IAC-FH-NL-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00526/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 April 2015	**On 10 June 2015**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

EDDIE IDOWU KWOMO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Hulse of Counsel, instructed by A & A Solicitors
For the Respondent: Mr P Deller, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Nigeria, appeals with permission a determination of First-tier Tribunal (FtT) Judge Scott-Baker dismissing his appeal against a decision made by the respondent on 27 February 2014 to make a deportation order by virtue of s.32(5) of the UK Borders Act 2007. That decision was made in light of the fact that he had been convicted of an offence and sentenced to a period of imprisonment of at least twelve months. On 11 August 2011 he was convicted of conspiring to steal and was sentenced to eighteen months' imprisonment. The year before, on 21

July 2010, he was convicted of possession or control of false or an improperly obtained ID card and making false representations for gain.

2. The grounds of appeal are essentially sixfold. It is contended that the FtT judge erred firstly because she wrongly assessed the appellant's son's autism as not being at a high level; secondly, because she wrongly considered that the daily lives of the children would remain the same if the appellant were deported; thirdly because she had taken into account an offence apparently committed in the USA which "isn't a relevant offence for the purpose of this appeal hearing"; fourthly, she had attached excessive weight to the description given to the appellant by the sentencing judge in 2011 that he was a "professional criminal"; (allied to this, it was argued that the judge gave insufficient consideration to the OASys Report which assessed the appellant as being at a low risk of re-offending); fifthly, she erred in failing to recognise that s.117D of the Nationality, Immigration and Asylum Act 2002 sets out a "more generous test for the appellant" than the Immigration Rules; finally, the judge was said to have made inadequate credibility findings in respect of the appellant and witness.

3. At the hearing, by reference to a further document headed "Grounds for the Renewed Application for Permission", Ms Hulse made amplifying submissions. I am grateful to her and Mr Deller for their ventilation of the important points.

4. As regards the final point, the judge who granted permission rejected this ground and Ms Hulse did not seek to revive it before me.

5. Turning to the first ground, I am entirely satisfied that the judge dealt properly with the medical circumstances of the appellant's son. Neither the social worker report nor the GP letter nor any other document identified the child as having severe autism. They did identify that he had severe behavioural problems but the judge took these fully into account and properly sought to have regard to the evidence as to the child's situation at the date of hearing and not to confine herself entirely to reports on a 6 year old child that were over two years old: see paragraphs 77 and 79, with reference to 31-38 and 63-65 in particular. Ms Hulse sought to argue that the expert evidence established that the child had "severe autism" but was unable to point me to any document asserting that.

6. As regards the contention that the judge wrongly assessed that removal of the appellant would make no difference to the daily lives of the children, the simple answer is that she did not say that. At paragraph 93 she stated that his departure would clearly affect the children and in that regard she noted at paragraph 93 that they are "used to him living with them as a family unit" and that he "has played a caring role in [C's] life and as an autistic child change will adversely impact on him". The grounds appear to rely on the subsequent statement of the judge in the same paragraph that "[t]heir daily life will not be materially altered" but this was followed

by a passage that clearly circumscribed what the judge meant: "....in that they will continue to live in the same house with their mother and will attend their same schools. The children would be denied the daily contact with their father but this has happened in the past." In paragraph 93 and allied paragraphs the judge can be seen to make a measured assessment of the best interests of the children and the impact the appellant's removal would have on them. It was clearly in her mind from her earlier decision of whether as an alternative to the appellant being removed and the children and mother staying here, the family could resettle in Nigeria, that in the UK C had the guarantee of a supportive school and care environment (the family also receives disability benefits). It was open to the judge to consider that the mother would be prevented, by the appellant's absence, from continuing to ensure the children were able to live with her; indeed the judge noted that the mother had managed that when the appellant was in prison. She noted also that the mother ran her own business as a beauty consultant.

7. The grounds also argue more widely that the judge failed to apply the full panoply of best interests of the child principles set out in Zoumbas but that is belied by the very full and careful application the judge made of these principles.

