



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02775/2019

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 17 March 2020

Decision & Reasons Promulgated
On 28 April 2020

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

KELVIN SAMMY TUNDE
(aka JOHNSON TAIWO GBENRO)
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mrs R Pettersen, Senior Presenting Officer

For the Respondent: Mr C Timson, Counsel, instructed by Manchester Associate

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State. The respondent, whom I shall call 'the claimant', has previously been found following judicial assessment to be a national of Nigeria. He asserts that he is also a national of Zimbabwe.

2. The Secretary of State appeals against the decision of Judge of the First-tier Tribunal Knowles ('the Judge'), issued on 8 August 2019, by which the claimant's appeal against a decision of the respondent to deport him was allowed on article 8 grounds, outside of the Immigration Rules ('the Rules').
3. Upper Tribunal Judge Allen granted permission to appeal on all grounds.

Anonymity

4. The Judge did not issue an anonymity direction and neither party requested such direction before me.

Background

5. The claimant is presently aged 44. He is known to the United Kingdom authorities under two different identities possessing two different nationalities. He claims to have entered the United Kingdom in February 2003, using a passport to which he was not entitled.
6. On 22 October 2007 at Manchester City Crown Court the claimant was convicted in the identity of 'Kelvin Tunde', a citizen of Zimbabwe, on one ground of possessing a false identity document, namely a false Dutch passport, which he sought to use to open a bank account. He was sentenced to a 12-month custodial sentence. He was subsequently served with a notice of decision to deport, accompanied by a reason for deportation letter on 4 February 2008. The claimant appealed against this decision asserting, *inter alia*, that he would be at real risk of persecution upon being returned to Zimbabwe. His appeal was dismissed by the Asylum and Immigration Tribunal ('AIT') on 7 April 2008. Before the AIT the claimant asserted that he was a citizen of Zimbabwe, detailing that he was born in Harare to an ethnic Shona mother and a Nigerian father. He stated that the family relocated to Nigeria when he was aged 3, after the death of his mother. The Tribunal accepted that the claimant was a Zimbabwean national, a fact that was not challenged by the Secretary of State, and noted at [17] of its decision:

'The appellant informed us that he had never claimed to be a citizen of Nigeria and he had not instructed his former legal representatives to that effect.'

7. The claimant pursued an appeal to the Upper Tribunal and then sought a review from the High Court. His challenge to the Tribunal decision concluded in March 2009, some eleven months later after the promulgation of the First-tier Tribunal's decision.
8. On 2 September 2009, the Secretary of State withdrew the decision to deport dated 4 February 2008 having become aware that the claimant was using two identities. Several checks were undertaken by the Secretary of State's Immigration Fingerprint Bureau which revealed that in addition to the claimant's purported Zimbabwean identity of 'Kelvin Sammy Tunde', he was also known to the authorities as a Nigerian national called 'Johnson Taiwo Gbenro'. Various correspondence was exchanged between the claimant and the Secretary of State before the latter served a

notice of a decision to make a deportation order on 29 September 2010. The claimant appealed and the Secretary of State withdrew this decision on 22 November 2010. A new decision was served on 29 November 2010, in which the Secretary of State noted, *inter alia*:

'... we believe your client's true identity to be Johnson Taiwo Gbenro as the Home Office has a copy of what is believed to be your client's Nigerian passport.'

9. The First-tier Tribunal dismissed the claimant's appeal by means of a decision dated 8 February 2011, finding that the claimant was a Nigerian national called Johnson Taiwo Gbenro, and permission to appeal was refused by the Upper Tribunal on 3 June 2011. In refusing permission to appeal, Senior Immigration Judge Grubb observed, *inter alia*:

'At paras 27–31, the FtT gave detailed reasons for its findings. The FtT referred to the appellant's conviction for using a false Dutch passport in his claimed name. At para 23 the FtT refers to the trial judge's sentencing remarks in which the judge pointed out that the appellant had knowingly used a Dutch passport in his claimed name. Further, at paras 28 and 30, the FtT referred to a witness statement from a fingerprint expert who confirmed that the fingerprints of the appellant were the same as Gbenro. The FtT also referred, whilst noting that it was not an expert in photographic recognition, that the photographs of Gbenro produced by the respondent were, in fact, photographs of the appellant. The expert evidence, in the form of fingerprint evidence, was highly persuasive that the appellant was in fact Gbenro. The appellant's previous conviction for using a false passport in his claimed name was also relevant.'

