Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number

IA/19758/2013

THE IMMIGRATION ACTS

Heard	**at**	**Field House**
On 4 June 2014		**Determination promulgated On 9 June 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Anthony Ngozi Dimgba
(Anonymity direction not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: Mr. A. Burrett of Counsel instructed by CASA.
For the Respondent: Mr. S. Kandola, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Seelhof promulgated on 19 February 2014, dismissing the Appellant's appeal against the Respondent's decision dated 8 May 2013 to refuse to vary leave to remain in the UK and to remove the Appellant from the UK.

Background

2. The Appellant is a national of Nigeria born on 15 May 1959. He entered the UK on 7 November 1998 with a six months visit visa. The Appellant overstayed his visa. The Appellant's history – and in particular his use of the identity Chinedum Okey Rufus, and the Appellant's encounters with the immigration authorities between 2004 and 2006 - is otherwise considered in the determination of the First-Tier Tribunal and further referenced below. Suffice to say at this juncture, the Appellant made no formal application to regularise his status in his own identity until he applied for indefinite leave to remain by way of application form SET(O) signed on 6 July 2012 and sent under cover of letter of the same date – such application being recorded by the Respondent as having been made on 7 July 2012 – on the basis of long residence. In a supporting statement, also dated 6 July 2012, the Appellant stated that although he had not quite reached the 14 years required under the then applicable 'long residence rule', he was "*now aware that the immigration rules have changed and the changes will take effect from 9 July 2012*" and he understood that if he did not make his application before 9 July 2012 he "*would have to wait until I have lived in the UK for 20 years before I could attempt to regularise my immigration status*".

3. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter dated 7 May 2013, and a Notice of Immigration Decision was issued accordingly on 8 May 2013.

4. The Appellant appealed to the IAC. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in his determination.

5. The Appellant sought permission to appeal which was initially refused by First-tier Tribunal Judge Parkes on 11 March 2014, but subsequently granted by Upper Tribunal Judge Allen on 15 April 2014.

6. The Respondent has filed a Rule 24 response dated 10 May 2014 resisting the appeal.

Consideration

7. The First-tier Tribunal Judge found that the Appellant had been living in the UK since 6 November 1998, and as such for a period in excess of 16 years by the date of the hearing (determination at paragraph 23). In this context the Respondent had conceded that the Appellant had been here for over 14 years (paragraph 16).

8. Further, it was agreed between the representatives and the Judge that the Notices served in 2004 and 2006 could not be treated as notices that effectively 'stopped the clock' pursuant to paragraph 276B(i)(b) because they had not been specifically issued to the Appellant in his own name and related to the history of Mr Rufus - in whose identity the Appellant was then presenting himself to the Respondent: see paragraphs 15 and 24.

9. Accordingly the issue in the appeal related to paragraph 276B(ii) – specifically whether "*having regard to the public interest there are no reasons why it would be undesirable for [the Appellant] to be given indefinite leave to remain on the ground of long residence*" taking into account all of the circumstances.

10. The Judge answered this question against the Appellant: see in particular paragraphs 25–27.

11. The Judge went on to consider Article 8 of the ECHR, but found against the Appellant in this regard also. Although a challenge was raised to the Article 8 assessment in the Appellant's grounds in support of his application for permission to appeal, this did not find favour in Upper Tribunal Judge Allen's grant of permission, where he described this particular ground as having "*no arguable merit*". Before me Mr Burrett confirmed that he did not seek to pursue the Article 8 challenge.

12. In respect of the decision under the Rules it is argued on behalf of the Appellant that the First-tier Tribunal Judge misdirected himself when considering rule 276B(ii), and in particular failed to direct himself to the decision in **ZH (Bangladesh) [2009] EWCA Civ 8**.

13. It is to be noted that the Judge did make express reference to the case of **Aissaoui [2008] EWCA Civ 37**: see determination at paragraph 25.

