Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26513/2011

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Determination Promulgated**
On 8 July 2013	**On 10 July 2013**

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Before
UPPER TRIBUNAL JUDGE JORDAN

Between

The Secretary Of State For The Home Department

Appellant

And

Ifeanyichukwu Orji

Respondent

Representation:
For the Appellant: Mr Melvin, Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

1. The respondent, Mr Orji, is an Austrian citizen who was born on 8 June 1984. He is now aged 29. The Secretary of State appealed against the determination of the First-tier Tribunal (Judge C.J.E. Nichols and Mr A.P. Richardson JP) promulgated on 23 May 2012 allowing his appeal against her decision of 27 March 2012 to make a deportation order against the appellant. It replaced an earlier decision that had been made on 16 August 2011. For the sake of continuity, I shall refer to Mr Orji as 'the appellant', as he was before the First-tier Tribunal.

2. The Secretary of State made her decision following the conviction of the appellant on 10 January 2011 at Snaresbrook Crown Court for an offence of assault occasioning actual bodily harm. The circumstances of the offences were that, whilst on bail, he breached the terms of his bail

by going to the home of his wife (whom he had previously assaulted) and carried out a sustained assault upon her at a time when she was eight months pregnant. The sentencing judge noted that the appellant punched her in the face and stomach and later kicked her in the stomach. He remarked that the appellant had a piece of tubing which he used to hit her over the body whilst threatening to kill her. The appellant lit a cigarette and pushed it into her forehead; at one stage, throwing a match at her and threatening to kill her. He was sentenced on 7 February 2011 to 2 years and 4 months' imprisonment. At the conclusion of his custodial sentence, the appellant remained in immigration detention.

3. The appellant arrived in the United Kingdom on 1 September 2001 to join his mother and two younger half-sisters, the children of his mother's second marriage. His mother had acquired Austrian citizenship on the strength of her re-marriage to an Austrian national, the appellant's stepfather. The appellant's father remains in Nigeria. Having acquired Austrian citizenship, the appellant's mother travelled to the United Kingdom in order to exercise her own, or her new husband's, Treaty rights. The mother's acquisition of Austrian citizenship permitted the appellant to enter the United Kingdom from Nigeria. I understand that the appellant has never lived in Austria.

4. Since arriving in the United Kingdom some 12 years ago, the appellant has been convicted on nine occasions of nine offences. The two most recent offences concerned the two assaults upon his wife. However, an earlier decision made on 21 December 2006 to deport the appellant was withdrawn when his appeal was allowed. Unfortunately, this failed to deter the appellant who continued to commit further offences.

5. Under Reg. 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (2006 No 1003) the respondent is restricted in the circumstances in which she may deport a Union citizen. Such a decision can only be justified on the grounds of public policy, public security or public health. Pursuant to Reg. 21, the Union citizen who has acquired a permanent right of residence may only be deported on serious grounds of public policy or public security whilst a Union citizen who has resided in the United Kingdom for a continuous period of at least 10 years prior to the decision to deport him may only be deported on imperative grounds of public security. Periods of imprisonment are excluded from the calculation and the Court of Justice is considering whether periods of time between successive periods of imprisonment should be aggregated in order to calculate the qualifying periods, see *Onuekwere v UK* (C-378/12) and *MG v UK* (C-400/12). As appears from paragraph 3 of the determination, the appellant's counsel did not contend that the appellant had acquired a permanent right of residence.

6. In considering whether the appellant's deportation was justified under the Regulations, the Secretary of State took into account the Multi-

Agency Public Protection Arrangements under which it had been deemed appropriate for the appellant to be monitored under risk management strategies in circumstances which demonstrated he posed a continuing risk to the public. The appellant's offender manager found that the appellant posed a high risk of harm to his wife and children on the basis of identifiable indicators of the risk of serious harm. The harm included causing emotional and psychological harm such that his wife could be at risk if he was aware of her location on release from prison. More worryingly, the offender manager said the appellant was unable to accept responsibility for his previous and current offending. He concluded the appellant had an unrealistic expectation of reconciliation which fuelled the appellant's belief that he would be able to locate his wife and family.

7. The Secretary of State also relied upon remarks by the sentencing judge that an aggravating factor was that, in the most recent assault, his three children were present and, if not actual witnesses to the assault, were able to hear it.

