**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/01300/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 16 April 2014** | **On 15th May 2014** |

**Before**

**UPPER TRIBUNAL JUDGE STOREY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR HASSAN TAIWO ADELAKUN**

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Miss K McCarthy instructed by Westkin Associates

**DETERMINATION AND REASONS**

1. The appellant (hereafter Secretary of State or SSHD) appeals with permission against the determination of the First-tier Tribunal (FtT)(Judge Keane and Mrs AJF Cross De Chavannes) allowing under the Immigration Rules and on Article 8 grounds the appeal brought by the respondent (hereafter the claimant) against the decision of the SSHD dated 28 May 2013 refusing to revoke a deportation order in force against him. The

claimant, a citizen of Nigeria, was deported on 4 July 2008 following conviction for 6 offences which related to his obtaining by deception and possession of a false instrument. The claimant had previously been convicted for crimes of dishonesty and deception in 1999, for 6 months. When sentencing the claimant to 21 months' imprisonment in July 2006, the Crown Court Judge recommended that the claimant be deported. The SSHD made a decision to deport and the claimant was unsuccessful in his appeal against that decision, the determination to that effect being notified on 25 September 2007. Letters sent in April, June, July and August 2012 were accepted as an application for revocation of the appellant's deportation order. It is the refusal of these in May 2013 which founds the current appeal.

2. Having considered the submissions of the parties I am satisfied that the panel materially erred in law in at least two respects. First, they wrongly considered that it was determinative of the Article 8 assessment, both under the Rules and under Article 8 on its own, that it was not reasonable to expect the claimant's wife and two British-born children to relocate to Nigeria. That consideration cannot alone be determinative since it is clear from established case law that it can be proportionate for a state to maintain a deportation order even if the consequence might be separation or division of the claimant from his family: see e.g. Harrison [2012] EWCA Civ 1736.

3. A second error of law was the failure of the panel to consider that the only public interest to be weighed in the scales against the claimant was the fact of his criminality: see para 17. In the claimant's case it was also a factor to be weighed in the balance against him that he had a very poor immigration history, having become an overstayer in 1990, found in 1994 to have made a bogus marriage application and to have remained in the UK unlawfully except in the context of exercising his rights of appeal). Of this poor immigration history there is not a word by the panel in its proportionality assessment.

4. These errors more than suffice to establish that the panel's decision was vitiated by legal error necessitating that it be set aside.

## Remaking the Decision

5. There is no issue taken with the FtT panel's primary findings of fact. On that basis it is not in dispute that the claimant has family life ties with his wife and two British citizen children, namely M born in 2008 and Z born in 2012. It is unarguable that the decision appealed against constitutes an interference with, or lack of respect for, his right to respect for family life.

Factors weighing in favour of the claimant

6. Turning to consider whether the decision was a proportionate one, I count in favour of the claimant that he was found by the FtT panel to be "not at risk of re-offending" and I see no reason to revisit such a finding.

7. As regards his immigration history, whilst it was by any reckoning poor (after a period of leave to remain as a student commencing in January 1988 he became an overstayer in August 1990) and whilst it is far from clear to me that the claimant demonstrated he had always kept in touch with the immigration authorities, I accept that Immigration Judge Woodhouse (who had allowed his appeal in September 2005) found that it was not his fault that he had not learnt about the notice of intention to deport him served in 1994) .

8. The strongest factor in favour of the claimant is his family life ties with his wife, with whom he had been in a relationship since 1995 and had married in 2000, and his children. It is not dispute that (discounting the periods of time he spent in prison) the claimant had cohabited with his wife and children up to the time of his deportation in July 2008.

9. Also in the claimant's favour is that since he was deported he has maintained his family life ties by a combination of visits made by his wife and children to Nigeria to see him and by written and electronic forms of communication. Also relevant in this connection is that the visits from his wife and children have caused them a degree of hardship and difficulties. His wife tried to find employment but could not. She found the general conditions extremely trying. His children, Z, in particular, were also said to have encountered difficulties (I shall return to the matter of the extent of those difficulties below).

10. In the claimant's favour as well is the fact that his two children have British citizenship from birth are there are obvious disadvantages involved for them if they could not continue to enjoy their family life in the UK together with their mother and father.

11. As regards the claimant's ties with his wife, it counts in his favour that she was not Nigerian and that most of her friends were not Nigerian, that she had had difficulties trying to find work and resettle in Nigeria and that she has an established job in the UK as a physiotherapist. In the UK she also has family, friends and colleagues and has a close friendship with Mrs Prudon.

