Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00399/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 13 August 2013	**On 16 August 2013**
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Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MICHAEL CHINEDU JONATHAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by J R Rahman, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant is a citizen of Nigeria, born on 5 February 1969. He arrived in the UK as a visitor on 22 September 2006 and overstayed. He sought to remain in the UK with his wife and 2 children (twins, a boy and a girl, born on 31 May 1999), relying on Article 8 of the ECHR. The other family members are all also citizens of Nigeria. It is not contended that the case might succeed under the Immigration Rules.

2) The respondent refused the appellant's application (along with those of the other family members, who do not appear to have appealed separately) for reasons explained in various letters, the latest of which is dated 12 December 2012.

3) First-tier Tribunal Judge Burns dismissed the appellant's appeal by determination promulgated on 4 March 2013.

4) The appellant made the following application, which now stands as the grounds of appeal to the Upper Tribunal:

1 The appellant respectfully seeks to make an application to the First-tier Tribunal for permission to appeal to the Upper Tribunal on a point of law, arising from Immigration Judge Burns' determination of 4 March 2013.

2 The applicant seeks the points which have been raised in the application to the First-tier Tribunal for Permission to Appeal to be revisited as it is maintained that the decision of the Immigration Judge in relation to Article 8 of the ECHR ground is arguably inadequate, and his consideration of Article 8 does not adequately address the best interest of the children, and as a result he has materially erred in law.

3 It is submitted that on paragraph 43 of the determination, that Immigration Judge Burns has failed to give due weight to Mrs Jonathan's testimony, and failed to consider her evidence whereby she submitted that the appellant was in charge of the family's financial affairs. Therefore it is plausible that the amount allegedly to be taken from Nigeria. This material error of fact has led to a material error of law.

4 It is further submitted that at the appeal hearing, the appellant's representative confirmed that she is able to provide evidence to the effect that the appellant and his family are being supported by friend and church members, and regardless of the provision of this information, Immigration Judge Burns has opted to make a finding to the contrary without requesting the necessary evidence to make an informed decision.

5 The appellant takes great issue with Immigration Judge Burns comments in paragraph 45 of this determination, namely "I was satisfied that it was a scam put up by the appellant" and that the appellant "has remained here as an overstayer ever since, ducking and weaving, frustrating immigration law, and being cynical and dishonest in doing so." Said observations are deemed as damning, and equate to assumptions, but crucially important his comments are made without the basis of disputed evidence. Judge Burns has thus materially erred in law.

6 Paragraph 46 of the determination is based on gross assumptions and negates that children can hold their own opinions on issues that affect them, and be intellectually capable. It is evident that the children have been in the UK for 7 years and therefore the best interests of the children must prevail.

7 It is further submitted that the test of reasonableness as determined in **WV (Uganda) and AB (Somalia) v Secretary of State, 2009 EWCA (Civ) 5** and the test in relation to the best interests of the child as determined in **Uner v The Netherlands [2006] 3FCR340** has not been applied correctly. The test has been applied unreasonably leading to a material error of law.

8 The Immigration Judge has materially erred in the balancing exercise as he has not taken the above issues into consideration. It is unreasonable to expect the appellant and his family to return to Nigeria especially since he concludes the existence of family life and private life. Matters therefore merit further consideration.

9 If the Immigration Judge had taken the above concerns into account appropriately, it is more than possible that he may have reached a different conclusion, and so when considered separately and/or cumulatively, it is submitted that these alleged errors all amount to material errors of law. It is submitted that Immigration Judge Burns' reasoning is perverse and extremely irrational and amounts to an error of law.

5) On 21 March 2013 First-tier Tribunal Judge Landes granted permission, thinking it arguable that the judge erred in relation to the best interests of the children, who are aged 13 and have lived and been educated in the UK for 7 years. Judge Landes thought the other grounds appeared thin, Judge Burns having given reasons for all his credibility findings, but the grant of permission was not restricted.

Submissions for appellant.

6) Mr Winter said that the first ground of appeal could be taken as expressed in paragraphs 2, 6, 7 and 8, all going to the best interests of the children. They arrived in the UK with their parents at age 6, and were aged 13 by the time of the hearing in the First-tier Tribunal. Mr Winter referred to a skeleton argument for the appellant, prepared by his solicitors, for the history set out there of the children's educational and general progress. (He did not refer to that skeleton argument for any other purpose.) He pointed to the judge's conclusions at paragraphs 43-50 of the determination. He said that at paragraph 46 the judge erred by failing to consider the children's private lives, and failed to consider whether their length of residence tipped the proportionality balance in favour of the appellant. The same criticism could be made of paragraph 48.

7) The judge referred at paragraph 49 to the very substantial weight to be given to the Immigration Rules. Mr Winter said this is an expression of Lord Brodie's since overtaken by the Inner House – MS v SSHD [2013] CSIH 52.

8) On the correct approach to the best interests of the children, Mr Winter referred to LD [2011] IMM AR99, in particular at paragraphs 26 and 30(a) on the very weighty reasons required for separation of children from the community in which they have grown up and lived, and on educational welfare as part of the UK educational system possibly pointing strongly to continued residence here to promote these interests; to EA [2011] UKUT 315 on the weight to be given to a period of substantial residence as a child; to MK [2011] UKUT 00475, [2011] WL 6329683, again on the very weighty reasons required; to Azimi-Moayed [2013] UKUT 00197 at (1)(i), "as a starting point it is in the best interests of children to be with both their parents and if both parents are being removed then the starting point suggests that so should dependent children who form part of the household unless there are reasons to the contrary"; and finally to SC [2012] UKUT 00056, "in the absence of strong countervailing factors residence of 8 years in the UK with a child is likely to make removal at the end of that period not proportionate to the legitimate aims in the case".

