



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/06793/2015

THE IMMIGRATION ACTS

Heard at Field House
On 28 March 2018

Determination Promulgated
On 25 April 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR DANIEL OLOWE

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFO

Respondent

Representation:

For the Appellant: Mr P Harris, Counsel, instructed by Mansouri & Son solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. There is no good reason to make an anonymity direction in this case.

DECISION AND REASONS

Background

1. By a decision promulgated on 9 February 2018, I found an error of law in the decision of First-tier Tribunal Judge Lucas promulgated on 18 May 2017 dismissing the Appellant's appeal against the Respondent's decision dated 9 March 2015 refusing his application for entry clearance as a partner under

Appendix FM to the Immigration Rules. I therefore set aside that decision and gave directions for a resumed hearing before me to re-make the decision. My error of law decision is annexed hereto for ease of reference.

2. Pursuant to the directions made, on 21 February 2018, the Appellant's solicitor filed a copy of the determination and reasons of First-tier Tribunal Judge C H Bennett promulgated on 22 January 2013 in appeal number OA/0693/2012 ("the 2013 decision"). The 2013 decision is relevant to the issue which arises in this appeal relating to the application of paragraph 320(11) of the Immigration Rules ("the Rules").
3. Under separate cover, on 1 March 2018, the Appellant's solicitor filed a further witness statement from the Appellant dated 1 March 2018 which, I assume, was intended to comply with [2] of my earlier directions. Counsel for the Appellant had not been provided with that statement. Exhibited to that statement are refusals of entry clearance dated 28 September 2009 and 19 October 2009 and a number of documents which relate to the Appellant's family life with his wife and daughter.
4. I also have before me the statements and other documents filed at the time of the First-tier Tribunal hearing.
5. The Appellant is resident in Nigeria. There was no application for him to give evidence by video-link. Although his wife was present at the hearing, Mr Harris did not ask that she be called to give oral evidence. I accept that it was unnecessary for her to do so because the Appellant's family circumstances are not in dispute. The only factual matters which remain in dispute relate to the Appellant's past immigration history and applications for entry clearance and those are matters about which the Appellant's wife has no direct knowledge.

Limitations on the appeal

6. I begin by noting that, although at [1] of my error of law decision, I indicated that both parties accepted that this is an appeal which proceeds under the provisions of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") prior to amendment by the Immigration Act 2014 ("the 2014 Act"), Mr Harris at this hearing initially appeared to resile from that position. The question of which appeal provisions apply has a significant bearing in this case on the facts which I can consider and it is therefore necessary to set out why Mr Harris's submission is wrong.
7. The amendments to the appeal provisions in the 2002 Act were made by the 2014 Act over a period of time and by a sequence of commencement orders. The relevant commencement order for these purposes is The Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015 (SI 2015/371) ("Commencement Order No 4").
8. Since Commencement Order No 4 is the last in the sequence of orders implementing the amendments to the appeal provisions in the 2002 Act, it is

necessary to explain how those amendments were introduced previously. They operated by preserving “the saved provisions” (that is to say the appeal provisions which existed prior to the amendments by the 2014 Act) in certain respects and introducing the commencement of “the relevant provisions” (that is to say the provisions as amended by the 2014 Act) by further amendments to article 9 of an earlier commencement order (The Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014).

9. Article 8 of Commencement Order No 4 provides as follows (so far as relevant):-

“8(1) The Commencement Order is amended as follows.

(2) For article 9 substitute -

“9. - (1) Notwithstanding the commencement of the relevant provisions, the saved provisions continue to have effect and the relevant provisions do not have effect so far as they relate to the following decisions of the Secretary of State -

...

(d) a decision made before 6th April 2015 in relation to which, immediately before 6th April 2015, an appeal could be brought or was pending under the saved provisions.”

In this case, the Respondent’s decision under appeal is dated 9 March 2015.

10. Those provisions have the following consequences. First, the appeal is against the refusal of entry clearance under section 82(2)(b) of the 2002 Act prior to amendment by the 2014 Act and not against a refusal of a human rights claim under section 82 post-amendment. Second, the grounds available to the Appellant include not only that the refusal of entry clearance is unlawful under section 6 of the Human Rights Act 1998 as being incompatible with his Convention rights but also that the decision is not in accordance with the Rules or otherwise not in accordance with the law. Third, however, (and most importantly), sections 85 and 85A of the 2002 Act prior to amendment by the 2014 Act limit the matters which the Tribunal can consider as follows (so far as relevant):-

“85. **Matters to be considered**

...

(4) On an appeal under section 82(1)...against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision.

(5) But subsection (4) is subject to the exceptions in section 85A.

85A Matters to be considered: new evidence: exceptions

(1) This section sets out the exceptions mentioned in section 85(5)

(2) Exception 1 is that in relation to an appeal under section 82(1) against an immigration decision of a kind specified in section 82(2)(b)...the Tribunal may consider only the circumstances appertaining at the time of the decision.

...”

11. The Appellant’s daughter was born on 22 September 2016. As such, at the date of the Respondent’s decision, she was not even conceived. Accordingly, that is a circumstance arising after the date of the Respondent’s decision which, by reason of section 85A, I cannot take into account. The Appellant would need to make a further application for entry clearance based on his relationship as the parent of a British citizen child. As Ms Everett accepted in discussions, the Appellant’s position is probably strengthened (at least in human rights terms) by that relationship but it is not something I can consider in this appeal.
12. That brings me on to a further point raised at the error of law stage which is noted at [30] of my earlier decision. As I there noted, Mr Harris was not prepared to concede that section 85A applies equally to the human rights ground. As I there noted, however, the decision under appeal is not a separate one to refuse a human rights claim but a decision to refuse entry clearance which is appealed on various grounds including that the decision breaches the Appellant’s human rights. As such, there is no distinction to be drawn based on section 85A.
13. I also drew Mr Harris’ attention to the case of AS (Somalia) v Secretary of State for the Home Department [2009] UKHL 32. That case was concerned only with whether section 85(5) (now section 85A(2)) is compatible with Article 8 ECHR. As such, the distinction which Mr Harris sought to draw based on what is said at [9] of the judgment about whether the entry clearance officer is best placed to evaluate the effect of the change in circumstances has no merit. It is evident from the judgment that it was accepted by the House of Lords that section 85(5) (and therefore now section 85A (2)) operated equally to limit consideration of the facts when applying Article 8 ECHR. Indeed, were that not so, there would have been no reason for the appellants in those cases to appeal on the interpretation of that section at all.