8. As regards the third ground it is simply wrong to assert that the judge should have wholly disregarded the appellant's offence in the USA. It was part of the evidence before her and in the OASys Report she noted at paragraph 76, sixth bullet point, that:

> "The offender manager noted that the appellant had convictions for fraudulent offences during his time in the USA. Records from the USA indicated a longstanding history of dishonesty and inquisitive (sic) crime. Whilst the offender manager did not find the current matters an escalation in seriousness from previous convictions there was evidence of an established pattern of offending. However, due to the relatively low number of convictions in the UK, the actuarial assessment indicated a low likelihood of reconviction."

9. Against this background it was entirely open to the judge when making her overall assessment to treat as one relevant factor "his history of financial fraud since 1996 in foreign countries". Indeed, if she had wholly disregarded this matter, it would have been an error of law since it was clearly relevant to the issue of the appellant's criminal profile which the UK sentencing judge had concluded meant he merited the description "professional criminal".

10. That brings me to the fourth ground which takes issue with the "excessive weight" the judge was said to have attached to the fact that the appellant was a professional criminal. Given that (i) the OASys Report of June 2012 identified an established pattern of behaviour underpinned by a pro-criminal attitude; (ii) the appellant had committed a similar offence whilst on bail and (iii) the appellant's claim that he would not offend now because of the importance of his children and the diagnosis of autism in

2010 did not square with the fact that he was offending in 2008/9 after the birth of both children; and (iv) the offender manager noted that his offences were prompted by lack of finances and these circumstances still appertain - the FtT was quite entitled to conclude that the evidence as a whole did not support the offender manager's conclusion that there was a low risk of re-offending. The judge clearly attached significant weight to the offender manager assessment, but she was not bound to follow it and she gave sound reasons for not following it in the matter of risk of re-offending.

11. The fifth point raised relates to whether the judge failed to recognise that s.117D applies a "more generous test" than the Rules. I can be very brief in respect of this ground. It is not in dispute that the judge considered both whether the appellant could succeed under the Immigration Rules and whether he could succeed outside the Rules and in both contexts she clearly applied the considerations set out in ss.117A-D: this ground is poorly articulated but even if it decided to focus on the test under s.117C(5) on the basis that both the children were "qualifying children", that requires the appellant to show that "the effect of [an appellant's] deportation on the partner or child would be unduly harsh". But the FtT judge plainly considered the issue of undue hardship in depth when considering paragraph 399(b)(iii): see paragraph 95. At paragraph 109 she notes, a propos of s.117C-D, that both children are qualifying children and that "[r]easons for finding that the appellant cannot establish this [undue hardship under s.117C(5)] have been set out above". It is contended that the judge elevated "unduly harsh" to the level of "insurmountable obstacles" but that overlooks that leading cases have not accepted that insurmountable obstacles means anything more stringent. It also overlooks that the judge plainly did not apply any test higher than under hardship.

12. The grounds fail to identify any respect in which the judge's assessment of undue hardship under paragraph 399(b)(iii) failed to fully comply with the s.117C(5) test.

13. For completeness I shall deal with two other points that Ms Hulse drew from the renewed grounds. It was contended therein that the judge erred in failing to take account of the social worker report. It is difficult to conceive of a more hapless ground: the report played a prominent part in several passages of her decision.

14. It is contended that the judge erred in finding an inconsistency between the letter of November 2010 which states that the appellant works overseas and this 2014 report which states that one of the couple worked in the day and the other at night (see paragraphs 63 and 76). However, when one looks at the second bullet point of paragraph 76 where the judge finds an inconsistency, it is clear she was not solely relying on what the position was in November 2010 but on this evidence as indicating that his patterns was one of working overseas. Indeed on the next bullet point she adverts to evidence relied on by the appellant himself to explain why

he had stayed in Nigeria for significant periods (see also paragraph 92). It was his own evidence (see paragraph 39) that he had been in Nigeria from December 2013-May 2014. The judge considered his claim that this was unavoidable but gave cogent reasons why he had failed to show this: At paragraphs 69 and 72 she noted the Home Office Presenting Officer's submission that through a construction of the appellant's absences in Nigeria and time in prison, C was "used to his father being away" and her subsequent finding at paragraph 95, when assessing undue hardship, that "there have been periods in the past where he has not been present in the family home" was wholly apposite.

Notice of Decision

15. For the above reasons I conclude that the FtT judge did not materially err in law and her decision shall stand.

16. No anonymity direction is made.

Signed Date

Upper Tribunal Judge Storey