Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00207/2014

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 4 September 2014	**On: 8 September 2014**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

LESEGO BOLOANG
(NO ANONYMITY ORDER)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms O Taiwo of Ajan Immigration Advisory Service
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following a grant of permission to appeal on 26 June 2014.

2. The appellant is a citizen of South Africa, born on 23 July 1991. He arrived in the United Kingdom on 11 August 2002, aged 11 years, to visit his mother who had been residing in the United Kingdom since December 1999 on a work permit visa. He was granted leave to enter for six months and subsequently limited leave to remain in line with his mother until 16 December 2004, followed by indefinite leave to remain.

3. On 11 August 2011 the appellant was convicted at Snarebrook Crown Court of offering and supplying controlled Class A drugs and conspiracy to sell prohibited weapons. On 19 March 2012 he was sentenced to three years' imprisonment for the drugs offences and two years consecutive for the firearm conspiracy, making a total of five years' imprisonment. On 6 July 2012 he was served with a notice of liability to deportation to which he responded. Further representations were made on his behalf on 1 August 2013 on Article 8 grounds. A decision was made on 20 January 2014 that section 32(5) of the UK Borders Act 2007 applied and a deportation order was signed against him on 22 January 2014. He appealed against the decision of 20 January 2014.

4. The representations of 1 August 2013 gave details of the appellant's family and private life ties in the United Kingdom. It was stated that he had a daughter, born whilst he was in prison, from a previous relationship with Nikita Louise Brown, a British citizen. Ms Brown had been convicted of the same offences as the appellant and was also in prison and their daughter had been placed in the care of a family member, Chinneal Collins. It was claimed that the appellant maintained contact with his daughter through Ms Collins by way of telephone calls and Christmas and birthday cards and intended to take on his responsibilities as a father on release from prison. Reference was also made to his relationship with his mother who was settled in the United Kingdom and was employed by the NHS as a registered nurse and who visited him in prison. It was claimed that he had no family or other ties to South Africa and that his deportation would interfere with the family and private life established in the United Kingdom and would breach his Article 8 rights.

5. The respondent, in making the deportation decision, considered paragraphs 398, 399 and 399A of the immigration rules. With regard to paragraphs 399(a) and (b), it was not accepted that the appellant had retained parental responsibility for his daughter or that he enjoyed a genuine and subsisting relationship with her, and it was not accepted that he had a genuine and subsisting relationship with either the mother of his child or his current partner Latisha Samuel referred to in his response to the notice of liability to automatic deportation. With regard to paragraph 399A it was considered that the appellant retained ties to South Africa and that he could not, therefore, meet the requirements of that provision. With respect to paragraph 398, the respondent considered that there were no exceptional circumstances that would outweigh the public interest in his deportation. It was accordingly not accepted that the appellant's deportation would breach Article 8 of the ECHR.

6. The appellant's appeal was heard before the First-tier Tribunal, by a panel consisting of First-tier Tribunal Judge Powell and Mr Olszewski JP. The panel

heard oral evidence from the appellant and his mother but found neither to be credible witnesses. It was noted that neither Ms Brown nor Ms Collins were in attendance and the reasons given for their absence were not accepted. Accordingly little weight was attached to the evidence provided in their letters of support, including evidence of claimed telephone and other contact between the appellant and his daughter. The panel did not accept that the appellant and Ms Brown were in a genuine and subsisting relationship and did not accept that the appellant had a genuine and subsisting relationship with his daughter. The requirements of paragraph 399 were therefore found not to have been met. With regard to paragraph 399A the panel found the appellant and his mother to have been untruthful about his family ties in South Africa and in particular in his claim to have had no contact with his father and they considered that he retained ties to that country. The panel found nothing exceptional about the appellant's circumstances and, having gone on to consider all other relevant matters including the nature of the appellant's offence and the risk of re-offending, concluded that his deportation would not breach Article 8. The appeal was accordingly dismissed.

7. Permission to appeal to the Upper Tribunal was sought on the grounds that the First-tier Tribunal had erred by failing to pay enough attention to the assessment of risk of re-offending in the pre-sentencing report; that it had erred in its decision on Article 8; that it had erred by ignoring an adjournment request; and that there had been errors on the interpretation and application of relevant cases.

8. Permission to appeal was initially refused on 9 May 2014, but following a renewed application was granted on 26 June 2014 by Upper Tribunal Judge Perkins.

9. The reasons for the grant of permission focussed upon additional grounds submitted on 4 June 2014 alleging that there had been misrepresentations made by the respondent in the decision letter of 22 January 2014 with respect to evidence given by Chinneal Collins, the appellant's daughter's carer. The grant of permission indicated that there were concerns that evidence provided with the additional grounds "might reflect badly on the integrity of the respondent's officers".

