Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: IA/29017/2012**

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on:**
On 20 June and 8 August 2013	**On 13 August 2013**

Before

Upper Tribunal Judge Kekić

Between

Victor Opara
AKA Victor Oprah
(anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation
For the Appellant: Dr A I Corban, Solicitor
For the Respondent: Ms E Martin, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission on 2 May 2013 by Designated Tribunal Judge Garratt in respect of the determination of First-tier Tribunal Judge W L Grant dismissing the appeal of the appellant following a hearing at Taylor House on 11 March 2013. The matter came before him on a float list and as a result the respondent was not represented.

2. The appellant is a Nigerian national. Two dates of birth have been put forward - 12 and 18 February 1969; the appellant maintains the latter is correct. He claims to have entered the UK from Italy with a visa but various years for entry in the 1990s have been given and there is no record of lawful entry. He has also contradicted himself by claiming that it was a visitor's visa but elsewhere that it was a "sports" visa (in his letter/statement of 6 February 2013). He claims his passport had gone missing and obtained a new one in 2004. On 7 April 2004 he submitted an application for a residence card on the basis of his marriage to an EEA national. The application was refused and it transpired that this was a sham marriage for which the appellant paid £3500 (although he claims he was tricked and pressured into it). On 3 February 2012 (received on 7 February), the appellant made an application to remain outside the Immigration Rules on the basis of his relationship with Fatou Jagne, and her two children. On 19 April the Secretary of State returned the sponsor's passport to the representatives but maintained that the other documents would be retained until a final decision was made. In a notice of decision dated 30 April 2012, the respondent applied paragraphs 322(1) and 322 (1)(a) on the basis that he had sought leave for a purpose not covered by the rules, that he had no valid leave when the application had been made ad that his passport had been confirmed to be a forgery. In a letter dated 20 April 2012 she refused the Article 8 claim.

3. The appellant's solicitors made enquiries about the progress of the application on 28 November 2012 and on 11 December were informed that a decision had been made on 19 April 2012. A copy of the decision notice was enclosed (that is dated 30 April) and the appellant lodged an appeal on 14 December. It was maintained that the first notification the appellant and his representatives had received of the refusal was the notice sent with the letter of 11 December.

4. No issue appears to have been taken at any stage with the timeliness of the appeal. It came before First-tier Tribunal Judge W Grant but as mentioned above, it was in a float list and so there was no presenting officer. It was dismissed following the hearing by way of a determination dated 20 March 2013.

5. The grounds argue that the decision was made on 11 December 2012 (the date the appellant maintains he was first served with the notice of decision) and the judge erred in considering the appeal under the old Immigration Rules. It is also argued that the judge erred in his findings under paragraph 322(1) and 322(IA), that he erred in findings the appellant's passport was forged when that had never been raised by the respondent as an issue and that he made irrational and perverse findings in respect of the appellant's credibility. Lastly, criticism is made of the Article 8 findings which are said to be contradictory and unclear. It is argued that the judge did not undertake any balancing exercise when assessing proportionality.

6. The respondent has filed a Rule 24 response questioning the jurisdiction of the Tribunal to hear the appeal given that Notice of Appeal was lodged in December 2012 and the decision was made in April.

Appeal hearings

7. The appeal first came before me on 20 June 2013. I first heard submissions on the preliminary issue of jurisdiction. It was Ms Martin's submission that the decision of 30 April 2012 had been served on the appellant and that his appeal of December 2012 was out of time. Dr Corban's submission was that there was no evidence of service and that as the notice was first served in December 2012 that should be assumed to be the date of the decision. The relevance of this was that had the date of decision been in December, the amended rules would have become applicable and the appellant should not be deprived of full consideration of his case under all the applicable rules. Ms Martin countered that submission with the argument that even if the decision had not been served in April, the appellant's application still fell to be decided under the old rules following the implementation section of HC 194 which clearly stated that all pre 9 July 2012 applications were to be decided on that basis. Nevertheless she stated that her enquiries had shown that the notice had been served on the appellant's solicitors in April by recorded delivery however as the file was in transit to her she could not provide the recorded delivery number. In the circumstances I proposed to hear submissions on all matters and then to adjourn part heard to the next available date prior to which any evidence available from the Secretary of State regarding service should be served upon the parties. Ms Martin did not raise any objections to the hearing of the appeal given that the Notice of Appeal did raise the issue of lateness if it were not accepted that the December service date was also the date of the decision. She maintained however that the date of decision should be regarded as 30 April 2012 regardless of the date of service.

