Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01782/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 27 October 2015	**On 12 November 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OSAYI OMOZEE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Neale, instructed by Bar Pro Bono Unit
For the Respondent: Mr G Harrison, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The respondent was born on 26 November 1976 and is a citizen of Nigeria. The appellant appealed to the First-tier Tribunal (Judges Brunnen and Bruce; Mr Getlevog) against a decision of the respondent dated 17 September 2014 to refuse to revoke a deportation order made against him on 6 July 2012. In a decision promulgated on 9 February 2015, the First-tier Tribunal allowed the appeal to the limited extent that the respondent's

decision was not in accordance with the law. The First-tier Tribunal directed that the respondent make a lawful decision in respect of the respondent's application for revocation of the deportation order on the basis of the facts as the Tribunal found them to be. The Secretary of State appealed and Judge Parkes granted permission on 4 March 2015. I shall hereafter refer to the respondent as the appellant and to the appellant as the respondent (as they appeared respectively before the First-tier Tribunal).

2. The background to the appellant's appeal to the First-tier Tribunal is set out in the Tribunal's decision at [5 – 14]:

> The Appellant claims to have arrived in the UK in 2004. In July that year he was found by the police to be in possession of a Dutch driving licence that was not his. He claimed asylum. This claim was refused and his appeal was dismissed. By February 2005 his appeal rights had been exhausted. He then ceased to comply with the requirement that he report to the Immigration Service.
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> In October 2008 the Appellant applied for a residence card on the basis that he was married to a Dutch national, Geraldine Reena, who was exercising treaty rights in the UK. In January 2009 a residence card was issued, valid until January 2015. However in January 2012 the Appellant was convicted in the Crown Court of offences involving entering into a sham marriage for immigration purposes. He was sentenced to 21 months' imprisonment. His appeals against conviction and sentence were dismissed.
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> In February 2012 the Appellant's residence card was revoked and the Respondent initiated consideration of whether he was subject to automatic deportation pursuant to Section 32 of UK Borders Act 2007. The Appellant made representations including a new claim for asylum. However he subsequently withdrew this claim and expressed his willingness to be deported. On 6th July 2012 the Respondent decided that the Appellant was subject to automatic deportation and a deportation order was made. He was deported to Nigeria on 17th July 2012.
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> The Appellant petitioned the Customary Court of Lagos State for the dissolution of the marriage he had contracted in the UK and that court made an order dissolving the marriage on 10th September 2012.
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> Whilst still in the UK the Appellant had formed a relationship with Stephanie Orubor, who is a citizen of Britain and of Sierra Leone. She visited him in Nigeria and they were married there on 8th April 2013.
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> In July 2013 the Appellant and his wife travelled to Spain where she claims to have established herself as a self-employed hairdresser. In due course the Appellant was issued with a residence card by the Spanish authorities, valid until 23rd January 2019.
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> Mrs Omozee returned to the UK in October 2013 and on 15th October gave birth to a son. The Appellant is the child's father. Mrs Omozee returned with her son to Spain in November 2013.
>
> The family left Spain in July 2014. They went to the Republic of Ireland and were able to enter using their passports and the Appellant's Spanish residence card. They then went to Belfast and on 7th July 2014 attempted to fly to England.

However the Appellant was prevented from doing so as he was subject to the deportation order. He was detained.

On 8th July 2014 the solicitors then acting for the Appellant made representations to the Respondent which she has treated as an application to revoke the deportation order. On 17th September 2014 she made a decision to refuse to revoke the order and it is against that decision that the Appellant now appeals.

Whilst the matter has been under consideration the Appellant has been granted bail and temporary admission and he is living in Manchester with his wife and son.

3. Ground 1 asserts that the Tribunal failed to give adequate reasons for a material finding. The Tribunal had found that the Customary Court of Lagos State dated 10 September 2012 dissolving the appellant's first marriage to Geraldine Reena failed to be recognised as valid in the United Kingdom [23 – 27]. The Tribunal considered that recognition was required pursuant to Section 46(1) of the Family Law Act 1986:

(1)The validity of an overseas divorce, annulment or legal separation obtained by means of proceedings shall be recognised if—

(a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; and

(b) at the relevant date either party to the marriage—

(i) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or

(ii) was domiciled in that country; or

(iii) was a national of that country.

