



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03896/2017

THE IMMIGRATION ACTS

Heard at Field House
On 22 and 31 May 2018

Decision & Reasons Promulgated
On 20 June 2018

Before

**LORD UIST (SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**TOKUNBOH RICHARD AJAYI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer

For the Respondent: Mr L. Youssefian, Counsel, instructed by IMK Solicitors

NOTICE OF ADJOURNMENT AND DIRECTIONS

1. The respondent (hereafter "the claimant") is a citizen of Nigeria born on 12 June 1977.
2. The appellant (hereafter "the Secretary of State") is appealing against the decision of First-tier Tribunal Judge Nicholls promulgated on 1 February 2018 to allow the claimant's appeal against the decision of the Secretary of State dated 30 March 2017 to refuse his protection and human rights claim. The appeal was allowed on human rights grounds (under Article 8 ECHR) and it is only this aspect of the decision that is

before us as a cross-appeal was not made by the claimant against the decision to refuse his protection claim.

Immigration and Criminal History

3. It is unknown when the claimant first entered the UK although he claims it was January 2006.
4. The claimant first came to the attention of the immigration authorities in April 2007, when he was arrested attempting to open a bank account using a false Nigerian passport in the name of Siad Lawal. On 13 July 2007 the claimant (still using the name Siad Lawal) was convicted and sentenced to 6 months imprisonment. The judge recommended that he should be deported.
5. On 25 July 2007, the claimant was notified of a decision to make a deportation order against him. The decision was addressed to Said Lawal (date of birth 10 November 1975). (It is unclear why the claimant was referred to as "Said" and not "Siad"). The claimant appealed and his appeal was dismissed on 28 December 2007.
6. On 12 October 2007, the claimant applied for asylum (using the name Said Lawal), claiming to be at risk in Nigeria because of the repercussions he would face as a consequence of refusing to become the chief of his village and because of money owed to a creditor who had threatened to kill him. On 14 February 2008 the claim was refused by the Secretary of State and the claimant did not appeal.
7. In January 2008 the claimant absconded and was listed as an immigration absconder on 28 January 2008.
8. On 15 February 2010 the claimant applied for an EEA residence card as an extended family member of an EEA national. This application was made using the name Tokunboh Ajayi (date of birth 12 June 1977), which is the name and date of birth that has been used in the present appeal (but which does not appear to have been used by the claimant in his applications and appeals prior to absconding in January 2008). The application was refused on 13 August 2010.
9. A further application for an EEA residence card was made on 5 November 2010 (again using the name Tokunboh Ajayi). This was successful and the claimant was issued with an EEA residence card on 22 February 2011, valid until 22 February 2016.
10. On 17 February 2016, the claimant applied for a permanent residence card under the EEA regulations. This was rejected on 16 March 2016. A further application was then made, which was refused on 10 October 2016.
11. On 16 January 2017 a deportation order was made against the claimant pursuant to the court's recommendation for deportation in 2007 and the claimant was detained.
12. On 31 January 2017 the claimant made a further protection and human rights claim. The claim was refused by the Secretary of State on 30 March 2017.

Family History

13. The claimant has two children living in the UK, born on 1 January 2010 and 7 March 2011. They are not British citizens. They have limited leave to remain in the UK, along with their mother, until 5 October 2019. The claimant is not in a relationship with the mother of the children.
14. In June 2014 a child arrangement order was made. This gave the claimant equal entitlement to the children as their mother and directed that the consent of both parents, or a Court order, would be required before the children could be taken out of the UK. The unchallenged finding of the First-tier Tribunal is that the children live with the claimant on weekends and that he is involved in their lives, making a “substantial contribution to their everyday lives and to their general development, such as assistance with homework.”

Decision of the First-tier Tribunal

15. The claimant argued before the First-tier Tribunal that he was entitled to asylum on the basis that he would be at risk on return to Nigeria because of his sexuality (he claims to be bisexual) and because he refused to accept the chieftaincy of his tribal community. The judge did not accept the credibility of either of the claims. At paragraph 25 the judge stated that the claimant had lied extensively about his personal details.
16. The claimant also argued that deporting him to Nigeria would be unlawful under section 6 of the Human Rights Act 1998 as it would result in a disproportionate interference with his family life with his children. The judge allowed the appeal on this basis.
17. The judge firstly considered the best interests of the claimant’s children and found that it would be in their best interests for the existing arrangements to continue. He stated at paragraph 35 that the disruption to their family life as a consequence of the claimant being deported would be “very harmful to their best interests”. The judge also found that removing the claimant would be detrimental to the children’s mother as “the burden of care would entirely fall” on her.
18. The judge then considered the weight that should be given to the public interest in the claimant’s deportation. At paragraph 36, he stated:

*A balance must, therefore, be struck between the public interest in the deportation of foreign criminals and the private and family life factors which I have identified. As I have indicated, the offence which the appellant committed was now well over 10 years ago, the sentence of imprisonment was only six months and that sentence is below the durations mentioned in paragraph 398 of the Immigration Rules. The reasons for decision letter in respect of this appeal does not set out factors which demonstrate that the deportation of the appellant continues to be conducive to the public good. **I find that he has not committed any criminal offence since 2007 and that his general character and conduct do not disclose factors which add weight to the public interest.** I recognise that there is a very considerable weight to be given to the public interest in the deportation of foreign criminals (Emphasis added).*

19. The judge concluded that the best interests of the claimant's children outweighed the public interest in his deportation and on that basis allowed the appeal under Article 8 ECHR.

New Evidence and Grounds

20. From our initial review of Judge Nicholl's decision, it appeared to us that there is an incongruity between the recommendation to deport the claimant in 2007 and the decision of the Secretary of State in 2011 to exercise her discretion in the claimant's favour and issue him with an EEA residence card as an extended family member of an EEA national.
21. At the hearing on 22 May 2018, we asked Mr Duffy and Mr Youssefian to address us on this point.
22. Mr Duffy stated that he thought it likely that the residence card was granted in 2011 because the Secretary of State did not recognise that the claimant was the same person who had been recommended for deportation. He acknowledged that this issue had not been pursued by the Secretary of State.
23. We asked Mr Duffy if he had a copy of the claimant's EEA applications. He was unable to locate in his file the 2010 applications but had a copy of the claimant's application, dated 17 February 2016, for a permanent residence card. Having regard to the overriding objective to deal with cases fairly and justly under rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Procedure Rules") and exercising our powers under rules 5 and 15(2) of the Procedure Rules, we admitted the 2016 application into evidence. We noted that on the application form the claimant declared that he had never had a criminal conviction. This declaration is potentially a criminal offence under section 24A(1)(a) of the Immigration Act 1971.
24. Mr Youssefian argued that we should not consider this issue because it had not been raised by the Secretary of State at any previous stage in the proceedings. He noted that the Secretary of State in the decision to refuse the claimant's application on 30 March 2017 had explicitly recognised (at paragraph 97 of the refusal letter) that the claimant was in the UK lawfully during the period between January 2011 and January 2016 when he had an EEA residence card. His contention, in short, was that it was now too late for the Secretary of State to pursue a new issue.
25. As a result of our enquiries of the parties at the hearing on 22 May 2018, it emerged that the claimant might have been issued with a five year residence card on the basis of his giving incorrect information about his criminal history. The Procedure Rules require us to deal with cases fairly and justly. In our view, this appeal cannot be dealt with in a fair and just way unless this issue is considered. Accordingly, exercising our case management powers under rules 5(2), 5(3)(d) and 5(3)(h) of the Procedure Rules, we directed the Secretary of State to produce the claimant's EEA residence card applications; required him to amend his grounds of appeal to address the question of whether the claimant provided false information and/or committed a criminal offence since his release from prison; and adjourned the hearing in order to give both parties sufficient time to consider the new evidence and grounds.

26. At the resumed hearing on 31 May 2018, Mr Duffy informed us that he was unable to locate the claimant's applications for an EEA residence card in February 2010 and November 2010. Given that the application in 2016 failed to declare that the claimant had a criminal conviction, we find that it is more likely than not that the applications made in February 2010 and November 2010 also failed to include this information.

Grounds of Appeal

27. The Secretary of State initially raised three issues in the grounds of appeal (hereafter "the original grounds of appeal"):
- A. Firstly, the grounds argue that the judge failed to engage with the relevant Immigration Rules and with Section 117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").
 - B. Secondly, the grounds submit that the judge failed to have regard to several material facts, these being: that the claimant remained in the UK when there was an expectation he would leave; that the passage of time does not reduce the public interest in deportation; and that the claimant's offence was such that it undermines the good order of society.
 - C. Thirdly, the grounds argue that the judge failed to give clear reasons why the claimant's presence in the UK is required apart from the normal interactions that occur between a parent and his children and failed to explain why the public interest in his deportation was outweighed by other factors.
28. Following the Directions given at the hearing on 22 May 2018, the Secretary of State raised, with permission of the Tribunal, the following two further grounds of appeal (hereafter "the new grounds of appeal"):
- A. The first new ground of appeal submits that the judge erred by failing to factor into his assessment of the public interest the period of absconding between 2008 and 2010.
 - B. The second new ground of appeal argues that the judge erred by failing to consider that when applying for an EEA residence card the claimant would have been asked to declare any convictions and that the failure to declare his conviction is indicative of a tendency to deceive and as such adds weight to the public interest in deportation.