8. With respect to the substantive grounds, Dr Corban submitted that the judge was required to consider the law as it stood at the date of the hearing as well as the existing circumstances. He was unable however to refer me to anything in the Acts or Procedure Rules to support the first part of his argument. When asked how a consideration of the new rules would benefit the appellant, Dr Corban submitted that family life would have had to have been considered as a free standing issue. He criticised the judge for not having analysed family and private life, for making contradictory findings and for failing to consider whether it would be reasonable to expect the appellant's partner and her children to relocate to Nigeria. He submitted there was a plethora of documents to show cohabitation and the appellant's partner's claim for single occupancy discount of her council tax did not mean the appellant was not living with her. Dr Corban submitted that the judge had failed to consider that the authorities issuing the appellant's second passport had made an error

in the date and had wrongly reached his conclusions only on the basis of that single error. He submitted there had been no intention to deceive and nothing could have been achieved by a change in the appellant's date of birth. His name was changed simply because he preferred the other variation.

9. Ms Martin replied. She submitted that the judge had not simply considered the appellant's name and date of birth. The passport also contained a spelling error with regard to the place of birth and further, it was a completely different place of birth. There was also a difference in how the appellant had signed his name. The Secretary of State had raised the issue of forgery in her letter and the judge did not err in making findings to that effect. If the Tribunal agreed that the findings and conclusions under paragraph 322(1) and (1A) were sustainable, then that was the end of the matter.

10. With regard to the argument about the new rules, the judge was correct to find that he did not have to consider them as the decision was dated April 2012. However if the December 2012 service date was taken as the date of the decision, then the transitional rules applied and they confirmed that any application made prior to 9 July 2012 (as the appellant's was) would be decided under the old rules. She argued that even if the new rules applied, the appellant could not benefit and so the judge's failure to consider them was immaterial. The requirements of paragraph 276ADE(vi) could not be met as the appellant retained ties to Nigeria and had family there. He would also fail under the financial requirements as he could not show that he had £18,600 available to him, he did not have leave to remain when his application was made and the judge found he was not living with his partner. There were also issues with regard to his suitability to remain given the adverse credibility findings. The appellant had taken part in a sham marriage, it was not accepted he had been tricked into it because he had paid £3500 to marry the woman. There was no evidence that he had given evidence for the prosecution at a trial to convict the organisers of the marriage and if he had been told his status would be regularised in return, it was not credible that he would have done nothing to follow up that undertaking. Numerous reasons had been given for rejecting the claim. Clear reasons had been provided.

11. Dr Corban responded. He submitted that the background evidence showed chaos in Nigeria and he argued this supported the contention that the passport issuing authorities had been responsible for the wrong date of birth being entered for the appellant. He referred me to irregularities in political matters but submitted that impunity was widespread in all levels of the government. He submitted that it was not for this Tribunal to consider details of the new rules with a view to assessing whether the appellant met the requirements. The Tribunal was only required to make a decision as to whether the judge made an error of law in failing to consider them. He submitted further, that the appellant would fall to be considered as an

overstayer under Appendix FM EX-1B. For that category he did not need to show £18,600 or existing leave. The judge did not make clear findings on the relationship; had it been accepted as genuine and subsisting? The issue of relocation should also have been considered. It was highly unlikely that the appellant's partner would find work in Nigeria and the education of the children would be disrupted. The appellant accepted he had entered into a sham marriage but that was a dark part of his past and did not mean he did not have a genuine relationship with his current partner. The core of his claim could be accepted even if there were inconsistencies and concerns over other matters.

12. That completed the submissions. A date for 8 August was then arranged, that being the earliest date available.

13. On 26 June Ms Martin served copies of a computer print out said to show that the appellant's solicitors were served with the appellant's immigration decision on 19 April 2012 by recorded delivery. On 29 June, the appellant's representatives filed a response.

14. When the matter resumed on 8 August I heard submissions from both sides. Ms Martin had not had sight of the representatives' response and a copy was made available to her. Dr Corban relied on his response but added that the print out confirmed that three passports were sent by recorded delivery on 19 April but that a note below that indicated that the files was sent to the relevant department to liaise with the LIT (Local Immigration Team) with regard to service. He submitted this clearly demonstrated that the decision letter had not been sent out on 19 April. The entries related to two separate actions.

