



IAC-FH-CK-V1

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

Appeal Number: DA/02183/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 10 September 2015**

**Determination Promulgated
On 10 November 2015**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OS

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr K Norton, Senior Home Office Presenting Officer

For the Respondent: Mr R Singer, of Counsel

DECISION and DIRECTIONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Russell, who in a determination promulgated on 21 January 2015 allowed the appeal of OS against a decision of the Secretary of State to deport the appellant made on 1 October 2013. Although the Secretary of State is the appellant before me I will, for ease of reference, refer to her as the respondent as she was the respondent in the First-tier Tribunal. Similarly I will refer to OS as the appellant as he was the appellant in the First-tier Tribunal.

2. At the beginning of the hearing Mr Singer stated that as it was I who had granted permission to appeal I should not hear the appeal on the issue of whether or not there was an error of law in the determination of the First-tier Judge. He therefore asked that I recuse myself. I stated that I would not do so. In granting permission to appeal I had stated that the grounds of appeal were arguable. I had not stated that there was a material error of law in the determination. I had not prejudged the case and I would be hearing submissions from both Mr Singer and Mr Norton before deciding whether or not there was a material error of law. I pointed out that the decision was different from that in, for example, a judicial review application where permission to bring judicial proceedings was considered substantively and, if refused, could be renewed orally. In those circumstances it might well be the case that it was inappropriate for the judge who had refused permission to hear the oral renewal of the application.
3. The appellant is a citizen of Nigeria born on 7 December 1969 who entered Britain in 1987, being granted indefinite leave to remain in May 1992. In September 2012 he was convicted of two kinds of dishonesty making false representations to make gain for self/another or to cause loss and of possessing/controlling articles for use in fraud in 2010 and 2011. He was sentenced to a term of twenty months' imprisonment.
4. Thereafter the Secretary of State having considered representations made on the appellant's behalf by his solicitors decided to make the deportation order which was signed on 1 October 2011. The appellant appealed, his appeal was dismissed by a panel sitting at Hatton Cross on 27 February 2014 but the appeal was then remitted on 15 July 2014 by order of Upper Tribunal Judge Clive Lane. The remitted hearing was heard by Judge Russell at Taylor House on 16 January 2015.
5. Judge Russell noted that the appellant had three children here and had lived with his partner whom he had married in a customary marriage in either 1993 or 1994. He heard evidence from the appellant, his wife and his youngest son David, who was born on 3 August 2000.
6. He referred to the terms of Section 32 of the Borders Act 2007 and to paragraphs 396, 398 and 399A of the Immigration Rules. He also made reference to Part 5A of the Nationality, Immigration and Asylum Act 2002 as amended. He noted that the appellant's two eldest children are at university although his eldest child had recently had a mental breakdown and was at that time detained under the Mental Health Act.
7. In paragraph 30 he set out his conclusions on the factual evidence before him and in paragraph 31 referred to issues relating to the appellant's youngest child.
8. In paragraph 32 onwards he referred to the appellant's relationship with his partner and in paragraph 37 set out his conclusions regarding the appellant's long residence. He reached his conclusions in paragraph 41

and then stated that the appeal was allowed under the Immigration Rules. As the appeal before me related to what the judge actually said in the determination I now set out paragraphs 30 through 41 of the determination as follows:-

- “30. Having looked at the evidence of the appellant’s relationship with the children in the round I draw the following conclusions:
- a. The evidence of what role the appellant plays in the lives of his children is limited;
 - b. The evidence of what role the appellant plays in the lives of his eldest children is both negative and positive; the breakdown of his eldest child is ascribed to the appellant’s conviction, while he is also said to have been a positive influence to his daughter;
 - c. There is no evidence of financial support to the children in the form of earnings to support the current household income;
 - d. There is extremely little evidence of responsibility for the children in the form of taking important decisions, exerting parental authority, discussions of the future, the giving of guidance, interaction with teachers etc.;
 - e. The youngest child is doing averagely well at school and has outside interests: he has had trouble in the past but says that he is doing better since his Father re-joined the household: there is no objective evidence of the stabilising influence the appellant provides David;
 - f. The appellant was prepared to undertake multiple trips overseas in pursuit of a criminal enterprise and risk imprisonment, separating himself from his family for several years in both the execution of the offences and the punishment.
31. From the foregoing, I find that it would be unduly harsh to expect the youngest child to relocate to Nigeria. I bear in mind the important juncture at which he finds himself in his education and transition to adulthood. The analysis of education provision in Nigeria contained in the reasons for refusal is shallow and unpersuasive and does not reflect the importance of education to this particular family. I also note that education is but one part of any child’s life and there is no consideration of the impact of rupturing social connexions would have on David or how that affects his best interests: s.55. That being said, it appears to me that the appellant plays a minimal role in the lives of the children and does not prioritise their interests. Taking into account what is accepted by the Home Office and para.399(a) I find that the appellant has not established that it would be unduly harsh for the children to remain in the UK without him.