Analysis

29. The issue in contention before the First-tier Tribunal, in respect of the claimant's Article 8 ECHR human rights claim, was whether the public interest in his deportation was outweighed by his, and his children's, right to respect for their family life under Article 8(2) ECHR. As summarised in *Kaur (children's best interests / public interest interface)* [2017] UKUT 00014 (IAC) at 16.3:

[I]n every case of this kind, there is an Article 8(2) proportionality balancing exercise to be performed. At the outset of the exercise, the scales are evenly balanced. The exercise

is then performed by identifying all material facts and considerations and attributing appropriate and rational weight to each.

30. We are satisfied that the new grounds of appeal have been established as in our view the judge fell into error by failing to identify and have regard to two material facts that should have been considered in the Article 8 proportionality balancing exercise on the public interest side of the scales.
31. The first error was a failure to take into consideration that the claimant absconded in January 2008 after his appeal against deportation was dismissed and did not resurface until 2010 when he applied for an EEA residence card. Although this fact was before the First-tier Tribunal (it is set out at paragraph 12 of the Secretary of State's refusal letter dated 30 March 2017) it is not considered in the decision. At paragraph 36 of the decision (quoted above at paragraph 18), the judge found that the claimant's conduct since the offence in 2007 did "not disclose factors which add weight to the public interest". However, it is a criminal offence under section 24A(1)(b) and (2)(b) of the Immigration Act 1971 for a person who is not a British citizen to secure or seek to secure the avoidance of enforcement action (which includes deportation) against him by means which include deception by him. Had the judge had regard to the fact that the claimant absconded in 2008, he could not have rationally concluded that there had been no factors since the offence in 2007 which add weight to the public interest. It is therefore clear that the judge failed to consider this factor.
32. Mr Youssefian argued that the fact that the claimant absconded could not have made a material impact on the final conclusion that deportation would not be proportionate. We disagree. Reading the decision as a whole, it is apparent that the judge considered this to be a finely balanced case, where, in the Article 8 balancing exercise, considerable weight was given to factors on both sides of the scales. It is impossible for us to know whether the judge would have found the scales to weigh in the same direction if the claimant's absconding had been taken into consideration and thereby increased the weight on the public interest side of the scales. We are therefore satisfied that this error was material and renders the decision unsafe such that it will need to be made afresh.
33. The second error is that the judge failed to identify that there was a failure to declare the 2007 conviction in the claimant's application for an EEA residence card. This error is material because, as with the fact that the claimant absconded, had it been taken into consideration it would have added to the weight given to the public interest in deportation.
34. Mr Youssefian argued that the judge cannot be found to have made an error of law as the issue of what was declared on the EEA applications about the claimant's criminal history was not raised before the First-tier Tribunal. Citing *BM (Iran)* [2015] EWCA Civ 491, he maintained that if a point is not raised before the First-tier Tribunal it cannot be the case that the Tribunal erred in law by failing to have regard to it. He also submitted that this is not a case where it can be said, applying the test at paragraph 66 of *E v Secretary of State* [2004] EWCA Civ 49, that an error of law arises from a mistake of fact.

