



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

Appeal Number: DA/00452/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 20 January 2015**

**Decision & Reasons
Promulgated
On 27 January 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

**MR OLAOLUWA ADEBISI AGBANA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Timson, instructed by Birleys Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant Mr Olaoluwa Adebisi Agbana was born on 26 August 1976 and is a citizen of Nigeria. The appellant appears to have entered the United Kingdom sometime between 2003-2004. On 26 November 2007, the appellant was arrested in possession of a number of false identity documents and was convicted on 2 January 2008 and sentenced to twelve months' imprisonment. He was advised of his liability to deportation as a

result of his conviction. The appellant subsequently made a claim for asylum which was refused by the respondent on 25 June 2008. His appeal against deportation was dismissed on 7 January 2008. A subsequent appeal was dismissed in 2009.

2. In June 2012, the appellant (by then an absconder) was arrested on suspicion of drink driving. He submitted further representations in December 2012 and on 25 February 2014 a decision was made to deport the appellant. It was against that decision that the appellant appealed to the First-tier Tribunal (Judge Lever) which, in a determination promulgated on 4 June 2014, dismissed the appeal. The appellant was initially refused permission to appeal to the Upper Tribunal but permission was granted by Judge O'Connor on 17 November 2014. Granting permission, Judge O'Connor wrote:

Whilst the appellant cannot meet the requirements of paragraph 399(a) or 399(b) of the Rules – given, *inter alia*, (i) the nationality of his spouse and (ii) that his spouse is able to care for his children it is arguable that the Tribunal's First-tier Tribunal determination fails to display a lawful adequacy of reasoning in relation to the consideration of the issues of 'exceptional circumstances' under paragraph 398 of the Rules, including in its consideration of whether it would be reasonable to require the children to move to Nigeria.

3. Mr Timson, for the appellant, accepted that the version of paragraph 399(a) in force as at the date of the application and decision was that which provided that an applicant might only succeed if there was, in the United Kingdom, no other family member who could care for his children; in the case of the appellant, that family member is the mother of the children, Precious Ronke Agbana.
4. Mr Timson submitted that, notwithstanding the inability of the appellant to meet the requirements of paragraph 399, he should succeed under the "exceptional circumstances" provisions of paragraph 398. He argued that the judge had failed to pay proper attention to the statements of the appellant and his partner and to a report from the school. The children (J and N) are both Nigerian citizens. Mrs Agbana has discretionary leave to remain in the United Kingdom until 2015.
5. Judge Lever "entirely agreed" with the reasons given in the refusal letter refusing the appellant's application under paragraph 399 and 399(a). He then turned to consider the question of "exceptional circumstances" in his determination at [24] *et seq.* The judge noted that Mrs Agbana had herself made a claim for asylum which had been refused and her appeal subsequently dismissed. It is clear from the determination that the judge was puzzled that, notwithstanding the outcome of her asylum application and appeal, Mrs Agbana and the children had been granted further leave to remain, albeit on a discretionary basis. At [31], the judge wrote:

[Mrs Agbana] is Nigerian who has spent most of her life in Nigeria. Her children are Nigerian. They have had the benefit of free schooling in the UK

as a result of the decision to grant a discretionary leave. There was no obstacle to the removal of any of this family to Nigeria. On current known evidence it would not be unreasonable to direct the removal of the wife and the children at the termination of the discretionary leave in 2015. In any event, and more importantly, the fact that the appellant's wife and children have discretionary leave to remain does not, of course, prevent them returning to Nigeria to be with the appellant. The children's best interests are to be with both of their parents in the country of their nationality namely Nigeria and to therefore be brought up and to experience her own culture.

There are no exceptional circumstances in this case nor anything to suggest that her circumstances would indicate a need to consider the appellant's Article 8 claim outside the Rules. Furthermore there is clearly in my view no difficulty in terms of the removal of the appellant to Nigeria nor for the appellant's wife and children to themselves go to Nigeria to be reunited with him.

6. It is clear that, in order to establish the existence of exceptional circumstances, an appellant must show that his or her circumstances go beyond those considered under the Immigration Rules. The version of the Rules applying in this case, the appellant could not succeed because the mother of the children would be able to remain in the United Kingdom to look after them. By Judge Lever's reasoning, a different scenario might be envisaged which might properly exclude any recourse the appellant might have to "exceptional circumstances" namely that Mrs Agbana and the children move to live in Nigeria with the appellant. It is clear that Judge Lever considered this to be a case where the duty of the Tribunal to have regard to the best interests of the children might be discharged by providing for the children to remain in a family unit with their parents, a family unit which would leave the United Kingdom together in order to enjoy family life in the country of their nationality. That was, in my opinion, an entirely proper and reasonable observation. As Mr McVeety submitted, there are, thankfully, no health or educational issues affecting the children in this case. There is, indeed, nothing "exceptional" about what would seem to be an entirely normal family. The evidence which Mr Timson submitted established the existence of exceptional circumstances is nothing more than a plea by both parents to remain in the United Kingdom with the children on grounds that they have lived here for quite a long time whilst the school reports do no more than record the fact that the children regularly attend lessons. I find that Judge Lever has properly considered all the relevant circumstances and that his conclusion was clearly available to him on the evidence. Accordingly, the appeal is dismissed.

NOTICE OF DECISION

This appeal is dismissed.

Signed

Date 27 January 2015

Upper Tribunal Judge Clive Lane