



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01795/2013

THE IMMIGRATION ACTS

Heard at North Shields

On 13 May 2014

Determination

Promulgated

On 26 August 2014

Before

UPPER TRIBUNAL JUDGE DEANS

Between

AB

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Schwenk of Counsel, instructed by Brar & Co

For the Respondent: Mrs H Rackstraw, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Holmes and Dr C J Winstanley dismissing an appeal against a decision dated 14 August 2013 to deport the appellant in terms of section 32(5) of the UK Borders Act 2007. The appeal was brought on the grounds of asylum, Article 3, and family life and dismissed on all grounds.
- 2) The appellant claims to be a citizen of Sierra Leone and to have been born on 15 April 1979. In 2008 he pled guilty to an offence of possession of a false identity document with intent and was sentenced to a term of imprisonment of 12 months. In January 2009 the appellant was notified of

his liability to deportation. Between his guilty plea and his sentencing the appellant had claimed asylum and on 8 August 2013 his asylum claim was refused by the respondent. On the same date the respondent issued the decision to make a deportation order.

The decision of the First-tier Tribunal

- 3) The First-tier Tribunal found the appellant's evidence regarding the alleged risk of persecution or serious harm he claimed to face in Sierra Leone to be wholly lacking in credibility. This finding has not been challenged in the application to the Upper Tribunal.
- 4) The challenge to the Upper Tribunal concerns the appellant's relationship with a Miss LJ. The couple claimed to have known each other since before the appellant was arrested in 2008 in respect of the offence of which he was later convicted. It appears that they commenced a sexual relationship around the end of 2010. LJ appeared to be unaware that the appellant was in the UK illegally or facing deportation until late in 2013. The couple have a daughter, EJ, born in December 2013, who is both a British citizen and a citizen of Sierra Leone.
- 5) In the respondent's deportation decision of 14 August 2013, at paragraph 18, it was accepted that the appellant was "in a genuine and subsisting relationship with [LJ]". It was further stated, at paragraph 19 that, although the appellant claimed to have been in a relationship with LJ since 2008, they did not live together. This was said to be on account of the appellant's religious beliefs, which forbade him to live with someone outside marriage. The respondent nevertheless noted that according to the appellant, LJ was pregnant with the couple's first child.
- 6) The First-tier Tribunal noted the respondent's concession with regard to the existence of the relationship between the appellant and LJ and made the following comments:
 - "85. The appellant says that he is in a genuine and subsisting relationship with [LJ] (dob [xx].7.89), and the respondent has not challenged this aspect of the claim directly, although for the reasons set out below, and having heard them both give evidence, and seen their demeanour towards one another on 4 February 2014, we have very grave doubts as to the true nature and strength of this relationship as it stands today.
 86. We note that LJ continues to live in her mother's home. We consider it significant that there is no evidence before us from either LJ's mother, or the aunt with whom the appellant is said to live.
 87. Where the evidence of the appellant and LJ is discrepant, we have no hesitation in concluding that LJ is the more reliable witness."