10. The Secretary of State signed the claimant's deportation order on 1 August 2011. The claimant submitted further representations on 12 February 2013, in the name of 'Kelvin Sammy Tunde'. I observe that the claimant's present representatives drafted these representations. Throughout the representations there is no engagement with the FtT's decision as to the claimant's true identity. The representations are in the name of 'Kelvin Sammy Tunde' and the witness statement is also in the same name. No true engagement is made with the accepted fingerprint evidence or other evidential issues that led to the judicial finding of fact, save a bald assertion that the appellant is not Johnson Taiwo Gbenro. The representations assert that the claimant was fearful of an 'occult group' that had threatened him after he had refused to join. They further detail that his brother had been killed by the group in 1995 because he also had refused to join it. The application was treated by the Secretary of State as an application to revoke a deportation order and was refused by a decision dated 13 August 2013. The claim was certified as clearly unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). The claimant did not challenge this decision.
11. The claimant was detained by the Secretary of State in September 2017 and required to take part in the 'face-to-face scheme' with the Nigerian High Commission on 6 October 2017. The purpose of this process was to secure an emergency travel document in order to facilitate the claimant's deportation to Nigeria. The claimant refused to leave the detention centre to attend the meeting with officials from the High Commission and generally demonstrated non-compliance. He asserted that he

is not Johnson Taiwo Gberno as a means of frustrating the process of securing an emergency travel document.

12. The claimant submitted further representations on 15 December 2017 and 30 May 2018, relying upon article 8. The further representations of 15 December 2017 were again authored by the claimant's present solicitors, and again positively assert that the claimant is a Zimbabwean national called Kelvin Sammy Tunde. The representations again contend that the judicial finding of fact that the claimant is a Nigerian national called Johnson Taiwo Gberno is mistaken. A misleading positive assertion is made as to the respondent's records confirming:

'... that our client was born of mixed ethnicity. His late father was a Nigerian citizen and his late mother was a Zimbabwean. Although Kelvin himself is a Zimbabwean national, he left Zimbabwe as a child aged 3 years and lived in Nigeria having moved there with his father and brother.'

13. I have grave concerns as to whether the approach adopted by the claimant's solicitors, which can be said to be misleading for the reason detailed in the paragraph above, meets the professional standards expected by experienced immigration lawyers. Though advancing their instructions, there is a clear failure to be candid as to the relevant judicial finding of identity and nationality accompanied by a failure to advance a positive case as to the FtT having materially erred in law in its approach. The judicial finding of fact, and the significant adverse evidence it relied upon, is simply ignored. I proceed on the basis that the appellant's solicitors were acting on express instructions from the appellant, though this is not necessarily sufficient to permit a solicitor to act contrary to his or her professional duty as the failure to produce any new evidence on the issue of identity in this matter could not be considered by a competent, professional lawyer as satisfying the requirements of paragraph 353 of the Immigration Rules ('the Rules'), namely that when taken with previously considered material, there was a realistic prospect of a reasonably directed judge finding that the claimant is a Zimbabwean national called Kelvin Tunde.
14. The further representations of December 2017 and May 2018 place reliance upon the claimant's relationship with his partner, Ms. [IA].
15. The respondent refused the claimant's further representations by a letter dated 7 March 2019 but accepted that they constituted a fresh claim for the purpose of paragraph 353 of the Rules and the claimant enjoyed an in-country appeal right. It is against this decision that the claimant presently appeals.

Hearing before the FtT

16. The appeal came before the Judge sitting at Manchester on 21 June 2019. The claimant continued to assert that he is 'Kelvin Sammy Tunde' and had been mistakenly detained by the Secretary of State some years previously under the name 'Johnson Taiwo Gbenro'. This has led to his present problems as to establishing his

identity. He detailed that he had known Mr. Gbenro, but that was many years ago. The Judge considered the claimant's evidence on this issue at [44]-[45]:

'In answer to questions in cross-examination concerning Mr Gbenro the appellant stated he had never used his name, that Mr Gbenro is a friend, and that on 6 December 2009 there was a stop and search at Victoria Station and he was taken to Dallas Court along with others. He stated that was his only mistake, and they worked together. He accepted his fingerprints were taken but stated that they cannot be the same as Mr Gbenro's and there must have been a mix-up ...'