10. It is necessary at this stage to provide more details about the additional grounds and the attached evidence. That evidence consists of a handwritten letter from Ms Collins disputing that a statement relied upon by the Home Office at the appeal hearing, and stated to be her statement, was in fact her own statement. The additional grounds clarify that that "letter" (referring to the said statement) was relied upon by the respondent at paragraph 27 of the refusal decision and by the Tribunal at paragraph 54 of its determination.

11. In granting permission, Upper Tribunal Judge Perkins was clearly concerned about the respondent's production of, and reliance upon a statement whose provenance was being challenged by its claimed author and it was on that basis that he made the decision to grant permission. However,

having had the benefit of an opportunity to consider the evidence in more detail, it became clear to me that there had been a misunderstanding of that evidence, in that the document referred to at paragraph 27 of the refusal decision and paragraph 54 of the determination was not in fact a statement from Ms Collins but an email from a social worker at Hackney Social Services Children's Unit to the Home Office referring to information provided to her from Ms Brown and Ms Collins in regard to the nature of the contact between the appellant and his daughter. The social worker, in that email, stated that Ms Collins maintained that the appellant had not made any contact with her in regard to his daughter, either directly or indirectly. As such, Ms Collins' letter appended to the additional grounds was no more than a challenge to the social worker's record of the information she had provided to her.

12. Both Ms Taiwo and Ms Isherwood agreed that that was the case. Nevertheless, Ms Taiwo continued to rely upon Ms Collins' denial of the information in the social worker's email, submitting that the correct information about the contact between the appellant and his daughter had been set out in Ms Collins' previous handwritten letters. She sought an adjournment of the proceedings in order to await the response to a Subject Access Request made to the Data Protection Unit of the Home Office on 8 July 2014 to obtain a copy of the social worker's email which she stated had never been provided to the appellant's representatives, despite several requests having been made. She submitted that the respondent's appeal bundle had not in fact been made available prior to the hearing before the First-tier Tribunal and that the bundle, when received, did not contain the email.

13. However, when Ms Isherwood referred Ms Taiwo to a letter dated 27 February 2014 from Ajan Immigration Advisory Service confirming receipt of the papers from the Home Office, Ms Taiwo conceded that the bundle had been produced. Further, it was apparent that Annex P1, the social worker's email, had been included in her copy of the respondent's appeal bundle. Ms Taiwo was furthermore unable to explain why, if the document had indeed been missing from the bundle at the time of the hearing before the First-tier Tribunal, that had not been raised as a concern at that time. It was accordingly clear that the document had been provided to the appellant's representatives prior to the hearing before the First-tier Tribunal and that there were no grounds for an adjournment on that basis. I considered that Ms Taiwo's submissions in that regard were misleading.

14. Ms Taiwo nevertheless pursued the adjournment request relating to the Subject Access Request, submitting that it was necessary to obtain all information relating to the appellant's case. However she was unable to suggest what information or evidence was required from the Home Office. She also requested an adjournment in order for Ms Brown to attend the hearing, but was unable to explain how Ms Brown's presence was relevant to the issue of error of law. She agreed, in the circumstances, that she was ready to proceed with the appeal.

15. Having accepted that the grant of permission was made on the basis of a misunderstanding in relation to Ms Collins' evidence, Ms Taiwo relied on the initial grounds and submitted that the First-tier Tribunal had erred in its assessment of the family life between the appellant and his daughter. She referred to various cards and letters sent to the appellant from his daughter but when pressed on the issue accepted that that evidence had only been produced with the application for permission to appeal to the Upper Tribunal and was not before the First-tier Tribunal. She submitted that the First-tier Tribunal had erred in law by failing to give due weight to the low risk of re-offending stated in the OASys report, to the appellant's efforts at rehabilitation, to the fact that he had spent his formative years in the United Kingdom and to the impact of his removal on him and his family members. She submitted that if the Tribunal had given due weight to those factors, it would have come to a different conclusion on Article 8. Ms Taiwo submitted that an adjournment request should have been made to the Tribunal at the hearing to enable Ms Brown and Ms Collins to attend, but she accepted that no such request had been made. She stated that a request had been made prior to the hearing, but when referred to the relevant letter from Ajan Immigration Advisory Service dated 27 February 2014, she agreed that it did not refer to problems experienced by the witnesses in attending on the given date and that it was no more than a general request for more time to prepare the case.

16. Ms Isherwood submitted that there was no error of law in the Tribunal's decision and that the allegation of misconduct by the respondent was unfounded and was based on confusion. With regard to the other grounds, there was no error of law in the Tribunal not adjourning the proceedings, given that the representative had been specifically offered an opportunity to make an adjournment request but indicated that an adjournment was not required. The Tribunal had considered all relevant matters and was entitled to attach the weight that it did to the evidence, in particular in the light of the adverse credibility findings which had not been challenged.

