



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/11584/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 15 November 2017**

**Decision & Reasons
Promulgated
On 18 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**DAYO [O]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Garrod of Counsel, instructed by Pride Solicitors
For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Khan promulgated on 28 February 2017.
2. The Appellant is a citizen of Nigeria born on [] 1975. He has appealed against a decision of the Respondent dated 17 November 2015 refusing him leave to remain. Such decision was considered to be a decision on a human rights claim attracting a right of appeal on human rights grounds.
3. I am grateful to both representatives before me today for the helpful manner with which the case has been dealt, and the indication that there

is common ground as to its disposal. In such circumstances I do not propose to rehearse the Appellant's immigration history or the history of his human rights claim in any particular detail. Suffice to say that his case focused on his relationship with his two children, presently aged 11 and 9.

4. The Respondent's decision as indicated in the 'reasons for refusal' letter ('RFRL') of 17 November 2015 was in significant part premised on the lack of status of the children and their mother in the United Kingdom: see for example and in particular paragraph 18 of the RFRL.
5. Before the First-tier Tribunal Judge the Appellant gave evidence to the effect that he assumed that his wife had now been given some type of status on the basis of the circumstances of the children, but he acknowledged that he did not know if that was correct: see paragraph 19. He had asked his daughter about the matter in 2014, and whether or not she had been given a passport; she had told him that her mother had not said anything. He thought, however, that in 2015 his daughter had told him that she had gone for "*a biometric*" (paragraph 19).
6. The First-tier Tribunal Judge was not prepared to accept on the basis of this evidence that the Appellant's children or their mother had secured any sort of status in the United Kingdom. Notwithstanding, it is recorded that Counsel had made submissions to the effect that the Appellant's daughter had been in the United Kingdom for more than ten years and would be eligible for registration as a British citizen. At paragraphs 25 and 26 the Judge considered that the Appellant had been an evasive witness and found that he had "*simply not tried to find out about his wife and children's immigration status or perhaps he is aware of it and does not wish to disclose it in evidence*". Indeed, the Judge went further and at paragraph 30 opined that it was his "*strong instinct*" that any application made by the children and their mother had been refused.
7. Be that as it may, at paragraph 30 the Judge in any event identified that it was for the Appellant to prove his case in this regard, and stated there was no evidence before him as to the wife and children's immigration status. (In context - bearing in mind that the Judge had already set out in his Decision the Appellant's oral testimony in this regard - I take this to mean that the Judge meant that there was no supporting documentary evidence.) At paragraph 32 the Judge again refers to there being a lack of evidence as to the children's status, and comments that he "*can only make a decision on the evidence before [him]*".
8. In such circumstances the appeal of the Appellant was dismissed by Judge Khan.

9. Permission to appeal was sought, and granted by First-tier Tribunal Judge Kelly on 12 September 2017. The grant of permission - and indeed the grounds upon which permission was sought - focused on the issue of the status of the children.

10. The Respondent has filed a Rule 24 response dated 28 September 2017. It states in material part:

“The respondent does not oppose the appellant’s application for permission to appeal, a review of the CID database reveals that the appellant’s eldest child was naturalised as a British citizen on 18 October 2016, and that her mother and brother have limited leave to remain in the UK.

The Tribunal is invited to remit the matter to the First-tier Tribunal for a hearing de novo.”

11. 18 October 2016 is, of course, a date that post-dates the Respondent’s decision of 17 November 2015 but pre-dates the hearing before Judge Khan on 2 February 2017.

12. Ms Willocks-Briscoe confirmed that the Respondent’s position was indeed as set out in the Rule 24 response. She acknowledged that the Respondent conceded that an error of law had been made insofar as the First-tier Tribunal Judge had proceeded on a mistake of fact so fundamental that it constituted a material error. In those circumstances I am content to accept that there was such an error and that the appeal should be dealt with by way of setting aside the decision of Judge Khan with a view to the decision in the appeal being remade before the First-tier Tribunal by a different Judge with all issues at large.

13. In this context, bearing in mind the chronology referred to above, it follows that the RFRL of 17 November 2015 has been overtaken by events. The reasons advanced in the RFRL are themselves now wrongly premised, albeit they might have been applicable at the time the letter was written.

14. In those circumstances the Respondent should now give consideration to the Appellant’s case in light of the acknowledged fact of the status of his children and their mother. In doing so the Respondent will no doubt wish to have regard to the evidence that has been filed in these proceedings in respect of the contact that the Appellant says that he enjoys with his children.

15. In the event that the Respondent wishes to maintain the decision to refuse the Appellant leave to remain, new reasons will have to be offered to replace the now redundant reasons in the RFRL: this will enable the Appellant, and the Tribunal in turn, to understand the basis of any outstanding issues on the part of the Respondent. Any such new reasons should be filed and served with the First-tier Tribunal as far in advance of the resumed hearing as possible, and in any event within fourteen days of the new hearing.
16. In the event that the Respondent reaches a favourable reconsideration of the Appellant's application in light of the new information regarding the status of his children the parties should inform the Tribunal so that the hearing date may be vacated.

Notice of Decision & Directions

17. The decision of the First-tier Tribunal contained a material error of law and is set aside.
18. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge M A Khan.
19. Further to paragraph 18, the Respondent is to provide a written statement of any reasons for maintaining her decision of 17 November 2015 in light of the newly acknowledged statuses of the Appellant's former partner and their children. (See further paragraph 15 above.)
20. The Appellant is to file and serve any further evidence upon which he wishes to rely whether in response to further reasons from the Respondent or generally, at least 7 days before the hearing before the First-tier Tribunal.
21. No anonymity direction is sought or made.

The above represent a corrected transcript of ex tempore reasons given at the conclusion of the hearing

Signed:

Date: 15 December 2017

Deputy Upper Tribunal Judge I A Lewis