'... I did not understand his evidence concerning Mr. Gbenro. He stated that at the stop and search he told the police that he was Mr. Gbenro.'

17. The Judge determined as to this issue, at [86]-[87]:

'[The appellant's] evidence cannot be reconciled with his witness statement and grounds of appeal which both assert he has not used Mr Gbenro as his name. His evidence is that he had done so twice, once in August 2007 for which he was convicted in October 2007 and again in 2008 when he was fingerprinted. He states that his fingerprints match Mr Gbenro's due to a mix-up. Whether or not they matched was considered with a fingerprint expert's evidence in the 2011 hearing. There were other factors indicating that the appellant was Mr Gbenro at the hearing in 2011. The findings were made with no doubt in 2011.

The evidence which has been presented to me in this appeal is contradictory. The appellant refers to 'one mistake' but he has given evidence of using another's identity more than once. Upon conviction it was clear he used the false passport more than once. His attitude towards his conduct in misleading others in relation to his identity and proof of identity appeared to me to be flippant.'

18. The claimant asserted that his marriage to his ex-wife had broken down, and that he is now in a settled relationship with Ms. [A], a Nigerian national and a failed asylum seeker who was granted discretionary leave to remain consequent to her daughter registering as a British citizen under section 1(4) of the British Nationality Act 1981. Her daughter, 'E', is aged 14. The Judge recorded the claimant's evidence as to the present state of the relationship, at [27]

'... At the time of those submissions in September/October 2017 Miss [A] was 5 weeks pregnant with his child. An update was provided in May 2018 stating that his partner gave birth to a baby boy on 26 April 2018 and that the appellant spends most of his time with his partner, son and step-daughter only returning to Pastor Joseph's house at night where he sleeps in accordance with his bail conditions.'

19. The Judge further determined that the claimant possessed no well-founded fear of persecution in Nigeria, at [95]:

'Considering in the round the limited evidence added by the appellant concerning his identity, his nationality and his account of his core situation, I do not consider that the appellant has established credibility in any of those matters or that his account of being Mr. Tunde, a national of Zimbabwe, who has a genuine fear of the criminal occult gang in Nigeria, to be reasonably likely to be true. I find that he is Mr. Johnson Taiwo Gbenro a national of Nigeria and that he

has not established that he is at risk of persecution or serious harm if returned to Nigeria.'

20. The claimant was unable to rely upon his relationship with Ms. [A] to outweigh the public interest in his deportation:

'The appellant cannot meet the exception to deportation based upon his relationship with his partner because she is not a British citizen and is not settled in the UK. She has leave to remain until 9 October 2020. That is article 8 discretionary leave and does not amount to settlement. Their relationship was formed when the appellant's immigration status was precarious. The appellant cannot meet paragraph 399(b) on the basis of his relationship with the appellant alone. However, if it would be unduly harsh for [E] to follow the appellant to Nigeria, it appears impossible that the appellant's relationship with his partner could continue.'

21. The Judge accepted that the claimant was in a genuine relationship with Ms. [A] and had parental responsibilities for her daughter, 'E', who is a qualifying child for the purpose of the Rules:

'I accept on the balance of probabilities that the appellant has parental responsibilities for [E]. In my conclusion on the evidence, the appellant has played a part in her life for more than 3 years as her step-father, and she regards him as her dad. Her regards her as his daughter. He spends each day together with the family and takes [E] to school and picks her up and helps her with her homework. He is registered as her parent with [her] school and her contact with their general practitioners. Taking the appellant's evidence, his partner's, [E's] and Pastor Joseph's evidence into account I accept that on the balance of probabilities the appellant has a genuine and subsisting parental relationship with [E]. I do not consider the respondent's conclusion that the appellant had not established that he has a genuine and subsisting parental relationship with [E] to be well founded. It flies in the face of their later acceptance ... that she would experience significant emotional upheaval and a sense of loss following the appellant's deportation.'

