Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/15838/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
13 August 2014 and 24 October 2014	**On 10 December 2014**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

DIALIBE NDUBISI OSIEGBU
(Anonymity directions not made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Hart of Terrance Ray, Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal issued on 28 November 2013 dismissing his appeal against the respondent's decision of 26 June 2012 to make a deportation order under the provisions of s.32(5) of the UK Borders Act 2007 following the appellant's conviction on 28 February 2012 at Carlisle Crown Court of fraudulent embezzlement for which he was sentenced to 1 year 6 months' imprisonment. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal on 24 June 2014.

2. On 13 August 2014 DUTJ Garratt found that the First-tier Tribunal had erred in law such that its decision should be re-made on human rights grounds only. His reasons were as follows:

> 1. On 24th June 2014 Upper Tribunal Judge Pitt gave permission to the appellant to appeal against the determination of Judge of the First-tier Tribunal Lobo in which he dismissed the appeal on all grounds against the decision of the respondent to make a deportation order against him on the basis that Section 32(5) of the UK Borders Act 2007 applied.
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> 2. The grounds of application before the Upper Tribunal rely upon grounds submitted to the First-tier Tribunal seeking permission. Three points are argued. First, that the judge misdirected himself as it was not true to say that the appellant had been deported to the United States "a few years ago" when this was in fact in July 2012. Second, it is argued that the judge's assessment of the Article 8 rights of the appellant's two British citizen children was flawed because the principle of citizenship referred to in *ZH (Tanzania)* [2011] UKSC was not applied nor were their best interests considered on the basis set out in *LD (Article 8 – best interests of child) Zimbabwe* [2010] UKUT 298. The judge had wrongly considered his own test about whether or not the children would lose their British citizenship in going to America. Third, the judge did not attach appropriate weight to the appellant's wife's private life rights.
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> 3. In granting permission Judge Pitt noted that the judge's decision depended upon whether the Nigerian mother of the British children would take them either to Nigeria or the United States. Assessing the case against that factual matrix was not correct. She therefore thought it arguable that the judge had failed to assess the correct outcome of the deportation in which the appellant remained in the United States separated from his children who would remain in the United Kingdom with their mother. Nevertheless, Judge Pitt also pointed out that only a "very strong case indeed" could succeed because of the decision of the Court of Appeal in *SS (Nigeria)* [2013] EWCA Civ 550.
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> 4. At the hearing before me I heard submissions from both representatives.
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> 5. Mr Hart confirmed reliance upon the grounds I have summarised above. He emphasised that the judge failed to consider that the appellant would remain in the United States and his children in the United Kingdom rather than wrongly identifying (paragraph 26(o)) the issue as the disadvantage which the children would suffer if they moved to America.
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> 6. Mr Hart also contended that the judge should have considered that the appellant had returned to the United States following the issue of the deportation order against him because he was influenced by UKBA officials to do so. He therefore opted for the Facilitated Return Scheme instead of appealing the respondent's decision which wrongly indicated that he did not have an in-country right of appeal. In this respect Mr Hart drew my attention to the appellant's second supplementary bundle in which there is a statement by the appellant of 18 July 2013 explaining why he returned voluntarily to the United States (paragraph 12). The judge did not appear to have taken this evidence into consideration. He also argued that there was insufficient evidence for the judge to reject the private life claim. Particularly since there was evidence that the appellant's wife was engaged in business.

7. Mr Kandola confirmed that the respondent relied upon the response although this was prepared without sight of the initial grounds of application. He argued that the determination did not show a material error because, even if the judge had given further consideration to the best interests of the appellant's children, it would not have been unreasonable to expect them to leave the United Kingdom or for the judge to consider the possibility of life in America for the whole family. He reminded me that the children were 4 and almost 2 years of age so could readily adapt. He quoted *Zambrano* to emphasise that neither of the appellant's children would be forced to leave the United Kingdom where their mother remains. On this basis the judge was not wrong to consider removal to America.

8. In conclusion Mr Hart emphasised the decision of the Upper Tribunal in *Sanade and Others (British children – Zambrano – Dereci)* [2012] UKUT 0048 (IAC) emphasising that the appellant's wife had not thought of going to the United States. On this basis an incorrect proportionality assessment had been made.

