Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02224/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 September 2014	**On 12 September 2014**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

MR CA-O
(ANONYMITY DIRECTION PRESERVED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee, Counsel instructed by Messrs Lawrence & Co Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of Nigeria, born on 29 November 1961 against the decision of the First-tier Tribunal who sitting at Kingston Crown Court on 2 May 2014 and in a determination subsequently promulgated on 4 July 2014, dismissed the appeal of the Appellant against the decision of the Respondent dated 28 October 2013 to make a deportation order.

2. The Appellant has persistently committed criminal offences culminating in a sentence of twelve months' imprisonment for offences of dishonesty in October 2012. He was therefore clearly subject to deportation as a foreign

© CROWN COPYRIGHT 2014

criminal under Section 32(5) of the UK Borders Act 2007 unless he could show that certain exceptions applied.

3. In that regard and in the present case, the Appellant claimed that the decision to deport him from the UK would be a breach of his rights under Article 8 of the ECHR, in that the Appellant was the father of a 13 year old British child whose best interests would not be served if the Appellant was removed from the UK. In short, the present challenge to the determination of the First-tier Tribunal panel as identified in the grant of permission to appeal, is that the panel failed to consider the best interests of the Appellant's child with reference to Section 55 of the Borders, Citizenship and Immigration Act 2009 that relates to the need to safeguard and promote the welfare of children who are in the UK.

4. The grounds upon which permission to appeal was successfully obtained contend that the panel reached the conclusion that the Appellant's removal was proportionate "after looking at the question through the lens of the Appellant's rights rather than treating the interests of his child as a primary consideration" and that nowhere in the determination did the Tribunal engage with the question of whether it was in the Appellant's son's interests for the Appellant to be removed.

5. First-tier Tribunal Judge Levin in granting permission to appeal had this to say in that regard:

> "The Appellant relies on one single ground namely the panel's failure to consider the best interests of the Appellant's child with reference to Section 55 of the 2009 Act".

6. It is right to say that FTJ Levin sought to identify a further arguable matter that he acknowledged had not been raised in the grounds. However at the outset of the hearing before me, Mr Lee for the Appellant explained that these further matters were not on his instructions, issues that he wished to pursue as they were based on a misunderstanding of the position. It was therefore not part of the Appellant's challenge that there was procedural unfairness for the reasons identified by FTJ Levin in the grant of permission.

7. By letter dated 5 August 2014 the Respondent served her Rule 24 response in which she had this to say:

> "The Judge is criticised for failing to consider the Appellant's son's best interests. Arguably this is immaterial in light of his findings that the Appellant's son had family life but that the evidence indicated that it was very limited, and that he had a carer in the UK, and would therefore not be required to leave if his father were to be deported".

8. Thus the appeal came before me on 9 September 2014, when my first task was to decide whether the determination of the First-tier Tribunal

disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

9. Mr Lee opened his submissions by referring to the basis of the Respondent's Rule 24 response that he contended appeared to have been a concession that the case was indeed not looked at through the lens of the Appellant's son's best interests.

10. Mr Lee continued that if I looked at the Tribunal's determination as a whole in particular at paragraph 57, it was apparent that the panel's reasoning was entirely from the point of view of the Appellant.

11. He continued that the two things that the Tribunal should in particular have done, was to determine whether the Appellant's removal was in the best interests of the Appellant's son and if not; whether there were countervailing features rendering removal proportionate in the public interest. That, contended Mr Lee, was precisely what the panel failed to do.

12. Mr Lee submitted that at no point in their determination did the Tribunal consider and reason the effect on the Appellant's son on the severance, as found by the Tribunal of a genuine and subsisting relationship between himself and his father, despite the fact that they were bound to do so.

13. Ms Isherwood in response maintained that there was no material error of law. She referred me to paragraph 6 of the Appellant's skeleton argument before the First-tier Tribunal panel that made reference to SS (Nigeria) [2013] EWCA Civ 550 that indeed quoted the observation of Laws LJ at paragraph 46:

> "Thus whilst the authorities demonstrate that there is no rule of exceptionality; they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. This antithesis, in my judgment, catches in the present context the essence of the proportionality test required by Article 8(2)".

14. I was also referred to the recent decision of the Tribunal in McLarty (Deportation – proportionality balance) [2014] UKUT 315 (IAC) and more particularly paragraphs 20 and 36 that I set out below:

> "20. In paragraph 42 the Court stated that in cases of criminal deportation: '…the scales are heavily weighted in favour of deportation and something very compelling (which will be exceptional) is required to outweigh the public interest in removal'. In paragraph 43 the Court stated that the general rule was that in the case of foreign prisoners to whom paragraphs 399 and 399A did not apply 'very compelling reasons' would be required to outweigh the public interest in deportation.

