Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/25181/2012

THE IMMIGRATION ACTS

Heard at : Field House
On : 17th July 2013

Determination Promulgated
On : 18th July 2013

Before

Upper Tribunal Judge McKee

Between

CHUCK OBIOMA ADIBE

Appellant

and

Entry Clearance Officer, Lagos

Respondent

Representation:

For the Appellant: Mr J. Aghayere of Louis Ssekkono Solicitors
For the Respondent: Mr J. Isherwood of the Specialist Appeals Team

DETERMINATION AND REASONS

1. This appeal comes to the Upper Tribunal with permission granted by Judge Macleman, who had to sort out a number of errors and misunderstandings. Indeed, this whole business has been fraught with problems, starting with the original decision of the ECO. The application for a visit visa was refused on three grounds,

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two of which were based on information not disclosed to Mr Adibe. "*Fingerprint records held in the United Kingdom*" were said to confirm that Mr Adibe had been convicted of an offence punishable with at least 12 months' imprisonment, thus making him liable to refusal under paragraph 320(18) of the Immigration Rules. "*Records available to us*" were said to indicate that Mr Adibe had previously been known by other names, including Patrick Kelly, which were not disclosed in answer to Q.3 on the Visa Application Form. This attracted a mandatory refusal under rule 320(7A), as allegedly constituting both false representations and failure to disclose material facts.

2. The records in question should have been open to inspection as Annexe E to the Respondent's Bundle, but were instead put into a plain brown envelope marked for the judge's eyes only. Into the brown envelope was also popped a lengthy Appeal Statement by Mr Adibe, in which he insists that he has never been known by the name of Patrick Kelly, and explains that there has been a mix-up with somebody else. As Judge Macleman has pointed out, it was wholly uncalled for to invoke section 108 of the 2002 Act as the justification for keeping both the police records and the Appeal Statement out of the public domain – and as far as the records are concerned, out of the purview of the appellant and his representatives. On 14th May this year, Judge Macleman directed that these documents be copied to both parties, but this direction was overlooked by the administrative staff. At today's hearing, copies were made, as indeed were copies of the Police National Computer Record concerning Mr Adibe, handed up by Miss Isherwood.

3. Despite protests from Mr Aghayere, it was established today that Mr Adibe has been convicted of at least one offence which was punishable by at least one year in prison, even though he has never been sentenced to such imprisonment. The ECO caused confusion by misunderstanding when a conviction becomes spent. This is based on the actual sentence imposed, not on the sentence which could have been imposed. Although it seems that the total of nine months' imprisonment imposed on Mr Adibe on 28th June 2002 required a ten-year rehabilitation period, which was not quite spent when he applied for entry clearance on 20th June 2012, Mr Aghayere may wish to come back on that. In any event, whether or not the conviction was spent is not determinative. It is just a factor going to the exercise of discretion under rule 320(18).

4. When the appeal came before the First-tier Tribunal 'on the papers', Judge Juss thought it was clear that the appellant had gone by the name of Patrick Kelly. No mention was made of the Appeal Statement or of Mr Adibe's insistence that he had never gone by the name of Patrick Kelly. It was an error of law for the judge to overlook material evidence, such as the appellant's explanation for why the wrong name had been ascribed to him. The judge went on to make two further errors of law. Because the appellant had failed to disclose a material fact, "*Accordingly, the refusals under the relevant paragraphs stated by the Entry Clearance Officer must be correct*." That does not follow at all. There is no logical connection between using the name Patrick Kelly and being convicted of an offence punishable with 12 months in jail. Still less is there any connection with the ECO's third ground of refusal, namely that Mr Adibe would not be able to maintain and accommodate himself during his visit, or to pay for his onward journey. The third error is that Judge Juss thought that the appellant bore the burden of proof, and had not discharged that burden. But

with refusals under Part 9 of the Rules, such as paragraphs 320(7A) and (18), the onus of proof falls on the respondent.

5. Despite these errors, Designated Judge Woodcraft did not grant permission to appeal to the Upper Tribunal. He partly misunderstood the First-Tier determination, thinking that Judge Juss had found that the appellant "*had sought to deceive the Entry Clearance Officer by failing to disclose a criminal conviction*." The judge made no such finding. Judge Woodcraft was also led astray by paragraph 5 of the 'Reconsideration Grounds' (the notion of 'reconsideration' has been remarkably persistent) into thinking that Mr Adibe had received a third conviction, for which he was sentenced to six months' imprisonment – a conviction which he had not disclosed.

6. Only when the renewed application came before Upper Tribunal Judge Macleman, supported by rather better grounds from Louis Ssekkono, were the misunderstandings sorted out. Judge Macleman was of the view that the Upper Tribunal should set aside the first-instance determination and remit the appeal to the First-tier Tribunal. Both representatives were in agreement with that course today. As well as giving the appellant's representatives a proper opportunity to consider the documents which had previously been concealed under the aegis of section 108, and which were only disclosed today, remittal will also give time to prepare submissions on the other ground of refusal, under paragraph 41 of the Immigration Rules, which has faded into the background, but will have to be adjudicated upon if the appeal succeeds under Part 9 of the Rules.

7. I did not canvass with the parties what Judge Macleman had said about the appeal being determined afresh by the First-tier Tribunal 'on the papers', as the appellant has not paid for an oral hearing. That is a matter which is best left to the First-tier Tribunal itself.

DECISION

The decision of the First-tier Tribunal is set aside, and the appeal is allowed to the extent that it is remitted to the First-tier Tribunal for re-determination *de novo*.

Richard McKee
Judge of the Upper Tribunal

17th July 2013