Paragraph 320(11) of the Rules

14. It is necessary to begin my consideration of the Appellant’s case with the Respondent’s refusal of his application under the Rules. If he is able to meet the Rules then he has no need to fall back on his human rights claim.
15. I have set out at [14] of my earlier decision what I understood at that time to be the factual background to the Appellant’s previous immigration history and particularly the earlier applications which were said by the Respondent to be “frivolous”. As I noted at [15] to [20] of my earlier decision, I could not be sure that I had been given the entire factual background because neither I nor either party had before us the 2013 decision on which Judge Lucas placed some reliance.
16. As already noted, I have now been provided with a copy of the 2013 decision. I have also received a further witness statement from the Appellant dated 1 March 2018. That statement is highly unsatisfactory as it deals only with the

applications for entry clearance made on 4 September 2009 refused on 28 September 2009 and another which was refused on 19 October 2009.

17. In terms of his immigration history, the Appellant says that he entered the UK in 1988 and in 1999 as a visitor with his mother and that his father arranged for solicitors to make a visa application for him in 1999 before the Appellant's leave expired, said to be supported by a letter from those solicitors which is exhibited to an earlier statement from his father dated 5 May 2017 and which appears at [AB/34] in the bundle before the First-tier Tribunal. However, even the briefest of references to that letter do not support the Appellant's case.
18. In the first place, the letter is dated 18 March 2003 and, whilst it might be the case that the solicitors did not immediately make an application when instructed to do so, there is no evidence to support those instructions having been given, as the Appellant's father says is the case, before the Appellant's visa expired. He puts the fact of the solicitors having not made the application for three years down to their professional negligence but there is no evidence that he reported them for such negligence. Furthermore, even on the case as put in the Appellant's father's statement, the Appellant overstayed for a period at that time because the application was not in fact made until March 2003.
19. The letter is also somewhat inconsistent with the position as set out in the statement of the Appellant and his father about his immigration history. The solicitor's letter states that "[t]he applicant first entered the United Kingdom on the 22/12/97 and has subsequently had occasions to re-visit the United Kingdom thereafter until lately when he decided to stay with the father on the last occasion. He had to be assisted to enter by a relative in view of certain threatening circumstances back home." Those assertions are inconsistent with the Appellant's statement that he entered the UK in 1988 and 1999 with his mother. They are slightly more consistent with what is said by his father that he sponsored the Appellant to enter in 1997, 1998 and 1999 but, again, inconsistent with the Appellant having arrived last in 1999 with his mother as a visitor.
20. The documents exhibited by the Appellant's father said to confirm that the Appellant entered with his mother as a visitor also do not confirm this. They confirm the visits by the Appellant's mother in the period but there is no mention of a child being included on that passport.
21. That brings me on to the 2013 decision which casts a different complexion on the factual circumstances at that time. In short summary, the Judge noted that the Respondent's records showed the Appellant having entered the UK unlawfully and that no attempt having been made to regularise his stay until 20 March 2003. I observe that the reference to 20 March 2003 ties in with the date of the solicitor's letter under cover of which an application was submitted on 18 March 2003 to which I refer at [18] above. That application is said to have been refused on 29 April 2003 because no passport was submitted.
22. The 2013 decision then recites details of the immigration history and further applications after 2003. Further applications were made for indefinite leave to

remain as a dependent child on 2 June 2003 and 3 December 2003. By those dates, the Appellant was no longer a child (his date of birth is 24 March 1985). The first application was rejected for failure to submit a passport. The second was rejected because no fee was paid.

23. A further application made on the same basis on 2 January 2004 was refused on 18 October 2008 on the basis that the Appellant was not a child at the date of application, only copies of the passports had been submitted, the Secretary of State was not satisfied of the Appellant claimed relationship with his father and the Appellant had no leave to remain.
24. The Appellant was served with notice of removal on 22 October 2008 (as an illegal entrant). He made a voluntary departure.
25. In light of that much fuller immigration history, it appears that the Appellant and indeed his father have been less than candid about the Appellant's past. No explanation is offered by either (except so far as I have noted) for the actions of the Appellant and his father at the relevant time. The Appellant's father says in his statement that he believes that the immigration history record is incorrect. However, he supplies no documentary proof of having obtained the necessary clearances when he asserts that such were sought. He supports what he says at [8] of his statement only with a copy of the degree certificate obtained by the Appellant which says nothing about the Appellant's immigration status at the relevant time (in 2008). There has been no successful appeal against the 2013 decision and, in the absence of supporting evidence about the facts asserted by the Appellant and his father, I accept the factual history as found in the 2013 decision.
26. I then turn to the applications to which the Appellant does make reference in his statement namely those made in September and October 2009 which were refused on 28 September 2009 and 19 October 2009 respectively.
27. The Appellant made an application to enter as a student on 8 September 2009. That was refused initially on the basis that the Appellant did not meet financial requirements. The Appellant sought administrative review of that decision but at the same time made a fresh application on 7 October 2009. It was in consideration of that second application that the Entry Clearance Officer became aware of the deception of which the Appellant stands accused. As a result, not only was the second application refused but also, on review, the first application was refused for deception. Paragraph 320(7A) of the Rules was applied.
28. The deception on which reliance was placed and as set out by Judge Bennett in the 2013 decision is as follows. In the second application, the Appellant was asked at Q6.3 whether he had ever been refused a visa for any country including the UK. He replied that he had not which was incorrect because, on any view, he had been refused a visa in response to the first application. Judge Bennett also noted that, even if it was the case that earlier applications had been made on the Appellant's behalf by his father, he had been refused leave to remain on 18

October 2008. As such, the Appellant's declaration in response to this question in both the first and second applications was inaccurate.