22. I observe at this juncture that the claimant and Ms. [A] are not married and the term 'step-father' is defined at paragraph 6 of the Immigration Rules so as to not include the role of a male adult in a family unit outside of marriage or a civil partnership. The claimant is therefore not the stepfather of Ms. [A]'s daughter for the purpose of the Rules. However, he has been accepted by the Judge to enjoy a parental role.
23. At [103] of the decision the Judge found that it would be unduly harsh for Ms. [A]'s daughter to relocate to Nigeria. However, he concluded that it would not be unduly harsh for her to remain in this country and for the claimant to be deported to Nigeria, at [105]-[106]:

'It would be harsh upon [E] were the appellant not to be granted leave to remain and were the appellant to be deported. However, in the light of [KO (Nigeria) v. Secretary of State for the Home Department] [2018] UKSC 53; [2018] 1 W.L.R. 5273, MK (Section 55; Tribunal Options: Sierra Leone) [2015] UKUT 223 (IAC); [2015] I.N.L.R. 563 and MAB (para 399; 'unduly harsh') USA [2015] UKUT 00435 (IAC)] in

my conclusion the circumstances do not support in [E's] case a finding that refusal of leave to remain and deportation would be unduly harsh. She could be looked after by her mother who is her primary carer and would continue to live with her as she did for 10 years before the appellant entered her life. The appellant does not contribute to her upbringing financially.

In my conclusion it would however be in the best interests of [E] for the appellant to remain in the UK and not be deported. It would be in her best interests for the family unit to remain together and a refusal of leave to remain and deportation would mean that the family would be separated given that it would be unduly harsh for [E] to follow the appellant if he were deported to Nigeria. That must however be balanced with the public interest in deportation and is not conclusive in itself. Viewed in isolation, I do not consider that the appellant's relationship meets paragraph 399 of the Immigration Rules because I find that the respondent has established on the balance of probabilities that it would not be unduly harsh for her to remain in the UK if the appellant is deported.'

24. With regard to the claimant's young son, the Judge found that he is not a qualifying child under paragraph 399 of the Rules because he is a Nigerian national and not a citizen of the United Kingdom. The Judge further observed, at [108]:

'The appellant's second biological child, who would be one month old now if she arrived on the due date, would similarly not meet the paragraph 399 requirements as a qualifying child.'

25. The Judge determined that very compelling circumstances arose, such as to outweigh the public interest in the claimant's deportation, at [113]-[115]:

'I take into account the public interest in foreign criminals being deported. The sentencing remarks describe the appellant's offence as serious. The appellant was sentenced to 12 months' imprisonment and meets the definition of a foreign criminal. The deportation order was made in the interests of preventing further reoffending and there is a strong public interest in deterring others from committing similar offences through deportation.

I note however that it has been more than 11 years since the appellant's conviction, and he has no subsequent convictions. His claim to have reported to the respondent for the last 12 years has not been disputed. The deportation order was made 8 years ago. I consider the delay significant in light of the guidance in [*KD (Jamaica) v. Secretary of State for the Home Department* [2016] EWCA Civ 418 and *MN-T (Columbia) v. Secretary of State for the Home Department* [2016] EWCA Civ 893]. The respondent has ascribed the delays to identity difficulties, however the findings in relation to the appellant's identity, adopted by the respondent in their reasons for refusal, were all made in 2011 prior to the deportation order being made. I do not find that delays since the deportation order have been explained in the appeal. I note that the public interest in deportation decreases where the process takes many years. The appellant has formed a genuine and subsisting relationship with his partner since the deportation order was made, with her daughter [E], and they by now (sic) he is likely to have two biological children with his partner.

Considering all of these issues in the round, in my conclusion whilst the exceptions in paragraph 399 are not met there are exceptional circumstances

which are the strength (sic) significance of the appellant's family life which outweigh the public interest in deportation in the light of the delay since conviction and since the deportation order was made. The decision not to grant leave to remain and the refusal to revoke the deportation order has not, in the particular circumstances of the appellant's case, been shown to be proportionately justified.'