9. Mr Hart also added that, if I ordered a re-making of the determination, it would be necessary to adjourn the appeal as some of the witnesses to be called were presently in Nigeria.

Conclusions

10. Paragraph 25(e) of the determination suggests that the judge believed that the appellant only had a right of appeal from outside the United Kingdom in respect of the respondent's deportation decision. He does not comment on the fact that the decision appealed against, namely that Section 32(5) of the UK Borders Act 2007 applied, should have given the appellant an in-country right of appeal but wrongly stated that such an appeal could only be exercised from outside the United Kingdom. That error coupled with the content of the appellant's statement in relation to his reason for returning to the United States should have been the subject of consideration by the judge before reaching the conclusion (paragraph 25(g)) that the appellant had made the decision to use the Facilitated Return Scheme to enable him to maintain contact with his wife and family more easily.

11. Whilst that error, alone, might not be material I have concluded that the judge's approach to proportionality issues was also flawed. The judge's consideration of human rights issues should have been guided by paragraphs 398 and 399 of the Immigration Rules taking into consideration the best interests of his British children. In paragraph 26(o) the judge gives consideration to the potential loss by the children of their British citizenship if they relocate to America yet this was not an issue before him nor does there appear to be any evidence upon which he based his conclusion that the children would not be at a disadvantage if they moved to America. The judge's consideration of the Article 8 family life issues relating to the appellant's wife and children is therefore flawed because he failed to consider the "exceptional circumstances" test set out in paragraph 398 of the Immigration Rules and it cannot be said that his determination was otherwise comprehensive enough for such an omission to be immaterial.

12. The determination shows material errors on a point of law in relation to the Article 8 claim and should be re-made. Nevertheless, representatives are reminded of the comment set out in the grant of permission by the Upper Tribunal that, in applying *SS (Nigeria),* only a "very strong case indeed" can succeed.

DECISION

The determination of the First-tier Judge shows errors on points of law such that it should be re-made on human rights issues only.

No anonymity direction is made."

3. Directions were given for the re-making of the decision and it was accordingly relisted on 24 October 2014. Unfortunately Judge Garratt was not available to continue the hearing due to ill health and in order to avoid unnecessary delay in re-making the decision, the parties agreed that a transfer order should be made so that the hearing could be completed.

4. The appellant is a citizen of the United States born on 3 July 1980. He is of Nigerian origin. His wife is a citizen of Nigeria aged 33 at the date of the hearing before the First-tier Tribunal. She has lived in the UK for 9 years since she was 24 having originally come as a student. She had indefinite leave to remain and in June 2014 she acquired British citizenship. They have two children born on 10 August 2009 and 25 January 2012 respectively who are both British citizens and they have lived all their lives in the UK. The appellant came to the UK in 2005. He and his wife married on 31 May 2008 and they lived together as a family prior to his conviction.

5. The convictions were on four counts of fraud to a total value short of £15,000. In his sentencing remarks the judge said:

> "You played your part in what was a sophisticated scam, whereby you arranged bookings in hotels around the country, purporting to be somebody else, normally a Mr Richard Taylor, giving a false address and a variety of cloned payment cards. That was the first step in the fraud. The next was to arrange for a delivery of good quality wine from a local Majestic Wine Store to that hotel, and the third stage was to arrange for couriers to go to the hotel and collect the wine that had been innocently delivered, the bills for both the wine and the courier service being again paid for using cloned credit cards. As soon as the fraud had worked, the booking and the hotel would be cancelled. The wine, as has been established through careful investigation, was delivered to an address associated with you. Just what you did with it remains unclear, but this was a carefully planned and well executed operation. It is fortunate that it was caught at a relatively early stage, and that the overall figure that I am dealing with is little under £15,000, both frauds successfully committed and attempted to be committed."

6. The notice of decision and the deportation order indicates that the right of appeal to the First-tier Tribunal cannot be exercised in-country. It was argued by Mr Hart that that was in fact wrong and explains why the appellant took advantage of the facilitated return scheme receiving £500 and being removed under that scheme. After removal he exercised his right of appeal arguing generally that the decision was not in accordance with the law, Home Office policy, the immigration rules, was contrary to article 8 and more specifically that the respondent had failed to consider his family life in the UK with his wife and children or the obstacles that prevented them from accompanying him to the United States. The grounds further argue that the fact that

the appellant decided to return to the United States on early release should not prejudice his appeal as he was desperate to get out of the confinements of prison.

