IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/03605/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th February 2016	**On 19th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ADEYEMI ODAMO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Clara Odamo
For the Respondent: Mr S Walker (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Ievins, promulgated on 24th March 2015 following a hearing at Taylor House on 6th March 2015. In the determination, the judge dismissed the appeal of Adeyemi Odamo, who subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant's Claim

2. The Appellant's claim is that, although in 2004 he was arrested and sentenced for various offences involving fraud in the UK, and then sentenced to two years' imprisonment, following which he was deported back to Nigeria on 20th November 2011, he had subsequently appealed that deportation, and his appeal reserved by Judge Symes at Hatton Cross under reference OA/08130/2012 on 11th February 2013. There was a considerable amount of evidence before Judge Symes. The judge heard evidence from the Appellant's spouse and Sponsor, Crystal Marie Kagbo (now Odamo).

3. The judge found her evidence to be credible and he allowed the appeal under paragraph 281 and 320 as well as paragraph 320(15) on the basis that this was a genuine and subsisting marriage relationship and that entry clearance should be granted to the Appellant to return back to the UK. The Appellant was now entitled to return to the UK.

4. When Judge Ievins heard this matter on 6th March 2015 he rightly described the appeal as having "An unfortunate history, not least that came before me as a 'floating case' ..." (paragraph 1). Judge Ievins observed how Judge Symes had weighed the Appellant's family history against the public interest in the continued exclusion of a person that committed crimes of dishonesty. The previous Appellant had noted that the risk of reoffending was low and the sentence was not at the highest end of the scale.

5. Judge Symes found that the proportionality balance tilted in the Appellant's favour and allowed the appeal under the Human Rights Convention. He observed (at paragraph 32) that,

> "Immigration Rule 391(b) provides for the continuation of a deportation order to be the normal course of events for ten years following the sentencing to the imprisonment which attracted deportation, unless such continuation would be contrary to the Human Rights Convention. As I have found this, the deportation order should be revoked".

6. The Respondent sought permission to appeal against Judge Symes' decision. This was on two grounds. First that the person who was the subject of a signed deportation order was required under paragraphs 390, 390A, and 391 to apply to the Secretary of State to seek to revoke the deportation order prior to making an application to return to the United Kingdom. This the Appellant had not done. Second, that Judge Symes had erred in law by failing to give adequate reasons as to why the Appellant's wife and child could not relocate to Nigeria instead.

7. Permission to appeal was granted by First-tier Tribunal Judge Juliet Grant-Hutchinson and the appeal came before a panel of the Upper Tribunal at Field House on 24th March 2013 and was heard by Upper Tribunal Judge Freeman and Deputy Upper Tribunal Judge Frances. The Appellant had met his wife while he was in the United Kingdom. They got married after his deportation in Nigeria on 5th January

2012. A child was conceived, a daughter [A] who was born in the United Kingdom on 12th September 2012.

8. The mother is a British citizen and that makes [A] a British citizen too. Before the child was born, however, the Appellant had already applied on 6th February 2012, for a visa to rejoin his wife. He had disclosed his convictions and the deportation order. Judge Freeman concluded that the Entry Clearance Officer should have treated that as an application to revoke the deportation order and should have dealt with that first before dealing with the visa application on its merits.

9. This was clear from paragraph 392 of the Immigration Rules which read:

> "The revocation of the deportation order does not entitle the person concerned to re-enter the United Kingdom; it renders him eligible to apply for permission under the Immigration Rules. An application for revocation of the order may be made to the Entry Clearance Officer or direct to the Home Office".

10. What the Entry Clearance Officer had instead done, however, was to consider the application and refuse it and the Tribunal concluded that the application to revoke the deportation order did not need to be made to the Secretary of State but needed to be dealt with either before an appeal against revocation could be heard, or a further visa application could be considered on its merits.

11. The Entry Clearance Officer had not done so. The Respondent had failed to field a Presenting Officer before Judge Symes. Judge Freeman referred to the case of **Latif [2012] UKUT** which confirmed that the revocation needed to be considered by the Entry Clearance Officer first.

12. On this basis, as Judge Ievins has most helpfully set out in his careful and comprehensive determination (see paragraphs 6 to 12) the Upper Tribunal proposed the following solution. This was that the Entry Clearance Officer in Nigeria was to treat the Appellant's visa application as an application under paragraph 392 for the deportation order against him to be revoked. If that succeeded then his application was to be treated as an application for a "husband visa". No further fee was to be charged. But when that application came to be considered the Entry Clearance Officer should apply paragraph 391 which requires ten years to lapse unless the continuation of the deportation order "Would be contrary to the Human Rights Convention" or there are "Other exceptional circumstances that mean the continuation is outweighed by compelling factors". The Upper Tribunal emphasised that the ten year bar to revocation of deportation orders and the Appellant's convictions were factors which had to be weighed against the birth of the child to his wife.