29. The Appellant also said that he had been granted a visa to the UK on 2 August 1999 and had travelled to the UK on 20 December 1999. That is consistent with his case that he entered as a visitor with his mother. As I have already observed though, there is no evidence of his lawful entry at that time and as the Judge noted, the Respondent's records were that his entry at that time was unlawful. Judge Bennett accepted the Respondent's case on this issue.
30. Further, in answer to Q6.6, when asked if he had been in breach of immigration conditions at any time, the Appellant said he had not. He had on any view overstayed his leave even if his case as to entry as a visitor is accepted. In answer to Q6.7 in both the first and second applications, the Appellant said that he had never been deported, removed or otherwise required to leave any country including the UK. Even if his case as to having made a voluntary departure is accepted, as Judge Bennett noted at [26] of the 2013 decision, the Appellant was served with notice that he was required to leave the UK.
31. In answer to Q6.8 about previous applications, the Appellant gave no information in the first application and declared only the application made on 18 March 2003 in the second application. There is no mention of the subsequent applications.
32. The 2013 Decision itself relates to a later refusal dated 5 March 2012 in response to an application made on 22 December 2011. That refusal was, as in the present case, based on paragraph 320(11) of the Rules. The text of that paragraph of the Rules as it was at the date of the Respondent's refusal is set out at [8] of the 2013 Decision. However, the Judge also set out at [11] (and applied) the text of that paragraph as amended prior to the date of the hearing which is in precisely the same terms as the rule applied by Judge Lucas.
33. Furthermore, the Judge set out at [9] of the 2013 Decision and had regard to the case of PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440.
34. Those factors are relevant because, as noted at [20] of my earlier decision, Mr Harris had submitted that there was a distinction to be drawn between the First-tier Tribunal's decision in this appeal and the 2013 Decision because the wording of the rule had changed as had the guidance. That is in turn relevant to the application of the Devaseelan principle (arising from the case of Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702). That principle relates to second appeals involving the same parties and applies as follows (taken from [39] to [41] of the judgment in that case):-
 - (1) The first Judge's determination should always be the starting-point.
 - (2) Facts happening since the first Judge's determination can always be taken into account by the second Judge.

- (3) Facts happening before the first Judge's determination but having no relevance to the issues before him can always be taken into account by the second Judge.
- (4) Facts personal to the Appellant that were not brought to the attention of the first Judge, although they were relevant to the issues before him, should be treated by the second Judge with the greatest circumspection.
- (5) Evidence of other facts may not suffer from the same concerns as to credibility, but should be treated with caution.
- (6) If before the second Judge, the Appellant relies on facts that are not materially different from those put to the first Judge the second Judge should regard the issues as settled by the first Judge's determination and make his findings in line with that determination.
- (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Judge should not be held against him.

The Tribunal in Devaseelan made clear that those guidelines are not intended to cover every eventuality.

35. My starting point is therefore the findings made by the previous Judge in the 2013 Decision. The text of paragraph 320(11) of the Rules is now as it was at the time of the 2013 Decision as follows:-

"(11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:

- (i) Overstaying; or
- (ii) Breaching a condition attached to his leave; or
- (iii) Being an illegal entrant; or
- (iv) Using deception in an application for entry clearance, leave to enter or remain in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not); and

There are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process."

36. Having dealt with the evidence before him at [25] to [30] of the 2013 Decision, the Judge went on to make the following findings of fact and to draw the following conclusions based on those findings:-

"[33] I am satisfied that Mr O had, before making the application he made on 22 December 2011 and/or before 2 March 2012, contrived in a significant way to frustrate the intention of the Immigration Rules. I reach that conclusion for the following reasons.

- (a) I am satisfied that he has been an immigration offender and/or was in breach of the United Kingdom law during the course of his stay in the period up to his departure on 12 June 2009. Whether or not he had leave to enter at any time is not of relevance in this connection. If he did, on the basis of his own statement, his leave expired in 2007/8. If he did not, he was an illegal entrant at all times. If it is necessary to reach a conclusion as to whether or not he had leave, I prefer the Entry Clearance Officer's statement, on the basis of the information which he had. Mr O has not provided any documentary evidence to demonstrate that he had leave to remain until c.2007/8 or at any time whilst he was in the United Kingdom. The Entry Clearance Officers who have had responsibility for dealing with Mr O's applications, both in 2009 and 2011/2, were public officials having public duties to perform. They made their statements relating to Mr O's past immigration history on the basis of records available to them and in the course of their duties. They had no motive to misrepresent that which they had seen or the content of the documents.
- (b) Although, on the footing that Mr O entered the United Kingdom *unlawfully* that unlawful entry (in c.1999) and/or his remaining thereafter (up to 24 March 2003) would have been effected at a time when he was a minor, the applications which he made in June and December 2003, as well as that made on 2 January 2004 (for leave to remain as a dependent child) *were all made after he had attained the age of 18 years*. He was therefore not a minor when those applications were made. Additionally, he remained in the United Kingdom, following the making of those applications and after the last of those applications had been refused (on 18 October 2008) and after he had been served with the forms IS151A and IS151B (on, respectively, 22 and 27 October 2008) when he was *at all times an adult* and knew (or ought to have known) that he had no leave to be in the United Kingdom and had no right under the Immigration Act or the Immigration Rules to be or to remain. Lest there be any doubt on that point, it cannot but have been apparent to him that, following the rejection of the application which had been made on his behalf on 20 March 2003, (c.4 days before his 18th birthday), *he was no longer a minor or dependent child* and that each of his subsequent applications, based as they were on his being a dependent child, were doomed to failure.
- (c) Mr O has not asserted, there is no basis for believing, and I do not accept, that any of those applications were made on any basis other than that he was a dependent child (under the age of 18 years).
- (d) Although there is no explanation from the Entry Clearance Officer (or the Secretary of State) for the apparently surprising delay between the day of the last application made by Mr O for leave to remain as a dependent child (2 January 2004, by which time he was 18 years and 9 months old) and its rejection on 18 October 2008, c.4 years and 9 months later, there is likewise no explanation from Mr O. If he had genuinely thought that he was entitled to leave to remain and had, during that c.4 years and 9 month period, been pressing the Secretary of State for a decision, it is to be expected that he would, at the very least, have said so and explained the basis for his belief and have provided documentary evidence in support. But he did not do so - and has offered no explanation *at all*. Nor has he offered any explanation for his having remained, after service of the IS151A and IS151B form from October 2008 until his (albeit voluntary) departure in June 2009. Whatever the position may have