Grounds of Appeal

26. The Secretary of State relies upon two grounds of appeal. The first ground asserts that the Judge failed to provide adequate reasoning as to why very compelling circumstances arose in this matter to outweigh the public interest in deportation, particularly as to the impact of delay. The second ground is related to the first, detailing that the Judge materially misdirected himself in law by placing weight on the delay that had flowed from the appellant's conviction in 2007 to the hearing in 2019.
27. The claimant did not file a rule 24 response nor did he cross-appeal the Judge's decision on his article 8 appeal under the Immigration Rules.

Decision on Error of Law

28. The claimant is subject to a deportation order issued on conducive to the public good grounds under section 3(5)(a) of the Immigration Act 1971 ('the 1971 Act').
29. Section 117A(1) of the 2002 Act is applicable when a court or tribunal is required to determine whether a decision made under the Immigration Acts including a refusal to revoke a deportation order made under the 1971 Act which is a person's right to respect for private and family life under article 8 and as a result would be unlawful under section 6 of the Human Rights Act 1998. Section 117A(2) confirms that in considering the public interest question a court or tribunal must in particular have regard in all cases to the considerations listed in section 117B and in cases concerning the deportation of foreign criminals to the considerations listed in section 117C of the 2002 Act. Section 117C(1) confirms that the deportation of foreign criminals is in the public interest.
30. Paragraph 398 of the Rules provides that if a foreign criminal liable to deportation is unable to meet the exceptions to the public interest in deportation established by paragraphs 399 and 399A which mirror the statutory provisions at section 117C(3) to (5) then the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A. By means of paragraph A362, Part 13 of the Rules is applicable to the consideration of article 8 to deportation matters regardless as to when the notice of intention to deport or the deportation order as appropriate was served.
31. The claimant contends, and the Judge found, that his personal circumstances concerning his article 8 private and family life rights are such that very compelling

circumstances arise outweighing the public interest in his deportation. The Court of Appeal confirmed in NA (Pakistan) v. Secretary of State for the Home Department [2016] EWCA Civ 663; [2017] 1 WLR 207 that the very compelling circumstances exception established by paragraph 398 of the Rules is also to be read into section 117C(3) of the 2002 Act.

32. Lord Reed observed in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 WLR 4799, at [38], that only a very small minority of persons, particularly non-settled cases, established circumstances in which the public interest in deportation is outweighed. Such cases need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary but they can be said to involve exceptional circumstances in the sense that they involve a departure from the general rule:

‘The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders as assessed by Parliament and the Secretary of State.’

33. The impact of delay in the article 8 proportionality balancing exercise has been subject to consideration by several courts. In RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 00330 (IAC) it was held that in cases where the public interest favouring deportation was potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in making the underlying decision is unlikely to tip the balance in an individual’s favour in the article 8 proportionality balancing exercise.
34. However, it is not the case that delay can never be a potentially relevant factor in the proportionality exercise. In EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] I AC 1159 the House of Lords held that delay may reduce the weight otherwise to be accorded to firm and fair immigration control if the delay is a result of a dysfunctional system which creates unpredictable, inconsistent and unfair outcomes. It may well be that during the period of such delay a foreign national criminal may develop closer personal and social ties thereby strengthening a family and private life claim to remain in the United Kingdom. However, the consideration of delay in the proportionality assessment remains a fact sensitive exercise.
35. At the outset of the hearing I informed the representatives that I considered a further ‘obvious’ ground of appeal arose upon consideration of the Judge’s decision, with regard to the Judge considering two judgments from the Court of Appeal as enjoying the elevated status of guidance, at [114] of the decision. I observe that it is reasonable to expect professional representatives to set out appeal grounds with an appropriate degree of particularity and legibility and the Tribunal should be hesitant in forensically examining the decision to identify grounds beyond those advanced by a professional representative. However, there remains a duty upon the Tribunal to consider points that are obvious: R v Secretary of State for the Home Department, ex parte Robinson [1997] 3 WLR 1162. The Tribunal enjoys a power to consider any other point arising from a decision if the interests of justice so require.