17. Ms Taiwo, in response, submitted that due weight had not been placed on the appellant's relationship with his daughter and that it would have been better if Ms Brown and Ms Collins had been present at the hearing.

18. I advised the parties that, in my view, the Tribunal had made no errors of law in its decision. My reasons for so concluding are as follows.

Consideration and findings.

19. As stated above, it is now quite clear that the grant of permission was made in the mistaken belief that paragraph 27 of the respondent's refusal decision and paragraph 54 of the Tribunal's determination relied upon a statement from Ms Collins of which she was arguably unaware and whose provenance was challenged, when in fact the evidence referred to in those paragraphs was an email from a social worker confirming the information she had been given by Ms Collins about the appellant's lack of contact with his daughter. In her letter dated 3 June 2014 appended to the additional grounds

of appeal, Ms Collins denied that she had provided such information and claimed that the evidence given in her previous handwritten letters to the Home Office, confirming contact by telephone and cards, was in fact the true account. The Tribunal, however, in its findings at paragraph 54, referred to Ms Collins' previous evidence and was clearly aware of the inconsistencies between that and the evidence in the social worker's email, but decided to place weight upon the latter rather than the former for the reasons set out in some detail at paragraphs 53 to 56 of the determination. The Tribunal was perfectly entitled to attach the limited weight that it did to Ms Collins' evidence, noting that there had been other inconsistencies in her evidence, that she had not attended the hearing to submit to cross-examination and to respond to queries and that inconsistent and inadequate reasons had been given for her absence.

20. Likewise, the Tribunal was entitled to attach the weight that it did to the social worker's email. The email had been produced by the respondent in the appeal bundle, at Annex P1, and as stated above, it is clear that the appellant's representatives had been in possession of that bundle, containing the email, for a period of six weeks prior to the hearing. Accordingly, and for the reasons fully and properly given at paragraphs 53 and 58 to 61, and on the basis of the unchallenged adverse credibility findings made against the appellant and his mother and in particular with respect to the appellant's relationship with the mother of his child, the Tribunal was entitled to conclude that he did not have a genuine and subsisting relationship with his daughter.

21. Turning to the other grounds of appeal, Ms Taiwo acknowledged that no request was made to the First-tier Tribunal for an adjournment of the hearing in order for Ms Brown and Ms Collins to attend and the grounds are therefore misconceived in asserting that the Tribunal erred by failing to adjourn the proceedings. Indeed it is clear from paragraph 44 of the determination that the Tribunal went to some lengths to offer an opportunity to request an adjournment but the appellant's representative indicated that none was required. Ms Taiwo appeared to rely upon a previous written request for an adjournment, made in the letter of 27 February 2014, but it is clear from the contents of that letter that no reference was made to any witnesses or to problems in regard to attendance at the hearing. The request made in that letter was simply for additional preparation time, but as the Tribunal stated in refusing the request, there was ample time to prepare the case. In any event there was no indication, at the hearing before the First-tier Tribunal, that Ms Brown or Ms Collins were likely to attend a hearing on another date and the reasons given for their absence at that time were wholly inconsistent. The Tribunal was accordingly perfectly entitled to proceed as it did with the hearing and to give the limited weight that it did to the evidence from Ms Brown and Ms Collins.

22. The remaining grounds relied upon by Ms Taiwo are simply disagreements with the weight the Tribunal attached to the evidence. The Tribunal gave detailed and careful consideration to the appellant's offending, including the risk he posed to the public, the seriousness of the offence and the risk of re-

offending. Consideration was specifically given, at paragraph 97, to the indications in the OASys report as to the low risk of re-offending. The Tribunal also gave consideration to the question of rehabilitation and considered the courses undertaken by the appellant in prison. Those were all factors fully and properly considered by the Tribunal and the weight to be attached to them was a matter for the Tribunal. Likewise, the weight attached to the appellant's family and private life ties was a matter for the Tribunal and the conclusions reached in that regard followed a careful consideration of all the evidence, including the family relationships in the United Kingdom, the appellant's length of residence in the United Kingdom, the age at which he first came to the United Kingdom and the family and other ties to South Africa.

23. Having taken account of all relevant matters and having made cogently reasoned findings of fact, the Tribunal was fully entitled to conclude that the appellant was unable to meet the requirements of paragraphs 399(a) and (b) and 399A of the immigration rules and that there were no exceptional circumstances outweighing the public interest in his deportation, for the purposes of paragraph 398. The conclusion, that the appellant's deportation would not breach Article 8, was one that was entirely open to the Tribunal on the evidence before it. The grounds of appeal do not disclose any errors of law in the Tribunal's decision.

DECISION

24. The appellant's appeal is dismissed. The making of the decision of the First-tier Tribunal did not involve an error on a point of law, such that the decision has to be set aside. I do not set aside the decision. The decision to dismiss the appellant's deportation appeal therefore stands.

Signed

Date

Upper Tribunal Judge Kebede