Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00642/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 February 2014	**On 13 February 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

O S I
(Anonymity Direction Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: the appellant was not legally represented
For the Respondent: Mr P Deller a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who was born on 25 December 1971. He has been given permission to appeal the determination of a panel consisting of First-Tier Tribunal Judge Beg and non-legal member Dr P L Ravenscroft ("the panel") who dismissed his appeal against the respondent's decision of 15 March 2013 to make a deportation order against him under section 5 (1) of the Immigration Act 1971.

2. The appellant entered the UK illegally using a forged Dutch passport in October 2001. On 7 December 2001 he claimed asylum. He was asked to complete a statement of evidence form but failed to do so and his asylum claim was refused on 30 January 2002. On 11 July 2002 he was convicted of handling stolen goods and failing to surrender to custody at the appointed time. He was sentenced to 3 months imprisonment. On 9 May 2003 he was convicted of conspiracy to defraud and sentenced to 12 months imprisonment. On 22 May 2003 he was convicted of conspiracy to defraud and sentenced to one year and nine months imprisonment. He was ordered to pay £12,395 in compensation.

3. On 26 May 2007 the appellant was convicted of driving a motor vehicle with excess alcohol and disqualified from driving for 12 months. His licence was endorsed and he was fined £150 with costs of £70. He was also ordered to serve one day for the offence of failing to surrender at the appointed time. On 6 July 2007 he was convicted of driving whilst disqualified and given a community order of 12 months, an unpaid work requirement of 60 hours, disqualification from driving for 12 months and his driving licence was endorsed. He was also convicted of having no insurance and given a community order of 12 months, an unpaid work requirement of 60 hours, his driving licence was endorsed and he was ordered to pay costs of £75.

4. And 17 September 2010 further representations were submitted on behalf the appellant relating to his private and family life. He claimed to be in a relationship with his partner, Miss B, their son and his stepson. Further representations were made on 8 December 2011. It was said that he had an older stepdaughter.

5. Following the respondent's decision the appellant appealed and the panel heard his appeal on 14 August 2013. Both parties were represented and the panel heard oral evidence from the appellant, his partner and his stepdaughter. The panel considered the human rights grounds under paragraph 362 to 400 of the Immigration Rules relating to deportation which had come into force on 9 July 2012 and in particular paragraphs 399 and 399A. The deportation of the appellant was conducive to the public good because he had been convicted of an offence for which he had been sentenced to a period of imprisonment of less than four years but at least 12 months. In these circumstances "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors". The panel referred to a number of authorities including MF (Nigeria) [2012] UKUT 00395, Maslov v Austria (1683 – 03) [2008] ECHR 546, N (Kenya) [2004] UKIAT 00009, RG (automatic deport) [2010] UKUT 275, Uner v Netherlands (46410/00) [2006] ECHR, Razgar [2004] UKHL 27, Huang [2007] UKHL 11, VW (Uganda) [2009] EWCA, Beoku-Betts [2008] UKHL 39, ZH (Tanzania) [2011] UKSC 4 and Kugathas [2003] EWCA Civ 31. The panel concluded that the appellant was not a credible witness. A two stage approach was adopted, first considering the Article 8 grounds under the Immigration Rules and then under the Article 8 jurisprudence outside the Immigration Rules. It was found

that the appellant did not satisfy the mandatory requirements and that his Article 8 grounds failed under the Immigration Rules. The panel went on to consider the Article 8 grounds under the jurisprudence outside the Immigration Rules, applying the five-step Razgar tests. The best interests of the children were treated as a primary consideration and it was concluded that their welfare would best be served if they continued to live with their mother. There was no suggestion that the children should be removed from this country. The appellant could keep in touch with his partner and the children through modern means of communication and they could also visit him in Nigeria. His partner had her own parents living in Nigeria. His stepdaughter was an adult and their relationship did not amount to family life.

6. The panel set out the factors militating for and against the proportionality of the appellant's proposed removal from the UK. It was found that his criminal offences undermined the system of immigration control. He had used a false passport to enter the country. The offences of conspiracy to defraud involved sophisticated dishonesty. Whilst the appellant had a private and family life in the UK and had been here since 2001 the offences were serious. Having attempted to obtain asylum he then absconded and made no attempt to contact the Home Office until 2010. It was concluded that he did not contact the Home Office because he recognised that he had a very weak asylum claim which was likely to fail and that deportation action would be taken against him. His failure to regularise his immigration status provided further evidence of his dishonesty and disregard for the laws of the country. It was concluded that the right to respect for private and family life did not outweigh the public interest in deportation. His appeal was dismissed.

7. The appellant applied for permission to appeal submitting that the panel erred in law; firstly, by failing correctly to apply the principles in Uner v Netherlands. Secondly, by making an irrational and perverse finding as to the appellant's propensity to offend. Thirdly, by failing to take into account the delay between the commission of the offences and the making of the deportation order. Fourthly, by incorrectly applying the new Immigration Rules which post dated the appellant's application. Fifthly, by failing to give proper weight to the appellant's contribution to the parenting of the children.

8. Permission to appeal to the Upper Tribunal was refused by a judge in the First-Tier Tribunal but granted on renewal to the Upper Tribunal. There is a Rule 24 response from the respondent which submits that there is no error of law.

9. The appeal came before me on 14 November 2013. Both parties were represented, the appellant by counsel and the respondent by Mr Deller. In relation to the question of whether the panel erred in law I heard full submissions from the appellant's counsel. During the course of submissions from Mr Deller a query arose as to whether the determination of the panel which was before me and the representatives was complete, correct and the final version. There were indications that it might not be. In the circumstances

I adjourned for enquiries to be made. After these were made, including contacting the First-Tier Tribunal judge who chaired the panel, it was established that the determination which had been promulgated was not the final correct version. The final correct version has now been sent to all parties. I gave directions enabling the appellant to amend the grounds of appeal and the respondent to amend the Rule 24 response if desired. No amendments have been made.