12. Turning to the private life aspects of the claimant's case, his own length of residence in the UK in particular, it counts in his favour that he has resided here since 1983 having arrived in 1983 as a 14 year old schoolboy and having been absent from the UK during the period 1983-1987 for only 12 months. There is also evidence that he has worked for significant periods in the UK and has obtained educational qualifications.

13. There is also evidence (which the First tier Tribunal accepted) that the claimant has not found work in Nigeria and lacks family there to support him.

14. It is also a factor in his favour that a significant period of time elapsed since he was deported from the UK in July 2008 – a period of over 3 years and 9 months since he actively commenced to apply for revocation and being 5 years by the date of decision.

15. I next turn to consider factors counting against the claimant's Article 8 claim.

Factors weighing against the claimant

16. Whilst the claimant has been found by the FtT not to be at risk of re-offending, that finding was accompanied by the caveat that he had displayed "a distinct lack of candour insofar as his criminal history [is] concerned," and that in the context of his challenge to the refusal to revoke the deportation order he had deliberately failed to declare his 1999 criminal history. The panel also observed, accurately, that the fraud for which the claimant was convicted in 2006 took place over a period of time of more than a year. Further, the finding that he was not at risk of re-offending has to be considered against the background that he is a person who already was a "re-offender": i.e. he is someone who had chosen to re-offend several years after committing offences in 1999 contrary to the public good which had led the respondent to consider deportation action against him in 1994. His 2006 re-offending also arose only a short time after an immigration judge had allowed his appeal against a decision to deport.

17. As regards his immigration history, whether or not the claimant was properly served notice of the notice of intention to deport him in 1994, it is clear that that his residence in the UK since 1990 has been unlawful and that the SSHD saw fit to take deportation action against him in 1994 in view of his having made a marriage application in respect of a marriage that was not subsisting. He sought to stay in the UK on the basis of asylum but his claim was held to be groundless.

18. Whilst I have counted in his favour that during his time in the UK he did have periods of working and he also obtained educational qualifications, it remains that his working was illegal and, according to the sentencing judge, he used his educational progress to facilitate his criminal activities in 2006.

19. As regards the claimant's wife, it is significant that he entered into a relationship with her when he knew his immigration status was precarious and proceeded to marry her at a time when his immigration position had in fact worsened.

20. Although I have counted in the claimant's favour the difficulties his wife has experienced trying to live in Nigeria, I note however that in 2007 a tribunal found that she was an intelligent person who was capable of learning the local language and would in any event still be able to converse in English with other Nigerians. I note that since then his wife has made several visits to Nigeria and during the periods of time spent there, there has not been any suggestion that she was prevented from being able to communicate freely with Nigerians due to language difficulties.

21 As regards the two children, it was noted earlier that the fact that they are British citizens entailed obvious disadvantages for them if they were not able to live with their father and mother in the UK. In this connection I must note the first of two respects in which I am not able to follow one of the panel's secondary findings. The FtT panel considered that in consequence "these advantages which accrue from British citizenship would be lost if they attempted to settle in Nigeria". That in my judgment is an overstatement. The children would not lose British citizenship; Nigeria allows dual nationality; and they would continue to have a right of abode in the UK exercisable as and when they chose. They are two very considerable advantages.

22. At this point it is necessary to consider not just the issue of the best interests of M and Z, but also the **Zambrano** aspects to their situation.

23. Regarding their best interests, although I would accept that from their point of view the optimum was to be able to live with both their mother and father in the UK, there was no evidence of any significance to show that either of them had established strong private life ties of their own through their schooling. It is not clear whether they can speak Yoruba (their father's local Nigerian language), but in any event (i) English is widely used in Nigeria including in the educational system; (ii) both children are young enough to learn a local language over time; (iii) the evidence does not demonstrate that they would not have access to adequate schooling.

24. There has been some suggestion in the submissions advanced by the claimant that his children would not have adequate education available in Nigeria. However COI produced by the SSHD showed that adequate education was available. As regards the a risk to children in Nigeria from attacks by terrorists, there was no evidence to indicate that such attacks were occurring on a significant scale and the brunt of terrorist attacks on schools has been on Christians.

25. It is not suggested in this case that either of the children has been brought up to reject Nigerian cultural values. Clearly they have ties with extended family members in the UK, but there is no evidence that these have been of decisive importance to their well-being.