13. However, what then subsequently complicated matters was a letter from UKBA of 13th May 2013 and a minute from Silo Monekosso, of the Specialist Appeals Team at Angel Square of 3rd May 2013. Silo Monekosso accepted the Upper Tribunal's conclusions. He pointed out that that the Upper Tribunal had "Remitted the revocation decision back to the ECO". He concluded that the file should be sent back

to the Entry Clearance Officer in Lagos. Silo Monekosso also in his minute concluded that "The Appellant be granted entry clearance". A further letter from UKBA in Angel Square to an Entry Clearance Officer in Lagos on 15th May was to the effect that the Specialist Appeals Team were not challenging the Upper Tribunal's determination and that the ECO was asked if he "Could now act in accordance with any directions given by the Tribunal or, if none had been given, the spirit of the determination, and in the light of the applicant's present circumstances" (see paragraph 14 of Judge Ievins determination).

14. Further correspondence ensued between Ansah Solicitors and the Respondent. There was then the decision letter, which gives rise to the appeal in this case, namely, the refusal letter of 13th February 2014. In this decision letter, Mr Odamo's application to revoke his deportation order was refused under paragraphs 390 and 391 of the Immigration Rules. His immigration history is set out. It is observed that the application for revocation was to be considered in the light of all the circumstances, including the interests of the community including the maintenance of effective immigration control. The Secretary of State did have regard to the fact that he was married and that his wife was a British citizen and there was a child. The case law was properly referred to and that his best interests were considered.

15. The Appellant then gave Notice of Appeal. The Appellant refers to his family unit and family ties and the pain occasioned by his separation from his daughter. The child was not to be held responsible for the moral failings of her parents. There was a Case Management Review hearing a Taylor House before an unidentifiable judge on 8th August 2014. The Respondent was represented. The Appellant's wife was present. Standard directions were issued. The purpose was "To clarify the status of the Specialist Appeals Team minute dated 3rd May 2013 by 5pm 22nd August 2014 and to serve such clarification on the Sponsor ..." (see paragraph 20 of Judge Ievins' determination). There is a further Case Management Review on 22nd August 2014. This repeated the specific direction earlier given. The case was listed for a full hearing at Taylor House on 6th March 2015. Attempts were made to speed up the process. Nothing was heard from the Respondent it appears that the directions were not complied with by the Respondent.

16. Judge Ievins gave careful consideration to the oral evidence and submissions that he heard on 6th March. There was a quantity of documentary evidence that he heeded fully. There were statements from the Appellant's wife, Crystal Odamo, and his sister Clara Odamo. Judge Ievins records the progress of the matter before him on that day (see paragraphs 22 to 36). The appellant was represented by able Counsel, Miss Wass.

17. Miss Wass' submissions were that Tribunal Judge Symes had dealt with both aspects of the Appellant's case. He had dealt with the revocation. He had applied the relevant law at the time. He had considered the public interest at paragraph 31 of the determination. The points considered were no different now to what they were then. There was a low risk of reoffending. There was today further evidence that there were strong ties in 2013 which had been maintained. Miss Wass also referred to the

annex to a note of his true proceedings and said that the Entry Clearance Officer regarded himself as bound by the decision of the Specialist Appeals Team. The clarification sought from the Respondent Home Office had not been provided and,

> "The Appellant had found it difficult to prepare for the hearing without receiving clarification about the minute and without knowing what the Respondent conceded. The initial position of the First-tier Tribunal should be the starting point and the just outcome of the case required immediate revocation ..." (see paragraph 36 of the determination).

18. For his part, Judge Ievins did begin with the initial decision as a starting point by referring to the case of **Devaseelan** and making it clear that he was bound by Judge Symes' findings of fact when the case came before him on 11th February 2013.

19. Judge Ievins ultimately concluded that he could not see how he was bound by the remark in the memo of 3rd May 2013. He concluded that,

> "I simply do not know what the status or authority of Silo Monekosso might have. I appreciate that the Respondent has not, despite directions, clarified that minute but I consider that the First-tier Tribunal should act in accordance with the findings of the Upper Tribunal" (paragraph 38).

