Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30785/2015
IA/11624/2015

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 7 December 2018	**On 18 February 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

JUDE [O]
HELEN [K]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms Fisher, instructed by Qualified Legal Solicitors
For the Respondent: Mr Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, Jude [O] and Helen [K], are husband and wife, citizens of Nigeria and were born respectively on 6 December 1979 and 11 November 1981. They have two children both born in the United Kingdom who are aged 3 years and 1 year. The appeals are linked and the second appellant's appeal is dependent upon that of her husband who made an application as an entrepreneur migrant under Tier 1. By a decision dated 3 September 2015, that application was refused. The appellants appealed

to the First-tier Tribunal which dismissed the appeal but that decision was reversed by the Upper Tribunal on appeal. The Upper Tribunal directed that the decision be remade by the First-tier Tribunal. In a decision promulgated on 24 April 2014, the First-tier Tribunal (Judge O'Rourke) dismissed the appeal. The appellant now appeals that decisions, with permission, to the Upper Tribunal.

2. There are three grounds of appeal. The first ground of appeal concerns the judge's analysis of the evidence relating to the entrepreneur application. The appellant asserts that the judge's conclusions were perverse, and with the judge having found that the appellant (here and subsequently I refer to the first appellant, Mr [O] as the 'appellant') did not satisfy the entrepreneur provisions of HC 395 (as amended). Paragraph 12 of the grounds of appeal sets out a detailed set of references to the evidence adduced by the appellant in support of his application and which, it is asserted, the judge either misunderstood or ignored. The appellant's view of that evidence is that it should have led the judge to conclude that there was sufficient evidence to show business activity and trading within the relevant period. Had the judge assessed the evidence correctly, he would have decided that the appellant met the requirements of the Immigration Rules and this, in turn, would have been a factor which impacted on the appeal which was on Article 8 ECHR grounds.

3. First, I am not satisfied that the judge ignored any of the evidence. At [28], the judge states that he had "examined *all of the documents provided by the appellant with his three applications and the evidence he provided to meet the above requirement* …" [my emphasis]. Thereafter, follows a detailed analysis of the documentation provided by the appellant. For example, the judge refers to consultancy service agreements with Makejrii-Komo Ltd dating from 2014 some of which were within the "relevant period" required under the Rules and some which he found were not. The judge observed there were no invoices from the appellant's own company to these third party companies the requirement for which is set out in the contract. As the judge observed, "apart from the money being paid into the bank accounts there is little explanation as to where this money comes from and why". The judge's conclusion was that the applications were "premature" and failed to show the requirement as to business activity and trading both predating and during the relevant period. The judge noted that it was likely that the application had been "driven by the need to make an in-time application due to the pending expiry of his post-study visa the following day".

4. The grounds of appeal challenge the judge's findings. However, having considered the grounds of appeal carefully, I am not satisfied that the judge has overlooked or indeed misunderstood the evidence. This is not a case where there was obviously a clear "black letter" error on the part of the judge. Rather, the judge, who I am satisfied did examine all the evidence, is required to carry out an evaluation and to decide whether or not the respondent had been correct to conclude that the relevant business activity within the relevant period had been established, to the

standard of the balance of probabilities, by the material produced by the appellant. It was an exercise which, by its nature, required an exercise of judgment. Notwithstanding the appellant's protestations that he had proved the existence of the business activity, I find that the judge reached his conclusions by way of a thorough and rational assessment of the evidence. In such an assessment, he was not compelled to take the view of the evidence urged upon him by the appellant.

5. Secondly, this is, as I have observed above, an appeal on Article 8 ECHR grounds. Unlike, for example, Appendix FM, compliance with which is very likely to indicate success in an Article 8 ECHR appeal, it is not clear to me why the mere fact that the appellant may satisfy provisions concerning an entrepreneur migrant should indicate a breach of Article 8. Whilst Appendix FM is, in effect, a codification of the law relating to Article 8, it is difficult to see any relation between the requirements for obtaining an entrepreneur visa and the appellant's private and family life other than that the appellant and his family, had they persuaded the Secretary of State that the appellant met the entrepreneur provisions, would have enjoyed a further period of leave to remain. Even if the appellant had persuaded the judge that he met the entrepreneur provisions, it did not follow that he should succeed under Article 8 ECHR. In any event, I am satisfied that it was open to the judge to reject the appellant's assertion that he met the requirements of the Immigration Rules.

6. The appellant asserts that his family are able to speak English and that they would make a positive contribution to the UK economy and society. The judge has concluded that family life may be continued in Nigeria, the country of which both appellants and their children are citizens. The parents of the children have no right to remain in the United Kingdom and the judge concluded that their best interests would be met if they accompany their parents to Nigeria.

7. The grounds complain that the judge failed to have regard to the best interests of the children, in particular the interests of the son of the first and second appellants who may or may not be autistic. The judge sets out his findings on Article 8 at [41]. The judge notes the uncertainty over the diagnosis of the son's condition, observing that there is "no definite diagnosis" and that "the family support worker" had made the only firm suggestion that the child is autistic "with no indication as to this person trading or expertise to make such an assessment". Faced with uncertainty over the diagnosis, I consider that the judge correctly concluded that "the available evidence [shows] that the child will need considerable care and attention from his parents" in any event and notwithstanding any eventual diagnosis. It is difficult to see what else the judge may have concluded in the circumstances. What is clear from the judge's analysis is that there is no question that the child requires a sophisticated drug or drug regime or medical interventions. The judge made the reasonable observation that, whether or not the child lives in Nigeria or in the United Kingdom, "the bulk of the responsibility for his care will fall on [his parents]". The difficulty for the judge was that he was seeking to make findings in the

almost complete absence of evidence regarding support organisations or other relevant medical facilities which might assist the child in Nigeria. In the light of what the Tribunal knew at the date of the hearing, the finding that the child will require the close attention and care of his parents represented a legally sound outcome to his assessment of best interests. That finding led, in turn, to the judge's conclusion that the two children who are not "qualifying children" for the purposes of Section 117 of the 2002 Act could return to continue their family life with their parents in Nigeria.

8. For the reasons I have given above, the judge reached findings which were available to him following an anxious scrutiny of the relevant evidence. The grounds of appeal contain nothing which would lead me to interfere with the outcome of the appeal. In the circumstances, the appeals are dismissed

Notice of Decision

These appeals are dismissed

No anonymity direction is made.

Signed Date 1 February 2019

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 1 February 2019

Upper Tribunal Judge Lane