- 7) The Tribunal then went on to consider the evidence before it about this relationship. The Tribunal, at paragraph 98 of the determination, noted the appellant's evidence that he had not cohabited with LJ prior to the birth of the baby on 19 December 2013 but he claimed in evidence to have done so since. The Tribunal nevertheless noted that in his witness statement of 22 January 2014 the appellant had given his address as being in Gosforth whereas LJ's home was in Gateshead. The Tribunal noted, at paragraph 100, that the appellant's claim to have lived in LJ's home for the last month in order to assist with caring for their baby was not a claim that LJ supported. Her evidence, both in chief and in cross-examination, was that the only people living in her home were her mother, her 8-year-old brother, herself and the baby. The Tribunal rejected the appellant's claim to be cohabiting with LJ.
- 8) The Tribunal went on to consider whether the appellant and LJ were engaged to be married. The appellant had claimed this at his screening interview in February 2009, although in his witness statement he claimed that they became engaged in 2011. The Tribunal noted, at paragraph 106, that in her witness statement LJ claimed that she and the appellant intended to marry in the event that the appellant was allowed to remain in the UK. The Tribunal observed, at paragraph 107, that it was quite plain once LJ had given her evidence at the hearing that the appellant was extremely annoyed with her over the content of the evidence. After giving evidence LJ went to sit at the back of the court room but did not attempt to sit beside the appellant. There was no eye contact between them and they did not speak to one another or acknowledge one another at all. They remained like that for the remainder of the hearing.
- 9) The Tribunal went on to consider the relationship between the appellant and his daughter EJ. The Tribunal recorded at paragraph 109 that the appellant claimed in oral evidence to have played a significant part in EJ's life since her birth but neither his witness statement nor that of LJ had made this plain. It was accepted by the Tribunal that the appellant visits EJ at LJ's home from time to time, and probably assisted with caring for her when he does so but his claim to live at that property was rejected. The Tribunal was not satisfied that he went there every day. The Tribunal expressed doubts as to whether the appellant has a genuine and subsisting parental relationship with EJ or was simply responding to legal advice as to how strengthen his Article 8 appeal.
- 10) The Tribunal, having considered the evidence, set out their conclusions on family life, as follows:
 - "112. We are satisfied that the appellant has enjoyed a longstanding relationship of friendship with [LJ], which became a sexual relationship at about the end of 2010. That sexual relationship has led to the conception, and recent birth of baby [EJ].

113. Until very recently the appellant had deceived [LJ] into believing that he held immigration status in the UK. He had not disclosed to her that he had been recommended for deportation by the sentencing judge in 2008 and he did not disclose his true position to her until about the time baby [EJ] was born. That disclosure has in our judgment seriously damaged their relationship.
 114. We are not satisfied that the appellant and [LJ] enjoyed a genuine and subsisting relationship akin to marriage, or that they currently jointly hold any genuine intention to marry. We accept however that their relationship probably was of a different quality when [EJ] was conceived; the appellant's deception had not yet come to light."
- 11) The Tribunal found that the pregnancy was not planned. The couple had not been cohabiting when the baby was conceived or born. Although this was a borderline case the Tribunal accepted that there was "family life" between the appellant and EJ from birth. The Tribunal then went on to consider EJ's best interests. It was plainly in her best interests to be brought up in the UK and to be cared for by her mother. The Tribunal recognised that ordinarily it would be in the best interests of any child that even if they cannot be brought up by both of their parents, they should grow up enjoying contact with both parents and their extended family.
 - 12) The Tribunal found at paragraph 130 that the appellant did not meet the requirements of paragraph 339(a). This was because even if all the requirements of that provision were met, it was not disputed that LJ could care for EJ in the UK in the event of the appellant's deportation. The appellant did not qualify for any of the exceptions to deportation under the Immigration Rules.
 - 13) The Tribunal then went on to consider whether the appeal might succeed under Article 8 outwith the Rules and whether the question of delay by the respondent in the decision making process might have any effect upon the outcome of the appeal. In this regard, however, the Tribunal noted that the appellant did not take LJ into his confidence and tell her of his lack of immigration status and that he was already facing deportation at the time they entered into a serious relationship. The Tribunal further observed that if the appellant had not attempted to rely upon forged documents purporting to be issued by UNHCR the decision to make a deportation order upon refusal of his asylum claim might have been made earlier. The Tribunal found that the family life that the appellant had established since his release from detention in 2009 was established while he was deceiving LJ as to what his true immigration status was.
 - 14) The Tribunal nevertheless found that the decision to make a deportation order was an interference with the right to respect for private and family life. The appellant's deportation would lead to his being physically separated from LJ and EJ and being able to play very little part in EJ's life as

she grew up. It was not suggested that it would be reasonable to expect LJ and EJ to make a life in Sierra Leone. Communication by letter or by electronic means would be a poor substitute for direct contact. Nevertheless the evidence before the Tribunal, despite consideration of the best interests of EJ, did not disclose “exceptional circumstances” and the deportation of the appellant would not be a disproportionate response to his offending.