> 36. In relation to the assessment exercise which is called for, it is necessary to recall that the scales are not evenly weighted. Parliament has tilted them strongly in favour of deportation and it is not for the Tribunal to seek to rebalance those scales. It is clear from case law that for the tilted scales to return to the level and then swing in favour of a criminal opposing deportation, that there must be compelling reasons, which must be exceptional: see case law above. What amounts to compelling reasons or exceptional circumstances is very much fact dependent and must necessarily be seen in the context of the articulated will of Parliament in favour of deportation".

15. Ms Isherwood maintained that if one looked through the determination it was clear that the Appellant had an opportunity to provide evidence of his relationship with his son by way of putting forward a Social Services report but he failed to produce it.

16. Ms Isherwood continued that at paragraph 45 of the determination, it was clear that the panel were mindful of the requirements of paragraph 399A of the Immigration Rules and were aware of the Appellant's son's circumstances, reminding themselves the criteria that had to be satisfied if the parental relationship between the Appellant and his son was considered to outweigh the public interest in deportation in line with Article 8. Firstly, that there had to be established a genuine and subsisting relationship between the Appellant and his son and that his son was a British citizen and that it would not be reasonable to expect the Appellant's son to leave the UK and there was no other family member who was able to care for the Appellant's son. The panel had accepted that the Appellant's son was a British citizen and that it would not be reasonable to expect him at the age of 13 to leave the UK. They had concluded however that the requirements of the Rules were not met because, as found at paragraph 54 of the determination, it was apparent that the Appellant's son was being looked after by his mother and that she was a family member who could care for him as required by paragraph (a)(ii) (b) and therefore the Appellant's claim failed under paragraph 399A.

17. At the conclusion of the parties' submissions I reserved my determination.

<u>Assessment</u>

18. I have concluded that the determination of the First-tier Tribunal does indeed disclose material errors on a point of law and I would agree with the contention of the Appellant that the Tribunal reached the conclusion that the Appellant's removal was proportionate, solely after looking at the question, through the lens of the Appellant's rights rather than treating the interests of his child as a primary consideration.

19. This is no better exemplified than by reference to paragraph 57 of the determination and the following passage:

> "The issue to determine is whether the removal of the Appellant and the consequent interference with his right to family life is proportionate to the legitimate public end of the maintenance of the wellbeing of society and the protection of the rights and freedoms of others" (underlining added).

20. I agree with Mr Lee's submission that nowhere in the determination did the Tribunal engage with the question of whether it was in the Appellant's son's best interests for the Appellant to be removed, let alone consider the question of whether the countervailing factors in the case outweighed the Appellant's son's interests in maintaining family life with his father.

21. The matter does not end there. In the Respondent's Rule 24 response, it is submitted that the criticism of the panel for failing to consider the Appellant's son's best interests was "immaterial in light of his finding that the Appellant's son has family life but the evidence indicated that it was very limited….". That in my view is not correct. In fact, the panel looked at the evidence and at paragraph 54 of their determination they stated:

> "Taking these matters together we find that the Appellant just succeeds in showing that he is in a genuine and subsisting relationship with (his son)".

22. It was Mr Lee's submission in that regard, that as he explained, without being flippant "it is a bit like saying 'just pregnant'". I would agree with him that the finding ought to be recognised as stating that the evidence just got there as opposed to some limitations to family life itself. If you are found to be in a genuine and subsisting relationship by whatever route then the relationship is established. However, at no point did the Tribunal determine the effect upon the Appellant's son on the severance of that genuine and subsisting relationship.

23. I would also observe that at paragraph 51 of their determination, the Tribunal recorded that there was before them a handwritten note from the Appellant's son and a supplementary statement. They decided however, that because it was not clear as to how the two statements were prepared, it was "difficult for significant weight to be attributed to the written and un-witnessed evidence of (the Appellant's son". This was nonetheless evidence that went to the issue that the panel simply failed to decide upon, namely the effect upon the Appellant's son of the Appellant's removal. It was of course open to them if there were concerns about the two statements, to adjourn the hearing so as to give the Appellant the opportunity of addressing the panel's concerns.

24. I then turn to paragraph 56 of the determination the opening sentence of which states as follows:

> "This appeal is not considered under Appendix FM and it is not necessary to bear in mind the recent decisions in Nagre and Gulshan".