Exception relating to a relationship with a British partner

32. The appellant is in a relationship with a British citizen in the UK, which the Home Secretary accepts is genuine and subsisting but does not accept that there are no insurmountable obstacles to them continuing their relationship in Nigeria.
33. I was told about the problems the appellant’s partner would face in adapting to a new life in Nigeria, particularly in finding employment

when she is close to qualifying as an English lawyer. The effort involved in this, while bringing up three children to a high standard, should not be underestimated and the ending of her career prospects in the UK requires careful consideration. Requiring her to remove to Nigeria represents, in my view, an interference with her right to private life serious enough to engage the operation of article 8.

34. Nonetheless, I do not look at her as an individual alone but also as a Mother to three British children, with whom she lives and for whom she cares. The evidence about her eldest child is that he suffers from mental health problems severe enough to be detained under s.2 MHA 1983, implying that he is a risk to himself and/or others. Her youngest child is now approaching his GCSEs and I have found, above, that it would be unduly harsh to expect him to remove to Nigeria. The appellant's partner faces a choice of leaving for Nigeria with the appellant and leaving her children behind or staying in the UK with her children and without the appellant, with whom it is accepted she has a genuine and subsisting relationship. This is the dilemma to which the Home Secretary has not turned her mind.
35. Having looked at the evidence of the appellant's relationship with his partner in the round I draw the following conclusions:
 - a. If the appellant's partner decides to follow the appellant to Nigeria she would have to leave her children behind in the UK: this dilemma does, in my view, represent an insurmountable obstacle to following the appellant to Nigeria;
 - b. If the appellant's partner decides to remain in the UK she would have to raise their youngest child without him; I have found, above, that this would not be unduly harsh.
 - c. The deportation of the appellant results in a 10-year bar on re-entry to the UK.
36. Taking into account that it is accepted by the Home Secretary and para.399(b) the appellant and his partner have a genuine and subsisting relationship I find that the appellant has established that it would be unduly harsh for his partner to follow him to Nigeria or to remain in the UK without him.

Exception relating to long residence

37. The Home Secretary accepted that the appellant had lived in the UK for at least 20 years preceding the deportation order (discounting any period of imprisonment) and over 20 years have been with indefinite leave to remain. The Home Secretary did not accept that the appellant has lost his connexions to Nigeria.
38. Guidance from the Upper Tribunal in *BK (Deportation - s33 "exception" UKBA 2007 - public interest) Ghana* [2010] UKUT 328 (IAC) and *RG (Automatic Deportation - s.33(2)(a) exception) Nepal* [2010] UKUT 273 (IAC) provides that where a person has spent a good deal or most of their life in the UK since childhood they are, in reality, home grown criminals and their long residence can outweigh even the most serious kinds of offences including causing grievous bodily harm and dealing in Class A drugs. As Sedley LJ said at paragraph 35 of *HK (Turkey)* [2010] EWCA Civ 583, involving automatic deportation:

'The number of years a potential deportee has been here is always likely to be relevant but what is likely to be more relevant is the age at which those years began to run. Fifteen years spent here as an adult are not the same as fifteen years spent here as a child. The difference between the two may amount to the difference between enforced return and exile. Both are permissible by way of deportation, but the necessary level of compulsion is likely to be very different.'

39. The appellant has been in the UK since 1987 and it is not disputed that he has had indefinite leave to remain since 1992. Having been here since the age of 17, been to school, worked, established relationships and fathered three children here it can be said that he is socially and culturally integrated into the UK. While I do not accept that the appellant has no links to Nigeria, as evidenced by his travels there and engagement with a criminal gang I do accept that his family connexions are now tenuous with the death of his parents and the migration of his siblings to the UK. I also accept that this means of establishing employment and a new life in Nigeria in the absence of a presence there for a long time have become more marginal. The deportation of the appellant would in reality amount to exile rather than enforced return, with the consequentially higher threshold referred to above by Sedley LJ.
40. An absence of nearly three decades from Nigeria, during a major part of his adult life represents a serious obstacle to the appellant's integration into Nigeria, compounded by the presence of his siblings in the UK.

