Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00379/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 1 October 2013	**On 9 October 2013**
Prepared 1 October 2013	

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

VALENTINE OBERA OBI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs M. Nollet, Duncan Lewis & Co Solicitors
For the Respondent: Ms C Avery, Senior Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a decision of the First-Tier Tribunal (First-Tier Tribunal Judge Britton and Mrs J Holt [non-legal member]), promulgated on 1 May 2013, dismissing an appeal against a decision of the Secretary of State for the Home Department of 12 February 2009 that section 32(5) or the UK Borders Act 2007 applies to this appellant.

2. The appellant is a citizen of Nigeria, born 13 January 1992. He first entered the United Kingdom on 25 July 2005, with his mother and brother, Chukwudi Lawrence Obi, on a lawfully issued visit visa conferring leave to

enter until 6 January 2006. At this time the appellant's mother returned to Nigeria, leaving the appellant and his brother in United Kingdom.

3. At some point thereafter that the appellant's brother was diagnosed with having severe renal problems. Both the appellant and his brother claimed asylum on 6 August 2007. The appellant's application was refused on 24 October 2008 and a decision was made to remove him from the United Kingdom. First-Tier Tribunal Judge Moore allowed an appeal brought against this decision, in a determination of 3 June 2010; this being on the basis that the appellant was the primary carer for his sick brother. The appellant was subsequently granted leave to remain until 6 June 2015.

4. On 6 August 2010 the appellant was convicted at Snaresbrook Crown Court of an offence of violent disorder, and was sentenced to 51 weeks imprisonment wholly suspended for 18 months. On 15 December 2011 the appellant was convicted at Winchester Crown Court of conspiracy to supply a controlled drug (Class A- heroin) and was sentenced to three years and nine months in a Young Offenders Institution. It was pursuant to this latter conviction that the Secretary of State made the immigration decision that now underlies this appeal.

5. The appellant’s pleaded grounds, in summary, challenge the decision of the First-tier Tribunal on the following basis;

   (i) the First-tier Tribunal erred in failing to carry out a two-stage assessment of the article 8 ECHR grounds by failing to consider the application of article 8 outside of the Immigration Rules;

   (ii) alternatively, if the First-tier Tribunal did consider the application of article 8 outside of the Rules, it misdirected itself as to the relevant legal threshold;

   (iii) the tribunal erred in failing to have regard to, and treat as its starting point, the determination of First-tier Tribunal Judge Moore;

   (iv) the tribunal erred by failing to make a finding as to whether the appellant has a family life with his brother;

   (v) the tribunal's conclusion, on the issue of whether the appellant would donate a kidney to his brother, was speculative;

   (vi) the tribunal erred in failing to come to a conclusion on the issue of whether the appellant had established a family life with his daughter;

   (vii) the tribunal erred in failing to provide reasons as to why it would not be in the appellant’s daughter’s best interests for the appellant to remain in United Kingdom.

6. I shall consider these grounds in turn.

7. The First-tier Tribunal set out its conclusions, between paragraphs 33 to 41 of its determination; under the heading *"findings".* It is clear, when these paragraphs are considered as a whole, that the tribunal gave detailed consideration to the application of article 8 ECHR outside of the Immigration Rules.

8. The tribunal gave specific consideration to the seriousness of the appellant's past offending [39] and the risk of him reoffending [35]. It also assessed the truthfulness of his assertion that he wishes to donate a kidney to his brother [37], and considered the best interests of his minor daughter [38].

9. Although such considerations are of relevance to a decision made in relation to paragraph 398 of the Rules, in that they play a part in determining whether 'exceptional circumstances' exist, they are also relevant to an assessment of the issue of proportionality in relation to article 8 ECHR consideration outside of the Rules.

10. In paragraph 41 of its determination of the tribunal concluded as follows;

> "[W]e find that any interference with the appellant's private and family life is proportionate to the legitimate aims by the immigration policy of United Kingdom."

11. This is a conclusion that can only have relate to a consideration of article 8 ECHR outside of the Rules.

12. Given that which I say above, I reject the contention that the tribunal erred in failing to consider, or come to a conclusion on, article 8 ECHR outside of the confines of the Immigration Rules.

13. It was submitted, in the alternative, that the tribunal applied an unlawfully high threshold to its consideration of article 8 outside of the Rules, i.e. whether there were any 'exceptional circumstances'. I do not accept this is so. Although the structure of the conclusory paragraphs of the determination could have been clearer, it is plain that the tribunal's conclusion, in paragraph 39 of the determination, that there were no 'exceptional circumstances' was a finding made in relation to paragraph 398 of the Rules.