The Evidence

7. I heard oral evidence from the appellant's wife and the documentary evidence relied on is contained in four bundles, A, B, C and D.

Oral Evidence from the Appellant's Wife

8. The appellant's wife confirmed the contents of her witness statement dated 13 November 2012, 30 January 2013 and 18 July 2013 and said that she had read and agreed with the appellant's statement dated 18 July 2013.

9. She confirmed that she had an appointment for counselling from her depression and had been prescribed Fluoxetin for depression and Codomal for tension headaches. She was now 12 weeks pregnant and her husband was the father. Since her husband had been deported she had visited him on 3 occasions from December 2012 to January 2013 in Nigeria, in summer 2013 from July to August in the United States and in summer 2014 when the family went to Nigeria when the appellant travelled there for his grandmother's funeral. She referred to the photographs in the bundle from those trips. She also referred to the record of Skype calls confirming that the appellant telephones and speaks to the children everyday both before they go to school and then before they go to bed at about 8-8.30pm. There was a very close relationship between the children and their father. They missed him a lot and both wanted him to come back to the UK.

10. She confirmed that she became a British citizen in June this year. She had come to this country in September 2004 and had lived here continuously. She referred to the evidence that their older child had been to nursery but had now moved on to school and the younger child was now at the same nursery. She had come to the UK as a student and had an MSc in computer studies. She had been on the science and engineering graduate scheme, had had leave under the HSM scheme for two years and then as a Tier 1 General Migrant. She had obtained indefinite leave to remain after working for five years.

11. Her husband come to the UK initially as a visitor, then as a student and finally as her dependant from 2008. He had citizenship of both the United States and Nigeria. She agreed that he had obtained £500 under the Facilitated Return Scheme. He had been told he could apply for the balance but he had not done so. He now worked at a help desk with a mobile phone network. He had a brother in the USA who lived in Atlanta. She was asked to consider what she would do if the only way for the family to be together was for her and the children to go to the United States. She replied that she did not want to choose between her husband and going to the States; she did not know whether she would be able to get work there.

Submissions

12. Mr Duffy submitted that the appeal should be considered under the current immigration rules as amended and taking into account the principles set out in sections 117A-D of the Nationality, Immigration and Asylum Act 2002 following the amendments set out in s19 of the Immigration Act 2014. This was not a case where the appellant could meet the requirements of para 399(a) and in particular the requirement to show undue harshness. He accepted that there was a genuine and subsisting family life but the reason for the current separation arose from the fact that the appellant had committed a crime leading to a sentence of imprisonment. If the position was looked at outside the rules the public interest considerations in s117C needed to be taken into account. The appellant could not meet either exceptions 1 or 2. When granting permission UTJ Pitt had referred to the Court of Appeal judgment in SS (Nigeria) v Secretary of State [2013] EWCA Civ 550 that only a "very strong case indeed" could succeed a comment echoed by Judge Garratt in his decision. This appeal did not, so he argued, fall into that category.

13. Mr Hart pointed out that this had not been a case where a court had recommended deportation as erroneously recorded on the notice of decision and submitted that the appeal should be approached on the basis that it was immaterial that the appellant was now in the United States. He had had an in-country right of appeal but had decided to take advantage of the facilitated return scheme not appreciating that he could have exercised his right of appeal in country. He submitted that the fact that there were two British citizen children was an exceptional factor and that it would be unduly harsh for those children who had lived all their life in the UK and were settled here to have to move to the United States.

14. He further submitted that the appellant was entitled, however, to be considered not only under the rules but also outside the rules under the general jurisprudence relating to article 8. There were mitigating factors in the pre-sentence report and the appellant had received a reduced sentence because of an early plea. These factors should be weighed against the public interest in deportation. He referred to and relied on ZH (Tanzania) [2011] UKSC 4 and LD (article 8, in events of a child) Zimbabwe [2010] UKUT 278. The rights of the appellant's wife and children had to be given full weight together with the private life of his wife who had been here as a student. The fact that she was now pregnant was also a strong factor. When these issues were considered together, he submitted that this was a case where deportation was disproportionate.