9) Mr Winter submitted that the judge's approach had not been set out in logical order. He had not plainly separated the children's best interests from the conduct of the parents. It was therefore not clear that the judge's ultimate assessment was not tainted by his views of the adverse immigration history. That led to error of law such that the determination should be set aside. There was no application to lead further evidence, and there has been no significant change in the situation of the children. Mr Winter was ready to argue that the decision should be remade in favour of the appellant, but

would welcome the opportunity to submit a note of argument on the remaking of the decision.

10) Mr Winter turned to the other paragraphs of the application. In relation to paragraph 43 of the determination, he submitted that the judge said there was a discrepancy between evidence from the husband and evidence from his wife, but did not specify clearly what the discrepancy was. (I observed that such a complaint was not to be seen at paragraph 3 of the grounds, which appear to be framed only as an insistence on the appellant's case and not so as to bring out any arguable legal error.) Mr Winter said that paragraph 4 was intended to express an issue of procedural fairness, and that a letter containing further evidence had been produced with the application for permission. He accepted that no application has been made to introduce further evidence in accordance with the Procedure Rules and Practice Directions, but he suggested that if error of law based on unfairness were to be made out, then such an application might follow. As to paragraph 5, Mr Winter conceded that this amounted only to disagreement, and that the assessment of credibility was a matter for the judge. As to paragraph 6, Mr Winter said that this was an attack on the judge's finding that the evidence from the children had been produced partly by coaching, which was speculative. The matter had not been put to the children or other witnesses in cross-examination and the judge had not been entitled to reach that inference based on the letters the children had written or on their oral evidence. The children were evidently doing well at school and so would have been capable of answering questions put to them.

11) At the end of Mr Winter's submissions I drew attention to the last sentence of the grounds, and observed that none of the submissions appeared to aim at the legal error of perversity, a high test, and that the wording "extremely irrational" seemed to go too far. Mr Winter stated that he did not say that part of the grounds could properly be supported. He suggested that the wording might reflect the inexperience of the drafter (the grounds were prepared by his instructing firm of solicitors, not by Mr Winter) and that he would give appropriate advice for the future.

12) I also pointed out that in the skeleton argument prepared by solicitors and referred to above the appellant's immigration history is described in glowing terms as if factual but which do not reflect the truth, or the findings reached in the First-tier Tribunal. Mr Winter accepted this was also erroneous, and (as noted above) he had not sought to associate himself with that part of the skeleton argument.

Submissions for respondent.

13) Mr Mullen said that reading the determination fairly and as a whole the judge had taken into account the private lives of the children and their educational history separately from their parents' poor immigration history. He accepted the principles set out in the well known cases referred to by Mr Winter, and observed that while each case turns on its own acts, the present case was closer to MK, where the appellant failed, than to any of the cases where appellants had succeeded. In the successful cases

the parents had generally been in the UK lawfully for most of the relevant period. Seven or even eight years residence did not automatically render removal of children disproportionate. The appellant and his family have known they had no right to be here since around March 2006, and were served with formal notice to that effect in 2007. Their residence had been built up without a shred of lawful basis and although the best interests of the children had to be separately viewed, in the proportionality assessment their length of residence and its lack of basis could not be divorced from the adverse immigration factors. The judge had to carry out a difficult assessment but he made no error in doing so and his decision should not be interfered with. This case required seriously weighty factors in favour of removal, but those factors were present. The children's interests in gaining a UK education were relevant but not determinative. The judge was entitled to find that education would be available in Nigeria, where the appellant was educated to a very high standard. The case did not involve any suggestion of splitting up the family, the only reasonable expectation being that they would leave as a unit. This was not a case where the appellant and his family had rights to remain in the UK, irrespective of their inability to meet the Immigration Rules.

14) As to the credibility criticisms, Mr Mullen said that the weight to be given to any aspect of the evidence was very much a matter for the judge. I indicated that I did not need to hear any further from Mr Mullen on the credibility points.

Discussion and conclusions.

15) As to credibility, the judge was plainly entitled to make the adverse findings which he did. His reasons are adequately explained. No part of the reasoning has been undermined in this appeal.

16) While it is not necessary to go any further for present purposes, the appellant's version of events was so far from the truth, including the immigration history on record, that no other conclusion could reasonably have been expected. His rosy version should not have been repeated in the skeleton argument for the Upper Tribunal as if it were fact. The judge's view of the appellant's credibility, describing him as cynical and dishonest, is expressed in trenchant terms, particularly at paragraph 45, but is no more than is justified.

17) The facts regarding the children's residence and education were before the judge and plainly taken into account. His conclusion that their evidence had to some extent been coached was also open to him. There are reasonable findings that it is highly unlikely that the children would have no interest in their country of origin and citizenship and that the confluence of their letters suggested pre-preparation. At paragraph 46, the judge goes straight on to remind himself of the need to stand back and to look at the overarching interests of the children. His conclusion that they would quickly adapt and prosper in Nigeria was also properly open to him and not capable of any real criticism.

18) The judge's overall conclusion on proportionality, including evaluation of the children's best interests, has not been shown to be legally flawed.

19) The skeleton argument and the grounds prepared by the appellant's solicitors went beyond what was justifiable in presentation of his case at its legitimate highest. It is to be hoped that his solicitors will learn for the future to confine their enthusiasm within the limits of factual and legal accuracy.

20) The appellant's appeal to the Upper Tribunal is dismissed. The determination of the First-tier Tribunal, dismissing his appeal on all grounds, shall stand.

21) No order for anonymity has been requested or made.

15 August 2013
Judge of the Upper Tribunal