4. The respondent submits that the words "law of the country" in Section 46(1) should be construed as referring to the national or federal law of the country in which the divorce was obtained. She asserts there was no evidence to show that the divorce decree issued in a Customary Court in Lagos State would be recognised nationally across Nigeria. In consequence, the respondent argues that the appellant had failed to prove that he was validly divorced from his first wife and able to marry his current spouse. Mr Neale, for the appellant, had submitted that there was no dispute that, for the purposes of the Immigration (EEA) Regulations 2006, a marital relationship must be examined in accordance with the laws of the Member State from which the union citizen obtains nationality (*TA and Others (Kareem explained) Ghana* [2014] UKUT 316 (IAC). In the present case, the appellant's current wife (Stephanie Omozee) is a British citizen. Mr Neale submitted that the Tribunal was correct to apply Section 46(1) of the 1986 Act and that, in the absence of evidence to the contrary, a competent Nigerian court of law had acted within its own jurisdiction to pronounce a decree of divorce in respect of the appellant's first marriage;

without evidence, it was not for the panel to go behind the Nigerian court's interpretation of Nigerian law.

5. I agree with Mr Neale's submission. There is, in my opinion, no basis whatever for the assertion made in the grounds of appeal that ".....at its highest, the divorce decree is on its face valid under customary law in Lagos State rather than nationally across Nigeria as appears to have been found by the judge". [7]. The Secretary of State did not dispute that the document produced regarding the divorce was a genuine document and that it had been issued by the Nigerian court which purported to have issued it. The Presenting Officer before the First-tier Tribunal did not raise any issue whatever regarding the competence and jurisdiction of the Customary Court to issue the divorce. Rather, as the Tribunal noted [25], "the only point taken by Mr Tan [the Presenting Officer] concerning this court order was to question whether the court proceedings were valid as Geraldine Reena may have been unaware of them." On that point, the Tribunal observed that the court in Nigeria had been satisfied the service of the order had been effected as required by its own procedures. The point now being advanced in the appeal to the Upper Tribunal is that the appellant should have adduced expert evidence to show that a divorce certificate issued by a Customary Court in Lagos "is effective under the law of" Nigeria for the purposes of Section 46(1). I do not accept that argument. First, as I have noted, it was never raised before the First-tier Tribunal and, secondly, I agree with Mr Neale's submission that, where no point is taken as to the authenticity of such a divorce document, it was open to the Tribunal to find that the Customary Court in Lagos was competent to determine the limits of its own jurisdiction. I have to say that I find it would be extraordinary if the Customary Court issued a divorce certificate which, on its face, appears to have no geographical limitation but which would, according to the Secretary of State's argument, be valid only within Lagos State and not Nigeria as a whole. The Tribunal was entitled to make its findings on the basis of the evidence before it; it was not required to reject a validly issued divorce decree simply because there was no expert evidence to show the geographical extent of its validity, an argument which was never even advanced before the Tribunal.

6. As Mr Neale explained, Ground 2 raises the same issues as Ground 1. The Secretary of State asserts that the Tribunal misapplied the relevant burden of proof at [26]:

> However we see no reason in the absence of evidence on the point. I find that this would make the order [pronouncing the appellant's divorce from Mrs Reena] invalid in Nigeria.

7. Ground 2 fails to give any context for the quotation at [26]. The Tribunal had been concerned with an apparent discrepancy between the appellant's evidence (that his wedding had taken place according to the rites of the Church of England) whereas the order had referred to the wedding having taken place "under native and custom law." First, it appears that the Tribunal itself raised this issue (rather than the

Presenting Officer). It was plainly open to the Tribunal to conclude that, notwithstanding the discrepancy, the order was valid in Nigeria. There is nothing in the decision of the Tribunal which indicates that it reversed the burden of proof in the manner asserted by the grounds.

8. Ground 3 asserts that the Tribunal made a material misdirection of law in respect of its application of Regulation 24(3) of the 2006 Regulations. To set the context of that challenge, I set out below the Tribunal's reasoning [47 – 53]:

The Respondent has raised a further argument in her skeleton argument based on Regulation 19(1A) of the 2006 Regulations which states:

> "A person is not entitled to be admitted to the United Kingdom by virtue of Regulation 11 if that person is subject to a deportation or exclusion order."

The Respondent contends that as the Appellant is subject to a deportation order he has no right to be admitted. This argument is misconceived. For the purposes of this provision "deportation order" must be understood in accordance with the definition in Regulation 2:

> "'Deportation order' means an order made pursuant to Regulation 24(3)."