14. Mrs Nollet reminded the tribunal that the appellant had made no assertion before the First-tier Tribunal that he satisfied the requirements of the Immigration Rules. Nevertheless, it was incumbent on the tribunal to identify whether such had been met, and this is exactly what it did in paragraph 39 of its determination. When the determination is read as a whole I find that the tribunal did not apply an impermissibly high threshold to its considerations of article 8 outside of the Rules.

15. During the course of the hearing Mrs Nollet further submitted that the First-tier Tribunal had erred by failing to give consideration to the Maslov criteria. Upon being asked to identify which particular features of the

appellant's case it was said the tribunal had failed to consider Mrs Nollet made reference to three; (i) the risk of the appellant reoffending, (ii) the features of the appellant's relationships with his brother and daughter and (iii) the appellant's social, culture and family ties United Kingdom.

16. As to the former, the tribunal summarised the pre-sentence report in its conclusions [35], the author of which had concluded that there was a low risk of the appellant offending and a low risk of him harming the public. Despite Ms Nollet's attention being drawn to this passage during the course of submissions, she maintained that the First-tier Tribunal had failed to take such matters into consideration when coming to its conclusion. I do not accept this to be the case. The First-tier Tribunal summarised the PSR under its heading *'findings'.* Nowhere in the determination does the tribunal indicate a disagreement with the views of the author of the PSR and, in such circumstances, I find that it can be taken to have (i) agreed with such views and (ii) have taken them into account when coming to its conclusions.

17. As to the appellant's social and cultural ties to United Kingdom, there was limited evidence given in relation to these, the focus of the hearing being on the family/private life ties the appellant claimed to have with his brother, partner and daughter.

18. After discussion with the tribunal Mrs Nollet accepted that in order to be successful on her 'Maslov ground', she would need to demonstrate that the First-tier Tribunal had erred in its consideration of the appellant's various relationships. For the reasons follow, I conclude that it did not err in this respect.

19. The First-tier Tribunal was not satisfied that the appellant genuinely intended to donate a kidney to his brother [37]. Complaint is made by Mrs Nollet that in making such finding the tribunal failed to take as its starting point the conclusion of First-tier Tribunal Judge Moore that the bond between the appellant and his brother was of significant strength [reference being made to the starred decision in Devaseelan [2002] UKAIT 00702].

20. The First-tier Tribunal was clearly aware of the earlier determination of Judge Moore. It made reference to there having been an earlier appeal [8] and it stated in paragraph 33 of its determination that it had given consideration to all of the evidence before it, which included Judge Moore's determination. Whilst the First-tier Tribunal did not specifically refer to Judge Moore's findings as to the strength of the appellant's relationship with his brother, the fact that it did not do so does not, in my conclusion, amount to an error of law. Even if I am wrong in this conclusion, it is not an error capable of affecting the outcome of the appeal.

21. The tribunal's disbelief of the appellant's evidence that he genuinely intended to donate a kidney to his brother was, in my conclusion, clearly and cogently reasoned. I find that such conclusion was open to the

tribunal on the available evidence. In any event, even if the appellant does have a genuine intention to donate a kidney to his brother, the fact remains that it is still not known whether he is a match and therefore whether such a donation is feasible. Absent such knowledge, only a very limited weight can be attached to the appellant's intentions; such weight being insufficient to disturb the tribunal's conclusion that the appellant's deportation would be proportionate.

22. It was further submitted that the First-tier Tribunal erred in failing to make a finding as to whether family life currently exists between the appellant and his brother; a material matter given the conclusions of Judge Moore.

23. Whilst it is correct to say that the tribunal did not specifically identify whether the appellant and his brother share family life together (within article 8(1)), they do identify the relevant features of such relationship. Whether this is to be labelled as family life, or as part of the appellant's private life, is, on the facts of this case, a matter of irrelevance. It is the nature and degree of the relationship that it is of importance to the tribunal's considerations.

24. The determination of Judge Moore was promulgated on 3 June 2010 and reflected the circumstances that existed as of that date. At the time of Judge Moore's determination the appellant was his brother's primary carer. The appellant has been in detention for a lengthy period since that date. Inevitably, the relationship he shares with his brother has undergone a significant change as a consequence. The appellant no longer fulfils the role of his brother's carer. The evidence discloses that during the appellant's detention, he and his brother speak two or three times per week and the appellant provides his brother with unparticularised emotional support over the telephone.