26. Significantly, there is nothing to suggest that either during the period when the claimant was in prison or during the periods he has spent with his family during their visits to Nigeria that their mother has not been an effective primary carer.

27. At this juncture it is necessary to revisit one other issue of secondary fact concerning the extent of the difficulties of the child Z. I see no reason to revisit the underlying circumstances to which the FtT panel had regard: Z has allergies to egg and dairy products and suffers from moderate eczema; for treatment he requires Oilatum shower gel and diprobase cream; on his only trip he had an episode of malaria. However, beyond those underlying facts, the SSHD's grounds of appeal challenge the FtT panel's evaluation that these difficulties were "deeply injurious" to Z's health, bearing in mind that the claimant and his wife's subjective self-assessment that such medicines were not available in Nigeria were not objectively well-founded. In this regard I consider the SSHD's submission has force. As regards the risk of malaria there was no objective evidence before the panel to show that he or the other family members would be at risk of contracting malaria if they adhered to well-known prophylactic drugs prior to and after arrival. Nor was there any objective evidence to show that Oilatum shower gel or diprobase cream were not available in Nigeria (even if he and his wife had tried without success). In any event these was no reason to think that, if need be, his wife could not make arrangements prior to departure, for such medicines to be sent from the UK. Hence, whilst it weighs in favour of the appellant that Z had health difficulties, it cannot properly be said that these were serious. Nor was there any reason for considering the difficulties met by M were particularly significant

28. This brings me to the matter of family choice. As a result of the **Zambrano** decision and the subsequent concession made by the SSHD in **Sanade** that it is unreasonable to expect the resident parent of British citizen children to move abroad, the fact remains that since the claimant's deportation he has been able to maintain ties with them not only by indirect means such as electronic communication but by them visiting and in this regard I have rejected the claimant's submission that has caused them difficulties beyond the level of hardships. That is a matter relevant to the proportionality assessment I have to conduct. In short, whilst it counts in favour of the claimant that he has British citizen children who have met with past difficulties whilst visiting Nigeria, their best interests, when considered overall do not point overwhelmingly in favour of them remaining in the UK, unless they and their mother choose to.

29. Turning to the claimant's private life circumstances, I have already covered his criminal history, his poor immigration history, his working and educational history in the UK. As regards his circumstances in Nigeria, whilst there is evidence that the appellant has not found a job in Nigeria there is no suggestion that he is destitute and I consider that he is better placed, by virtue of his educational qualifications, than a great many other

Nigerians. It is a factor in his favour that several years have now elapsed since he was deported but by the same token the new Immigration Rules, which in relation to foreign criminals were found by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192 to constitute a "complete code" specify that exclusion should normally be maintained for 10 years: see below.

Conclusions

30. To summarise, the factors weighing in favour of the claimant when conducting the Article 8 balancing exercise carry much more weight than those in his favour. He has committed criminal offences considered sufficient to justify deportation action on not one but two occasions, the second set of offences being more serious than the first. He sought to stay in the UK on the basis of asylum but his claim was held to be groundless. He sought to stay in the UK on the basis of a marriage which proved to be bogus. His criminality is mitigated to some extent that he is not considered to be at risk of reoffending. His immigration misconduct is mitigated to some extent by the fact that he did (it seems) keep in touch with the immigration authorities throughout his time in the UK. Yet it remains he is a foreign criminal who has offended a further time after his first conviction and he has chosen to remain in the UK without lawful permission since 1990. A significant period of time has elapsed since he was deported but it is still significantly short of the period contemplated as the norm within the new Immigration Rules: see below.

31. Weighing all relevant factors and circumstances in the balance I consider that the decision of the SSHD to refuse to revoke the deportation order in force against the claimant was both in accordance with the law and the Immigration Rules and was also a proportionate interference with his right to respect for family life.

32. It is not for me to opine on how long a period it would continue to be proportionate of the SSHD to maintain the deportation order but I would observe that the period set by the Immigration Rules for considering whether someone who has been deported following a criminal offence can normally continue to be excluded is 10 years (see para 391(i)) and that would in this case require an SSHD review by May 2018.

33. For the above reasons:

The FtT materially erred in law. Its decision is set aside.

The decision I re-make is to dismiss the claimant's appeal on all grounds.

Signed Date

Upper Tribunal Judge Storey