36. The two judgments referred to by the Judge at [114] are KD (Jamaica) where the Secretary of State had delayed in taking effective steps to deport a foreign criminal and in such time the foreign criminal had undertaken and was found to have achieved rehabilitation and also the judgment of the Court of Appeal in MN-T (Colombia) where the Secretary of State had informed the appellant upon a release in 2003 that he would be deported and took no further steps until the appellant applied for further leave to remain in 2012. The Court of Appeal judgments do not present elevated guidance as to the weight that delay is to enjoy in the proportionality exercise. They simply exemplify the fact sensitive nature of any consideration of delay and the weight that it carries in the public interest assessment.
37. However, such error of law does not mean it is material *per se* and I therefore heard submissions from both representatives. Mr Timson accepted that there was no weighing in the balance of the claimant's actions contributing to delay in [114] and [115] but submitted that the Tribunal could find that they had been addressed elsewhere in the decision and the Judge had them firmly in mind when considering whether very compelling circumstances arose. The problem with this submission, though eloquently presented, is that the consideration of very compelling circumstances within [114] and [115] only expressly addresses the Secretary of State's behaviour. Whilst it is not compulsory for a balance sheet approach advocated by Lord Thomas of Cwmgiedd in Hesham Ali to be applied, simply 'desirable', a failure to adopt such approach can lead, as occurred here, in only one side of the argument being considered. Such failure in this matter resulted in the Judge failing to identify comprehensively the factors that should go into the balance for article 8 purposes in this matter. It is not sufficient to seek to read over into the proportionality assessment earlier reciting of events in summary form that may, briefly, address points favourable to the Secretary of State.
38. The Judge has found as being of positive weight to the claimant the fact that he has formed a genuine and subsisting relationship with his partner and their combined children, including E. I note that a foreign national criminal can rely upon being able to satisfy either or both paragraph 399 and 399A when seeking to establish very compelling circumstances, but to outweigh the public interest in deportation such very compelling circumstances must be over and above those identified within the exceptions and so a holistic approach is adopted to the assessment: NA (Pakistan). In this matter, the claimant was unable to satisfy either paragraph 399(a) or 399(b) and whilst the genuine and subsisting relationships could be considered in the round, on their own they cannot be determinative as to very compelling circumstances.
39. The very compelling circumstances existing over and above the genuine and subsisting relationships was identified by the Judge as the Secretary of State's failure to deport the claimant over a lengthy period of time. The Judge placed weight upon the claimant having continued to report to the Secretary of State for a period of at least 12 years, with the implicit finding that the claimant had not absconded and gone underground. However, the Judge was required to consider the relevant circumstances in the round, the key events being:

- a. The claimant was convicted in October 2007 of a serious crime and sentenced to 12 months' imprisonment.
- b. The Secretary of State served notice of decision to deport and accompanying reasons in February 2008.
- c. The claimant appealed to the AIT on the wholly false basis that he is a Zimbabwean national and could not be deported to Zimbabwe. By adopting the false identity, the claimant sought to rely upon the political situation in Zimbabwe to evade deportation. The appeal was dismissed by the AIT in April 2008.
- d. Despite knowing that his claim to be a Zimbabwean national was entirely false, the claimant pursued an appeal to the Upper Tribunal and a High Court review until he was appeal rights exhausted in March 2009.
- e. The decision to deport, which had been considered by the AIT on the basis that the claimant was a Zimbabwean national, was withdrawn in September 2009 upon the Secretary of State becoming aware that the claimant held two identities.
- f. A new notice of deportation, with attendant reasons, was issued in 2010.
- g. Upon considering fingerprint evidence as well as evidence relating to the claimant's Nigerian passport, the FtT refused the claimant's appeal in February 2011. The claimant was identified by the FtT as Mr. Johnson Taiwo Gbenro, a national of Nigeria
- h. The claimant's appeal to the Upper Tribunal was refused in June 2011 and he became appeal rights exhausted.
- i. The deportation order was signed on 1 August 2011. The claimant's argument as to delay runs from this date.
- j. There is a delay by the Secretary of State in effecting deportation between 1 August 2011 and the receipt of further representations on or around 12 February 2013, a period of 17 months.
- k. The further representations, by which the claimant continued to assert that he is a Zimbabwean national, were refused and certified as clearly unfounded on 13 August 2013.
- l. The claimant's relationship with his wife, Ms. Iyamu, broke down in late 2015 and ended in March 2016.
- m. The claimant's relationship with Ms. [A] commenced either in 2015 (as per evidence before the FtT, and Ms [A]'s letter dated 26 September 2017 detailing that she was 5 weeks pregnant with the claimant's child in September 2015) or in 2016 (as per further representations, and undated letter of the claimant accompanying further representations).
- n. E naturalised as a British citizen in August 2016.
- o. There is a delay between the certification of further representations in 2013 and the claimant's detention in September 2017, a period amounting to 4 years and 1

