Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00913/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 September 2013	**On 1 October 2013**
Prepared 18 September 2013	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MICHAEL ABAYOMI WILLIAMS
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Jegarajah, Counsel, instructed by Prime Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of the First-tier Tribunal Judge (First-tier Tribunal Judge Eldridge and Ms S E Singer) promulgated on 2 July 2013 dismissing his appeal against the decision of the respondent pursuant to section 32 (5) of the UK Borders Act 2007 to deport him.

2. The appellant is a citizen of Nigeria born on 31 May 1980, and it is his case that he arrived here to join his mother at the age of twelve. On 10 February 2003, he was

granted Indefinite Leave to Remain ("ILR") under the regularisation of overstayers scheme. On 2 July 2012 he was convicted of conspiracy to make false representations, and on 24 August 2012 was sentenced to 21 months in prison. In reply to the enquiries from the respondent as to why he should not now be deported, the appellant explained that he was in a relationship with Ms Carlie Jones, and that he had two children in the United Kingdom, both of whom are British Citizens, but from different mothers.

3. The appellant's case as put to the First-tier Tribunal that he is in a relationship with Ms K M and that they have a daughter K, born in 2008. He also has another daughter, M, born in 2009; her mother is Ms R. The appellant's case is that he has no ties with Nigeria, and that to deport him there would not be in the best interests of his children and would be in breach of his protected rights, contrary to article 8 of the Human Rights Convention.

4. The respondent accepts that the appellant is the father of K but did not accept that he is still in a relationship with Ms K M. She did not accept that he was in a genuine and subsisting parental relationship with M. For these reasons, she concluded that the appellant did not meet the criteria set out in paragraph 399(a) of the Immigration Rules.

5. The respondent did not accept either that the appellant met the requirements of paragraph 399 (b) as he had not shown that he was in a subsisting relationship with Ms Carlie Jones, or that he had been living in the United Kingdom continuously with leave for 15 years.

6. In addition, the respondent considered that the appellant did not meet the requirements of paragraph 399A of the immigration rules, as he had not shown that he had lived continuously in the United Kingdom for at least 20 years, nor had he shown that he had no ties to Nigeria.

7. The First-tier Tribunal heard evidence from the appellant and Ms K M, it being their evidence that they were now in a relationship again. The appellant explained that his relationship with Ms Carlie Jones had come into being when he and K M had had a mis-understanding.

8. The First-tier Tribunal dismissed the appeal on all grounds, finding:

   (i) That the appellant was not a credible witness [51], [52]; that he was prepared to take up with and abandon women as he chooses [54]; that it was not the appellant's intention to form or re-form a long-term relationship with K M [54] and that they had not lived together since at the latest 2010 [56]; that the appellant does not have strong and committed relationship with Ms K M , Ms R or Carlie Jones [59]; that he does have a continuing relationship with K, but that he did not have any family life with M;

   (ii) That there was nothing to imply that the appellant was anything other than a low risk offender who did not present a risk of serious harm to the public [61];

(iii) That although the appellant has many family members and friends here, and has lived here for most of the last 20 years, they did not accept that he had no-one to turn to in Nigeria [62];

(iv) That the appellant could not succeed under paragraphs 399 (a), 399 (b) or 399A of the Immigration Rules [63],[64];

(v) That there was a strong public interest in deporting the appellant [70], [71]; that it was in K's best interests to have a committed father in her life [76], but that her interests were in this case outweighed by the public interest in deporting him [79];

9. The appellant sought permission to appeal against this decision on the grounds that the First-tier Tribunal had erred on four grounds:

(i) Ground 1: In failing to note that as the appellant had in meeting the terms of the Regularisation of Overstayers scheme shown a successful article 8 claim and thus for the 10 years prior to the grant to him in 2003 of ILR, his residence had been lawful [9]; and, had erred in failing to take the basis of the grant of ILR into account in assessing the nature of the appellant's private life [10]

(ii) Ground 2: In failing properly to apply Uner v Netherlands (46410/99), as by its proper application [13] 20 years residence is sufficient to render removal disproportionate;

(iii) Ground 3: In failing to identify or apply properly the principle established in Maslov [2008] ECHR 546 at [75] that "a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion" and thus rendering the balancing exercise under article 8 flawed [21];

(iv) Ground 4: In failing to make an adequate finding whether there was a genuine and subsisting parental relationship between the appellant and child; and, in failing thus to give proper consideration to the best interests of the child, and failing to consider the impact on her over and above the fact that there would be a parent within the United Kingdom to care for her, and thus failing properly to apply Ogundimu (article 8 – new rules) Nigeria [2013] UKUT 60 (IAC).

10. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Frankish on 1 August 2013 on all grounds. Subsequent to that, on 2 September 2013, the respondent replied to the grant, challenging each specific ground.

Submissions

11. Ms Jegarajah formally withdrew Ground 2 of her grounds. Turning to ground 1, she submitted that the First-tier tribunal had erred in failing to taken into account the quality of the appellant's life in the United Kingdom, as well as its length, and that fact that it had been recognised by the grant of ILR under the Regularisation of Overstayers Scheme was important as it flowed from this that he had established to the satisfaction of the respondent that he had sufficient ties to the United Kingdom.

12. Ms Jegarajah submitted that the panel had erred in failing to consider the dicta in Maslov that there needed to be very serious reasons why a person resident for 20 years should be deported, and that in such a case, the respondent's case must be all the stronger.

13. Ms Jegarajah sought permission to expand Ground 4 to which request I acceded in the absence of any objection on the part of the respondent. The ground was expanded to permit the argument that the First-tier Tribunal had erred in failing to enquire properly into the circumstances of the child, K, and in particular, failing to take into account the effect that her father's deportation would have on her. She was, however, unable to direct me beyond the letter from Ms Winfield, or the mother's statement, as to what had been put to the First-tier Tribunal, if anything, in respect of this issue. She did, however, submit that they had considered too narrow a framework, and that it was reasonable to have concluded that, were the appellant to remain here, that there would be emotional and financial stability for the family.

14. Mr Deller submitted that, relying on D v SSHD [2012] EWCA Civ 39 at [32], the appellant's presence here was either lawful or unlawful, asking me to note that Ms Jegarajah had accepted that the grant of ILR in 2003 did not render lawful the appellant's residence between 1993 and 2003. He submitted further that this was not a **Maslov** case, and that the First-tier Tribunal had correctly distinguished it.

15. Turning to Ground 4, Mr Deller submitted that the adverse credibility findings should be borne in mind, and the strong indications that the family would not remain as a unit. He submitted that the First-tier Tribunal had taken a proper view of the interests of the children, and that it needs to be borne in mind that best interests of the children, even if they do suffer, can be outweighed by the public interest.

16. In reply, Ms Jegarajah submitted that looking at the case as a whole, the First-tier Tribunal had not properly assessed the situation of K who is a vulnerable child. She submitted further that, given the nature of the section 55 duty as enunciated in SS (Sri Lanka) v SSHD, safeguarding that child is something with which I should be concerned and that additional evidence, including a report from a social worker which is now available, should be taken into account.

Does the determination of the First-tier Tribunal involve the making of an error of law?

17. I turn first to Ms Jegarajah's final submissions first. In **MA (Fresh evidence) Sri Lanka *** [2004] UKIAT 00161the IAT stated, after considering **E v SSHD** [2004] EWCA Civ 49:-

> 23(ii) New evidence will normally be admitted only in accordance with '*Ladd v Marshall* principles' (see *Ladd v Marshall* [1954] 1 WLR 1489), applied with some additional flexibility under the CPR (see *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, 2325; White Book para 52.11.2). The *Ladd v Marshall* principles are, in summary: first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; secondly, that if given, it probably would have had an important influence on the result; and, thirdly, that it is apparently credible although not necessarily incontrovertible. As a general rule, the fact that the failure to adduce the evidence was that of the party's legal advisers provides no excuse: see *Al-Mehdawi v Home Secretary* [1990] 1AC 876."

15. The Court of Appeal pointed out that it was not dealing with the current jurisdiction of the Tribunal which is limited to hearing an appeal on a point of law. However, we see no reason why the general principles governing the reception of evidence which was not before the Adjudicator should be different. There is no reason why the first and third principles should be changed. The application of the second principle will be different. When applied in the context of an appeal on the ground of error of fact or law, the fresh evidence has to be such that it would probably have had an important influence on the result of the factual or legal conclusions of the Adjudicator. When applied in the context of error of law alone, the test for the relevance of fresh evidence which could and should have been before the Adjudicator cannot now be that it assists a challenge to factual conclusions such as credibility findings or other personal circumstances which are very much matters for the Adjudicator. The application of the second principle now requires that the evidence be relevant to showing that the Adjudicator made an error of law, which probably had an important influence on the result.