14. In the Appellant's Skeleton Argument before the First-tier Tribunal quotations from both **Aissaoui** and **ZH (Bangladesh)**

were set out consecutively under the same paragraph (3v). Further, both cases were cited together in support of the same proposition at paragraph 4 of the Skeleton Argument: "*While the appellant committed an offence in using another person's identity to work in the UK, the Court of Appeal in* ***Aissaoui*** *and* ***ZH (Bangladesh)*** *made it clear that the use of a false identity is not a decisive factor that will make a refusal of ILR inevitable*".

15. In my judgement it is plain that the Judge had well in mind the substance of the Appellant's case, and his reliance on case law. It is overt at paragraph 21, and moreover it is apparent that the Judge accepted the legal proposition that the Appellant relied upon:

> "*Mr Burrett [who also appeared before the First-tier Tribunal] addressed me on conduct and reminded me that the visa category in which the Appellant applied was for persons who had spent 14 years in the UK illegally and that it was inevitable that everyone in that category would have broken the law in some way. I indicated that I agreed with him in principle…*"

16. It is also apparent that the Judge accepted the essential principle relied upon by the Appellant in his citation of **Aissaoui** at paragraph 25:

> "*I have considered the case of* ***Aissaoui****…. in which the Court of Appeal held that the use of a false identity in order to obtain work was not sufficient to engage 276B(ii)*".
>
> The Judge repeats his acceptance of this principle in the first clause of the first sentence in paragraph 27.

17. It is equally clear that the Judge, having accepted the essential principle, evaluated the particular facts of the Appellant's case pursuant to that principle, but determined that the Appellant's conduct was such that applying paragraph 270B(ii) it would be undesirable for the Appellant to be granted indefinite leave. The Judge indicated his concerns in this regard during Mr Burrett's submissions (paragraph 21), and gave detailed reasons for his conclusion at paragraphs 25–27.

18. The Judge's reasons relate not merely to the use of a false identity, but its particular use during the period 2004-2006 when the Appellant had come to the attention of the immigration authorities.

Indeed at paragraph 25 the Judge explains why he considers the instant case to be distinguishable from the facts in **Aissaoui**:

> "*The difference in this case is that this Appellant did come to the attention of the Home Office and while the Respondent may have made an initial error as to his identity, in August 2004 he was in possession of a passport that could have clarified that issue from November 2004. I find that on each and every weekly signing appointment over the following year and a half the Appellant's failure to disclose his passport to the Home Office was calculated to avoid his removal. I further note that the Appellant allowed High Court proceedings to take place in which it appears he was represented as Chinedum Okey Rufus and removal was avoided. I find that the perpetuation of the deception will have been disruptive for the Respondent and costly to the public purse.*"

19. The Judge summarises the matter in paragraph 27: "*… I find that specific and prolonged deception of the Immigration authorities is different to just being here illegally, or using false documents*".

20. The Judge also finds that the reason the Appellant was not issued with a valid removal notice in 2004 (rather than the notice in the identity of Mr Rufus) was "*in part a consequence of his deception*" (paragraph 26).

21. I note paragraph 22 of **Aissaoui**:

> "*Nor is it true to say that he had assumed a false identity "to evade the consequences of the refusal of his appeal." He had started to use a false identity for the purposes of obtaining work late in 1991.*"

22. Judge Seelhoff appropriately identifies as a key distinguishing feature that the Appellant herein did make use of a false identity in order to resist removal – indeed, even going so far as to represent to the High Court that he was somebody else. (Although the First-tier Tribunal Judge did not articulate it in this way, Mr Kandola observed in the course of submissions before me that this might be considered both as contempt of court and perjury, the latter of which might be considered a serious crime.)

23. Further, in this context and generally, it is to be noted that the Judge in setting out his 'Findings and Conclusions' from paragraph

23 onwards makes no *adverse* reference to the Appellant's use of a false identity to secure employment – which was essentially the erroneous approach successfully challenged in both **Aissaoui** and **ZH (Bangladesh)**.