15. Ms Martin responded. She submitted that if the written response was to be accepted then that would mean the three British passports sent to the representatives had never been received. As there had been no suggestion that this was the case, it could been presumed that the passport and refusal letter must have been received. In the alternative, she relied on the submissions made at the last hearing. She pointed out that the issue over when the notice of decision had been served went to the timeliness of the appeal but as the appeal had now been heard, that was academic.

16. Dr Corban replied. He submitted that it had not been disputed that the passports had been returned. His argument was that there was no trace of the recorded delivery package on the Royal Mail website. In any event, no decision was received. He submitted that the judge should have considered both the old and the new rules. If he had been right to apply the old rules, then he should also have considered whether discretionary leave should have been given to the appellant as the appellant had asked for such leave when

his application was made. He conceded that the skeleton argument before the judge did not refer to this but said that he had represented the appellant and he was sure he had made submissions on it. He argued this was not a new point as it was encompassed by the Article 8 assessment. He was unable to produce a copy of the policy and accepted it had not been placed before the judge.

17. Ms Martin argued that discretionary leave had not been raised as an issue in the grounds for permission to appeal. It had been raised today for the first time but no copy of the policy had been adduced. The skeleton argument did not rely on it. The judge had properly considered Article 8 and had applied the Razgar test.

18. Dr Corban did not wish to add anything further. That completed the hearing and I then reserved my determination.

Findings and Conclusions

19. I deal first of all with the service of the decision and the timeliness of the appeal. I take account of regulations 6 and 7 of the Immigration (Notices) Regulations 2003 and I also have regard to the computer print outs from the respondent and the submissions made by both sides. The respondent's evidence shows that on 19 April 2012 the application was refused under paragraph 322(1) and 322(1)A, that three British passports were copied for the file and returned to the representatives by recorded delivery number AG127682552GB and that the file was transferred to the relevant department *"who are liaising with LIT to serve"*. There is also a copy of an envelope addressed to Corban Solicitors with recorded delivery number DW 0067 1892 5GB.

20. The respondent argues that this evidence demonstrates that the decision was served on 19 April. The appellant argues that no mail was sent on 19 April to the Solicitors because the Royal Mail tracking system does not confirm delivery of the AG recorded delivery number and because it does not make sense that the respondent would date a refusal notice 20 April, a letter 30 April and post them on 19 April. The appellant says nothing about the delivery of the second recorded delivery item (with the DW reference).

21. There is in one of the appellant's bundles a letter from the respondent to the representatives dated 19 April 2012. It is marked as received by the Solicitors on 26 April. It is from Helen Parkes and confirms that the appellant's application has been passed to another team and that enclosed with her letter are the passports. This accords with the respondent's computer record of that date. It also supports Dr Corban's submission that a decision was not sent out on 19 April. Ms Martin is right to point out that the representatives have not

claimed that the passports were not returned and indeed contrary to what is argued in the appellant's response, correspondence of the 19 April (which enclosed the passports) has been shown to have been received by the appellant's representatives.

22. Receipt of the letter of 19 April (with passports) is a different matter to the service of the decision. I do not accept Ms Martin's submission that the decision was sent with the passports. Plainly, the letter of 19 April is what was sent and that is supported by the computer record. I do not know when the decision was first served. It may be that it was sent in the DW recorded delivery packet (which a tracking enquiry shows was delivered on 1 July) but neither party made any submission on this and so I make no finding on that. What I do find is that the respondent has failed to establish that notice of the decision was served on the appellant or his representatives before 11 December. As such, I find that the appeal was not lodged late.

23. The next issue relates to the date of the decision. The notice of decision, regardless of when it was served, is dated 30 April. There is also a letter refusing the Article 8 claim on 20 April but that does not constitute a notice of decision for these purposes. I do not accept Dr Corban's submission that the date of service must be treated as the date of the decision. He was unable to point me to any case law or statute to support that submission. Plainly the notice of decision is dated 30 April 2012 and there is no reason to find any other date applies.

24. The relevance of the date of decision in any event, has little impact upon the consideration of the claim. This was an application made outside the Immigration Rules on Article 8 grounds. It was made on 3 February 2012 and received on 7 February and under the implementation provisions of HC 164 falls to be considered under the rules in force prior to July 2012. Contrary to the misleading grounds (on which it would seem permission to appeal was granted), the decision was not 11 December 2012 and paragraph 276ADE and Appendix FM did not apply to the appellant's case. Much has, therefore, been made by the appellant's representatives of a point that has no relevance to the claim.