Assessment of the Issues

15. It is common ground that the decision must be re-made on the basis of the current rules and the law as set out in the Immigration Act 2014. Any doubts about that have been resolved by the Court of Appeal judgment in YM (Uganda) v Secretary of State [2014] EWCA Civ. The relevant deportation rules are set out in paras 398-399 of HC395 as amended.

16. The judgments of the Court of Appeal in MF (Nigeria) v Secretary of State [2013] EWCA Civ 1192 and R (MM) v Secretary of State [2014] EWCA Civ 985 have confirmed that the immigration rules are intended to provide a complete code for dealing with Convention rights in cases involving "foreign criminals". At [135] of R (MM) the Court said:

> "Where the relevant group of IRs [immigration rules], upon their proper construction provide a "complete code" when dealing with a person's convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test would be more at large, albeit guided by the Huang tests and UK and Strasbourg case law."

17. I must also take into account the public interest considerations applicable in all cases set out in s117B and more particularly the additional considerations in cases involving foreign criminals in s117C. These confirm that the deportation of foreign criminals is in the public interest and the more serious the offence, the greater the public interest in deportation. It is then provided:

> "(3) In the case of a foreign criminal (C) who has not been sentenced to a period of imprisonment of 4 years or more the public interest requires his deportation unless exception 1 or exception 2 applies.
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> (4) Exception 1 applies where –(a) C has been lawfully resident in the United Kingdom for most of C's life, (b) C is socially and culturally integrated in the United Kingdom, and (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
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> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh."

18. Mr Hart submitted and I accept that I should not draw any adverse inference from the fact that appellant has been removed and has exercised his right of appeal from abroad or that he made use of the Facilitated Return Scheme. The position is that the appellant is a citizen of the United States who lived in the United Kingdom for 7 years from 2005 to 2012. Although he is of Nigerian background it is clear from the information provided to the Criminal Case Directorate that he was born in the United States as were both his mother and father. It is clear from these facts alone that he is unable to meet the requirements of exception 1 at S117C (4). In particular there are no significant obstacles to his integration into the United States.

19. However, in relation to exception 2 it is equally clear that he has a genuine and subsisting parental relationship with his wife and his children. I accept the evidence that his wife and children have visited him on three occasions since he was deported, twice in Nigeria and once in the United States. I also accept that he maintains regular

contact by Skype speaking to his children twice a day. His wife is now pregnant following the most recent visit to Nigeria and she has been receiving treatment for depression and tension headaches. The children are settled in school and at nursery. I must consider where their best interests lie. It would be in their best interests for them to live with both their mother and father even though at the present the relationship is being maintained through regular contact on Skype. However, the test under statute is whether the effect of the appellant's deportation on his wife and children would be unduly harsh.

20. I am not satisfied that this test is met. No adequate reason is given why his wife and children would not be able to join him in the United States. There is no evidence of any legal obstacles to that course or to indicate that the children are not entitled to (even if they do not already formally have) US citizenship. Under British law there is no question of them losing their British citizenship if they move to the United States. When the appellant's wife was asked whether, if it was the only way for the family to be together, she would be prepared to move to the United States, she replied that she did not want to choose between her husband and going to the States and did not know whether she would be able to get work.

21. Whilst I have every sympathy with the position she has found herself in following her husband's conviction, imprisonment and deportation, the evidence does not satisfy me that the effect of his deportation on her or the children would be unduly harsh. It is clear from the appellant's own witness statement at [16] that he and his wife have chosen not to relocate their family to the United States which he describes as being "the easy option" but the fact remains this is the choice that he and his wife have made. They have chosen that she and their children remain in the UK even though it would not be unduly harsh or even unreasonable for them to relocate in the United States. The appellant is therefore unable to meet the requirements of S117C (4) or (5). Similarly, the appellant and his wife have made the choice of having another child knowing the risk of the appeal being unsuccessful and in circumstances where the family could be together in the United States. This is a case where the public interest assessed in accordance with the statutory guidelines outweighs the interference with the appellant's and his family's right to respect for their private and family life.

Decision

22. The First-tier Tribunal erred in law and the decision has been set aside. I re-make the decision by dismissing the appeal on both immigration and human rights grounds against the decision to deport the appellant.

Signed Date 9 December 2014

Upper Tribunal Judge Latter