25. When looked at as a whole the tribunal's consideration of the appellant's relationship with his brother, and its relevance to their conclusions, is adequately dealt with in the determination. The tribunal set out the relevant features of the relationship and come to rational and reasoned conclusions based on such findings.

26. I turn now to the grounds which relate to the appellant's relationship with his British citizen daughter, who, at the time of the First-tier Tribunal's determination, was just 19 months old.

27. The tribunal concluded that the appellant was not in a genuine and subsisting relationship with the mother of his daughter. This finding has not been the subject of substantive challenge. It is in this context that the tribunal's conclusions, in relation to the appellant's daughter, must be viewed.

28. Although the tribunal do not specifically set out its finding on the issue of whether the appellant's relationship with his daughter amounts to family life, it does set out the nature and degree of such relationship. This is a

decision of a specialist tribunal and it would have be well aware of the extensive case law to the effect that there is a presumption of family life between a minor child and its parents, and that it is only in very exceptional and limited circumstances that such a presumption can be rebutted. Those exceptions clearly have no place on the facts of this case.

29. In my conclusion, the tribunal proceeded on the basis that the appellant does share a family life with his daughter, but that the extent of such family life was limited. In such circumstances I do not accept that the First-tier Tribunal erred as the manner claimed.

30. I turn finally to the First-tier Tribunal's consideration of the appellant's daughter's best interests. Mrs Nollet relied, in this regard, on the decision of the Upper Tribunal (President and Upper Tribunal Judge Taylor) in Azimi-Moayed [2013] UKUT 00197, which, when summarising the judicial learning in regard to the application of section 55 UK Borders and the Citizenship Act 2009, identified that *"[a]s a starting point it is in the best interests of children to be with both their parents"*. Azimi-Moayed was a case involving the removal two minor children and both of their parents.

31. In the instant case the appellant and his daughter would not be living together in the United Kingdom, even if the appellant were allowed to remain here. As also identified by the First-tier Tribunal, the appellant's relationship with his daughter was very limited. There can be no doubt that it is in the appellant's daughter's best interests to remain living in the United Kingdom. She was born here and is a British Citizen. It is also beyond doubt that it would be in her best interests to remain living here with her mother, who has brought her up since her birth and who is also a British Citizen. It has not been asserted, neither could it be, that it would be in the appellant's daughter's best interests to live with the appellant (rather than her mother) either in the United Kingdom or in Nigeria.

32. The benefit to the appellant's daughter's best interests of having the appellant living in the United Kingdom, as opposed to in his homeland, is at best marginal given the findings of the First-tier Tribunal as to the nature of the appellant's relationship with his daughter and her mother. In these circumstances I find that it was open to the First-tier Tribunal to conclude that it was in the best interests of the child to remain living in the United Kingdom with her mother.

33. Even if the tribunal did err in failing to conclude that the best interests of the appellant's daughter would be served by the appellant remaining in the United Kingdom, given its other findings there is no basis upon which it could have concluded that the child's interests would have been so much better served by the allowing the appellant to remain in this country, such that deportation of the appellant would not be proportionate.

34. In my conclusion looked at as a whole the reasons given by the First-tier Tribunal for dismissing the appellant's appeal are clear, cogent and

rational and its determination does not contain an error requiring it to be set aside.

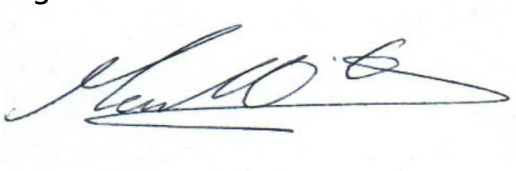
35. For the sake of completeness I observe that the First-tier Tribunal's determination was promulgated shortly before the handing down of the Court of Appeal's decision in SS Nigeria [2013] EWCA Civ 550. It is clear to me that in light of the decision in SS the First-tier Tribunal placed insufficient weight, when coming to its conclusions, on the public interest in deporting foreign criminals. This error operated in the appellant's favour and, as a consequence, does not require the First-tier Tribunal's determination to be set aside. Given what is said in SS, in my conclusion, even taking the facts of this case at their highest, there is not even the remotest possibility of the appellant succeeding in his assertion that the interference caused to his private and family life, by his deportation, would not be proportionate to the public interest pursued.

36. I find that the First-tier Tribunal's decision does not contain an error on a point of law requiring it to be set aside, and it is to remain standing.

Decision

For the reasons given above we find that the determination of the First-tier Tribunal does not contain an error on a point of law such that it ought to be set aside. The First-tier Tribunal's determination is to remain standing.

Signed:



Upper Tribunal Judge O'Connor
Date: 7 October 2013