Permission to appeal

- 15) Permission to appeal was granted on three main grounds. The first of these was that it was arguably wrong for the Tribunal, without giving notice, to go behind a concession made by the respondent in the refusal letter accepting that the appellant and his partner were in a subsisting relationship and to base an assessment of their relationship on demeanour. The second ground was that it was contended that the Tribunal relied in part on a lack of evidence from the partner's mother but this was a further arguable error because she had provided a statement, which was in the respondent's bundle. The third ground was that the Tribunal had arguably erred in their assessment of proportionality. In the application for permission to appeal it was contended that the Tribunal did not give adequate reasons for its decision on this issue.

Submissions

- 16) At the hearing before me, Mr Schwenk, on behalf of the appellant, argued that there was a clear and unequivocal concession on behalf of the respondent as to the existence of a genuine and subsisting relationship. This was not challenged. The Tribunal was wrong to go behind this concession. Mr Schwenk sought to rely on a decision of the Immigration Appeal Tribunal from 2000 in Carcabuk 00TH01426, which was approved by the Court of Appeal in NR (Jamaica) [2009] EWCA Civ 856. If the concession was to have been challenged it should first have been withdrawn.
- 17) Turning to the issue of the couples' demeanour, Mr Schwenk sought to rely on a decision of the Immigration Appeal Tribunal in Luwuzi [2002] UKIAT 07186, in which the danger of relying on demeanour was pointed out. Mr Schwenk continued that the Tribunal made a third error in relation to the evidence of LJ's mother, when the Tribunal stated at paragraph 86 that there was no evidence from her. It was pointed out that there was a letter reproduced at both N2 and N4 of the Respondent's bundle. Ms Schwenk noted that this letter was brief but could have made a difference to the outcome of the appeal. The Tribunal had considered the absence of evidence from LJ's mother significant and in so doing had made a mistake of fact.
- 18) Mr Schwenk further pointed out that although the Tribunal referred to not having evidence from the appellant's aunt in Newcastle, there was a letter from her at pages 133-134 of the appellant's bundle. This stated that the appellant used to live with his aunt but did not do so any longer.
- 19) Mr Schwenk submitted that the Tribunal had assessed proportionality on an incorrect factual basis. The concession by the respondent should have been accepted. If it was accepted that the Tribunal had made errors in the evidence then there should be a re-assessment of the appeal under Article 8 even though it had been accepted by both parties that the appellant would

not qualify under the Immigration Rules. In support of this proposition Mr Schwenk referred to the case of Haleemudeen [2014] EWCA Civ 558.

- 20) In conclusion Mr Schwenk submitted that there were a number of errors in the determination. It was unlawful for the Tribunal to go behind the respondent's concession. It was not possible to say that if these errors had not been made, the outcome would have been the same. It was pointed out that there was also an issue of fairness and that the mother of LJ might have been called as a witness had it not been for the concession.
- 21) For the respondent, Mrs Rackstraw submitted that the Tribunal had looked at the case very carefully and made a careful assessment of credibility. The concession as to the existence of a relationship was set out very briefly and, given the appellant's history, it was always likely the judge would have made different findings on the existence of the substantive relationship. The appellant has a history which showed him to be unreliable and he had given evidence which was not genuine. As was pointed out by the Tribunal at paragraph 80 of the determination, in reliance upon the case of SS (Nigeria), it was for the appellant to choose what evidence to place before the Tribunal. Although the Tribunal referred at paragraph 86 to not having any evidence before it from either LJ's mother or the appellant's aunt, this was not material. The letters from the mother and aunt were short of content and undated. It was pointed out that the letter from the aunt was dated 7 August 2011, but Mrs Rackstraw submitted this was a considerable time ago. It did not cover the period of the relationship. Having regard to the appellant's circumstances and history, the reasons given by the panel were sufficient.
- 22) In response Mr Schwenk submitted that if the concession as to the relationship had been doubted, then the Tribunal should have asked the respondent to withdraw the concession and given the appellant the opportunity to call evidence in support of the existence of the relationship.
- 23) It was put to Mr Schwenk that the concession was essentially limited to the point in time when the respondent's decision was made and did not refer to a continuing state of affairs. It could not be assumed that a particular state of affairs would continue months or years into the future.
- 24) In response Mr Schwenk again sought to rely on Carcabuk. He submitted that a concession related to a matter of fact and he acknowledged that a concession about a past event could be undermined by new evidence. He submitted that if there was a question about a concession in the refusal letter then this ought to have been brought to the attention of the parties. He appeared further to submit that the task of the Tribunal was to determine the facts at the date of the decision appealed against.
- 25) Mrs Rackstraw pointed out that the Tribunal was only able to consider the nature of the relationship once it had heard the evidence of LJ so the concession could not have been withdrawn in advance of the hearing.

