Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: IA/14909/2012**

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on:**
On 25 June 2013	**On 26 June 2013**

Before

Upper Tribunal Judge Kekić

Between

Mrs Caroline Dennis-Durugbor

Appellant

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation

For the Appellant: Mr D Coleman, Counsel
For the Respondent: Ms S Vidyadnaran, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission on 13 March 2013 by Upper Tribunal Judge Chalkley in respect of the determination of First-tier Tribunal Judge Cohen who dismissed the appeal following a hearing at Taylor House on 4 October 2012 by way of a determination promulgated on 5 November 2012.

2. The appellant is a Nigerian national born on 11 August 1969. She appeals against the decision of the respondent to cancel her leave as a Tier 1 Migrant under paragraph 321(A) on 19 June 2012 on the basis that she had misrepresented her income with a view to obtaining her Tier 1 leave. Her husband and four children are dependent upon her application.

3. The judge has been accused of making various factual errors which are said to have infected his determination. He is also criticised for failing to follow the Razgar steps and for wrongly stating that the appellant's children had spent most of their lives in Nigeria.

4. Permission was granted on the basis that the typing errors do not inspire confidence in the decision.

Appeal hearing

5. At the hearing I heard submissions from the parties as to whether the judge made errors of law such as to make his determination unsustainable.

6. Mr Coleman submitted that the judge had based his fact finding applying the wrong burden of proof. He had set out the wrong burden in paragraph 15; his starting point should have been that the burden was on the respondent. He then expanded upon the grounds put forward. He submitted that the appellant had never stated that she had purchased 30 computers to sell and the judge's reference to this was an error. He also submitted that she had never claimed to have paid £9000 in tax and that the judge was wrong to have said she had at paragraph 4. Additionally, the judge had wrongly recorded that the appellant had claimed to earn £39,345 when she had never said that. He submitted that the appellant had four children aged 10, 9, 7 and 4. The three older children had lived here for five years, the youngest had been born here and had never lived in Nigeria. the judge had, therefore, based his assessment of the Article 8 claim on the wrong facts as they had not lived in Nigeria most of their lives. Approaching the claim from that perspective, he had considered it to be weak but had he realised the correct position he may have reached a different conclusion.

7. For the respondent, it was argued that the judge had not made errors which detracted from his decision. The date of decision was June and not August but that did not impact upon his reasoning. The appellant had mentioned paying £9000 in taxes at her interview with the interviewing officer, and had said at the hearing that she earned £39,345. The judge could not be blamed for referring to the appellant's own evidence. There was a significant difference

between the appellant's claimed income and that declared to the Inland Revenue and that showed that the appellant had falsely represented her earnings. It had been for the appellant to prove her claim of income and she had failed to do so. In that sense there was no misdirection as to the burden of proof. The judge had dealt with the contradictory evidence as best he could. He was right to find there had been a deliberate misrepresentation. His adverse findings were open to him to make. MK (best interests of child) India [2011] UKUT 00475 (IAC), EA (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC) and Shizad (sufficiency of reasons : set aside) [2013] UKUT 00085 (IAC) were relied on and I was referred to various paragraphs therein to support the submissions made. Ms Vidyadnaran accepted that the judge was wrong to have said that the children had lived in Nigeria the majority of their lives but he had nevertheless considered all the evidence properly and had made sustainable findings on their best interests which accorded with the case law referred to. The children were very young and their relationship with their parents was the pivotal factor. The appellant had no legitimate expectation to remain given her misrepresentation. That must weigh heavily against her in the balancing exercise.

8. In response Mr Coleman submitted that the whole assessment of Article 8 was made on a factual misdirection and as such was unsustainable. The case law did not assist in the circumstances. The judge had punished the children for the errors of their mother. The older child had spent the last five years of his life here; those years were the important ones, more so than his younger years. The judge's error was material and there should be a re-hearing of the appeal.

9. At the conclusion of the hearing I reserved my determination which I now give.

Findings and Conclusions

10. I have carefully considered all the submissions and the evidence before arriving at my conclusions. I would state at the outset that the typing errors which are spread throughout the determination and which appear to be the result of voice recognition software not operating as it should, are most regrettable however these are not the 'errors' identified in the grounds .

