Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/25351/2015**

HU/23912/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 14 December 2017	**on 22 December 2017**

Before

THE HONOURABLE LADY RAE, SITTING AS AN UPPER TRIBUNAL JUDGE,
UPPER TRIBUNAL JUDGE BLUM

Between

SA
YA
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E. Waheed, Counsel, instructed by Dylan Conrad Kreolle
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Metzer (FtJ), promulgated on 5 December 2016, dismissing the appellant's joined appeals against the respondent's decision dated 7 July 2015 to revoke his EEA Permanent Residence card, and the

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respondent's decision dated 28 January 2016 refusing his human rights claim.

Factual Background

2. The appellant is a national of Nigeria, date of birth 25 March 1972. He arrived in the United Kingdom, unlawfully, in either 2000 or 2001. He married a French national on 6 January 2004 and applied for an EEA residents card as her spouse. This was refused in the same year. On 11 November 2011 the appellant applied once again for an EEA residents card, this time on the basis that he retained a right of residence following the termination of his marriage to the EEA national. This application was refused, but his appeal was allowed on 27 April 2012 and the appellant was issued with a permanent residence card.

3. The appellant's partner is YA, who is also a Nigerian national. On 26 March 2013 she was arrested on suspicion of overstaying and in respect of offences relating to the possession of a false document. A search of her residence uncovered documents indicating that she and the appellant had been married long before he married the French national. They have 5 children, born in 2004, 2006, 2008, 2010, and 2013. At least 2 of these children are British citizens.

4. On 30 March 2015, the appellant was convicted of bigamy, of using a false instrument with intent, and of seeking to obtain the avoidance/postponement/revocation of immigration enforcement action. He received two concurrent sentences of 12 months imprisonment, and a further concurrent sentence of 6 months imprisonment. YA was also found guilty of offences including bigamy.

5. In light of the appellant's convictions the respondent concluded (echoing the view of the sentencing judge) that his marriage to the French national was a sham and revoked his permanent residence card. This decision carried a right of appeal which the appellant exercised. Meanwhile, the respondent considered that the appellant fell within the automatic deportation provisions of UK Borders Act 2007 and a deportation order was made. Following representations made on the appellant's behalf the respondent also refused his human rights claim. This latter decision attracted a right of appeal which was duly exercised. Both appeals were joined and considered by the FtJ at a hearing on 9 November 2016.

The decision of the First-tier Tribunal

6. At the outset of his decision the FtJ stated that the appellant did not seek to appeal the decision revoking his residence card made on 7 July 2015. This may have been based on submissions made at the

hearing as we cannot locate any document in which the appellant withdrawals his appeal against the 7 July 2015 decision.

7. The judge heard evidence from both the appellant and his partner, and considered a bundle of documents running to 272 pages. Included in this bundle were birth certificates and registration certificates relating to the children, letters from the children, photographs of the appellant and his children, a Hertfordshire County Council 'Child and Family Assessment' dated 14 September 2016, a further letter from Hertfordshire Children's Services and completed 'Child and Family Assessment', dated 19 October 2016 (indicating that there were no safeguarding concerns for the children), and documents detailing the children's involvement in football teams.

8. At paragraph 24 of his decision the FtJ noted that the appellant had 5 children (although he wrongly stated that they were all British citizens), and that it was necessary to consider their welfare pursuant to s.55 of the Borders, Citizenship and Immigration Act 2009. The FtJ made brief reference to the Hertfordshire County Council assessment, which referred to potential breaches of article 8 if the children who removed to Nigeria or separated from their parents. The FtJ observed however that there was no question of the children being removed or separated from their mother. The FtJ then stated, "… *in the circumstances, although section 55 is of significance, it is necessary to consider all the other relevant features*." The judge observed that neither the appellant nor his partner appeared to accept their convictions, and that there was no evidence relating to the appellant's business or church or community involvement. The judge noted that the children were doing well in relation to their sporting activities and was satisfied that this would continue even if he was not present.