- 26) Mr Schwenk submitted that even at that stage the appropriate course would have been for the Tribunal to ask the respondent to withdraw the concession. The appellant's poor immigration history did not address the issue of the concession. The observations about the need for the appellant to choose what evidence to provide, in terms of SS (Nigeria), did not detract from the proper way in which the concession should have been addressed.
- 27) In relation to the letters from the appellant's aunt and the mother of LJ, Mr Schwenk submitted that this was not just a question of the content of the letters but a question of the Tribunal having been influenced by the supposed absence of evidence from these individuals. If the appellant had been aware that the subsistence of the relationship would be in dispute then further evidence might have been called.
- 28) Mr Schwenk asked for a further hearing to determine the Article 8 issue. He confirmed there was no challenge to the determination insofar as it addressed asylum and Article 3. In terms of the Practice Direction he submitted that remittal would be the appropriate course.
- 29) At the end of the hearing I reserved my determination on the question of whether there was an error of law in the determination such that it should be set aside.

Discussion

- 30) Mr Schwenk's principal argument in relation to the concession was that once it was made the Tribunal should not have gone behind it without giving the parties notice that they considered it would be appropriate to do so and asking the respondent to withdraw the concession. I note that the case of Carcabuk concerned two asylum appeals in which the respondent had accepted the credibility of the account given by each of the appellants on which their asylum claims were based. In that case, however, the Immigration Appeal Tribunal stressed the importance of identifying the precise nature of any so-called concession. The Tribunal accepted that if it was a concession of fact, for example that a particular document was genuine or that an event described by the appellant or a witness did occur, then the Tribunal should not go behind it. I note that although, as Mr Schwenk submitted, the Court of Appeal in NR (Jamaica) referred to the decision in Carcabuk, the Court pointed out that the Tribunal's discretion was wide and that a significant feature of how that discretion should be exercised was by having regard to the question of whether or not there would be prejudice to an appellant. The Court also observed that in a case involving asylum or human rights it was the position at the date of the hearing which was important.
- 31) The respondent had good reason to accept that the relationship between the appellant and LJ was genuine and subsisting at the date of the decision on 14 August 2013. This was because LJ was expecting a baby of whom the

appellant is the father. That was the position as it appeared to the respondent in mid-August 2013.