8. In the NOMS 1 assessment the offender manager found the appellant posed a medium risk of reoffending. There were issues about the suitability of the accommodation which would be available to the appellant upon his release and the difficulty in finding approved premises as a result of the appellant posing a high risk of serious harm.

9. The offender manager also noticed that, whilst in prison, he had received several adverse entries including one concerning an assault on a fellow prisoner. At one stage, the appellant was transferred to a more secure prison. The Secretary of State took the view that she had been provided with no evidence the appellant had made progress in prison to address aspects of his offending behaviour. In particular, there was little material to suggest he had addressed his lack of insight over the effects upon the victim of his wrongdoing.

10. These were serious allegations made against the appellant and which supported the decision to remove him, notwithstanding the restrictions placed upon the Secretary of State by the 2006 Regulations at whatever level the appellant was placed in the Reg. 21 hierarchy.

11. The panel, in paragraph 22 of its determination, referred to the well-established legal principles governing the Tribunal's consideration of deportation cases where removal would impact upon the best interests of children and the preservation of family life. The panel properly remarked upon the fact that the best interests of the children had to be a primary consideration and that, as a starting point, their best interests would usually be served by living with both parents. In the appellant's case, however, the panel was aware that the appellant was estranged from his wife and children, whom he had last seen in November 2010 when they visited him in prison. The panel was aware

that an application had been made, and subsequently transferred to the High Court, in relation to contact with his children. The appellant's wife was vehemently opposed to contact, so much so that her and the children's whereabouts had not been disclosed. The panel noted that the appellant's anticipated release from prison on 21 December 2011 was subject to the specific condition that the appellant was not to approach or communicate with his wife or any of the children. These conditions had not been challenged by the appellant. Unsurprisingly, the panel concluded that the best interests of the children would best be served by their remaining with their mother and by not having contact with the appellant. As appears from paragraph 31 of its determination, however, the panel stressed that this conclusion was limited because of the panel's inability to access information about the children's needs which would have been available in the contact proceedings. The panel found in paragraph 32 the appellant posed a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society so that, notwithstanding his presence in the United Kingdom for at least 11 years, his removal was proportionate.

12. In reaching this decision, the panel acknowledged the fact that the appellant did not speak German but, considering the nature and seriousness of the appellant's offending, the decision to remove him was compliant with the limitations upon removal within the 2006 EEA Regulations.

13. Notwithstanding these findings, the panel allowed the appeal on human rights grounds. It did so on the basis that whilst litigation was in progress in the Family Division, the Tribunal was bound to allow the appeal pending the resolution of the contact proceedings. In paragraph 39 of its determination, the panel concluded that, but for its reliance upon decisions in the Court of Appeal and in the European Court of Human Rights, it would have sanctioned the appellant's removal. However, it considered itself bound to permit the appellant to remain pending the conclusion of the litigation.

14. The panel concluded:

> "On that basis alone, we find that the decision to deport the appellant does place the United Kingdom in breach of the European Convention on Human Rights, particularly Articles 6 and 8, and on that basis that it is unlawful."

15. On 25 February 2013 the Upper Tribunal (Upper Tribunal Judge Coker and Deputy Upper Tribunal Judge I. Lewis) were unable to reconcile the reasoning of the panel with its conclusion to allow the appeal. In paragraph 10, it decided that the panel reached a conclusion that the appellant was not a person with whom the children should have close or regular contact and that it would not be in the children's best interests to have contact with him. Further, in paragraph 11, it

concluded that the appellant's removal was in accordance with the 2006 EEA Regulations and was proportionate. Accordingly, there were only two alternatives; either to dismiss the appellant's appeal or to adjourn it for the Family Division to reach a decision on the contact. Accordingly, the First-tier Tribunal panel's decision disclosed an error on a point of law and was set aside. The decision of the Upper Tribunal dealing with this aspect of the appeal was served on the parties and forms part of my determination.

16. There was no cross-appeal by the appellant.

17. In a judgment made by Theis J in the Family Division on 13 February 2013 in the appellant's application for contact with his 4 children (the contents of which the Upper Tribunal is permitted to see), the Judge concluded that it would not be in their interests that the appellant has contact with them save indirect contact by letter, perhaps twice a year under the effective supervision of CAFCASS. The conclusion of the Family Division effectively prevents the appellant from relying upon his claim that his children's interests preclude his removal. Since this was the only outstanding issue given the decision of the Upper Tribunal in finding an error on a point of law, this determines the appeal before the Upper Tribunal.

