Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/ 06365/ 2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 June 2017	**On 20 September 2017**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

A---- O----
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Wells, Counsel instructed by M & K Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make this order because the welfare of children is a prominent in element in this case and they risk harm if their circumstances are known.
2. This is an appeal against a decision of the First-tier Tribunal dismissing the appellant's appeal against a decision of the Secretary of State on 26 February 2016 refusing him leave to remain on human rights grounds.
3. At the risk of over simplification and for the purposes of introduction only, the appellant is a foreign criminal who was sentenced to 30 months' imprisonment on 17 July 2014 at the Crown Court sitting at Luton for offences arising from his involvement in distributing false identity documents. The appellant is married

and has four children. The appellant's wife and eldest child are British citizens. The First-tier Tribunal Judge decided that, notwithstanding the special consideration that have to be given to the rights of children, the appeal against the decision should be dismissed.

4. The case was opened to me on the basis that there was a "narrow issue". Whilst it was accepted that the First-tier Tribunal Judge had identified as the main feature of the case concern about the health of the eldest child, these needs were particular and explained and considerable and, it was contended, were not considered properly in the decision and that therefore the decision was unsound.

5. It is necessary to consider the judge's decision with some care in order to set the criticism in context.

6. She began by considering the appellant's immigration history. It is his case that he entered the United Kingdom in 2001 using a false British passport. He returned to Nigeria in early 2004 and was then issued with a two year multivisit visa in Lagos and used that to enter the United Kingdom.

7. In March 2005 he came to the attention of the Home Office after being arrested for the receipt of counterfeit passports. He identified himself with a name that he does not now use and was served with illegal entry paperwork but given temporary leave to enter. He absconded.

8. In December 2006 he applied for a five year multivisit visa from Lagos in a different name. He was interviewed by an Entry Clearance Officer who discovered his true identity after taking a fingerprint check. The application was refused and an appeal against that decision was dismissed.

9. Nevertheless he managed to enter the United Kingdom and was encountered in March 2010 when he identified himself in his present name but claimed to be a national of South Africa and he supported that claim with a passport that was false. In March 2010 he was convicted at the Crown Court sitting at Luton of possessing a false instrument and was sentenced to six months' imprisonment.

10. In May 2010 he applied for leave to remain but the application was refused. His wife and children had been given discretionary leave.

11. In February 2014 he applied for further leave to remain as a dependent spouse. The application was rejected and he made a fresh application in April 2014.

12. In July 2014 he was convicted and sent to prison for 30 months. I say more about this conviction below.

13. He was warned of his liability for deportation and he returned a questionnaire on 26 September 2014. On 21 January 2015 representations were made by his solicitors.

14. In January 2015 his wife and three elder children were given three years' limited leave to remain and then in May 2016 his wife and eldest child were given British citizenship.

15. The judge then summarised the appellant's case. She noted that the appellant lived with his wife and their four children. There are three boys and one girl. They were aged 10, 8, 5 and 1 year when she made her decision.

16. At paragraph 19 of her decision she summarised the appellant's attitude to the offence. She said:

> "The appellant denies the offences for which he was convicted in 2014. He says he had no part in the carriage of the identity documents; he did not know that they were there. He says he has been unable to appeal the conviction. Nonetheless he was compliant with the prison sentence and probation. He has explained his use of false names and passports and says he admitted as much immediately. He is now contrite: he has owned up to the Home Office about how he came to the UK with a false British passport. Whilst in prison, he was visited by his wife regularly but his children did not come often because they became distressed by their father's absence from the home. He did not tell them he was in prison. His two elder children's behaviour deteriorated when he was in prison."

17. The judge then noted that there were particular concerns about the oldest child who I identify as "V". The child V is disabled. He has been diagnosed with Acute Cerebellar Ataxia. This condition is described and the consequences explained. Initially V needed a helmet to protect him from falls when he walked. He has needed and benefited from physiotherapy and speech therapy and his condition had stabilised so that he was able to attend a special school where he travelled, supervised, by bus. He has monthly medical appointments and is on medication. It was said that he enjoyed his school and has friends and attends a special needs club twice a week. Significantly the judge also noted that:

> "V can behave aggressively on occasions and, as he grows and becomes older, this is more difficult to manage. V is sometimes incontinent and this causes him embarrassment. On occasions, he becomes frustrated; this is part of his disability. This is managed by his parents."

