Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36135/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 April 2014	**On 5th June 2014**
Oral Determination given following the Hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

DANNY ABBEY ADEKOYA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Singarajah, Counsel instructed by Palis Solicitors
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 25 December 1962 and is a citizen of Nigeria. He claims to have arrived in this country in or about 1992 but he first came to the attention of the United Kingdom immigration authorities on 9 July 2003 when he made an application for leave to remain on the basis of

long residence. That application took some time to be determined and it was not eventually dealt with until 2008 when on 19 June that year a decision was made to refuse that application. Thereafter, there were various applications brought by or on behalf of the appellant which it is not necessary to set out in detail for the purposes of this determination.

2. On 4 January 2012 the appellant was detained whilst reporting and on 26 January 2012 he was served with removal directions. Further representations were made and a judicial review application was lodged and following the refusal of those representations with no right of appeal yet further representations were made and on 24 January 2012 a planned removal which had been due to take place on 26 January 2012 was delayed by order of the High Court. Subsequently, the respondent agreed to reconsider the subsequent submissions made on 12 January 2012 together with other submissions made on 23 January 2012. These submissions were to the effect that the removal of the appellant would be in breach of his Article 8 rights. Subsequently, in a decision made on or about 15 August 2012 (it is not entirely clear from the papers when precisely in August 2012 this decision was made) the respondent made a decision that the appellant was not entitled to remain on the basis of his Article 8 rights. Thereafter on 15 August 2013 the appellant was notified of the respondent's decision to seek his removal from the United Kingdom as an illegal entrant in accordance with the provisions of Section 10 of the Immigration and Asylum Act 1999 following the refusal of his application for leave to remain under human rights grounds which, as I have already stated was made in or about 15 August 2012.

3. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Traynor sitting at Hatton Cross on 11 December 2013. In a determination promulgated on 27 January 2014 Judge Traynor dismissed the appellant's appeal both under the Immigration Rules and also under Article 8 which he considered as a stand alone right outside the provisions of the Immigration Rules. The appellant has appealed against this decision and he was originally refused leave to appeal by First-tier Tribunal Judge Osborne on 14 February 2014. The appellant renewed his application for permission to appeal to the Upper Tribunal and was eventually given permission to appeal by Upper Tribunal Judge Eshun on 20 March 2014.

4. The grounds assert that Judge Traynor's determination contained errors of law. First because he made significant errors regarding contact that the appellant had with his son at his son's school and secondly because he applied the wrong legal test when considering in relation to that child (it is submitted) by stating that there were no "insurmountable obstacles" to his removal. It is said in the grounds that "the issue in relation to EX.1(a) is not whether or not there are such insurmountable obstacles but whether it is "reasonable" for a child with seven years or more residence in the UK to [leave] the UK". It is also submitted that the judge failed to take into account the respondent's substantial delay in determining his application and it is said that "the fact that during this period of delay the appellant

formed substantial family life with his son" is relevant to Article 8, relying on the House of Lords' decision in *EB (Kosovo)* [2008] UKHL 41.

5. It is also submitted that when considering Article 8 "under the *Razgar* steps" the judge wrongly found (at paragraph 73 of his determination) that "there was no family life between the appellant and his child" which was wrong "given that there is a presumption of family life between a child and its natural father, provided he continues to have a level of contact with the child even if the relationship with the mother has ended at date of birth".

The Hearing

6. I have heard submissions on behalf of both parties which I have attempted to record contemporaneously. As these submissions are set out within my Record of Proceedings I shall not set out below everything which was said to me during the course of the hearing but shall refer only to such of the submissions as are necessary for the purposes of this determination. I have however had regard to everything which was said to me during the course of the hearing as well as to all the documents contained within the file. It is necessary before dealing with these submissions to summarise the findings which were made by Judge Traynor and the submissions that were made before him.

7. It was the appellant's case as set out by the judge at paragraph 3 of his determination that he had entered this country unlawfully in September 1992 but had lost his passport. He had been continuously present in this country until in 2003 he sought to regularise his stay. The respondent did not accept that there was evidence of the appellant's presence in the United Kingdom prior to 2003 and for this reason, when the present application was considered, the respondent did not accept for the purposes of paragraph 276ADE of the Rules now to be applied since 9 July 2012 that the respondent had been present in this country for twenty years. The respondent did not accept that the appellant had been present from earlier than 2003. The respondent also was not satisfied that the appellant's ties with Nigeria were severed.