It is this which is the crux of the dispute in the appeal before this Tribunal now. The question here is now whether, given that the Specialist Appeals Team considered, by virtue of what Silo Monekosso had intimated, itself to be bound by the decision of Judge Symes that entry clearance should be granted. Or, whether it be the case, as Judge Freeman stated in the Upper Tribunal, that the proper course of action is for the Entry Clearance Officer to consider the application to revoke a deportation order. This had to be done before a decision could be made on whether to grant a spouse's entry clearance visa to the Appellant to join his wife, Crystal Marie Odamo.

20. Judge Ievins went on to consider the appeal against the decision made by the Secretary of State. Judge Ievins considered the fact that the Appellant had been deported following any connection to a criminal offence (see paragraph 41). He considered that the Appellant had a genuine and subsisting parental relationship with his daughter who is under 18 and who is a British citizen (paragraph 42). He considered the obligations upon him under Section 55 of the BCIA 2009 (paragraph 43). He gave regard to Section 117 of the 2002 Act. Finally, he followed the **Razgar** test (paragraph 46).

21. Judge Ievins ended by saying that the appeal turns upon whether the effect on the Appellant's genuine and subsisting relationship with his wife, and his child, would be unduly harsh if the deportation order was not revoked (see paragraph 47). He came to the finding that it would not be unduly harsh (paragraph 14) because [A] was conceived at a time when the deportation order was in existence and her mother and father both knew that and they took the risk so that their child was born. Judge Ievins did find both witnesses to be credible, truthful, and well meaning. He observed that they felt aggrieved that the Secretary of State should be bound by the remark of Silo Monekosso in his memo of 3rd May 2013 which had not been clarified

at all despite repeated requests by way of directions from the Tribunal. Nevertheless, Judge Ievins carried out a balancing exercise (paragraph 49). He concluded that the interference consequent upon the refusal to revoke the deportation order with the Appellant's right to respect for family and private life was not disproportionate given the legitimate aim of the Respondent in the deportation of foreign criminals (paragraph 49).

Grounds of Application

22. The grounds of application state that the proper interpretation of the Immigration Rules had been misconstrued an extent to which the revocation decision was relevant with respect to the memo from the Respondent direct to the ECO to grant entry clearance had not been properly evaluated by the judge leading him to the wrong decision.

23. On 3rd September 2015, a Rule 24 response was entered by the Secretary of State.

Submissions

24. At the hearing before me on 5th February 2016, the Appellant was represented by Ms Clara Odamo, the eldest sister of the Appellant, who indicated that the Tribunal had granted her permission to appear and to represent the Appellant. I see at the outset that Ms Clara Odamo has presented the case on behalf of the Appellant with considerable skill and dexterity and has left no stone unturned in favour of the Appellant. The Respondent, on the other hand, was represented by Mr Walker, who most helpfully at the outset indicated that he too was a member of the Specialist Appeals Team. He confirmed that it was not usual for an official to direct that entry clearance be granted.

25. Ms Clara Odamo directed my attention to the memo of 3rd May 2013. She pointed out that on 15th May 2013 the Specialist Appeals Team wrote to Lagos to say that they were not going to be appealing the decision of the court and that they should act in accordance with what Judge Symes had directed and issue an entry clearance certificate. She submitted that two notifications to the same effect could not be a mistake. The ECO wrote in May. She also brought to my attention an email addressed to the Appellant by the Lagos FCO office, which she submitted arose as a result of the Appellant pestering them to give him a decision, and this email, dated 13th May 2013, is from the Lagos office to say that "We are required to wait for a copy from the Appeals Authority in the UK to ensure that the Immigration Judge's decision is not being contested".

26. The indication here, submitted Ms Odamo, was plainly that everyone was planning to run with the decision of Judge Symes, but were only awaiting confirmation to that effect. It was only a year later that on 13th February 2014, the Home Office then wrote with a fresh decision to say that they would not be revoking the deportation order because it was not conducive to the public good to do so, since the Appellant had been found guilty of credit card fraud to the tune of around £17,000 going back to 2005.

27. Yet, as Ms Odamo skilfully submitted before me, there had been a number of attempts by the Tribunal to get clarification of the status of the minute from Mr Silo Monekosso, and there were CMRs on 8th August 2014, on 22nd August 2014 and 15th December 2014, and the Home Office had steadfastly refused to provide any clarification.

28. Mr Walker accepted that there had been attempts by the Tribunal (as confirmed at paragraph 12 of the determination) to seek clarification and none was provided by the Home Office. However, the Tribunal of UTJ Freeman and UTJ Frances had stated at paragraph 9 and at paragraph 5 on 20th April 2015 that the proper course of action was not to grant entry clearance, but for the Entry Clearance Officer to first consider revocation, and until that was done, one could not grant entry clearance certificate for a husband to join a wife in the UK.