25. In that regard, I share with Mr Lee the difficulty in understanding the Tribunal's reasoning. The Tribunal proceeded to wrongly apply Article 8 in

a freestanding manner and not by reference to the materially more constrained test as laid down in case law that requires compelling or exceptional circumstances within a proportionality test where the facts relating to the individual application are assessed in their own light and then weighed against the important public interest objectives that underpin the immigration regime. In relation to the policy objectives, that an individual's personal circumstances have to be weighed against, these have been referred to in many cases. So, for example in ZH (Tanzania) [2011] UKSC 4 the Supreme Court held that the interests of the children and in particular with regard to their nationality whilst very important were not trump cards over all other policy considerations but nonetheless remained matters of primary interest.

26. With great respect to the panel, even more difficult to understand is the second sentence of paragraph 56 in which the Tribunal said:

> "However, it is the case in this appeal that there are compelling circumstances not sufficiently recognised under the Rules. The Appellant would have to leave the UK and there is no possibility he will be able to maintain family life with his son other than through electronic forms of communication".

I would agree with Mr Lee that in that regard the panel's reasoning got "even worse".

27. Ms Isherwood in her submissions had placed reliance on paragraph 58 of the determination where the Tribunal, whilst acknowledging that they found the Appellant had established the existence of a parental relationship with his son "in line with Article 8 family life", continued that having regard to his criminal record and bearing in mind the Judge's sentencing remarks they found that there was a public interest in deportation sufficient to outweigh the family life considerations relating to the relationship between the Appellant and his son and in those circumstances it would not be disproportionate to deport the Appellant.

28. In my view such reasoning supports the Appellant's challenge and exemplifies the way in which the First-tier Tribunal panel reasoned their decision solely through the lens of the Appellant, without also considering matters, through the lens of the best interests of the Appellant's son.

29. I would also observe that given the largely adverse reasoning of the panel over paragraphs 46 to 53 of their determination, it is difficult to understand their thought processes, in the absence of the provision of further reasoning, that led them to the conclusion that "Taking these matters together we find the Appellant just succeeds in showing that he is in a genuine and subsisting relationship with (his son)".

30. In terms of Ms Isherwood's reliance on the decision of the Upper Tribunal in McLarty it would be as well to also refer to paragraph 24 of that decision when the Tribunal had this to say:

> "24. Secondly, it is submitted that the Tribunal judgment lacked adequate reasoning. Where two important countervailing principles collide - the public interest in deportation versus the interests of the individual in having an opportunity to develop a relationship with his children, fairness requires that the Tribunal provide full and proper reasons in relation to their consideration of both these factors".

31. Mr Lee correctly observed in that regard that this "counted double when one is looking at the best interests of a child".

32. For the above reasons I have concluded that the determination of the First-tier Tribunal panel did disclose material errors on a point of law such that their determination should be set aside.

33. I was informed by the parties that were I to so decide, that this was a case that ought to be heard de novo to include findings as to the nature and quality of the Appellant's relationship with his son to be properly weighed against the public interest. I further agreed with the parties, that in such circumstances the appropriate course was to direct that none of the panel's findings should be, for this purpose, preserved.

34. In the circumstances, I agreed with the parties' request, having regard to the errors of law found, the length of the hearing (estimated at three hours), and where I was told by Mr Lee that there was likely to be evidence given at the fresh hearing by four witnesses that included the Appellant's son (now age 14) and the Appellant's daughter and their respective mothers, that there were highly compelling reasons falling within paragraph 7.2(b) of the Senior President's Practice Statement, as to why the decision should not be remade by the Upper Tribunal. It was clearly in the interest of justice that the appeal of the Appellant be heard afresh in the First-tier Tribunal.

35. For the reasons that I have given above and by agreement with the parties, I conclude therefore that the appeal should be remitted to a First-tier Judge other than First-tier Tribunal Judges Perry and N M K Lawrence to determine the appeal afresh at Taylor House Hearing Centre on the first available date. For that purpose no interpreter would be required. For this purpose, anonymity is to be preserved, given that a minor is involved in the appeal, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Decision

36. The First-tier Tribunal erred in law such that its decision should be set aside and none of their findings preserved. I remit the making of the appeal to the First-tier Tribunal at Taylor House before a First-tier Tribunal Judge other than the Judges to whom I have above referred.

Signed Date 11 September 2014

Upper Tribunal Judge Goldstein