18. Nevertheless, I shall set out the salient factors of the appellant's Article 8 claim. It is not, however, necessary to dwell upon the position of the appellant's spouse or his children given the conclusion of Theis J in the Family Division.

19. By directions made by the Upper Tribunal on 8 April 2013 at a Case Management Review, the Tribunal directed that the findings of the First-tier Tribunal should stand insofar as they were '*amplified*' by the judgment of Theis J. The case was to proceed on the basis of submissions only.

20. Mr Melvin provided written submissions on 9 April 2013. He accepted that the appellant's mother and his two half-sisters are in the United Kingdom as well as other, more distant, relatives but there was scant evidence that the appellant had lived with his mother and half-sisters since his arrival and, in any event, there was little or no evidence that his two half-sisters would suffer any adverse consequences by reason of the appellant's deportation. They would, of course, remain with their mother. Effectively, that disposed of a protected family life in the United Kingdom.

21. The respondent accepted the appellant had established a private life having lived in the United Kingdom since 2001 although his criminal convictions and sentences amounted to over six years. It was also accepted that he attended Newham College but there was no evidence of his having completed courses of study. There was no evidence of

employment. Accordingly, the evidence of private life was thin indeed. (These findings also undermined the appellant's case to be entitled to a permanent right of residence on the basis of his being a qualified person having exercised Treaty rights for 5 years, although as I have said with reference to paragraph 3 of the panel's determination, the appellant's counsel did not argue the appellant had a permanent right of residence.)

22. The Secretary of State considered the appellant's claim to have no family contacts in Austria but had produced no evidence in this regard. For my part, I am not satisfied that he could produce evidence of a negative. Since his mother's acquisition of Austrian citizenship was derived from his stepfather, the only likely family members are those of his stepfather who had lived in the United Kingdom for some years. Consequently, the correct way to approach this appeal is on the basis that he has no family members with whom he is in close contact in Austria but that he has the support of a European country, should he require access to support mechanisms.

23. The appellant gave evidence to me in which he repeated he had no family in Austria. His mother commenced living in Austria in 1985, a few months after the appellant was born in June 1984. Meanwhile, he remained in Nigeria. His mother acquired Austrian citizenship in 1997 which permitted him to do the same. His mother relocated to the United Kingdom in 1999 and the appellant arrived here two years later in 2001, aged 17 or thereabouts.

24. He complained about a variety of injustices which he considered he has suffered both in relation to the hearing before the Family Division as well as in the attitude of the respondent in never being satisfied that he has done enough to remain in the United Kingdom.

25. The appellant went on to say that he is no longer a Nigerian citizen as Austria does not permit dual nationality and his mother, too, abandoned her Nigerian citizenship when she became a Union citizen. He repeated that he did not want to go to Austria and that he would be homeless were he to do so. His stepfather had died in 2008. He said that he had never met his father in Nigeria.

26. Nevertheless, although he had spent the first 17 years in Nigeria, he told me that he would prefer to be an Austrian citizen rather than a Nigerian citizen. He spoke of his two half-sisters both of whom lived with his mother in Canning Town. The elder was born in 1997 and is now aged 15 or 16. She is an Austrian citizen by birth. In contrast, her younger sister, born in 2003 and now aged 10, is a UK citizen by birth.

27. There is a presumption that foreign law follows United Kingdom law unless the contrary is shown; foreign law being a matter of fact. If so, and assuming the appellant is correct that Austrian law does not permit

dual nationality, the appellant may be able to re-establish his Nigerian nationality (or a right to enter) through his grandparents. However, Mr Melvin did not seek to rely upon this point. It is, in any event, academic because the appellant stated that he would prefer the benefits of Austrian citizenship, rather than those of Nigerian citizenship. This lies uneasily with his contention that he could not live in Austria.

28. I am satisfied that the disposal of this appeal before me was confined to a very limited scope. Although the First-tier Tribunal has been criticised for allowing the appeal, it is clear from its judgment that what was intended was to permit the appellant to remain in the United Kingdom pending the outcome of the proceedings in the Family Division. Had it made this perfectly clear, I see very little to criticise in the First-tier Tribunal's approach. It is open to the Tribunal to allow a claim on human rights grounds but then to make it clear in the judgment that it only envisages a very limited right to remain, perhaps a period as short as a month or two until, for example, a relevant child sits an examination. There is nothing wrong in principle with such an outcome. It is, to some extent, very little different from an adjournment where the effect is to continue existing leave pending the determination of the proceedings pursuant to s. 3C of the Immigration Act 1971.

