Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11305/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 March 2018	**On 27 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

I B A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Brown of Counsel
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 24 January 1981. He appealed to the First-tier Tribunal against the decision of the respondent to refuse the appellant's application for settlement, as the spouse of a settled person, on the basis that the appellant had failed to disclose a drug trafficking conviction (in Finland) in 2004 and that the respondent was not satisfied the appellant met the maintenance requirements, had been

residing in the UK for at least twenty years, or that there were very significant obstacles to integration in Nigeria.

2. The appellant's appeal to the First-tier Tribunal was dismissed in a decision promulgated on 5 October 2017 by Judge of the First-tier Tribunal Baldwin.

3. The appellant appeals, with permission from the Upper Tribunal, on the following grounds:

   (a) The conclusion in relation to proportionality and unreasonableness not open to the First-tier Tribunal Judge;

   (b) Misdirection in law in respect of the discretionary nature of paragraphs S-LTR.2.1. and 2.2. of Appendix FM;

   (c) Misdirection of law in respect of Section 117B of the 2002 Act;

   (d) Unlawful best interests assessment;

   (e) Failure to take into account relevant evidence/misstatement of evidence in relation to whether the appellant and his wife could obtain a mortgage.

Error of Law Discussion

Ground 1

1. Ms Brown relied on both the grounds before the First-tier Tribunal and the Upper Tribunal. Ms Fijiwala confirmed that in the refusal letter the respondent had accepted that the appellant had a qualifying relationship under EX.1. and therefore met the requirements of R-LTRP.1.1.(d)(iii) in relation to the decision under the ten year partner route. However, ultimately the application under the ten year partner route was dismissed as it was not accepted that the appellant met the requirements of paragraphs S-LTR2.2. of Appendix FM which are as follows:

   "Section S-LTR: Suitability-leave to remain

   ...

   S-LTR.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2. to 2.4. apply.

   S-LTR.2.2. Whether or not to the applicant's knowledge –

   (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

   (b) there has been a failure to disclose material facts in relation to the application".

2. Ms Brown argued that the judge erred in stating, as he did at [25], that it would neither be disproportionate or unreasonable to expect the appellant

to return to Nigeria without specific reference to R-LTRP or EX.1. of Appendix FM, when in effect the respondent had accepted that there were insurmountable obstacles to family life with the appellant's partner outside the UK. As I indicated at the hearing the finding at [25] related to the judge's findings outside of the Immigration Rules and indeed the judge set out at [13] and following, the relevant law in relation to Article 8 under the Immigration Rules and Article 8 outside the Rules.

3. At [14] the Tribunal confirmed that the relevant Immigration Rules included S-LTR.2.2.(b). The Tribunal found at [23] that the appellant did dishonestly make a false assertion in his application and that it related to a serious conviction. In addition the Tribunal referred to this issue throughout the decision, including at [25], where the Tribunal found that the case for returning the appellant was strong and the judge took into consideration that the appellant:

> "... may still not have learned that making untrue assertions in an Immigration Application or any other formal document is not acceptable just because it might help family members and that making false assertions can have very far-reaching consequences."

4. This related to the fact that the appellant had gone on to make a further false assertion in registering his daughter's birth on 16 February 2017 (as set out by the First-tier Tribunal at [23]) in asserting that he was a "trader-importer and exporter" which he admitted was false. The Tribunal further noted, at [25] that the conviction and sentence were clearly suggestive of a serious type of offending and both remain undisturbed, although the judge also noted that the conviction was now eleven years old (in the context of the Tribunal's consideration of Article 8). None of those findings of fact were specifically challenged. The Tribunal went on to conclude, at [26], that the respondent had discharged the burden of proof in relation to the assertions concerning the appellant's false and dishonest assertion and "that the reasons given by the respondent do justify the refusal".

5. I am satisfied therefore that the challenge in ground 1 is misconceived. The First-tier Tribunal was fully aware of the issues in dispute and gave adequate reasons for the decisions reached in relation to those issues. The Tribunal was satisfied that the appeal under the Immigration Rules fell to be dismissed on suitability grounds and that secondly the appellant's appeal did not succeed under Article 8 outside of the Immigration Rules. No error of law is disclosed in ground 1.

Ground 2

6. This is not unrelated to ground 1 and concerns the alleged misdirection in relation to the discretionary nature of paragraphs S-LTR.2.1. and 2.2. as set out above, in that such applications will only "normally be refused" on grounds of suitability. **Muhandiramge (section S-LTR.1.7) [2015] UKUT 00675 (IAC)** confirmed that with regard to S-LTR.2.2. of Appendix FM there is a discretion as to whether the application should be refused.