Exception on Convention grounds

41. Having found that the exception to automatic deportation provided for under para.399(b) applies to the appellant I do not need to go on to consider outside the immigration rules whether his deportation would breach his Convention rights: *MF (Nigeria)* [2013] EWCA Civ 1192."
9. The Secretary of State's appeal asserted that the judge had been illogical in what he had stated at paragraph 35(b) where he had stated:- "If the appellant's partner decides to remain in the UK she would have to raise their youngest child without him; I have found, above, (at 31) that this would not be unduly harsh", and stated that that was a clear finding that it would not be unduly harsh under paragraph 399(a) or (b) if the appellant's partner is to remain in the UK as the sole carer for the youngest child upon the appellant's deportation. However, at paragraph 36 the judge had written:- "I find that the appellant has established that it would be unduly harsh for his partner to follow him to Nigeria or to remain in the UK without him". It was argued that that left an impermissible and unresolved conflict with the judge's prior finding.
 10. It was also argued that he had failed to give adequate reasons for material findings in that he had found that it would be unduly harsh to expect the appellant's youngest child to follow him to Nigeria upon deportation but had then found that it was not unduly harsh for them to remain in Britain without him and then finding that it would be unduly harsh for his partner to follow him to Nigeria. It was stated that this was unreasoned – the fact

that a genuine and subsisting relationship might exist was not an adequate reason in support of a material finding that it would be unduly harsh to expect the appellant's partner to remain in Britain without him should he be deported. It was therefore stated that the judge had given inadequate reasons for finding that paragraph 399(b) of the Immigration Rules was met. Moreover it was argued that it was not rationally possible to conclude that it would be unduly harsh for the appellant's partner to remain in Britain to care for the children as the findings at paragraph 30 strongly indicated that that was already the status quo and the appellant had little or no real parental input to his children's lives. It was argued that no adequate reasons had been given for the judge's conclusion.

11. A Rule 24 response was submitted by Mr Singer which in effect argued that the determination contained merely typographical errors in that the word "not" at the end of paragraph 31 and in paragraph 35(b) were clearly typographical errors and that reading the determination as a whole meant that it was clear that the judge had found that there would be an unduly harsh impact on the appellant's son and on his partner if he were deported. It was stated that the decision was comprehensive and clear and the suggestion was made that the appeal should be adjourned to ask Judge Russell what exactly he had meant. It was argued that the typographical errors were not in effect errors of law.
12. At the hearing of the appeal before me Mr Norton relied on the grounds of appeal. He stated that it was not evident that where the judge had written "not" in paragraphs 31 and 35(b) that that was a typographical error. He argued further that the decision was both illogical and unreasoned.
13. Mr Singer referred to his arguments set out in his Rule 24 statement and stated that it was clear that these were typographical errors and clearly the judge had found that it would be unduly harsh for the appellant's partner to have to leave the children in Britain. It was wrong, he argued, to "dress up" typographical errors as errors of law. He went on to argue that it was clear that the judge had intended to allow the appeal on the basis that the effect of deportation on the appellant's wife would be unduly harsh and it was on that basis that he had allowed the appeal - he referred to what the judge had written at paragraph 36 of the determination.
14. With regards to the exception relating to long residence which the judge had considered in paragraph 37 onwards of the determination he argued that the judge had found that there was a serious obstacle to the appellant's integration into Nigeria and that that, of itself, was a basis on which the judge had allowed the appeal.

Discussion

15. I note the findings made by the judge in paragraph 30 of the determination bearing in mind, of course, that two of his children are now

at university. The findings made by the judge clearly do not indicate a clear positive role played by the appellant in the family.

16. At paragraph 31 the judge states that he finds that the appellant had not established that it would be unduly harsh for the children to remain in the UK without him. That finding clearly follows on from the conclusions he had reached in the previous paragraph and I do not accept that the “not” in the last sentence of that paragraph was a typographical error. It is indeed a clear and logical finding.
17. When the judge turns to the exception relating to the appellant’s relationship with his British partner he makes, I consider, clear findings that there would not be insurmountable obstacles to the appellant’s wife following him to Nigeria, and also that it would not be unduly harsh for her to have to raise their child without him – that conclusion is clearly based on his findings in paragraph 30. The judge’s conclusion is that it is not unduly harsh for the appellant’s partner to remain in Britain without him. I consider that that was a conclusion which he was entitled to reach on the evidence and I do not accept that the “not” in subparagraph 35(b) is a typographical error.
18. When considering the appellant’s long residence in Britain the judge states that there is a serious obstacle to the appellant’s integration in Nigeria but he does not say that the appellant met the requirements of paragraph 399A nor indeed does he give any reasons on which he could have based that conclusion.
19. The judge, in paragraph 41, refers to paragraph 399(b). That simply conflicts with what he wrote in paragraph 35. Indeed the judge does not give reasons for his decision nor indeed are there any factual findings regarding the situation of the appellant’s wife.
20. For these reasons I find that there are material errors of law in the determination of the Immigration Judge and I set aside his decision. Moreover I consider that the terms of the Senior President of the Tribunal’s Practice Directions are met and that it is appropriate that this appeal proceed to a hearing de novo in the First-tier.

Notice of Decision

The appeal is remitted to a hearing afresh in the First-tier at Taylor House.

Directions

Time : 3 hours. No interpreter

Signed

Date

Upper Tribunal Judge McGeachy