been in the period before the service of those forms, he cannot but have known *after* those forms had been served, that he was not entitled to remain in the United Kingdom. I do not accept that he did not know that he was not entitled to remain. I am satisfied that he knew that he was not entitled to remain – and that he did so in that knowledge. He has given no explanation for his having remained until June 2009, a further c.8 months.

- (e) For the reasons which I have given in paragraphs 25 and 30, I am satisfied that the answers to the questions in the Visa Application Form which Mr O submitted on 8 September and 7 October 2009 were inaccurate in the respects which I have identified in those paragraphs and that, if the Entry Clearance Officer's information is *incorrect* and that Mr O had entered the United Kingdom *lawfully*, his leave expired (as he asserts that it did) in c.2007/8, his answers to Q6.6 in the September and October 2009 visa application forms were inaccurate. I am satisfied therefore, not only were the above answers inaccurate, they were *deliberately* false and that Mr O answered them falsely with the intention of concealing his past history and with a view to procuring entry clearance, and when he knew or believed that, if he had told the full truth the Entry Clearance Officer [in each case] would have been significantly less likely to grant him entry clearance than if he had told the truth and his whole history had been disclosed. Precisely the same applies, if (and this is the version of events which, for the reasons I have given above) the Entry Clearance Officer's information is correct and Mr O entered the United Kingdom *unlawfully* and had never had leave to remain. On that version of the facts, I am satisfied that Mr O failed to declare that material fact and the further material fact that he had remained without leave. In relation to the matters which he omitted to disclose, what I have said above applies *mutatis mutandis*. I do not accept Mr O's explanation, given in his written statement, that, when completing the October 2009 application, he believed that he had disclosed his immigration history and that there had been a genuine error. I reach the above conclusions for the following reasons.

(1) It is apparent from looking at the September 2009 application that Mr O had not, as he stated in his written statement, given a full and accurate account of his past immigration history. The account which he gave in that (September 2009) application was, for the reasons which I have given above, inaccurate. His statement (December 2012) that he thought he had disclosed his immigration history in the September 2009 application – so that there was no need to repeat it in the October 2009 application, makes no sense at all. Over and above that, if he had genuinely believed that he had, in September 2009, fully and accurately disclosed his past immigration history, it is to be expected that he would have written in that October 2009 application, words to the effect “see application made on 8 September 2009” or have referred to that application. But he did not do so. On the contrary, in the October 2009 application, he *denied ever* being refused a visa for any country (see Q6.3).

(2) It is inconceivable that, in October 2009, Mr O could have *forgotten* that he had made the earlier application in September 2009 and that it had been refused. The explanation which he gave for having made that second application (at a time when his solicitors were making an application for Administrative Review) was that he had been told that application (for Administrative Review) “could take time”. The October 2009 application was made only c.10 days after the

refusal of the September 2009 application. And yet, in answer to the question 6.3 (as to whether he had been refused a visa), he placed an X in the box marked "no".

(3) It is equally inconceivable that, at the time when Mr O completed both the September and October 2009 applications, he can have forgotten that

- (i) he had been refused leave to remain on 18 October 2008, or
- (ii) on 27 October 2008, he had been served with the form IS151B, giving him notice of the decision that he was to be removed and which informed him that, if he did not appeal or if any appeal he made was unsuccessful, he was to leave.

(1) What I have said in (a) - (d) above applies. Mr O has given no explanation of those matters.

(f) Mr O has given no explanation for either the failure to submit the passport in support of the various applications made in 2003 and 2004 or to pay the fee for the application on 3 December 2003. Nor has he provided any explanation for having remained in the United Kingdom, after service of the IS151A and B form in October 2008, until his departure on 12 June 2009.

(g) The inaccuracy of the answers, given in the circumstances in which they were given, speaks for itself.

(h) Although the conduct identified as amounting to "aggravating circumstances" identified positively in the Entry Clearance Guidance is directed primarily to activity *within* the United Kingdom, as opposed to other deception *outside* the United Kingdom, it is apparent from the explanation given in PS that the Guidance is "*non-exhaustive*". I can see no reason to limit the "aggravating circumstances" to conduct within the United Kingdom or to exclude further attempts at deception and/or non-disclosure in relation to (past) applications for entry clearance. Nor can I see any reason why persistence in immigration offending, ie remaining in breach of UK Immigration Law should not itself amount to aggravating circumstances."