24. As regards **ZH (Bangladesh)**, Mr Burrett was invited to articulate in what way the Judge's approach diverted from any principle to be derived from **ZH (Bangladesh)**, notwithstanding the absence of any express citation of the case in the Determination. Mr Burrett made reference to passages in **ZH (Bangladesh)** which he submitted indicated that Judge Seelhoff had taken "*a different path*". I consider these passages below: however, in my judgement, these passages essentially related to matters of factual assessment, and not issues of principle. Indeed, save for the use of different examples and illustrations, and the more emphatic criticism of **MO (Ghana)**, the judgement of Lord Justice Sedley in **ZH (Bangladesh)** does not progress the issue of principle any further than the judgement of Lord Justice Hooper in **Aissaoui** – in which Lord Justice Sedley also sat and gave a judgement in agreement.

25. Further to Mr Burrett's submissions on **ZH (Bangladesh)** I make the following observations:

> (i) In respect of paragraph 16: the use of a false identity because the applicant was afraid of being detected as an illegal immigrant. This would appear to be a reference to paragraph 9 of the determination, cited at paragraph 7 of the Court of Appeal's judgement, which in part, states, "*I used an alias in 2001 because I was told that if you use genuine details then people will catch you so I was scared*". The context of use by ZH was in order to be better able to sustain himself without being caught by the authorities. This is factually distinct from using deceit when actually caught by the immigration authorities as happened herein.
>
> (ii) Further in respect of paragraph 16: in respect of the reference to sustained deceit, it is to be noted that Judge Seelhoff made a sustainable finding that the Appellant herein had practised a prolonged deception on the Respondent.
>
> (iii) In respect of paragraph 18: prolonged evasion of immigration control, not in itself to be used as a justification for refusing a '14 year Rule' application. In my judgement it is clear that what the Court of Appeal had in mind in referring to evasion of immigration control was the effective long-term 'going to ground' of ZH aftr becoming an overstayer, and not a deliberate and sustained misrepresentation made directly to

the immigration authorities – the distinguishing feature identified by Judge Seelhoff herein. Judge Seelhoff clearly had in mind that the operation of the 14 year Rule would be premised on persons who had been present in the UK illegally, and that there would be inherent in any such application the breaking of some laws: it is equally clear – in particular at paragraphs 21 and 27 - that the Judge recognised that this was not determinative and therefore not a basis which in itself could defeat a long residence application.

(iv) In respect of paragraph 23: "*The use of a false identity may be a relevant factor in gauging where the public interest lies, but nothing in the rule accords it any given weight, much less makes it decisive.*" In my judgement, this passage recognises that all cases are fact sensitive. The real issue is in what way and to what end use of a false identity is made. This is implicit at paragraph 16 of **ZH (Bangladesh)** where reference is made to the 'sinister' use of a false identity to commit fraud rather than avoiding being detected as an illegal immigrant: the implication being that use of a false identity, though not inevitably decisive, *may* be decisive depending on the facts and context. This passage does not, in my judgement, support the proposition that Mr Burrett urges upon me that the use of a false identity cannot ever be decisive.

26. In all such circumstances I find the Judge's failure to make any express reference to the decision in **ZH (Bangladesh)** in his determination is not material to the outcome. Moreover, I can detect nothing from the reasoning set out in the determination that indicates the Judge departed from the *ratio decidendi* in **ZH (Bangladesh)**, which is essentially the same as in **Aissaoui**. The failure to site **ZH (Bangladesh)** does not indicate that the judge erred in law.

27. Finally, for completeness, and for the avoidance of any doubt, I record that Mr Burrett appropriately acknowledged that the references in **Aissaoui** to the commission of 'a most serious offence' are not to be read as setting a test under paragraph 276B(ii) requiring that there to have been serious criminal conduct before an application under the 14 year rule could be defeated.

28. In all such circumstances I find no error of law in the decision of the First-tier Tribunal Judge. Accordingly, the decision under the Immigration Rules is to stand.

Decision

29. The decision of the First-tier Tribunal Judge contained no error of law and stands.

30. The appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 5 June 2014