Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00133/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 19 December 2014	**On 17 April 2015**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

MR OSITA OMENYIMA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Forrest, Advocate, instructed by Livingstone Brown, Solicitors
For the Respondent: Ms R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by a panel of the First-tier Tribunal comprising Judge of the First-tier Tribunal J C Grant-Hutchison and Mrs E Morton. The panel dismissed an appeal against a decision by the respondent that the appellant was liable to deportation as a foreign criminal under section 32(5) of the UK Borders Act 2007.

2) The appellant was born on 28 November 1975 and is a national of Nigeria. In 2011 he was sentenced to imprisonment for 5 years by the High Court of Justiciary in Edinburgh following conviction on two counts of the supply of a controlled Class A drug, namely cocaine.

3) Although the appellant did not raise in his grounds of appeal a fear of persecution or serious harm on return to Nigeria, in his oral evidence to the First-tier Tribunal he claimed to have a fear for his safety were he to return to Nigeria. The First-tier Tribunal did not find the appellant's alleged fears to be well founded.

4) So far as family life was concerned, the panel noted that the appellant married his wife in Nigeria on 19 August 2009. Mrs Omenyima had lived all her life in Nigeria until she came to the UK in September 2010 as a dependant of her husband. The couple have two children, born in July 2011 and September 2013. The older child is a British citizen because at the time of his birth the appellant was a serving member of the armed forces. The appellant was convicted the day after the birth and discharged from the Army in September 2011 but by this time the child had acquired citizenship by birth. The younger child is not a British citizen but is a citizen of Nigeria.

5) The First-tier Tribunal found that the appellant had committed a very serious crime for financial gain but still did not accept responsibility for it. He committed the crime when he was a serving member of the armed forces and subject to the Army code of discipline as well as having taken the Oath of Allegiance. He was formally discharged from the Army for misconduct. Removal of the appellant was not a disproportionate breach of his Article 8 rights. In the circumstances there were options open to the appellant and his family. Although the older child could not be removed from the UK, the appellant and his wife had the choice of remaining as a family unit and living with their two young children in Nigeria. They had close family there to assist them. The appellant already had two older children in Nigeria. English was an official language in Nigeria and neither child had entered the education system. The first child had attended nursery but he was under the age of 3 at the date of the hearing before the First-tier Tribunal in April 2014. The panel acknowledged as an alternative that the parents of the older child could choose for him to continue to reside in the UK with his mother as his carer. It was acknowledged by the Home Office Presenting Officer at the hearing that it was open to the mother to make an application for the younger child to remain with her in the UK. The panel was satisfied that the younger child would not be separated from her mother and there was no reason to suppose that any application by her would not be successful. The children's mother had leave until September 2016 as the parent of and carer for a British citizen.

6) The application for permission to appeal was based on the contention that the panel erred in failing to consider properly the best interests of the appellant's children in the balancing exercise under Article 8. The best

interests of the children should have been a primary consideration but the panel did not begin to address the position of the children until paragraph 54 of the determination after having first considered in detail the circumstances of both parents. In Zoumbas [2013] UKSC 74 it was considered by the Supreme Court important for the judge to ask the right questions in an orderly manner to avoid the risk that the best interests of the child might be undervalued when other important considerations were in play. It was further contended that the panel did not have regard to relevant factors. Reference was made to the case of Lee [2011] EWCA Civ 348, in which regard was given to an appellant's poor immigration history. It was submitted that in this appeal the appellant did not have a poor immigration history and was lawfully present in the UK as a serving member of the forces, as a consequence of which the older child was a British citizen. The panel took into account that the appellant had other children in Nigeria but the evidence of the appellant was that these children no longer lived there but were in South Africa.

7) Finally it was submitted that the panel took into account evidence which it should not have taken into account. The panel considered the evidence given by the appellant why he would be at risk in Nigeria but this was never part of his appeal, which was confined to Article 8. The material about the alleged risk to the appellant was irrelevant.

8) Permission to appeal was granted on the basis that it was arguable that the panel failed to make a finding in relation to the best interests of the children. At the hearing Mr Forrest confirmed that he did not intend to proceed with the third and fourth grounds of the application for permission to appeal, relating to the appellant's alleged fear of return to Nigeria and whether his two older children still resided there.