37. Those findings and conclusions are the starting point for my consideration. I have already noted that the Appellant and his father who have provided witness statements about the Appellant's past immigration history have been less than candid about that history. The Appellant was given the opportunity in my directions to provide a witness statement to plug the gaps in the evidence and to explain what had happened in relation to the past applications. He did not take that opportunity, preferring instead to ignore any of the events between the application in 2003 and the application in 2009. He has glossed over his previous deception. He even asserts that he did not make the same mistake as he had in the second application when completing the first application about whether he had been required to leave the UK previously and yet Judge Bennett had already found that the information he gave was inaccurate because he had been told that he was required to leave and liable to be removed (see [30(d)] of the 2013 decision).

38. The Appellant continues to say that he made an honest mistake in his 2009 applications but this is not simply a case of the Appellant having answered “no” when he should have answered “yes” because he has misunderstood one question. There are a number of inaccuracies relied upon in the 2013 decision all of which point to the Appellant having sought to cover up his past immigration history. The Appellant has not troubled to set out what those “mistakes” were nor how it is that he misunderstood the questions and therefore how it is said that the “mistakes” were “honest” ones. There is simply no explanation from the Appellant which in any way excuses or mitigates the deception which was found in the 2013 decision.
39. The fact of the Appellant’s past exercise of deception is made out for the reasons set out in the 2013 decision. There is no reason for me to go behind those findings, particularly given the Appellant’s failure to explain himself in that regard.
40. The “aggravating circumstances” relied upon by the Respondent in the decision currently under appeal is that the Appellant has made “frivolous applications”. In that regard, as noted in the 2013 decision, a number of applications were made either by the Appellant or on his behalf after the application made with the letter dated 18 March 2003. Not only were those hopeless for failure to comply with basic procedural requirements, such as submitting a passport or paying a fee, they were also made based on a requirement of the Rules which the Appellant could not, on any view, meet because he was no longer a child.
41. Furthermore, the examples of “aggravating circumstances” in paragraph 320(11) are just that. The list is not exhaustive. In this particular case, the Appellant’s deception on which reliance is placed is aggravated by the continuing attempts at deception, particularly to cover up his past immigration history and the facts of that immigration history itself. He exercised deception himself in not one but two applications in very close succession. The applications made either by him or on his behalf are a blatant attempt at disguising the true factual position.
42. For those reasons, I am satisfied that the Respondent’s case that the Appellant has exercised deception and that aggravating circumstances exist is made out.
43. I also take into account that paragraph 320(11) of the Rules is one of the provisions in the general grounds where leave should normally be refused. It is not a mandatory ground of refusal. I consider whether it can be said that leave should not have been refused on this occasion on this ground. I consider that also in the context of whether I should depart from the findings of Judge Bennett in the 2013 decision upholding the Respondent’s decision that the Appellant’s application should be refused under paragraph 320(11).
44. Mr Harris urged me to take into account circumstances arising since the date of the 2013 decision. Although he was, I think, constrained to accept that he could not maintain the points made at error of law stage regarding the changed wording of paragraph 320(11) or a failure to take into account what was said in PS because those matters were all taken into account by Judge Bennett in the 2013 decision, he submitted that it is now relevant that some five years have passed

since the 2013 decision and some eight years have passed since the deception which the Appellant is found to have perpetrated.

45. I take into account when considering this submission that paragraph 320(7B) of the Rules could not be applied to the Appellant because he applies to enter as the family member of a person settled in the UK. Were that not so, though, the fact of having practised deception in the past would lead to a mandatory refusal and refusals of further applications for a period of ten years. Although of course I am not dealing with a mandatory refusal because paragraph 320(7B) does not apply, the emphasis placed by the Respondent on the exercise of deception as a ground for refusal of leave is something which I can and do take into account.
46. Another relevant factor, though, is the extent to which the Appellant has accepted and explained the past deception and shown that he has no intention of further deceiving the authorities. To that extent, what I say above about the lack of candour on the part of the Appellant and his witnesses is something which I consider I should and I do take into account.
47. The extent to which the refusal on general grounds impacts on the circumstances of the Appellant and others, particularly in relation to family life, is something which I take into account below via the medium of Article 8 ECHR.
48. Particularly in light of the Appellant's continued denial of his past immigration history and failure properly to explain and accept past failures made by him and those acting on his behalf, I am satisfied that it is appropriate for entry clearance to be refused on this basis.
49. For those reasons, I am satisfied that paragraph 320(11) is met. The Respondent's decision is in accordance with the Rules and with the law.

Article 8 ECHR

50. The Appellant seeks to enter the UK as the spouse of a British citizen. It is not disputed that the relationship is genuine. As I have already indicated, I cannot take into account the additional circumstance of the birth of the Appellant's child who is a British citizen. That is a matter with which others will have to grapple if and when a further application is made for entry clearance.
51. The Appellant met his wife on 14 November 2008 and their relationship began in January 2009 (see 2013 decision). They have maintained their relationship by telephonic and electronic communication, visits by the Appellant's wife and holidays spent together outside the UK. They married in Nigeria on 30 September 2011.
52. The Appellant's wife would have been aware when they first met that the Appellant did not have the right to live in the UK. He had been refused leave to remain on the last occasion in October 2008. As Judge Bennett found in the 2013 decision, at the time they married, she would have been (or should have been)

aware that the Appellant had been refused a visa in October 2009 because of the exercise of deception.