11. As I read it, permission was granted on the assumption that the errors attributed to the judge were indeed made however a reading of the determination and the evidence shows that is not the case at all. Apart from the error relating to the date of the decision, which

has no impact upon the outcome of the appeal, and the Article 8 error (to which I shall return later) none of the other 'errors' exist.

12. The following misdirections are alleged. The judge is said to have referred to the appellant's purchase of 30 computers when it is asserted that this was never part of her evidence. In fact it can be seen from the appellant's landing card (contained at Annex C2) that it was the appellant herself who provided this information to the Immigration Officer. It is also repeated in the notice/report cancelling her leave to remain. For it to be maintained that this was a factual error on the part of the judge is wholly inappropriate and incorrect. This assertion did form part of the appellant's evidence and her attempt to deny it only reinforces the judge's adverse view of her credibility.

13. The judge is criticised for wrongly giving the appellant's earnings for 2008-2009 as £39,345 in paragraph 9 of his determination. It is maintained that later in his determination he referred to the correct figure of £29,345 and that this error adversely affected the decision. It is not explained how the decision was adversely affected but in any event the reference to the higher figure came from the recorded evidence of the appellant (which is confirmed by the hand written Record of Proceedings). The error is the appellant's and not the judge's. Notwithstanding that point, however, it is plain from the determination that the judge based his findings on what the appellant maintains is the correct sum (paragraphs 17 and 18); there is no reliance placed on an incorrect figure when the conclusions are reached.

14. The grounds further argue that the respondent wrongly maintained that the appellant had declared lower earnings to the Inland Revenue so as to pay less tax and that this "vital mistake" affected the whole decision. Contrary to this complaint, the interview record of the appellant discloses very clearly that this declaration emanated from the appellant herself. As such, the respondent was perfectly justified in using it to discredit her integrity as was the judge. He took account of her explanation at the hearing that she had only made this statement out of fear but was entitled to reject that as a ludicrous explanation finding that one would not lie and claim one had committed a criminal offence if that was not the case. It should also be noted that the appellant provided an entirely different excuse for the differing figures in her witness statement; there she blames her accountants for the mistake.

15. At the hearing Mr Coleman added another error. He maintained that the appellant's instructions were that she had never claimed to have paid £9000 in tax as the judge recorded at paragraph 4 of his

determination. However, as can be seen from her interview record (at Q.11) she did indeed make this claim.

16. It is plain, therefore, that the errors attributed to the judge (as set out above) were not his errors at all. These were all matters taken from the evidence before him; evidence from the appellant which she now seeks to deny. The judge took all this evidence into account. In order for the appellant to meet the requirements of the rules relating to Tier 1, she had to show a certain level of income. The contradictory evidence the judge was provided with did not show that the required level was attained. Indeed the reliable documentary evidence showed a much lower figure. The appellant's explanations were considered. The judge noted that apart from the appellant's inconsistent accounts, there were no invoices or business documents to substantiate her claimed business activities and the deposits into her bank account did not accord with her claimed earnings. He also considered it implausible that's he would have been able to sell £64,000 worth of computers simply as a result of chatting to people at the school gates. Given all these factors the judge's findings that the appellant had misrepresented her situation and that the respondent's decision was correct were fully open to him to make. I take note of Mr Coleman's submission on the burden of proof point however in view of the compelling findings, all borne out by the evidence, it is plain that no other outcome would have been possible. The appellant, on her own evidence, has misrepresented the facts. It is she, not the judge, who has provided inconsistent and unsatisfactory evidence and in all the circumstances the decision of the judge to find in the respondent's favour is sustainable.

17. I now turn to the criticisms made of the judge's approach to Article 8. It is argued in the grounds that the Razgar steps were not followed. To be fair, Mr Coleman did not seek to pursue this unmeritorious allegation. It may be seen from paragraph 25 that the judge did indeed follow the required steps.