18. It was noted as well that the appellant's wife has a heart condition for which she takes medication and she was taking a course in healthcare. The appellant cared for the children while she was undergoing her education.

19. The judge noted that the other children were doing well. One of the children became disruptive while his father was away.

20. The judge considered expressly the best interests of the children. She concluded, unremarkably, that it was in the best interests of the children that they lived with the appellant.

21. The judge considered particularly V's difficulties at paragraph 50. There she said:

> "V is disabled. The oral evidence of the appellant's mother is that V attends medical appointments about once a month for prescriptions of Bisprolol. This accords with the most recent view of these conditions by Cambridgeshire Community Services NHS Trust dated 29 January 2015. It notes that he is attending Richmond Hill School with transport facilities. His problems were then identified as improving acute cerebellar ataxia; learning difficulties; first seizure in December 2012, no blanks or seizures since; ventricular ectopics, no blank episodes; poor sleep; and enuresis. He is noted to be on Bisoprolol 2mgs daily which accords with his mother's oral evidence. Cardiology and metabolics investigations were normal. A muscle biopsy was planned but, given there is no reference in the evidence to an adverse outcome, I assume

> this was normal. The report refers to V's gait having improved significantly, such that he was able at that time to walk "long distances", jump, hop and to run fast without falling. He is described as having good sphincter control in daytime with occasional accidents. He has enuresis for which he was referred to a specialist clinic and was on a waiting list for alarms. He needed help with dressing and personal hygiene. As regards feeding, he was described as independent and able to finish meals without assistance. He was described as not being aware of danger. He was described as being healthy looking, speaking in short sentences and responsive; he had difficulties with comprehension of expression and with learning difficulties. His gait was stable, extremities were normal in tone and no contractures. He had fine motor co-ordination difficulties. He was to continue with follow-up appointments but no treatment was recommended save for his enuresis. The conclusion was that, at that time, V had special needs in personal care and was "fully independent with adult supervision". This evidence accords with the oral evidence of the appellant and his wife."

22. There were then uncontroversial findings about the health and educational attainments of the other children. The judge also noted at paragraph 54 that the "appellant's wife has cared for three of the children on her own during the appellant's absence and would have the benefit of family support in Nigeria."

23. The judge said at paragraph 57:

> "I have found that it is in the best interests of the children to live with and be brought up by both parents. Theirs is a cohesive family unit, interdependent and supportive; this is particularly so as regards the special needs of V and as a result of the "bad behaviour" of A. In both cases, the parents derive support from each other in dealing with these children and their learning and behaviour issues. The interdependency of the appellant and his children is such that it is in all of the children's interests that the appellant and the children live together."

24. The judge then set out the sentencing remarks of HH Judge Mensah who, if I may say so respectfully, is particularly experienced in the problems relating to immigration control.

25. Judge Mensah expressed withering condemnation of the seriousness of the offences describing the extent of the dishonesty as "breath-taking" and finding that the appellant was "involved in the thick of a fraud" and was not someone who had been duped. She commented adversely on the aggravating elements of the offence including his having had a previous conviction and was critical of his irresponsibility in committing the offences when he knew full well that his wife needed his support because of his son's condition. The judge then, unusually, commented on deportation and said:

> "I am also asked to consider deportation ... if it was the case that I had to make a recommendation or consider a recommendation, I would certainly make one in your case because it seems to me that you've taken advantage of the system, here, you've taken advantage of having a good position, a decent opportunity for employment; you've ignored the fact that you were once reprimanded by the court and have nevertheless gone on to commit further fraudulent offences ..."

26. There are two grounds of appeal. The first complains that the First-tier Tribunal Judge misdirected herself by treating the Immigration Rules as a complete code

which, it is said, is contrary to the decision of the Supreme Court in **Hesham Ali (Iraq) v SSHD [2016] UKSC 60**. The judge has lent herself to this criticism by stating expressly at paragraph 35 that the Rules are a complete code but, as Mr Wells very sensibly accepted, that is not itself a material error. What matters is whether the article 8 balancing exercise, taken as a whole, was conducted properly. Mr Wells deliberately addressed me only on ground 2 which complained that the judge had misdirected herself when she considered what was "unduly harsh" within the meaning of section 117C(5) of the Nationality, Immigration and Asylum Act 2002. If the judge's conclusion that deportation would not be "unduly harsh" then, on the facts of this case, I do not see how recognising that the rules are not a complete code could have made any difference.