29. I adjourned the matter for twenty minutes, requiring Mr Walker to take instructions on the fact that the Home Office had singularly failed to provide clarification, despite three attempts by the Tribunal to do so, in relation to the minute from Silo Monekosso, because after all, the understanding during this entire period was that entry clearance would now be granted on the basis of what Judge Symes had decided.

30. When the parties returned, twenty minutes later, Mr Walker stated that the letter of Silo Monekosso had to be read in its entirety. What he states in the middle paragraph is that the

> "Immigration Judge has correctly identified the burden and standard of proof required, and has found as a fact: the judge of the Upper Tier has allowed the appeal under the Immigration Rules and Article 8, however remitted the revocation decision back to the ECO. The judge of the Upper Tier has given adequate reasons for his findings".

31. The minute of 3rd May 2013 goes on to then say that, "I consider there is no material error of law disclosed by this determination and, therefore, no realistic prospect of securing permission to appeal". It finally ends with the statement that "The Appellant to be granted entry clearance". Mr Walker submitted that the middle paragraph was simply requiring the matter to be returned back to the ECO for a decision on whether or not to revoke the deportation order.

32. The letter of 15th May 2013 is to the same effect. There is no revocation decision that has been made at all. At paragraph 38 of the determination, Judge Ievins has said, "I consider that the First-tier Tribunal Judge should act in accordance with the findings of the Upper Tribunal". That was a correct direction that Judge Ievins made to himself. There is no error of law.

33. For her part, Ms Clara Odamo submitted that on the same minute of 3rd May 2013 Silo Monekosso also states that it is the "Immigration Judge" who has "Correctly identified the burden and standard of proof required". On the same minute it is said that "The Appellant to be granted entry clearance". On the same minute it is said

that "There is no material error of law disclosed by this determination". That is how this determination was to be treated by the Specialist Appeals Team. The Secretary of State did not appeal the decision. Yet, a year afterwards a new decision letter has been sent dated 13th February 2014. That states that there is to be no revocation of the deportation order. This does not make sense given that there were three CMR direction hearings where clarification was sought of that minute of 3rd May 2013 which has never been forthcoming. There is plainly an error of law.

No Error of Law

34. I am satisfied that the making of the decision by the judge did not involve the making of an error of law (see Section 12(1) of TCEA 2007) such that I should set aside that decision. This is notwithstanding Ms Clara Odamo's powerful submissions before me. The question is whether there is an error of law. The direction that Judge Ievins gave to himself at paragraph 38, is stating that what he had to do was to follow the decision of the Upper Tribunal, presided over by Judge Freeman, is entirely correct.

35. Judge Freeman's own determination, promulgated on 30th April 2013, was to the effect that Judge Symes had erred because he had

> "After a lengthy consideration, himself decided that the deportation order should be revoked; but, as the Rules and **Latif** make clear, that is something which had needed to be considered by the Entry Clearance Officer in the first place, before any appeal against the refusal to do so could be considered" (see paragraph 5).

36. I have, of course, considered whether the refusal to clarify the status of that minute of 3rd May 2013, despite repeated requests from the Tribunal, resulting even in a threat of wasted costs being made, amount to an abuse of power by the Secretary of State. This is not a simple case of delay resulting from a deliberate decision to defer consideration of the Appellant's application for entry clearance it is arguably tantamount to depriving him of the benefit of the minute of 3rd May 2015, which had resultant consequences in terms of other communications that then transpired in the light of that minute. At the very least, there should have been clarification of that minute. This is especially given that the Tribunal had repeatedly made requests to that effect.

37. The question, however, in relation to "abusive power", is whether there has been "conspicuous unfairness", a phrase that is "More naturally directed to the consequences of the acts or remission in question than the motives behind them" (see Moore-Bick LJ in **R (S) [2007] EWCA Civ 546**). Whether any particular act or decision meets the test of "conspicuous unfairness" is dependent on the particular facts of the case.

38. In this case, it was always open to the Respondent to make a decision whether or not to revoke the deportation order, before giving consideration to whether the Appellant should have entry clearance to enter as the spouse of his British citizen

settled wife in this country. That being so, I cannot conclude that there has been an abusive power such as to amount to an unlawful decision in the end.

Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity order is made.

Signed	Date
Deputy Upper Tribunal Judge Juss	13th February 2016