- 32) When the appeal came before the Tribunal to make decisions in relation to the appellant's family life, the Tribunal was bound to consider the strength and intensity of the relationship between the appellant and LJ. The underlying premise of Mr Schwenk's submission was that a relationship must be either subsisting or not subsisting. That is, however, a gross oversimplification of the spectrum possible states of relationships. A couple may be in a relationship but it may be one in which there is very little commitment between the parties. The relationship may be relatively casual and the bond between the couple may be weak. At the other end of the spectrum there may be relationships of considerable strength and duration where the couple have shown a commitment to each other over the long term. Regardless of the respondent's view of whether the relationship between the appellant and LJ subsisted or not, the Tribunal was required to make its own assessment of the quality and strength of this relationship, and even of its likely durability. In short, the Tribunal was required to make an assessment of the quality of the appellant's family life with LJ.
- 33) Bearing this in mind, it is difficult to see how the appellant has been prejudiced by the concession, if indeed such it was, not having been formally withdrawn on behalf of the respondent. The burden was on the appellant to satisfy the Tribunal of the strength and quality of his relationship with LJ. The appellant completely failed to do this. At the hearing he gave evidence, as did LJ, and there were inconsistencies in their evidence about the relationship between them. The Tribunal preferred LJ's evidence to that of the appellant and gave adequate reasons for so doing. The Tribunal found the relationship between the appellant and LJ was so weak as to be, in effect, no longer subsisting. This was a finding the Tribunal was entitled to make upon the evidence before it.
- 34) It has been argued for the appellant that it was unfair for him not to have notice that the subsistence of the relationship was to be in issue. As I have already pointed out, however, the appellant ought to have been aware that the quality of his relationship with LJ was bound to be at issue before the Tribunal given the nature of the appeal, resting as it did to a material extent upon the alleged interference with family life arising from the appellant's proposed deportation. The appellant ought therefore to have been aware of the need to provide evidence appertaining to this relationship. Indeed, the appellant did provide such evidence in terms both of his testimony and that of LJ and the evidence relating to the birth of their child. In the event this evidence was not sufficient for the appeal to succeed but this was to a large extent because of the discrepancies between the evidence of the appellant and the evidence of LJ as to the quality and nature of their relationship. The Tribunal was entitled to take these discrepancies into account in making the findings which it did. Indeed, there is very little, if any, difference between the Tribunal finding that the relationship was genuine and subsisting but nevertheless very weak and unlikely to continue, and the Tribunal finding

that the relationship was no longer subsisting. In the event of either of these findings the relationship would not weigh heavily in the balancing exercise under Article 8.

- 35) In short, I consider that the appellant had adequate notice of the case he had to answer and indeed he sought to provide evidence to meet that case but his evidence fell short. I do not consider that the appellant was materially prejudiced, or that the hearing was conducted unfairly, because the appellant was unable to show the quality of the relationship with LJ on which he relied. I do not accept that the Tribunal erred in law either in the findings which it made as to the nature of the relationship between the appellant and LJ or that the Tribunal proceeded unfairly in the way it reached these findings.
- 36) A further point relied upon by Mr Schwenk was the issue of whether the Tribunal had relied upon demeanour when they should not have done so. There is some force in Mr Schwenk's argument, in that demeanour can be an unreliable way of forming a judgment, particularly where witnesses are from different cultures. It is the case that at paragraph 107 the Tribunal commented on the demeanour of the couple after LJ had given her evidence. The Tribunal had, however, already pointed out that LJ's evidence as to whether the couple were cohabiting was completely different from the evidence of the appellant. The appellant claimed in his evidence to have been cohabiting with LJ since the birth of the baby in December 2013. LJ's evidence was that he had been to her home quite a bit in the last few weeks. Her evidence was that she was living with her mother, her brother and her baby but not with the appellant. It is clear that the Tribunal's finding was not based upon demeanour alone but principally upon discrepancies in the evidence of the appellant and LJ as to the nature and subsistence of their relationship.
- 37) I turn now to the letter from LJ's mother, which formed part of the respondent's bundle. It is submitted on behalf of the appellant that the Tribunal erred by stating there was an absence of evidence from LJ's mother when this letter was before them.
- 38) There was a question at the hearing before me as to the date of this letter and it is indeed not dated. It appears from the respondent's bundle, however, that it was submitted to the respondent with a covering letter dated 15 August 2011 from the appellant's solicitors. The letter is therefore not a recent letter but was more than three years old at the date of the hearing. It refers to the existence of a relationship between the appellant and LJ and describes them as a "loving couple". Given when this letter was submitted, however, its significance is little more than historic, and it throws little light on the nature of the relationship at the date of the hearing before the First-tier Tribunal.
- 39) Although it was not in the application for permission to appeal, I was referred by Mr Schwenk to the letter from the appellant's aunt in Newcastle,

at pages 133-134 of the appellant's bundle. I note that this letter is dated 7 August 2011. It therefore concerns past events rather than the appellant's current circumstances. The letter states that the appellant lived with his aunt and returned there after his release from detention until he was allocated accommodation by the Home Office. Mr Schwenk's submission was that it was wrong for the Tribunal to refer to the absence of evidence from the appellant's aunt and wrong to refer to the appellant as still living with his aunt.