35. We do not accept this argument. *BM* concerned an appellant in an asylum case seeking to show an error of law because the judge had not considered a Home Office policy suspending removals to the country of his nationality. Richards LJ questioned whether the Tribunal fell into legal error by failing to have regard to the policy given that it was not raised in the First-tier Tribunal “in any shape or form” and “[t]here was nothing in the case law to alert the tribunal to it, let alone to support it [and] [n]o evidential foundation had been laid down for it.” The position in this appeal is entirely different from that in *BM*. In this case, the claimant sought to rely on the “fact” that he had been in the UK lawfully for a substantial period (between 2011 and 2016) as a family member of an EEA national without drawing to the Tribunal’s or Secretary of State’s attention that incorrect information regarding his criminal history had been given on the application for an EEA residence card. The claimant had an obligation under rule 2(4) of the Tribunal Procedure (First-tier Tribunal) Rules 2014 to help the First-tier Tribunal to further the overriding objective of dealing with the case fairly and justly. The fact that the Secretary of State, had he been more diligent in reviewing the file, might have identified - and consequently raised - the issue of what was declared on the claimant’s EEA applications about his convictions, did not remove the obligation on the claimant to raise the issue himself with the Tribunal, as plainly it is information that is necessary for the Tribunal to deal with the case fairly and justly. Where, as in this case, a claimant fails to inform the First-tier Tribunal about incorrect information given on a previous application to the Secretary of State that is material to the appeal, if the information subsequently emerges, the claimant cannot hide behind the fact that the information was not before the First-tier Tribunal.
36. In *E* at paragraph 66, Carnwath LJ set out the criteria to be met for a separate head of challenge in an appeal on a point of law where a mistake of fact gives rise to unfairness:
- “First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been “established”, in the sense that it was uncontroversial and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal’s reasoning.”
37. We are satisfied that in the present case these criteria are met. First, there was a mistake of fact as the judge was not aware of the fact that the claimant’s EEA applications failed to declare that he had a criminal conviction. Secondly, this fact has been ‘established’ in light of the 2016 application which was produced at the hearing on 22 May 2018. Thirdly, the Secretary of State was not responsible for the mistake. As explained above, the responsibility lies with the claimant who should have drawn this information to the attention of the Tribunal. Fourthly, the mistake was material as it is relevant to the weight given to the public interest in the Article 8 ECHR proportionality balancing exercise.
38. Having found that the new grounds of appeal establish that the decision of the First-tier Tribunal contains a material error of law, it is not necessary for us to consider the original grounds of appeal. However, for completeness, we note that we would not

have allowed the appeal on the basis of these grounds. The first original ground (failure to engage with the Immigration Rules and Section 117 of the 2002 Act) was not pursued by Mr Duffy. He acknowledged that Paragraph 398 of the Immigration Rules (concerning deportation and Article 8 ECHR) was not applicable as the claimant had been sentenced to a period of imprisonment of less than 12 months (such that neither Paragraphs 398(a) or (b) applied) and his offending had not caused serious harm and he was not a persistent offender, and therefore Paragraph 398(c) also did not apply. He also accepted that Section 117C of the 2002 Act was not applicable as the claimant did not meet the definition of a foreign criminal in Section 117D(2). The second original ground of appeal maintains that the judge failed to engage with a number of material facts. However, it is clear from reviewing the decision as a whole that the judge has had regard to the issues raised in this ground: specifically, the seriousness of the claimant's crime; the length of time he has been in the UK; and the fact that he has been subject to a deportation order where there is an expectation that he would leave the UK. As argued by Mr Youssefian, this ground amounts to no more than a disagreement with the judge's assessment of the facts and as such is not a basis upon which to sustain a proper challenge to the decision. The third original ground of appeal (that the judge failed to give adequate reasons) also cannot be sustained as the judge has explained why, in the particular circumstances of the case, he reached the conclusion that the interests of the claimant's children outweigh the public interest. The Secretary of State cannot therefore succeed on a "reasons" challenge to the decision.

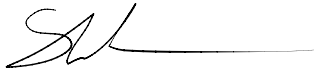
39. In conclusion, we find that the judge erred in law by failing to identify and take into account two material facts that are relevant to the public interest in deporting the claimant: (i) that the claimant absconded in 2008; and (ii) that the claimant's applications for an EEA residence card contained a false declaration about his criminal history. Given that this is a case where the proportionality assessment was finely balanced, each of these errors, standing alone and without regard to the other, is material and constitutes a sufficient basis to find that the decision of the First-tier Tribunal cannot stand and will need to be remade.
40. Both parties were of the view that if we found there to be an error of law the appeal should be remitted to the First-tier Tribunal for a fresh hearing. We agree. We note the extent of judicial fact finding which is likely to be necessary for the decision to be re-made as, inter alia, the Tribunal will need to consider up to date evidence about the best interests of the claimant's children. In our view, this case falls within paragraph 7.2(b) of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal and in all of the circumstances we consider this a claim which is appropriate to remit to the First-tier Tribunal.

Notice of Decision

41. The decision of the First-tier Tribunal concerning the claimant's human rights claim (Article 8 ECHR) involved the making of a material error of law and is set aside.

42. The decision of the First-tier Tribunal in respect of the claimant's protection claim has not been challenged and stands.
43. The appeal is remitted to the First-tier Tribunal to be heard afresh in respect of Article 8 ECHR only by a judge other than First-tier Tribunal Judge Nicholls.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 16 June 2018