18. Whilst there is a duty on the Upper Tribunal when considering the best interests of a child to treat those as a primary consideration, what is in issue here is whether the First-tier Tribunal erred in law, I do not accept that any positive duty towards the rights of the child K in this case are such that, in the light of these principles, I should consider evidence not before the First-tier Tribunal. I do not consider that the decision of the Court of Appeal in SS (Sri Lanka) v SSHD [2012] EWCA Civ 945 is authority for that proposition or that that case is authority for the proposition that either the First-tier or the Upper Tribunal have a duty pursuant to section 55 of the UK Borders Act. On a proper analysis, the decision is authority only for the proposition that the Tribunal should have considered the best interests of the child which, in SS (Sri Lanka) they had not done. Here, they did so. In the circumstances, therefore, I have not considered any of the material submitted which was not before the First-tier Tribunal.

19. I turn next to the grounds of appeal (as amended) in turn, omitting Ground 2 which has been withdrawn

Ground 1

20. The Regularisation of Overstayers Scheme was introduced to preserve the rights of those who were, at the commencement of the Immigration, Nationality and Asylum Act 1999, overstayers, and who, prior to that would have faced deportation under section 3 (5) (a) of the 1971 Act as originally enacted. The factors set out in the Immigration (Regularisation Period for Overstayers) Regulations 2009 simply repeat the factors that the respondent would have had to consider before deciding to deport such a person. Those factors overlap considerably with an article 8 consideration, but are not co-terminous, contrary to Ms Jegarajah's submissions.

21. The First-tier Tribunal records [73]:

> This appellant has been I this country since he was aged 12 and was here lawfully, so far as we can ascertain, until 2012, a period of 19 years. The majority of his childhood and youth was spent in Nigeria…"

22. The Tribunal, therefore, as Mr Deller submitted, considered the appellant's case as higher than it was, given that as Ms Jegarajah has effectively accepted that the appellant did not have leave between the first six months of his time here, and 2003, a gap of roughly 9 to 9 ½ years. In the light of D v SSHD at [17], I consider it is not arguable that the appellant's presence in this country was lawful between his initial leave to enter and the grant of ILR in 2003.

Ground 3

23. It follows from the above that the appellant had not spent anything like 20 years lawfully resident in the United Kingdom. The First-tier Tribunal did not err in failing to consider the dicta at [75] set out at paragraph 9 above. They gave adequate consideration to the appellant's private life, attaching weight to it in their determination [80]. I consider that the panel gave adequate consideration to the appellant's private life and its content, given the unchallenged negative findings regarding his credibility.

Ground 4

24. The First-tier Tribunal found that the appellant has a family life with K [74]; that there were no concerns with regard to her safeguarding [75]; and, that it is in her interest that she had a committed father in her life [76]. They then directed themselves properly as to assessing the interests of K, taking specific note of section 1(3) of the Children Act 1989 [76]. They noted also that [79] that K's life will be unable to develop as it would if the appellant had remained in this country.

25. Contrary to Ms Jegarajah's forceful submissions on this issue, is not evident from the letters from Ms Winfield or Ms K M that, given the findings the panel had reached about the appellant, that they erred in failing properly to take into account any issue regarding K. Ms Jegarajah was unable to take me to any specific issue which was raised, and I do not consider that it was incumbent on the First-tier Tribunal to

undertake an inquisitorial role as she submitted. It is not evident that it was put to the Tribunal that K's emotional situation would be more stable, or that the family's situation would be better. There are a substantial number of issues which would have to have been considered, not all of them in the appellant's favour; The panel found [59] that the appellant was not committed to Ms KM. That finding is not challenged, and it is not arguable that the continuing stability of the family or potential earnings from the appellant of Ms K M would have contributed to that.

26. In summary, the First-tier Tribunal did not err in their evaluation of K's best interests, treating them as they did as a primary consideration in line with SS (Nigeria). The Tribunal directed itself properly as to the law, attaching appropriate and permissible weight to the factors to be taken into account, and reached a conclusion which was open to them on the facts and for which they gave adequate reasons.

27. Accordingly, the determination did not involve the making of an error of law by the First-tier Tribunal capable of affecting the outcome and I uphold it.

SUMMARY OF CONCLUSIONS

1. The determination of the First-tier Tribunal did not involve the making of an error of law capable of affecting the outcome of the appeal. I uphold the determination of the First-tier Tribunal

Signed: Date: 30 September 2013

Upper Tribunal Judge Rintoul