- 40) It would appear that the Tribunal was under a misapprehension to the extent that they may have thought that the appellant was living with his aunt. The address he gave in his witness statement, however, was an address in Gosforth, whereas the address LJ gave in her witness statement was an address in Gateshead. The Tribunal was correct, therefore, to observe that the appellant and LJ had given different residential addresses from each other in their witness statements. As far as the Tribunal was concerned, the significant point was that the couple were not living at the same address but each gave different addresses. From this point of view it was immaterial whether the appellant was living with his aunt or not.
- 41) It has to be accepted that the Tribunal erred in stating that there was no evidence before it from either LJ's mother or from the appellant's aunt. Given that this evidence was, however, in the form of letters more than three years old, I think it is highly questionable whether it was material to the Tribunal's decision. The letter from LJ's mother says no more than the appellant and LJ were in a relationship more than three years ago. As the letter is over 3 years old, it casts little, if any, light on the current state of that relationship. The letter from the appellant's aunt says nothing which would assist the appellant in showing the strength of his relationship with Ms LJ. I do not consider that the Tribunal's mistake in not having regard to these letters was material or would have affected the Tribunal's findings in any material sense.
- 42) The remaining issue is the Tribunal's assessment of proportionality under Article 8. I have already found that the Tribunal was entitled to make the findings which it did in respect of the appellant's family life. Having made these findings, there was really little further the Tribunal could have said about proportionality. The Tribunal referred at paragraph 124 of the determination to the case of MF (Nigeria) [2013] EWCA Civ 1192 as establishing that the respondent has sought through the medium of the Immigration Rules to consider the relevant factors in making a decision to deport and the weight to be attached to them. Accordingly the appellant's position under paragraphs 396-400 of the Immigration Rules formed the context in which the Tribunal had to consider the balancing exercise as to the proportionality of the decision to deport. It was not disputed that the appellant would not succeed under the specific exceptions to deportation in paragraphs 396-400.

- 43) The Tribunal considered carefully whether there were factors which would render the appellant's deportation disproportionate, such as delay by the respondent in making the decision, or the best interests of the appellant's child. The Tribunal gave careful consideration to these factors and found they would not outweigh the public interest. The Tribunal referred to the term "exceptional circumstances", which appears in paragraph 398 of the Immigration Rules. It is apparent, however, from the context in which the Tribunal referred to this phrase that the Tribunal was not applying any test of exceptionality but looking only to the evidence and the facts in the context of this provision. On the basis of the findings made by the Tribunal, which were findings the Tribunal was entitled to make, the Tribunal's reasoning was wholly adequate to support their conclusion, namely that deportation would not be disproportionate.
- 44) Overall the determination by the Tribunal is a thorough and careful document. The two factual errors made by the Tribunal in respect of the existence of documentary evidence from the appellant's aunt and from LJ's mother were of a minor nature and were not material to the outcome. They do not justify the setting aside of the decision. The other matters on which Mr Schwenk sought to impugn the decision do not amount to errors of law but were matters to which the Tribunal gave proper consideration and reached appropriate findings and conclusions.

Conclusions

- 45) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
- 46) I do not set aside the decision.

Anonymity

The First-tier Tribunal did make a direction for anonymity and I continue that order for the reasons given by the First-tier Tribunal (pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Fee Award

Note: This is not part of the determination

As the appeal was dismissed no fee award can be made nor was any fee payable.

Signed

Date

Judge of the Upper Tribunal