months. As a meeting with the Nigerian High Commission had been arranged for 6 October 2017 I find to the requisite standard that the Secretary of State had been seeking to secure an emergency travel document from the High Commission for at least some period of time during the 4 year hiatus.

- p. The claimant frustrated the securing of an emergency travel document by non-compliance. He refused to leave the detention centre and continued to deny that he is Mr. Johnson Taiwo Gbenro, a national of Nigeria. Such behaviour meant that as the Secretary of State was unable to secure the claimant's deportation, the claimant was released back into the community. From this time onwards, the claimant enjoyed the benefit of his non-compliance and his frustration of the emergency travel document process.
 - q. During the course of his detention, the claimant submitted further representations on 29 September 2017, again asserting that he is a Zimbabwean national, which were followed by further representations dated 15 December 2017 and 30 May 2018. These representations again, in part, asserted that the claimant is a Zimbabwean national called Kelvin Tunde.
 - r. Ms. [A] secured discretionary leave to remain on article 8 grounds, outside of the Rules, on 9 April 2018.
 - s. Upon the further representations being considered by the Secretary of State to constitute a fresh claim, the claimant enjoyed appeal rights consequent to the refusal of his application to revoke the deportation order.
 - t. The period of time from the signing of the deportation order during which the claimant did not enjoy the protection from removal under paragraph 353A of the Rules secured by further representations and the exercise of appeal rights amounts to 5 years and 8 months over a period of 8 years before the FtT hearing.
 - u. The claimant enjoyed 2 years and 11 months residing in this country consequent to his having frustrated the Secretary of State's attempt to secure an emergency travel document.
 - v. The claimant's relationship with Ms. [A] amounted to between 1 and 1½ years as at the date of his detention pending deportation in September 2017.
40. A significant factor in this timeline is that save for the claimant's significant non-compliance in 2017, there is a very strong likelihood that an emergency travel document would have been secured and the claimant deported some three years ago. The Secretary of State has a copy of his passport, now over 10 years old, which I find, on balance, would have positively aided the Nigerian High Commission's consideration as to whether or not to issue an emergency travel document. I further observe that at this time the claimant's relationship with Ms. [A] was relatively young. It is clear that the claimant has benefitted from his adverse, non-compliant behaviour by securing further time in this country and in doing so he frustrated the public interest in his deportation. Throughout such time, the claimant continued - and continues - to seek to further frustrate his deportation, as he did during his

detention in 2017, by asserting that he is a Zimbabwean national called Kelvin Tunde despite the significant evidence that has established his true identity to the contrary.

41. Mr Timson was given time during the hearing to identify where the Judge had made any finding in the article 8 assessment as to the claimant's significant non-compliance. Mr. Timson accepted that save for a reference at [17] that the claimant refused to leave the detention centre and demonstrated non-compliance no further findings were made as to the significance of the claimant refusing to engage in the process that led to his release back into the community. I find that the reference at [17] is simply a summary of the claimant's history:

'The appellant was detained on 25 September 2017 to take part in the Nigerian face-to-face scheme on 6 October 2017. The appellant refused to leave the detention centre and demonstrated non-compliance. The respondent notes a further dispute concerning his name and further checks taking place.'