7. As already noted the Tribunal directed itself, at [14], which Immigration Rules were relevant. I am satisfied that the closely reasoned decision indicates the correct test was applied. This is highlighted by the wording of the Tribunal's conclusion and in the notice of decision at [26] where first of all the Tribunal found (at [21] to [23]) that the respondent had discharged the burden of proof in relation to the assertion concerning the appellant's false and dishonest assertion (and such is not disputed). The Tribunal went on to conclude that "the reasons given by the respondent do justify the refusal". It is evident therefore that the Tribunal had in mind the discretionary nature of the refusal and that the First-tier Tribunal Judge was satisfied that, including taking into account the nature of the conviction and all of the appellant's conduct including his further false assertion in relation to his daughter's birth certificate, together with the positive factors in his favour, that it remained appropriate that the discretion was properly exercised to refuse the application.

8. In doing so the Tribunal took into consideration all of the evidence including the evidence in support of the appellant including from his wife, a vicar, a councillor and his mother-in-law who all think highly of him. There was no error in that approach and no material error disclosed in ground 2.

Grounds 3 and 4

9. It was argued by Ms Brown that the Tribunal misdirected itself and failed to give effect to the ruling in **MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705** which is the authority for the proposition that where there is a qualifying child this will be a "factor of some weight leaning in favour of leave to remain being granted" (paragraph [45] of **MA**). It was submitted that there was insufficient evidence to show that the best interests of the children were outweighed by the appellant's thirteen year old conviction and him falsely entering his occupation on the child's birth certificate.

10. Ms Brown relied on the evidence that was before the Tribunal. including from a Labour councillor, from the appellant's mother-in-law and from the vicar in support of the application for leave to remain. Although Ms Brown submitted that these were not properly taken into account in the context that they were considered by the First-tier Tribunal, I do not accept that submission, including as the judge's consideration of that evidence, at [23], discloses that he had in mind all the relevant evidence including the evidence that was fully in support of the appellant remaining in the UK.

11. Grounds 3 and 4 are interlinked and Ms Brown relied on the appellant's witness statement and that of his wife before the First-tier Tribunal in relation to their concern about the effect on their children including that the appellant's wife stated that it would "devastate our family completely".

12. The Tribunal set out the evidence, summarised at [9] to [12] of the Decision and Reasons, including the written and oral evidence, and indeed recorded at [11] that the appellant's wife "told me somewhat tearfully that it would tear the family and everything they had achieved apart". The Tribunal was fully aware of all the factors and reached the reasoned conclusion, at [24], that the children's best interests would probably lie in the appellant being allowed to remain in the UK. However, the First-tier Tribunal Judge quite properly went on to direct himself that these best interests are not a "Trump Card". There is no error, for the reasons, the First-tier Tribunal gave, in finding that "the case for requiring him to return is strong" and this was a case where it was envisaged that the children would remain in the UK. Ms Fijiwala relied on the respondent's guidance in relation to the effect of the appellant's removal on the child with reference to the child's best interests

13. Ms Brown relied on pages 76 and 77 of the respondent's guidance in relation to where the child is a British citizen and that it would not be reasonable to expect them to leave the UK. Accordingly where this means that the child would have to leave the UK because in practice the child will not, or is likely not to continue to live in the UK with another parent, EX.1. (a) is likely to apply. The guidance goes on to state that:-

> "In particular circumstances it may be appropriate to refuse to grant leave where the conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative carer who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances of this position include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules".

14. It was Ms Brown's submission that the appellant's behaviour did not fall within the given examples given the age of his Finnish conviction and the relatively minor nature of his additional false declaration. However, the First-tier Tribunal reached well-reasoned conclusions. The Tribunal took into consideration that the appellant had failed to disclose a serious conviction of drug trafficking in 2006, where he was sentenced to four years' imprisonment. In setting out the types of behaviour which might exclude a grant of leave in the respondent's guidance the examples given are not exhaustive and it was open to the Tribunal to conclude, for the reasons it did, that the appellant's behaviour outweighed the best interests of the children and that it was not disputed that the children would remain in the UK with their mother.

Ground 5

15. I am not satisfied that any alleged error in the Tribunal's interpretation of whether or not the appellant and his wife would obtain a mortgage was a material error. The Tribunal considered this issue in the context of the best interest assessment, which conclude, in the appellant's favour, that it was in the children's best interests for the appellant to remain. Therefore it is difficult to see how any claimed misinterpretation would have made a material difference to that or the Tribunal's ultimate conclusions.

16. The decision of the First-tier Tribunal does not disclose an error of law and shall stand.

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

Unless and until a Tribunal or court directs otherwise, the Appellant 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 Date: 23 March 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and therefore there can be no fee award.

Signed Date: 23 March 2018

Deputy Upper Tribunal Judge Hutchinson