8. The appellant claims to have a child (the fact that he has a child does not appear to be disputed) who was born in 2003 but the respondent did not accept that the appellant had a meaningful relationship with his child and for this reason it was not accepted that this was a factor to be taken into account when assessing the strength of the appellant's private life. The appellant is now married and his wife gave evidence before the First-tier Tribunal. He was married in July 2011.

9. The basis of the current application for leave to remain that is now before the Tribunal and was before Judge Traynor is twofold. First, it is said that he has a subsisting relationship with his wife who is a British citizen such that he should be allowed to remain and secondly it is said that he ought to be allowed to remain because he has a genuine relationship with his child which would be adversely affected were he to be removed from the

United Kingdom. With regard to his relationship with his wife it is said that she could not go with him to live in Nigeria because of her own health problems. As the judge noted in his determination, the application which was made and refused in August 2012 was put on a different basis from previous applications which had been made in which he had not relied upon his relationship with his wife or indeed it would seem on his relationship with his child. The judge did not accept that the appellant was a credible witness in a number of regards. He noted at paragraph 62 of his determination for example that "it is clear that the appellant has used every device available to him to delay his removal from this country". He noted also that even despite the unfortunate delay in the respondent considering his initial application the evidence as to what he was doing during the period between 2003 to 2010 was extremely vague. There was an absence of evidence such as could assist the judge as he put it in "understanding the strength of the appellant's connections with his community over the period of time that he claims to have been here" (at paragraph 62).

10. When dealing with the appellant's claimed relationship with his son Matthew the judge found at paragraph 64:

> "I would agree with Counsel on behalf of the respondent that such evidence [as to the regular contact that he says occurs between him and his son] was easily obtainable and the fact the appellant has not adduced such evidence means that what he has said concerning the frequency of his association with the child is not as reliable as he would wish me to believe".

The judge also noted that although in his evidence he had "initially stated that he has good and regular contact with the child" in the course of his evidence "when I sought to clarify this with him, he admitted that the child's mother is hostile to him, claiming that this started in 2010 when he was married". The judge notes that the appellant then "changed his mind and said in fact that it was 2008 when that hostility commenced, when Matthew would be 5 years of age".

11. The judge also noted with regard to the appellant's evidence relating to his relationship with his son, also at paragraph 64, that "he has never explained the basis of the mother's hostility towards him or that he played any direct role in the child's life". I note in this regard that in the course of his submissions before me on behalf of the appellant, Mr Singarajah initially claimed that the appellant had been living with his son up to 2008 or thereabouts but when asked by the Tribunal if he could point to any evidence that was before the Tribunal to this effect, he had to accept that he could not do so.

12. At paragraph 66 the judge found as follows:

> "The appellant has been unable to identify any reference in the school reports which he has produced which would suggest that he is playing

> a role in the child's education and welfare. He has failed to adduce any evidence from the school to say that he enjoys regular fortnightly contact or that he is permitted to see the child for ten minutes, as the documents and statement suggest. Fundamentally, there is no evidence to show that the appellant is involved in a relationship with the child. I am therefore satisfied that the appellant's removal would not alter the current relationship which I find is almost nonexistent."

It is said on behalf of the appellant that this finding is at odds with the evidence because as noted above the first ground is that "the IJ erred at para 66 in stating that there was no evidence establishing that the appellant had contact with his son at school. The evidence of this in fact came from the UKBA itself, which had made enquiries with the son's school, see bundle P92".

13. This is a reference to what is set out at paragraph 17 of the respondent's letter of 15 August (or thereabouts) 2012 in which reference is made by the respondent to a response received from the son's school dated 14 March 2012 which apparently stated as follows:

> "Since December 2011 Danny has had contact with Matthew approximately thee times to date. The contact usually lasts around ten minutes in total and is supervised by members of staff. The contact takes place in the school office. When dad first requested contact with Matthew the school contacted Matthew's mother who consented that this was allowed as long as Matthew did not leave the school premises. The contact takes place on an ad hoc basis, with Danny just arriving at the school (we always ask for Danny to wait until lunchtime to see Matthew so he does not miss lesson time). They normally just talk about what Matthew has been doing, football etc. Danny also telephones the school to speak to Matthew. If Danny phones during lesson time he is asked to call back at lunchtime and the school arrange for Matthew to speak to his dad on the telephone school office. Again this is supervised and the conversation lasts approximately five minutes. Danny has had telephone contact about six times since September."