27. The grounds recognise that the judge did have regard to the needs of the children and particularly the needs of the oldest child V. The complaint is that the judge did not have proper regard to the evidence that the problems in managing the child would increase as he got older. The point is made at paragraph 15 where the grounds state:

> "It is submitted that though the judge has been very detailed in her findings and consideration she has failed to take into account the increasing aggression of the eldest child borne out of frustration at his condition. It is this aspect of care for the eldest child alluded to in paragraph 20 which is not referred to in later paragraphs which complicates the task of raising the eldest child to provide him with the best opportunities as an adult. The Counsel for the appellant argued that deportation would be unduly harsh and disproportionate, in particular, because of the eldest child's disabilities."

28. It is said that this point was not considered by the judge and is of such importance that the decision is flawed.

29. Mr Wells drew to my attention parts of the evidence that were not considered in much detail by the judge in the Decision and Reasons. In particular there are parts of the appellant's wife's statement where she refers to the difficulties in caring for V. She comments on the difficulties in finding a babysitter because of V's demands and refers to evidence in independent reports about V's aggressive behaviour. It is the appellant's wife's evidence that she is only managing to pursue her further education course because of her husband's support and she needs that support. Further although the concern over A's misbehaviour is not of the same magnitude as is the concern over V, A's behaviour did cause concern.

30. It was Mr Wells' submission, all the more powerful for being brief, that although the judge has in many ways conducted a very thorough balancing exercise it is not clear from the Decision that she has appreciated just how much the family depend on the appellant's presence and how much harm will be done by his being removed. The care and support that he provides is necessary and if it does not come from him it will have to come from elsewhere.

31. Mr Kotas pointed out that the judge did clearly have in mind some of the problems because she addressed them expressly. For example, she referred to the mother having to cope while the appellant was in prison.

32. However such findings are not a complete answer to the criticism because there are now four children and V in particular is making big demands.

33. The judge also referred to there being social and financial support for the family in the United Kingdom. This appears to be a reference both to formal support from state agencies and state funding and also informal support from the church community to which the appellant and his family belong.

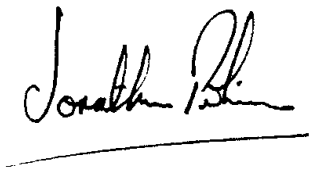
34. With the benefit of hindsight this decision would have been better if the judge had said more than she did about how the family would manage. I am not persuaded that this counsel of perfection has revealed a material error of law. It is absolutely plain that the judge had at the front of her mind the considerable difficulties that exist in this family because of the ill health of the older child but that was never considered to be the only difficulty. The judge clearly had in mind that professional help and community help has been provided and can be provided again and concluded unequivocally in paragraph 78 that "it would not be unduly harsh for V and A to remain in the UK without the appellant or leave with the appellant and live with the family unit in Nigeria."

35. Of course it is not the Secretary of State's case that the British citizen family should leave.

36. The judge also had in mind the reasons for deportation in this case and particularly the very clear steer given by HH Judge Mensah. To the extent that the public interest in removal is a varying interest it is particularly high in this case. The appellant's offences have been directed towards the system of immigration control. That is a very poor basis for saying he should be given favoured treatment when his deportation is considered.

37. Nobody with a crumb of human decency could not avoid feeling considerable sympathy for the appellant's wife and children. The appellant's many personal deficiencies do not stop him being a useful father figure and a supportive husband when he is at liberty. Deportation is a savage sanction with long lasting disruptive consequences not only on the person being deported but on those who love him and benefit from his presence. Parliament anticipates this. These difficulties can in some circumstances be avoided when they would be "unduly harsh". It is the necessary implication of this phrase that some harshness is due and the judge found that it is due here.

38. This judge did not err and I dismiss the appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 20 September 2017