53. The Respondent refused the Appellant's application on this occasion on the grounds that he did not meet the financial requirements but also because he did not meet the suitability requirements of the Rules. That is based on the Appellant's character and conduct for the same reasons as for the refusal under paragraph 320(11) of the Rules. I accept that the Appellant's past deception is reason enough to render him unsuitable on character and conduct grounds. For the reasons I have given above in that regard, the Appellant does not meet the suitability requirements.
54. It follows that the Appellant cannot meet the Rules in relation to the application. The application fails on general grounds and on grounds of suitability.
55. No submissions were made to me about the financial circumstances. The Appellant's wife did not take up her current employment until 24 August 2015 and therefore after the date of the Respondent's decision. It does appear from the application form for entry clearance, though, that her previous employment paid £19,826.04 and that the Respondent's refusal was based on a failure to provide the specified documents. It appears from the original grounds of appeal that this failure was remedied by the provision of further documents with those grounds of appeal. It appears at the very least that the couple would be financially independent.
56. If an application does not meet the Rules, the issue outside the Rules is whether refusal of entry clearance leads to unjustifiably harsh consequences for the Appellant and those affected by the decision, here, the Appellant's wife. The essential question is whether the Respondent's decision to refuse entry clearance is disproportionate.
57. In this case, although the Appellant's wife is a British citizen and was born and raised here, her father lived in Nigeria. It appears that her parents are estranged and she does not have a good relationship with her father. Nonetheless, it is not said that there are "insurmountable obstacles" to her living in Nigeria. She has visited that country to see her husband and indeed they married there.
58. The Appellant's wife has employment in the UK but it is not suggested that she could not find similar employment in Nigeria. The Appellant works in Nigeria and there is no suggestion that he could not support his family there.
59. There is no evidence to suggest therefore that family life between the Appellant and his wife could not be enjoyed in Nigeria. I emphasise again, that I am here considering only the Appellant's relationship with his wife because I cannot take into account the fact that the couple now have a British citizen child.
60. Balanced against any interference arising with the couple's family life by having to conduct that family life either at a distance (as they have since 2009) or in Nigeria, I take into account the public interest (and the factors set out in section

117B of the 2002 Act). In this case, because of the Appellant's past deception, the public interest in maintaining effective immigration control is heightened. I take into account that the Appellant's application fails because it cannot succeed within the Rules and that the reason it cannot succeed under the Rules is because the Appellant has, in the past, exercised deception for which he continues to deny any responsibility.

61. Drawing the above considerations together, the Appellant and his wife have failed to show that the consequences of refusal of the application leads to unjustifiably harsh consequences. There are no insurmountable obstacles to the couple continuing their family life as a couple in Nigeria. Balanced against the public interest, in particular in circumstances where the application cannot meet the Rules because the Appellant has previously exercised deception, the refusal of entry clearance is not disproportionate.
62. The appeal therefore fails also on human rights grounds.

DECISION

The appeal is dismissed on all grounds.

Signed



Upper Tribunal Judge Smith
Dated: 23 April 2018

ANNEX: ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/06793/2015

THE IMMIGRATION ACTS

Heard at Field House
On Thursday 1 February 2018

Determination Promulgated
.....9 February 2018.....

Before
UPPER TRIBUNAL JUDGE SMITH

Between

MR DANIEL OLOWE

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFO

Respondent

Representation:

For the Appellant: Mr P Harris, Counsel, instructed by Mansouri & Son solicitors
For the Respondent: Mr S Staunton, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. There is no good reason to make an anonymity direction in this case.

ERROR OF LAW DECISION AND DIRECTIONS

Background

1. The Appellant appeals the decision of First-tier Tribunal Judge Lucas promulgated on 18 May 2017 ("the Decision") dismissing his appeal against the Respondent's decision dated 9 March 2015 refusing his application for entry clearance as a partner under Appendix FM to the Immigration Rules. In light of the date of the Respondent's decision, it is accepted that this is an appeal which proceeds under the provisions of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") prior to amendment by the Immigration Act 2014 ("the 2014 Act"). That is potentially relevant to the Appellant's grounds.
2. The Appellant is a national of Nigeria. His spouse, Mrs Olufunmilayo Abiola Olowe ("the Sponsor"), is a British citizen albeit of Nigerian descent. She was born and lives in the UK. The couple married in Nigeria on 30 September 2011. The couple now have a child born on 22 September 2016. That child was not born as at the date of the Appellant's application (made on 15 December 2014) nor at the date of the Respondent's decision (either the initial decision or the review decision).
3. The Respondent initially refused the Appellant's application on the basis that the Sponsor's income did not meet the minimum threshold requirement. However, that reason was withdrawn by the Entry Clearance Manager ("ECM") on review by a decision letter dated 18 April 2016. However, the other reason for refusal was maintained. That reason is phrased in the ECM's letter as follows:-

"...the appellant made frivolous applications for leave to remain in 2003 and made deceptive visa application in 2009. I am satisfied that the application fell to be refused under paragraph 320(11). The decision is therefore in accordance with the law and the Immigration Rules and I am not prepared to exercise discretion in the appellant's case".

The ECM went on to review the application in accordance with Article 8 ECHR but concluded that the decision was proportionate. The Sponsor could travel to Nigeria to be with the Appellant.

4. The Judge upheld the Respondent's reliance on paragraph 320(11) of the Immigration Rules ("the Rules"). He therefore concluded that the Respondent's decision was in accordance with the Rules and the law. He also found that the Respondent's decision did not breach Article 8 ECHR as the couple could continue their relationship as they had done since 2011 or the Sponsor could choose to relocate to Nigeria with their child.
5. Permission to appeal the Decision was granted by First-tier Tribunal Judge L Murray in the following terms so far as relevant:-

“[3] The sole ground of refusal was paragraph 320(11) of the Immigration Rules. The burden of proof was on the Respondent in respect of this ground of refusal and the First-tier Tribunal Judge arguably failed to so direct himself, directing himself at paragraph 30 that the burden was on the Appellant. It is further arguable that the Judge failed to direct himself in relation to the relevant case of **PS (paragraph 320(11) discretion: care needed)** [2010] UKUT 440 (IAC) and failed to carry out the required careful balancing exercise taking into account all the relevant factors. It follows that the Article 8 assessment is also arguably flawed.”

6. The appeal comes before me to determine whether there is a material error of law in the Decision and if so either to re-make the decision or to remit to the First-tier Tribunal to do so.