In the present case the deportation order was not made under Regulation 24(3) but under the Immigration Rules and Section 3(5)(a) of the Immigration Act 1971. Regulation 19(1A) is therefore of no relevance.

For all these reasons we find that the Appellant has a derived right of residence in the UK and is entitled to be admitted without any additional documentation. His removal from the UK pursuant to the existing deportation order would breach his rights under the Community treaties and Exception 3 in Section 33(4) of the 2007 Act therefore applies. It follows that this is a situation in which, pursuant to Section 32(6) the Respondent may revoke the deportation order.

The manner in which the Respondent should deal with a situation such as the present is described in her published policy guidance:

> "If a person who benefits from the right of free movement under the EEA Regulations is deported under Section 3(5)(a) of the 1971 Act (conducive to the public good) … the decision is not comparable to public policy or public security considerations under the EEA Regulations. For example, if a person was deported before becoming an EEA national or family member of an EEA national.
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> Such deportation orders must be revoked. You must assess if the person can be excluded under the EEA Regulations."

It should be noted that the automatic deportation provisions in the 2007 Act lead to the making of a deportation order under Section 3(5)(a) of the 1971 Act and this policy is therefore applicable here. In view of our findings the Respondent's policy requires the revocation of the deportation order.

It remains open to the Respondent, at the same time as revoking the existing deportation order, to consider whether the Appellant should be excluded or deported under the 2006 Regulations. Although it appears from paragraph 81 of the Reasons for Refusal Letter, to which we have referred above, that the Respondent may not think there are grounds for exclusion or deportation under those Regulations, no express decision to that effect has apparently been made. It is not for us to make such a decision as that issue is not before us.

We consider that the appropriate course for us to take is to allow the appeal to the extent that the Respondent must apply her above policy on the basis of the facts as we have found them to be. Mr Neale concurred with this course.

In view of the above it is not necessary for us to consider or to make findings in respect of the Appellant's claim under Article 8. Immigration Act 1971 is capable of being an order made pursuant to Regulation 24(3) of the 2006 Regulations. The respondent submits that the Tribunal erred in law by failing to treat the deportation order as having been made pursuant to Regulation 24(3) or, in the alternative, by failing to give adequate reasons for treating the order as not made pursuant to that Regulation. Mr Neale submitted that Regulation 24(3) whilst specifying that a person to be deported under Regulation 19 should be treated *as if he were a person* to Section 35A of the 1971 Act applies does not indicate that any deportation order made under the 1971 Act is an order made "pursuant to" Regulation 24(3). Such an interpretation of the Regulations would deprive an individual of protection under Article 27 of Directive 24/38/EC which protects union citizens against expulsion except in circumstances laid down by that provision. When the deportation order was made in the present case (2012) the appellant was not a family member of an EEA national and had no rights deriving from the Treaties. However, the appellant has subsequently acquired such rights as a family member of an EEA national and the Directive would be infringed if the course of action ordered by the First-tier Tribunal (remittal to the respondent to make a lawful decision as regards revocation of the deportation order) was not followed.

9. I find I agree with Mr Neale's submission. Support for his argument is provided by the respondent's own Immigration Directorate Instructions (Chapter 7, Section 3, in particular at 7.4.3). The instructions deal, *inter alia*, with the

> case of a person ... previously deported on grounds other than public policy or public security at a time when he was neither an EEA national nor family member of an EEA national but has since required a right of admission and residence in the United Kingdom under EC law.

The Instructions go on to provide that

> persons who are subject to deportation orders 'on non-public policy or non-public security grounds ... should not be refused admission on the basis of this deportation order if they have subsequently acquired a right of admission and residence in the United Kingdom under EC law.

10. The argument now being advanced by the Secretary of State Ground 3 appears to be entirely at odds with her own guidance based on her own interpretation of the Regulations. Further support for Mr Neale's argument is provided by the Tribunal itself in the passage quoted above [49]. I find that Ground 3 is without merit and agree with Mr Neale that the Tribunal made the correct decision in this instance. The respondent cannot avoid looking at the matter again in the light of the appellant having acquired subsequent to the making of the deportation order the protection afforded to a family member of an EEA national.

11. In the circumstances, the Secretary of State's appeal is dismissed.

Notice of Decision

This appeal is dismissed

No anonymity direction is made.

Signed Date 11 November 2015

Upper Tribunal Judge Clive Lane