10. At the adjourned hearing before me on 3 February 2014 the respondent was represented by Mr Deller. The appellant attended with his partner, child and stepchildren. He said that he could no longer afford legal representation. In response to my suggestion he said that he wished to rely on the full submissions made by his counsel at the previous hearing.

11. Mr Deller accepted that what the panel said in paragraph 31 was factually incorrect. The appellant's partner did not look after the children whilst he was in prison because at that stage they had not met. Paragraph 32 of the determination contained a correct statement of the law and it was clear that the panel considered the Article 8 grounds on the basis that the appellant would leave the country and the rest of the family would remain here. There had been proper consideration of the best interests of the children. He accepted that in reaching a decision in 2012 the respondent relied on a conviction in 2003 and accepted that delay was a factor which needed to be taken into account. He submitted that, overall, the grounds disclosed no error of law and asked me to uphold the determination.

12. The appellant and his partner emphasised that the criminal restitution order was being paid and would be paid in full. £12,395 had been paid plus approximately £5000 in interest. Approximately £1500 was outstanding and was being paid at the rate of £50 per month by the appellant's partner out of her earnings. The appellant's partner made a plea for him to be allowed to remain in this country to help look after the children. She did not want to be a single parent. He was a changed man and good with the children. He had not committed any serious offences since 2002 which was a long time ago. I asked whether, if I needed to re-determine the appeal, the appellant would wish to submit any further evidence. He said that he would like me to consider up-to-date school reports which he handed in.

13. The appellants counsel submitted that there were three main issues, the length of time since the convictions for serious offences, the reasons why deportation action was not taken earlier and the best interests of the children. She argued that notwithstanding paragraphs 31 and 32 of the determination there had been insufficient consideration of the best interests of the children. Furthermore, the panel misunderstood the evidence. The statement in paragraph 31 that "for the period when the appellant was in prison his partner was able to make arrangements for the care of the children" was a factual error because at that time they had not even met. I note that this was not a point raised in the grounds of appeal.

14. Counsel argued that, whilst the panel referred to Uner v Netherlands in paragraph 26 (in fact it was paragraph 27) these principles had not been properly applied in considering the appellant's propensity to reoffend. In paragraph 27 the panel summarised their understanding of the effect of Uner on this appeal; "The court held that the nature and seriousness of the offence committed by the appellant should be taken into account alongside the time elapsed since the offence was committed and the appellant's conduct during that period as well as his family situation." Read in the context of the rest of paragraphs 26 and 27 and the determination as a whole I find that the panel properly applied Uner principles and that in this regard there is no error of law.

15. Counsel relied on the grounds of appeal that the basis of the finding as to the appellant's propensity to reoffend in paragraph 26 in the light of his failure to disclose a previous conviction for conspiracy to defraud in his 2011 application was perverse. Counsel accepted that there was a high threshold for the test of perversity. In paragraph 26 the panel gave a number of reasons for the conclusion that the appellant had a propensity to behave dishonestly only one of which was his failure to disclose a serious previous conviction when making his application for leave to remain in 2011. On the evidence it was open to the panel to reject appellant's explanation for the failure to mention this. Neither the reasoning nor the conclusion is perverse. There is no error of law.

16. Counsel submitted that the panel failed to give detailed or adequate reasons for the respondent's inexplicable delay in making the deportation order so long after the commission of the index offence. The respondent could have made a deportation order and served it on the appellant at his last known address. I find that the panel were aware of and did take into account the lapse of time between the commission of the index offence and the deportation order. The findings of fact make this clear. The panel made findings of fact in relation to this period, which were open to them on the evidence. In paragraph 35 it is said; "We find that the appellant having made an application for asylum after his arrival in this country then absconded. We find that he made no attempt to contact the Home Office until 2010. We find that the reason he did not contact the Home Office is because he recognised that he had a very weak asylum claim and he believed that it would be dismissed and the deportation action would be taken against him." Whilst the respondent has not provided any explanation why no action was taken during this period it was open to the panel to find that fault lay with the appellant. There is no error of law.

17. Counsel withdrew the ground of appeal which alleged that the respondent and the panel should not have applied the new Immigration Rules in relation to the Article 8 grounds. She was correct to do so. The ground is misconceived. In this case the law to be applied was that in force at the date of the decision. There is no error of law.

18. In relation to the last ground of appeal counsel submitted that the panel misunderstood the evidence and that the error impinged on consideration of the best interests of the children. The statement in paragraph 31 that "for the period when the appellant was in prison his partner was able to make arrangements for the care of the children" was a factual error because at that time they had not met. This is not a point raised in the original grounds of appeal but Mr Deller did not object and I allowed it to be argued because I find that there is error of fact which should be assessed. The appellant was in prison from May 2002 until July 2003. At that stage the appellant and his partner had not met. They met in 2007. The appellant's stepson was born in May 2003 and his son in December 2008. I must consider whether this factual mistake amounts to an error of law such that I should set aside the decision. I find that it does not. Notwithstanding the error any panel properly directing itself would inevitably have reached the same conclusion. Had I concluded otherwise and that there was an error of law such that the decision should be set aside then in remaking the decision in the light of the evidence available at the date of the hearing before me I would have reached the same conclusion to dismiss the appeal on Article 8 human rights grounds.

19. I consider that it is necessary to anonymise this determination in order to protect the interests of the appellant's partner and children.

20. I make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant or any member of his family.

21. I uphold the decision of the panel to dismiss the appeal.

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Signed Date 9 February 2014

Upper Tribunal Judge Moulden