42. The failure of the Judge to place such non-compliance into the article 8 proportionality assessment is a material error of law. Such adverse behaviour is a significant factor relied upon by the Secretary of State and is to be properly weighed in the proportionality assessment.
43. The Judge did not take into account several other relevant factors in the proportionality assessment. No weight was given to the claimant relying upon his false identity from 2011 onwards, not only when frustrating efforts to secure an emergency travel document but also when making further representations that denied the Secretary of State the ability to deport him until their consideration under paragraph 353A of the Rules. The claimant continued to assert his false identity up to and including the hearing before the FtT, where he gave evidence on the issue, though I observe that Mr. Timson who represented at that hearing made no submissions on this point before the Judge. No consideration was given to the development of the claimant's relationships with his partner and children having developed consequent to his non-compliance, nor as to the public interest in proposed deportees not benefiting from their adverse behaviour in frustrating deportation.
44. I further note as to the time taken by the Secretary of State to consider the various further representations, there is no specified period within which an immigration decision must be made: *EB (Kosovo)*, at [13]. Though not determinative, or necessarily of great weight where there has been excessive delay, it is a relevant factor when assessing whether delay occurred.
45. It is clear on the face of the evidence that significant parts of delay were caused by the claimant. The Secretary of State's behaviour is not blameless, and there has been to date no explanation for the delay in deporting the claimant between 2013 and 2017 when efforts were made to secure an emergency travel document with the Nigerian High Commission. However, the significant concern as to the Judge's proportionality assessment is that no consideration is given at [114] and [115] as to the claimant's

own actions, in circumstances where the Judge was to be mindful of the confirmation by the Supreme Court in *Hesham Ali* that only a small minority of persons will be able to establish circumstances in which the public interest in deportation is outweighed. A fact specific assessment requires the actions of both parties to be considered.

46. I find that the Judge failed to undertake the fact-specific assessment required and when assessing proportionality concentrated solely on the failings of the Secretary of State. The Judge failed to comprehensively identify the factors that were to be placed into the balance for article 8 purposes in this matter. Such failure constitutes a material error of law.
47. In the circumstances I set aside the First-tier Tribunal's decision solely as to the finding that 'very compelling circumstances' arise so as to outweigh the public interest in the claimant's deportation: section 117C(3) of the 2002 Act and paragraph 398 of the Rules.

Remaking the Decision

48. The parties were in agreement that they had addressed the issues that they wanted me to consider and confirmed that if I were to set aside the decision, I could proceed to remake the decision without the need for a further hearing.
49. I observe the judgment of the Court of Appeal in *OH (Algeria) v. Secretary of State for the Home Department* [2019] EWCA Civ 1763, at [63] that as a matter of language and logic, very compelling circumstances is a very high bar indeed. A tribunal or court concerned cannot properly get to that stage unless and until it has found that the consequences of deportation will be so harsh as to outweigh the public interest in deportation, that public interest being the general one. In this matter, the claimant solely relies upon delay, having decided not to cross-appeal, and is therefore deemed to have accepted the Judge's adverse conclusions on all other aspects of his appeal.
50. The Judge's findings as to the appellant's article 8 appeal under section 117C(5) and paragraph 399(a) and (b) stand.
51. For the reasons detailed above no reasonable Judge could find on the facts arising in this matter that the delay of the Secretary of State in enforcing the deportation order is of such compelling nature to outweigh the public interest in the claimant's deportation in circumstances where significant reasons for the delay lie at the feet of the claimant: firstly, by his false representations as to his true identity; and secondly by the significant efforts he undertook to frustrate his deportation in 2017. The claimant has openly exhibited that he will undertake various means of frustrating his deportation, up to and including non-compliance, and it is not in the public interest that he benefit from such actions which contributed to the delay in his deportation up to the present time, as evidenced by his continuing assertion that he is a Zimbabwean national called Kelvin Sammy Tunde.

52. I find that the claimant has produced no reliable evidence to undermine the judicial finding of fact that he is Johnson Taiwo Gbenro, a national of Nigeria. I further find that to date the claimant has produced no credible evidence that he is a Zimbabwean national called Kelvin Sammy Tunde. His reliance upon this identity was initially a means of hiding his true identity and is now solely a means by which he engages in his continued efforts to frustrate his deportation from this country.

Notice of Decision

53. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 8 August 2019 pursuant to section 12(2)(a) of the Tribunal's, Courts and Enforcement Act 2007.
54. I remake the decision. I dismiss the Appellant's appeal.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 3 April 2020

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed and so there is no fee award.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 3 April 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration

Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent” is that appearing on the covering letter or covering email