Discussion and conclusions

7. The first ground relates to the burden of proof applied by the Judge. Mr Harris directed my attention to [30] of the Decision which reads as follows:-

“[30] The burden of proof is upon the Appellant and the standard of proof is of the balance of probabilities. In relation to Human Rights, it is of a real risk of the relevant violation”

8. As Mr Harris rightly pointed out, this is an appeal under the 2002 Act provisions prior to amendment by the 2014 Act. As such, the grounds on which the Appellant is able to rely include that the Respondent’s decision is not in accordance with the Rules etc rather than being confined to whether the decision breaches human rights. If this had been a post-2014 Act appeal, the Judge would be right to say that the burden is on the Appellant to the balance of probabilities (as the appeal would only have been on the ground that the Respondent’s decision is in breach of the Human Rights Act 1998).

9. Mr Harris drew my attention to the case of JC (Part 9 HC395-burden of proof) China [2007] UKAIT 00027 (“JC”). The relevant part of the headnote reads as follows:-

“Paragraph 320 of Statement of Changes of Immigration Rules HC395 sets out general grounds for refusal of entry or leave to enter additional to those (mainly substantive) grounds set out in parts 2-8 of these rules. In relation to all the general groundsthe burden of proof rests on the decision maker to establish any contested precedent fact.”

10. Mr Harris also submitted, by reference also to JC, that the standard of proof is not the balance of probabilities but rather a more elevated standard since deception is at issue.

11. On the latter point, I do not accept Mr Harris’ submission for the simple reason that what was said about standard of proof in JC was expressly disapproved by the Court of Appeal (Richards LJ) in R (oao) Giri v Secretary of State for the Home Department [2015] EWCA Civ 784 as follows:-

"[36] In JC the tribunal said (at paragraph 13) that the approach adopted in an earlier tribunal decision, that in relation to a question of deception "the standard of proof will be at the higher end of the spectrum of balance of probability", still held good. That was incorrect, as should have been apparent from the citation, in the same paragraph, from the judgment in *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468 (referred to by the tribunal under the title *R (AN) v Secretary of State for the Home Department*). I gave the judgment of the court in that case. Paragraph 62 stated:

"Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

[37] That statement was subsequently approved, with an immaterial qualification, by the House of Lords in *In re D* [2008] UKHL 33, [2008] 1 WLR 1499 (see per Lord Carswell at paragraph 27). The judgment of the House of Lords in *In re B (Children)* [2008] UKHL 35, [2009] 1 AC 11, handed down on the same day as the judgment in *In re D*, was to the same effect. As Lord Hoffmann emphasised:

"13. ... I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not

15. ... There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities"

12. However, although recent decisions of both this Tribunal and the Court of Appeal in the so-called "ETS litigation" have nuanced the approach to the burdens of proof where deception is alleged (the so-called "boomerang" approach), the legal burden remains throughout on the Respondent. Therefore, although, if this were an appeal under the post-2014 Act provisions, the Judge might have been right to say as he did, he erred in his approach to the correct burden in this appeal. Mr Staunton conceded that there is an error in relation to ground one.
13. The second and third of the grounds can be taken together as both concern the appeal relating to application of paragraph 320(11) of the Rules. It is necessary at this point to say something more about the factual background to this case to set the grounds in context.
14. The Appellant came to the UK in 1999 when he was still a minor. He was permitted to come here legally as his mother's dependent. His father was, it appears, a British citizen. His mother has also settled in the UK. There were a series of applications

made on the Appellant's behalf. Two were made in 2003 when he was aged seventeen. Those were refused. One was made as a dependent after the Appellant turned eighteen in 2004. That was refused in 2008. Those are relied upon by the Respondent as the "frivolous" applications. According to Mr Harris' submissions, the reasons why those applications apparently failed was that the Appellant's father, who was responsible for making the applications on his behalf, was poorly advised and the applications were therefore either made on an inappropriate basis or with insufficient supporting documentation. I say apparently because there is little evidence other than the scant information in the application for entry clearance about what those applications were and why they did not succeed.

15. Be that as it may, the Appellant made an application in 2009 which is the starting point for the deception allegation. The Appellant says that he made a mistake and answered "no" instead of "yes" to one of the questions (see [8] of the Decision). Again, though, I have no evidence as to what the question was which the Appellant accepts he answered incorrectly. The Appellant left the UK voluntarily on 19 October 2009.
16. Similarly, I have no evidence as to an earlier appeal in 2013. That was an appeal against a decision, it appears, dated 5 December 2012 refusing entry clearance for settlement, consequent on the deception alleged in the 2009 application. The Respondent applied paragraph 320(11) of the Rules. The Tribunal in 2013 upheld that refusal.
17. Turning back to the grounds, ground two asserts that the Judge wrongly placed excessive reliance on the 2013 appeal decision. The third ground asserts that the Judge failed to assess for himself whether the alleged aggravating circumstances justified refusal under paragraph 320(11).
18. I begin by noting that neither I nor Mr Harris or Mr Staunton had before us a copy of the 2013 appeal decision. Mr Harris assured me that Judge Lucas had a copy provided to him but there is no copy in the papers and I am surprised if this is so that, when placing reliance on the earlier determination at [32] of the Decision, Judge Lucas did not say who was the Judge who made the earlier decision, what was the date of that decision or quote the finding made. Mr Harris rightly pointed out that he must have had sight of the earlier determination when he drafted his grounds as reference is made to the findings made and the date of the decision at [40] of his grounds. However, he admitted that he was no longer able to find a copy. For that reason, I have included expressly a direction that a copy of the earlier decision be provided by the Appellant's solicitors as well as evidence relating to the earlier applications and refusals (so far as they are able).
19. It is somewhat difficult to reach a concluded view on the second of the grounds without sight of the earlier decision. Mr Harris accepts that Judge Lucas was entitled to take the earlier findings as the starting point (applying Devaseelan). He also appeared to accept that the previous Tribunal had rejected the Appellant's

explanation of the wrong answer as being a mistake as the Tribunal upheld the deception allegation.

