Immigration Rules.
13. Even if the Judge was wrong in relation to his assessment of the existence of family life, family life between a parent and child being recognised by article 8 ECHR from birth, the Judge makes findings in the alternative if such family life exists. Accordingly no arguable unfairness has been made out.
14. Outside the Immigration Rules, the Judge reminds himself of the terms of section 117C and relevant case law at [127] and finds the appellant has failed to demonstrate very compelling circumstances sufficient to outweigh the public interest in his deportation and that, accordingly, any interference in a protected right had been shown to be proportionate. No arguable legal error material to that decision has been made out on the basis the pleaded grounds or submissions. The only situation in which consideration of proportionality will arise is if the Tribunal is considering interference with a protected right, such as family or private life.
15. There was a material difference between the circumstances of the earlier appeal and the current appeal although the Judge accepted, according to the Devaseelan principle, that the earlier decision should be the starting point. The Judge finds however that matters have moved on particularly as the appellant is now the subject of a deportation order based upon his conduct in the interim.
16. There is arguable merit in the submission by Mr Wilding that there is no challenge to the findings made by the Judge, the challenge being to the question of whether it was unfair to depart from the findings of the earlier Tribunal. It has not been made out the conclusions reached are outside the range of those reasonably open to the Judge on the evidence, warranting departure from the earlier decision although, as stated above, the findings in the alternative effectively accept that that will be the position if family life does exist.
17. No arguable unfairness is made out sufficient to amount to an arguable legal error of law warranting the decision being set aside.
18. The appellant's partner shall remain in the United Kingdom and it was not made out that it was unduly harsh or not proportionate for her to remain in the UK without the appellant, in light of the history of this matter as identified by the Judge.
19. Whilst the best interests of the children may be to remain with both their parents this is a deportation decision and the best interests of the children are not the determinative factor.
20. I do not find it made out the Judge has erred in law in a manner material to the decision to dismiss the appeal on the basis that it had not been made out that it will be unduly harsh for those family members who will remain in the United Kingdom to do so without the appellant, or that any interference with a protected right is proportionate in light of the decision to deport the appellant from the United Kingdom as a result of his conviction for drug-related offences. It is known drugs have a devastating effect upon those addicted to the

same and family members of such individuals and a negative impact upon society in general.

Decision

21. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated the 17 October 2018.