14. I will consider below as to whether or not the first ground is made out but it is right to note in this regard that the finding by the judge would seem to be that the evidence from the school contradicted the evidence given by the appellant that he enjoyed "regular fortnightly contact" with his son. With regard to the relationship between the appellant and his wife the judge dealt with this at paragraphs 67 onwards of his determination. I set out what the judge found at paragraphs 69 and 70 as follows:

> "69. The appellant's wife expressed a desire to remain in the United Kingdom because she said she has heard stories about medical treatment in Nigeria. She did not elaborate on what those stories are but from the tenor of her evidence it seemed that they were sufficient to deter her from wanting to travel and live in Nigeria. I

accept that she has lived all of her life in this country and enjoys the benefit of the National Health Service in supporting her healthcare. She has, however, made no enquiries whatsoever as to what medical facilities would be available to her in Nigeria and what assistance may be given to help her and the appellant conceive a child. I find that neither the appellant nor his wife have adduced any evidence which would suggest that an insurmountable obstacle arises concerning healthcare so that the appellant should be entitled to remain under the provisions of Appendix FM.

70. I take into account the fact the appellant's wife is currently in employment and has expressed a view that she would choose to live in this country. However, in answer to a direct question from me she confirmed that if the only way to save her marriage was to travel to Nigeria to live with her husband then she would do so but that would obviously not be her choice. In the circumstances, and notwithstanding the fact that I accept that she is in fulltime employment, I am satisfied that she has presented no evidence of an insurmountable obstacle which would prevent her and the appellant from continuing their relationship and developing that relationship in Nigeria."

15. With regard to the judge's references to "insurmountable obstacles" as noted it is argued in the grounds (albeit in relation to the relationship with the application's child) that this is the wrong test and the right test is whether it would be reasonable for that child to leave the UK. In argument before me Mr Singarajah submitted that with regard to the appellant's wife this was the incorrect test as well because (relying on various previous decisions and in particular *EB (Kosovo)* and *VW (Uganda)* [2009] EWCA Civ 5) the correct test was whether or not this would be reasonable. However, as Judge Osborne noted when refusing permission to appeal originally, the judge did go on to make findings in the alternative under Article 8 and when making these findings noted at paragraph 72 that in this regard:

> "I accept that terms such as 'insurmountable obstacles' were inappropriate to my consideration of the appellant's freestanding Article 8 rights and that I really must assess whether the respondent's decision is reasonable to the proposal that the appellant now be removed from this country."

16. Before me in addition to the authorities to which I have referred above, Mr Singarajah also relied on the decision of Green J in *Iftikhar AhmedI* [2014] EWHC 300 (Admin). He relied upon the grounds although he accepted that with regard to the appellant's relationship with his child it was not suggested now that the child could or would ever be expected to leave with the appellant to Nigeria. He maintained the submission that the balancing exercise necessary for consideration of the appellant's Article 8 rights had not been properly carried out, relying in particular to observations within *VW (Uganda)* to the effect that the correct test was

whether or not it was reasonable to expect a family member to leave with the appellant. He also sustained the argument which was contained within the grounds to the effect that the judge had wrongly considered that there was no relationship between the appellant and his son.

17. On behalf of the respondent Mr Deller submitted that if this appeal was to succeed either the appellant must meet the requirements set out within the specific parts of the Immigration Rules or it must succeed on the basis that his removal would be unduly harsh which is the expression used within the Rules to cover situations where even though an application cannot succeed under specific provisions, nonetheless it ought to be allowed otherwise under Article 8. The respondent had considered whether or not the appellant should be allowed to remain on the basis of his claimed relationship with his son but had considered that effectively there was not such a relationship. Back in 2012 there had been evidence only of very limited and sporadic contact between the appellant and his son and there does not seem to have been any evidence of any contact after that. There had been conflicting oral testimony from the appellant and his witnesses about the more up-to-date situation and the First-tier Tribunal Judge had difficult in accepting that the appellant had been a reliable witness. With regard therefore to the suggestion that there was a "genuine and subsisting parental relationship" between the appellant and his son the respondent considered that there was not and the judge had agreed that there was not. It was a simple requirement of the Rule as it stands that there has to be a genuine and subsisting parental relationship and there was no question of Matthew leaving the UK in any event.