9. Based on a concession from the appellants' representative the FtJ was satisfied that the 2012 EEA appeal would not have been allowed if the true position was known, and concluded that the appellant had never been lawfully resident in the UK. In paragraph 26 the FtJ noted the serious nature of the conviction, the respondent's legitimate interest in immigration control, and commented that the extent of the appellant's assistance with his children appeared to be his involvement in fearing them to "*sporting activities, school and the like*." The FtJ indicated that he took into account s.117C of the Nationality, Immigration and Asylum Act 2002, and paragraph 399 of the immigration rules, and concluded that there were no "exceptional circumstances" to outweigh the public interest in deportation. The appeal was dismissed.

The grounds of appeal and the error of law hearing

10. The grounds, which adopted a scattergun approach, criticised, *inter alia*, the judge's approach to the appellant's children and contended

that the judge had not considered whether his removal would be unduly harsh on the children.

11. In granting permission Upper Tribunal Judge O'Connor stated,

> The appellant is entitled to a decision from which he can understand why has lost his appeal. It is arguable that the FtT's decision is so deficient in its reasoning that it does not fulfil this function. Although the FtT identifies that it has 'taken into account section 117C of the 2002 Act' it is further arguable that it fails to lawfully engage with section 117C(5) and/or provide lawfully adequate reasons in relation thereto. Although not pleaded, the same can be said of the FtT's consideration, or lack of consideration, of paragraph 399(a) of the Rules.

12. We heard brief submissions from Mr Waheed and Mr Jarvis. Although recognising that it was not a model decision, Mr Jarvis submitted that the FtJ nevertheless applied the 'unduly harsh' test, that he was entitled to take account of the appellant's particularly poor immigration history, and, while he accepted that there was no detailed assessment of the children's evidence, even taking the case at its highest the public interest factors were sufficient to outweigh the best interests of the children.

13. We indicated our satisfaction that the FtJ had materially erred in law by failing to identify the best interests of the children, by failing to consider the evidence provided by the children, and by failing to adequately determine whether the impact on the children would be unduly harsh.

Discussion

14. In a human rights appeal involving 5 children, at least two of whom are British and 3 of whom have resided in the UK for 7 years or more, the FtJ has given surprisingly little consideration to the position of and evidence relating to the children. The FtJ made no reference to the ages of the children or their length of residence. No reference has been made to the letters written by the children. The FtJ made a single reference to the Hertfordshire County Council 'Child and Family Assessment' and failed to engage with any of the observations contained in the assessment. Although referring to the duty to consider the best interests of the children under s.55, nowhere in his decision does the FtJ actually identify the best interests of the children. At paragraph 24 he merely notes that, although section 55 is of significance, it is necessary to consider other relevant features. Having then noted that the appellant and his partner still deny any wrongdoing in respect of their convictions, and the absence of any evidence of the appellant's business or his involvement with the church, the FtJ observes that the children were "*doing well in relation to their sporting activities*" and found that even if the appellant was not present they would be able to continue to do so. With respect, the

best interests of the children extended far beyond their ability to engage in sporting activities.

15. At paragraph 26 the FtJ states that the extent of the appellant's assistance with his children appears to be his involvement in ferrying them to sporting activities and school. This is inconsistent with the respondent's acceptance that the appellant enjoys a genuine and subsisting parental relationship with his children. In her decision refusing the human rights claim the respondent notes that a parental relationship requires "*a significant and meaningful positive involvement in a child's life with a significant degree of responsibility for the child welfare*." It was accepted by the respondent that the appellant enjoyed such a relationship with his children. There has been no engagement by the FtJ with the evidence relating to the emotional bond between the appellant and his children, and no satisfactory assessment of the impact on the children if separated from their father.

16. Nowhere in the decision does the FtJ refer to Exception 2 contained in s.117C(5). There is no mention of the 'unduly harsh' test in respect of the children, and no satisfactory attempt is made to determine whether the impact on the children would be unduly harsh.

17. For these reasons, we are satisfied that the decision is unsustainable. Given that there has been no meaningful assessment of the appellant's relationship with his children or the impact of his deportation on those children, it is appropriate for this matter to be remitted back to the First-tier Tribunal for a full rehearing before a judge other than Judge Metzer.

Notice of Decision

The First-tier Tribunal decision is vitiated by material errors of law. The matter is remitted to the First-tier Tribunal for a fresh (de novo) hearing, to be heard by a judge other than Judge of the First-tier Tribunal Metzer.

Signed

Upper Tribunal Judge Blum Date 21 December 2017

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Upper Tribunal Judge Blum Date 21 December 2017