25. It was argued that the judge should have considered both the old and the new Immigration Rules. There is no merit in this argument and no reason was put forward to support it. In any event, as is plain from the letter accompanying the application, the appellant sought to remain on Article 8 grounds with a request for three years discretionary leave on compassionate grounds as a back up alternative. Nowhere in the letter is there any reference to any particular immigration rule.

26. Taking the three grounds put forward into account, therefore, I do not find the first is made out. The criticism that the Immigration Judge (sic) erred in failing to consider the new rules is without merit for the reasons set out above.

27. The next ground is also misleading but was taken at face value in the grant of permission to appeal. The judge was criticised for making findings on the authenticity of the appellant's passport when, it is said, *"no issue on this was raised by the respondent"*. That is blatantly wrong. The notice of decision made specific reference to paragraphs 322 (1) and 322 (1A) as the judge noted in his determination. It *was* the respondent's allegation that the passport was a forgery and as such the judge was required to address the issue. Contrary to what the grounds argue, the error of the day of the appellant's birth (given as 12 and not 18 February) was not the only mistake in the passport. His place of birth (said to be Agwa-Owerri) was wrongly stated and not only that but it was misspelled as Port Hacourt. It is argued that the judge failed to take account of the letter of 27 December 2012 allegedly issued by the Nigerian Immigration Service which stated that the date of birth was a typographical error. Even if he had considered that letter, there is no explanation for why the wrong place of birth and the wrong spelling for the place named was given.

28. The third ground takes issue with the Article 8 findings. It appears that permission to appeal was not granted on this point but on the two previous grounds which, as I have shown, were misrepresentations of the evidence. Nevertheless I consider it. The complaint is with the judge's findings on family and/or private life and the proportionality assessment. It is argued that the judge's finding on the former is unclear and that the balancing exercise was not undertaken.

29. The judge considered the documentary evidence and found that he could not be satisfied that the appellant and his partner (there is contradictory evidence as to whether they entered into a traditional marriage or are simply in a relationship) had lived together since 2007 as claimed. He noted that the appellant's payslips between 2007 and 2009 gave a Dagenham address and not the Emerson House address where Ms Jagne lived. He also noted that Ms Jagne had been claiming council tax discount as a single adult occupant at the time the appellant was supposed to be living with her and indeed was still doing so at the date of the hearing. He rejected her claim that she thought she could do so because the appellant was not working. That explanation is wholly without merit because the appellant has produced payslips to show that he was indeed employed at the time. The judge noted that whilst there was credible evidence to show she lived at Emerson House, the limited evidence to connect the appellant to that address conflicted with other documents from the same time period which gave him a different address. He

concluded that the evidence had not established that the appellant and Ms Jagne cohabited. It is in that context that he made his finding about family and private life. The finding is clear. He accepted there was a relationship but "not to the extent claimed"; i.e. no cohabitation. He found removal would interfere with family/private life. The remaining paragraphs of the determination address the best interests of Ms Jagne's children and the proportionality assessment. The judge took into account the Razgar steps and applied Beoku-Betts [2008] UKHL 39. Given the appellant's deception and abuse of the laws of this country by entering unlawfully, remaining without authority, making an application on the basis of a sham marriage and using a forged passport, it is hardly surprising that the judge found that the public interest had to take priority and that removal was proportionate. He was entitled to conclude that to permit the appellant to remain would be to reward those who deliberately violate the Immigration Rules and use false documents. He considered that the best interests of the children were to remain with their mother and that the relationship, such as it was, could continue by way of other means after he left. He found that the appellant had his mother and siblings in Nigeria and that they would be able to assist him until he re-established himself. Of course it is also open to the appellant once he can meet the requirements of the Immigration Rules to make an entry clearance application from Nigeria.

30. For the sake of completion I note that Dr Corban argued that the judge had erred in failing to consider whether the appellant could qualify for discretionary leave. Despite his submissions, I do not accept that this point was raised in the grounds for permission and there has been no application for the grounds to be amended. I note that the skeleton argument placed before the judge also failed to argue this point. Although Dr Corban maintains he was sure he made this point in submissions to the First-tier Tribunal Judge, the Record of Proceedings does not record any such argument in the recorded submissions. A copy of the policy which Dr Corban relied on was not placed before the First-tier Tribunal and has not been adduced as evidence to the Upper Tribunal. In the circumstances I find no error of law in this respect.

Decision

31. The First-tier Tribunal Judge did not make an error of law and his decision to dismiss the appeal stands.

Signed:

Dr R Kekić
Judge of the Upper Tribunal
12 August 2013