18. So far as delay is concerned, there is in any event a scarcity of evidence as to the suggestion that family life between the appellant and his son was strengthened during the delay from 2003 to 2008. Even if there had been such a strengthening (and the evidence did not support this) on the limited evidence which was now available and was available before the First-tier Tribunal, that relationship had weakened again. By the time of the hearing by the First-tier Tribunal the judge had legitimate doubts as to whether Article 8(1) was engaged at all. Even if it was it is an academic distinction as to whether or not the question of the parent/minor child relationship should be considered under question (1), (2) or (5) of *Razgar* because in any event in the circumstances of this case it should be accorded very little weight.

19. In reply Mr Singarajah suggested first that it would not be right to say that because the judge had found that the appellant could not establish that he had been here twenty years, that necessarily meant that he had also found that the appellant lacked credibility.

20. Secondly he submitted that the amendments to the Rules could not entitle the respondent not to have proper regard to the appellant's Article 8 rights because by Section 5 of the Human Rights Act the respondent was required to give effect to these Convention rights.

Discussion

21. I have tried to set out the arguments advanced in sufficient detail as to enable my decision to be expressed succinctly. The first issue which I have to consider is whether or not it can properly be said that there was a material mistake of fact in Judge Traynor's determination with regard to whether or not the appellant had had contact with his son at school. In my judgment there is no material error of fact in this regard. What the judge found at paragraph 66 was that the appellant had "failed to adduce any evidence from the school to say that he enjoys *regular fortnightly contact* [my emphasis] or that he is permitted to see the child for ten minutes, as the documents and statements suggest." It is said that this is inconsistent with what is contained within the response received from the appellant's son's school to the effect that the appellant did have contact with his son. However what is said in that response by the school is that they have had contact approximately three times between September 2011 and March 2012 which is on average once every two months. So when the judge says that the appellant has failed to adduce evidence from the school to say that he enjoys regular fortnightly contact, that is correct. The evidence from the school does not say this.

22. In my judgment the judge was entitled to go on to find as he did that "there is no evidence to show that the appellant is involved in a relationship with the child". He finds that the "current relationship" is one which "is almost non-existent". He does not say that there is no contact at all but that the contact is so limited as not to amount to any meaningful relationship.

23. It is not the function of this Tribunal to decide whether or not it would reach the same conclusion on the evidence. The Upper Tribunal can only interfere with a finding of fact if it is one which was not open to the judge on the evidence before him. In my judgment the finding which this judge made with regard to the relationship between the appellant and his son (or rather effectively the lack of such a relationship) was entirely open to him on the evidence which he considered and which he has set out in the course of what is a thorough and detailed determination.

24. Similarly with regard to the position of the appellant's wife it is clear that the judge considered this very carefully and not just on the basis of whether or not there were insurmountable obstacles to her leaving the country. As is apparent from paragraph 72 of his determination the judge considered whether or not "the respondent's decision is reasonable to the proposal that the appellant now be removed from this country". In other words he did what it is suggested in the grounds he should have done which is consider whether or not the removal was reasonable weighing up all the factors rather than merely whether or not there were insurmountable obstacles to the appellant's wife leaving with him.

25. In my judgment there is no material error of law in Judge Traynor's decision. Effectively, he considered all the circumstances and all the

evidence which was put before him and reached conclusions which were open to him on the evidence. He was entitled to find that the relationship asserted between the appellant and his son was extremely limited indeed and that the removal of this appellant in the full circumstances of this case was proportionate and therefore lawful with regard to his Article 8 rights. It follows that this appeal must be dismissed and I will so find.

Decision

There being no material error of law in the determination of the First-tier Tribunal, the appellant's appeal is dismissed.

Signed: Date: 30 May 2014

Upper Tribunal Judge Craig