29. In essence, this was what the First-tier Tribunal directed and it has borne fruit. Had the appellant being removed before the proceedings in the Family Division were concluded, there might well have been a procedural error in that the appellant was, potentially, deprived of the opportunity of participating. Be that as it may, the reason for the grant of leave, the quasi-adjournment, has now been satisfied in that the decision of Theis J has now resolved the only outstanding issue.

30. In her decision of 13 February 2013, Theis J directed that there should be no contact between the appellant and his children as a result of his conduct towards their mother. The fact that the Family Division has ordered that there be no contact between the appellant and his children (save indirect contact by the appellant writing to them) firmly establishes that there is no family life that is, at present, to be preserved or fostered or developed.

31. I have considered the appellant's evidence both in the context of the First-tier Tribunal's sustainable findings but also in my own free-ranging assessment, untrammelled as it were by those previous findings.

32. I am satisfied that the appellant enjoys family life with his four minor children by reason of his being their father. The nature of the family life that he is, however, permitted to enjoy is now determined by the ruling in the Family Division. It is a family life that can, and must be, preserved only by infrequent letter writing. Since this can be done from

Austria or Nigeria as well as from within the United Kingdom, there is no interference with this limited, preserved family life by removal.

33. The appellant is not, of course, currently exercising Treaty rights but, for these purposes, I am prepared to accept that he is a Union citizen and that the limitations upon his removal are to be found in Reg. 21 of the Immigration (European Economic Area) Regulations 2006. This requires a proportionality balance but one which is somewhat more nuanced than the same balance under Article 8 by reason of the various factors contained within Reg. 21. However, in the circumstances of this case, I detect no significant difference; all the more so since the First-tier Tribunal reached a sustainable conclusion on the issue of public policy. I accept that the appellant has a mother and two half-sisters in the United Kingdom. Even if he were to have a close relationship with them, it would not be one that went beyond the normal emotional ties that exist between an adult son and his mother or an adult brother and his half-sisters. There is no suggestion that his half-sisters will suffer by reason of his removal. This was not a matter that was raised before the Family Division as adding weight to his claim to have contact with his own children. Given the absence of a protected family life and the almost negligible evidence of a private life, the only viable counterbalance in the proportionality exercise is the effect of the appellant's presence in the United Kingdom since 2001 and the greater familiarity he has with the United Kingdom when compared with Austria.

34. This has to be weighed against the compelling public interest in removing foreign nationals who transgress United Kingdom law. In the appellant's case I consider that by far the most worrying aspect of his case is his inability to recognise his own responsibility and his readiness to blame others for the consequences that he has suffered. In particular, the fact that his wife and children have, in effect, been required to obtain a different identity demonstrates the continuing impact of his criminality and his resolute refusal to confront it. Whilst this may not represent a specific threat to his wife and children given their fresh identities, the appellant remains a dangerous man. Apart from this, there is in my judgment a public interest, distinct from impermissible factors such as deterrence [reg. 21(5)(d)] or reliance upon the appellant's previous criminal convictions as alone justifying removal [reg. 21(5)(e)], which comes into play. The appellant's personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and, in my judgment, it does. This conclusion is based exclusively on the personal conduct of the appellant and arises from his failure to address what has happened in the past as well as the justifiable anxiety that society feels about having within its midst an individual who has behaved like the appellant.

35. For these reasons, I am satisfied that, both under the 2006 Regulations and under Article 8 of the ECHR, the appellant's deportation is justified and proportionate and in accordance with the law.

36. The appellant’s former representatives were telephoned prior to the hearing on 8 July 2013 in order to ascertain whether they intended to appear. A representative of the firm notified the Tribunal that they would not be attending the hearing. I decided to hear the appeal in their absence.

37. The appeal comes before me as a re-hearing of the appeal before the Upper Tribunal because Upper Tribunal Judge Coker who originally heard the appeal on 23 April 2013 has been unable to determine the appeal as a result of a serious road accident. The appeal was, therefore, transferred to me.

DECISION

The First-tier Tribunal panel made an error on a point of law and I substitute a determination dismissing the appeal on all the grounds advanced.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
8 July 2013