Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08422/2019**

THE IMMIGRATION ACTS

Heard at Bradford (via Skype)	**Decision & Reasons Promulgated**
On 10 March 2021	**On 18 March 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DAVID OLESEGUN IDOWU
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs Thomas of Compass Immigration Law LTD
For the Respondent: Mr Diwnycz Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Birrell ('the Judge'), promulgated on 22 September 2020, in which the Judge dismissed the appellant's appeal on human rights grounds.

2. The appellant sought permission to appeal which was granted by a Resident Judge of the First-tier Tribunal on 20 October 2020 of the basis it is said to be arguable, particularly in light of what is said at

paragraphs 6 and 7 of the application, that the proportionality assessment was flawed.

Background

3. The appellant is a citizen of Nigeria, born on 19 May 1970, who was refused entry clearance on the basis of family and private life with his partner, who is also his sponsor, and two named children. The application was refused pursuant to Appendix FM and also paragraph 320(11) of the Immigration Rules. The Judge summarises the key points of the refusal letter at [3] in the following terms:

a) the appellant did not meet the suitability requirements because of his previous immigration history.
b) It was an aggravating factor that the appellant had used a false identity to gain employment in the UK.
c) The appellant did not meet the financial requirements of Appendix FM and had not provided the mandatorily required evidence from the Sponsor's employer or the payslips for the period of six months prior to the date of application.
d) The appellant did not provide an English language certificate.
e) There were no exceptional circumstances that would mean that refusal led to unjustifiably harsh consequences.
f) The appellant had provided no evidence of contact with his sons. Apart from some photographs and therefore it was not accepted that the appellant has had a significant role in his children's lives.

4. The Judge had the benefit of considering not only the documentary evidence relied upon by the appellant but also seeing and hearing oral evidence from the sponsor and from one of the children, JOI, including their reaction to cross-examination, which enabled the Judge to form a view relation to the reliability or otherwise of their evidence.

5. The Judge sets out findings of fact from [28] of the decision under challenge in which it was noted that it was not disputed that the appellant is the father of two British children as a result of a relationship with the sponsor whilst he was in the UK illegally. Those children were born in 2004 and 2007. The Judge accepts that the appellant is the father of the children and that family life recognised by article 8 exists [32].

6. The Judge was satisfied that removal will have consequences of such gravity so as to potentially engage the operation of article 8 [33] and that such interference is in accordance with the law and that any such interference is necessary in a democratic society having legitimate aims pursuant to one of the legitimate aims set out in article 8(2), namely the economic well-being of the country and also the right of the state to control the entry of non-nationals into its territory [35].

7. The Judge considers the fifth of the Razgar questions, that of whether any interference is proportionate from [36].

8. The Judge sets out the correct legal self-direction at [41] that the correct starting point in considering the welfare of best interests of the child will be that it is in a child's best interests to live with and be brought up by his or her parents. The Judge notes in the same paragraph, however, that although the children were brought up by both parents until the appellant left the UK in 2011, beyond the appellant being their father, there was no evidence of that or even that they lived in a common household or that he played any role in their lives. The Judge notes that since 2011 the documentary evidence of the appellant's role is very limited and there was nothing from any expert to suggest that the absence of the father has had an adverse impact on the children's welfare as the sponsor is clearly a well motivated and devoted mother.

9. The Judge notes at [42] the child who gave oral evidence had stated he would like his father to be with the family and have a closer relationship with him and his brother and that on balance it is in the children's best interests to have their father with them because that is the norm, although the Judge does record a caveat that this is not "overwhelmingly so".

10. The Judge thereafter considers the relevant parts of section 117 of the 2002 Act before setting out the conclusions between [50 – 51] in the following terms:

> 50. Drawing these threads together when considering where the balance lies between the best interests of the children on the one hand, where I have set out above that the best interests of the children are to be brought up by both parents, and the importance of maintaining immigration control on the other, I recognise that in Kaur (children's best interests/public interest interface) [2017] UKUT 14 (IAC) it was held that the seventh of the principles in the Zoumbas code does not preclude an outcome whereby the best interests of a child must yield to the public interest. This approach has not been altered by Part 5A of the Nationality, Immigration and Asylum Act 2002. Thus I am entitled to give significant weight at this stage to the public interest in maintaining immigration control and it is in this context that I remind myself that the Appellant entered the UK illegally, worked illegally, had healthcare he did not pay for, failed to attend an appeal hearing and left the country without notifying the Respondent. His behaviour was serious and albeit it was some years ago those breaches are old because the Appellant no longer remained in the UK.
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> 51. There is no suggestion that the Sponsor and her children who are British citizens should live with the appellant in Nigeria. The Respondent's case is that they should remain in the UK visiting the Appellant as they have done in the past and maintaining contact by phone and the Internet. I have considered whether this would result in unjustifiably harsh consequences for the two children as their relationship with their father would have to be maintained at a distance, as it has done in the past. There is nothing in the independent evidence before me to suggest that the absence of the Appellant from the children's daily lives in the UK has had or will continue to have an adverse impact on them. While I have sympathy with C1's desire to have his father with him in the UK. I am not satisfied that the Appellant has met the evidential burden of establishing that refusal will lead to unjustifiably harsh consequences or that this amounts to compelling reasons to outweigh the public interest in maintaining immigration control.

11. The Judge's conclusion therefore was that on the facts it had not been made out that there will be an unlawful breach of article 8 ECHR.

12. The appellant sought permission to appeal on two grounds. The first asserting an adequate assessment of the proportionality issue in failing to fully engage with the documentary evidence and the oral evidence of the child C1 and the sponsor, and that in doing so failed to properly address the question of the two children, especially in light of the fact the second child, C2, had been diagnosed with autism and learning difficulties, for the reasons set out in further detail in the application for permission to appeal.

13. The Secretary of State has filed a Rule 24 response dated 30 October 2020, asserting the Judge directed herself appropriately, that the Judge fully considered the best interests of children as part of the proportionality assessment, that there was no need for the Judge to recite all the evidence referred to in the application for permission to appeal, especially when it is clear the Judge did have regard to it and that the question of the weight to be attributed to that evidence was a matter for the Judge.

Error of law

14. It is understandable that the children may want their father to live with them in the United Kingdom, but it is not made out the Judge failed to take the evidence from the children into account or that the Judge failed to read or factor into her assessment of the evidence in the Education, Health and Care Needs Plan (EHCP) prepared by Bolton Council in relation to the second child containing the diagnosis of Autism Spectrum Disorder. It is also not made out that the Judge failed to read or factor into the assessment the letter from Jillian Davies. The Judge was not required to set out in detail in the decision the contents of such documents, provided they were considered with the required degree of anxious care, which I find to be the case.

15. The fact the decision is contrary to that sought by the appellant and/or the children does not mean all the evidence was not properly taken into account. The Judge in the determination specifically makes reference to both the appeal bundle and supplementary appeal bundle and notes that the contents of those bundles and the skeleton argument was specifically relied upon by Mrs Thomas in her submissions.

16. The Judge clearly considered the evidence with the required degree of anxious scrutiny and undertook an assessment of the merits of the human rights claim in a properly structured manner by reference to the Razgar test. The Judge's findings are supported by adequate reasons and the weight to be given to the evidence was a matter for the Judge.

17. The fact the Judge's decision is contrary to that sought by the appellant does not mean that the weight given to the evidence by the Judge was in any way irrational, unreasonable, or unfair.

18. At [6] of the appellant's grounds is an assertion the Judge erred at [40] in claiming the EHCP did not refer to the appellant's father or suggest he had played any role in their life, when the appellant is mentioned in the various pages quoted in that section. I find such submission misrepresents the Judges actual comment. It is accepted the appellant is mentioned in the report as the father of the children and that the child identified the appellant as a person who supports him, which was evidence clearly considered by the Judge. What the Judge was looking for within that report was sufficient evidence to show the appellant had played a sufficient role in the children's life such that the impact of his absence upon the child's future would support the appellant's claim. The Judge's observation that insufficient evidence was made available to support the claim the only finding available to the Judge was to allow the appeal is a finding clearly within the range of those available to the Judge on the evidence.

19. The Judge was aware of the historic timeline. The fact the appellant's overstaying occurred some years ago is specifically mentioned in the decision.

20. The Court of Appeal has made it abundantly clear that those considering whether to grant permission to appeal should not import their own view of the merits of the claim into the decision actually made. In this appeal, it is quite clear the Judge did consider the evidence adequately, has given sufficient reasons in support of the findings made, and that the decision to dismiss the appeal is within the range of findings clearly open to the Judge on the evidence. Whilst the appellant disagrees, I do not find it made out the Judge has erred in law in a manner material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

21. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

22. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated 11 March 2021