18. The only arguable error identified in the grounds is the last one where it is maintained that the judge was wrong to have said that the children had spent the majority of their lives in Nigeria. Their dates of births are 5 September 2002, 23 December 2003, 23 December 2005 and March 2009. The appellant arrived here with her husband and three children in October 2007; the youngest was born here. The oldest child was five on arrival and has spent just over five years here; the other two have spent the larger part of their lives here and the youngest is four and has never lived in Nigeria. The judge did therefore err when he stated that the children had spent the majority of their lives in Nigeria. Nor surprisingly, Mr Coleman made strenuous submissions on this point and maintained

that the judge's error invalidated all his findings on proportionality in that he approached this as a weak claim being under a misapprehension of the true length of the children's residence here. Mr Coleman also submitted that the findings on best interests of the children were unsustainable because they were based on a factual error.

19. I have considered this submission carefully as the lives of four very young children are involved and they are not responsible for their mother's deception. However, having considered the determination as a whole and all the reasons set out for the rejection of the Article 8 claim, I do not share the view that this is such an error as to render the determination unsustainable. The children are very young. The judge rightly concluded that their best interests were to be brought up by their parents which they would be even if returned to Nigeria. That assessment is sustainable regardless of whether they lived longer here than in Nigeria. As found in EA (op cit) *"the correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of the child to live with and be brought up by his or her parents, subject to any very strong contra-indication".* No contra-indications were put forward to the judge in this case. He correctly took this as his starting point. It is not suggested for the appellant that the children's best interests lie elsewhere.

20. EA also addresses the relevance and impact of long residence. It is stated that: *"Absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case".*

21. In the present case no evidence of links with the community, ties formed outside the family unit or other indication of integration was submitted. The only evidence the judge had with respect to the children was confirmation they attended school since November 2007, January 2008, January 2009 and January 2012 respectively. He took this into account (paragraphs 8 and 27). No doubt the children have friends at school and possibly outside school too however their very young ages mean that their family unit is pivotal in their lives. EA acknowledges that fact. Headnote (iii) observes that *"during a child's very early years, he or she will be primarily focused on self and the caring parents or guardian".* Mr Coleman himself in submissions acknowledged that the younger years of a

child's life were not as important or formative as later years (see paragraph 8 above). None of the children have spent anywhere close to seven years here; the period thought to be a determinative stage when assessing the position of children. They are all young. With the support of their family they would adapt. The judge was entitled to find as such.

22. The judge further found that the appellant and her husband had very large extended families in Nigeria to provide help and support on any readjustment that would need to take place. The children would have their grandparents, aunts, uncles and cousins as well as their parents. The appellant owns no property here and the judge did not accept that she had given up her home in Nigeria when she came here. He noted that she and her husband had both worked in Nigeria, indeed having had better jobs, and would be able to find employment again. He found that the children would be able to continue their education in Nigeria. He found that the appellant's private life here was established at a time when she was aware that she had misrepresented her position to obtain leave. There were no health, religious or linguistic issues put forward. The family are all Nigerians nationals and as such would be able to enjoy the benefits such citizenship confers. They would be able to enjoy their own culture and traditions. It is not suggested the children would be unable to obtain an education in Nigeria. There was no other evidence of ties here apart from family life within the family which would continue after removal. It is difficult to see what other factors the judge could have considered. The period of residence alone does not override everything else and in the absence of any particular factors to show integration or adverse impact (none having been raised) I cannot see how the judge's error can be said to be material. There is nothing in the determination to support the contention that the judge approached the Article 8 as being a weak one. He took all the factors argued into account and concluded that the circumstances of this family were not such that removal should be found to be disproportionate.

23. Mr Coleman submitted that the judge was wrong to punish the children for their mother's conduct when holding that her misrepresentation was a weighty factor in the balancing exercise. It is noteworthy that the judge did not reach his assessment of the best interests of the children with that factor in mind. His assessment of the family circumstances is fairly undertaken. The appellant's conduct is of course a relevant factor and has to be given due weight. The poor immigration history of the appellant in MK was also given weight despite the presence of children (paragraph 62). Where, as in the present case, an appellant makes false representations in order to remain here, she must take responsibility for the consequences.

24. In conclusion, despite Mr Coleman's able submissions I do not find that the determination is flawed to the extent that it should be set aside.

Decision

25. The First-tier Tribunal did not make an error of law. The decision to dismiss the appeal on immigration and Article 8 grounds is maintained.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

25 June 2013.