20. One of the points which Mr Harris makes in the grounds probably also requires sight of the earlier decision because he asserts at [21] to [25] that the wording of paragraph 320(11) of the Rules and the guidance relevant to the application of that paragraph has changed in the interim. He refers at [21] of the grounds to the earlier Tribunal dealing with an application made on 22 December 2011 and decided on 5 March 2012. However, according to the entry clearance application on this occasion, there is no decision dated 5 March 2012. There is a decision dated 5 December 2012. If, as appears likely, it was that decision which was the subject of the appeal determined in January 2013, the distinction which Mr Harris seeks to draw based on the different wording may be misconceived.

21. Mr Harris does though make good grounds two and three in the following way. Ground 320(11) of the Rules falls within that section of the general grounds where leave to enter is normally to be refused. It is not a mandatory ground. As such it involves the exercise of a discretion.

22. The wording of rule 320(11) of the Rules as it existed at the date of the Decision reads as follows (so far as relevant):-

“where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by;

.....

(iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not); and

there are other aggravating circumstances such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process.”

[my emphasis]

23. Mr Harris also drew my attention to what is said in PS (paragraph 320(11) discretion: care needed) [2010] UKUT 440 (IAC):-

“In exercising discretion under paragraph 320(11) of HC 395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C), the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance.”

24. Mr Harris pointed out that, since the previous appeal, further time has elapsed. As such, by the date of the hearing before Judge Lucas, the Appellant had been kept out of the UK for nearly eight years. He had during that time married a British citizen and was in a relationship which has been accepted as genuine and subsisting (although it is right to point out that the relationship was also in being in

2013). By reason of the application of paragraph 320(11), though, the Appellant was being punished for “frivolous” applications made some fourteen years previously and a mistake or deception itself made about eight years previously. Mr Harris pointed out that there is no time limit attached to the breaches cited in paragraph 320(11) (unlike the position relating to paragraph 320(7B) of the Rules). As such, he submitted, the Judge could not simply take the previous finding as the end point but had to exercise discretion taking into account the changed circumstances since the previous appeal.

25. Mr Staunton conceded an error also in relation to grounds two and three. I am satisfied for the reasons given above that he was right to do so. Accordingly, those grounds are also made out.
26. It is self-evident that the errors made in relation to the burden of proof and how paragraph 320(11) of the Rules should be applied in this case is material to the outcome. I therefore set aside the Decision.
27. In light of those conclusions, I do not strictly need to say anything about ground four. However, I do so because this ground raises a point of legal construction which may need to be considered in the course of re-making the decision. I therefore flag it up now so that the parties can consider it in their skeleton arguments.
28. Ground four concerns Article 8 ECHR. Insofar as this ground relates to the Judge’s finding about the Sponsor’s ability to relocate to Nigeria, I am unpersuaded by it. Based on what is said by the Supreme Court in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11, there is no error in the Judge’s finding that the Sponsor could relocate to Nigeria. Consistent with that authority, the matters asserted at [41] of the grounds could not amount to insurmountable obstacles. There has though been one quite major change in the Appellant’s circumstances, namely the birth of his daughter. Since she is a British citizen and in light of the Respondent’s policy that it is not reasonable to expect a British child to relocate outside the EU, the position under Article 8 may well be changed.
29. There is however a potential obstacle to that conclusion. This is an appeal which pre-dates the changes to appeal provisions made by the 2014 Act. As such, section 85 of the 2002 Act in its un-amended form applies. That reads as follows (so far as relevant):-

“Matters to be considered

- (1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

.....

- (4) On an appeal under section 82(1), 83(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

- (5) But in relation to an appeal under section 82(1) against refusal of entry clearance or refusal of a certificate of entitlement under section 10—
- (a) subsection (4) shall not apply, and
 - (b) the Tribunal may consider only the circumstances appertaining at the time of the decision to refuse.”

30. Mr Harris’ preliminary thoughts on this matter were that this section did not apply to the Article 8 ground. That ignores though that the appeal is against the decision to refuse entry clearance and not against any separate decision refusing a human rights claim. As such, it seems to me that the restriction of the matters which the Tribunal can consider applies equally to the Article 8 ground. I make it clear though that I have not reached any concluded view about this and the parties will wish to consider their positions prior to the resumed hearing.
31. In conclusion, the Appellant has established errors of law based on grounds one to three. I do not need to deal with ground four. In light of the errors of law which I have identified (and which the Respondent concedes), I set aside the Decision and I have given directions below for the resumed hearing.

DECISION

The First-tier Tribunal Decision involves the making of a material error on a point of law. I therefore set aside the First-tier Tribunal Decision of Judge Lucas promulgated on 18 May 2017 and make the following directions for the re-making of the decision.

DIRECTIONS

1. **By 4pm on Thursday 1 March 2018, the Appellant’s solicitors are to file with the Tribunal and serve on the Respondent a copy of the Tribunal’s decision in the 2013 appeal relating to the Appellant’s case or in default a letter explaining that they do not have and have not been able to obtain a copy.**
2. **By 4pm on Thursday 1 March 2018, the Appellant is to file with the Tribunal and serve on the Respondent any further evidence on which he relies. In particular, the Tribunal will be assisted by evidence concerning the detail of previous applications for leave to remain/entry clearance made by the Appellant or on his behalf and the reasons for refusal of those applications together with details of the wrong answer given in the 2009 application on which the deception allegation relies.**
3. **By 4pm on Thursday 15 March 2018, both parties are to file with the Tribunal and serve on the other party skeleton arguments dealing with the legal issues which arise in this appeal. Those should include the parties’ submissions on the legal issue which I identify at [29] and [30] of my decision above.**
4. **The resumed hearing will be listed before me on the first available date after 25 March 2018 with a time estimate of half day.**



Signed
Upper Tribunal Judge Smith

Dated: 8 February 2018