9) Mr Forrest was asked to identify the evidence before the First-tier Tribunal relating to the best interests of the children. In response Mr Forrest referred to a statement by the appellant's wife. This referred at page 5 to the rights of her son.

10) Mr Forrest submitted that we should examine how the First-tier panel conducted the balancing exercise and how they gave consideration to the best interests of the children. Our attention was drawn to a letter of 9 December 2013 from a health visitor who had been in contact with the family for 8 months. Mr Forrest submitted that the Tribunal was aware of the need to deal with the best interests of the children and directed itself to this effect at paragraph 31 of the determination. Mr Forrest acknowledged, however, that there was no report from social services apart from a letter of 9 December 2013 from a social worker who had known the family for 2 months. Mr Forrest also drew our attention to a letter dated 14 February 2013 from the Resettlement Team at the City of Edinburgh Council. There was evidence before the panel relating to the older child but this was not addressed. Mr Forrest submitted that in terms of JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 and ZH (Tanzania) [2011] UKSC 4 it was a duty of paramount importance to pay

attention to the best interests of the children. The evidence relating to this might not be immediately apparent but the Tribunal had to look for it.

11) Mr Forrest was asked about the circumstances of the younger child. He replied that he was arguing in the interests of the older child.

12) On behalf of the respondent, Ms Pettersen submitted that the case of JO had been addressed in the decision letter. This letter had also dealt with the best interests of the children, about which there was little evidence. The Tribunal had dealt with the issues in order. The Tribunal looked at the appellant's situation in Nigeria and considered whether the family could go there as a unit. It was unfortunate that the panel had then stated at the start of paragraph 54 that it would "now consider the children" but this did not constitute an error of law. The panel looked at the position of the younger child at paragraph 56. The panel recognised that the family had a choice about what to do and the panel was fully aware of all the circumstances.

13) In reply, Mr Forest acknowledged that the appeal could not succeed under the Immigration Rules but could under Article 8 if the proper approach was taken to the decision-making process.

14) At the end of the hearing we reserved our determination.

Discussion

15) We find that the panel did not err on a point of law. The appellant had committed a serious offence and this was reflected in the sentence of imprisonment imposed of 5 years. The hearing before the First-tier Tribunal was in April 2014 and at that time the Tribunal had to consider the terms of paragraph 398 of the Immigration Rules. This provided in effect that where a person was sentenced to imprisonment for 4 years or more it would be only in exceptional circumstances that the public interest in deportation would be outweighed by other factors. As was pointed out in MF (Nigeria) [2013] EWCA Civ 1192, great weight was to be given to the public interest in deporting foreign criminals who had been sentenced to imprisonment for 4 years or more and therefore were not entitled to the benefit of the provisions in paragraph 399 or 399A. At paragraph 42 the Court stated that in such cases "…in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal." A similar point was made in SS (Nigeria) [2013] EWCA Civ 550 in which Laws LJ stated at paragraph 47 "…the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail."

16) Mr Forrest relied on the decision of the Supreme Court in Zoumbas [2013] UKSC 74 as requiring questions to be addressed in a particular order in an appeal involving consideration of the best interests of the children. In

Zoumbas the Supreme Court was considering an argument derived from ZH (Tanzania) to the effect that it was important to ask the right questions in an orderly manner to avoid the risk that the best interests of the children might be undervalued when other important considerations were in play. The Court held in Zoumbas that there was nothing wrong with the Secretary of State in her decision giving her conclusions followed by her reasons. Lord Hodge, giving the judgment of the Court, stated at paragraph 25 that it was "legitimate for the decision-maker to ask herself first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance." We therefore do not accept that the First-tier Tribunal erred in law by not approaching the issues in a particular order, provided the Tribunal properly considered the relevant factors and gave adequate and sustainable reasons for the conclusion reached, which it did.

17) The panel used unfortunate wording at the start of paragraph 54 by stating: "We now consider the children." The panel clearly meant that at that point consideration of Article 8 would begin, after having looked at other matters raised by the appellant as reasons why he should not be deported. The British citizenship of the older child was not "a trump card", as recognised in ZH (Tanzania) at paragraph 30, although it was of particular importance and was given full consideration by the panel. The best interests of the children were a primary consideration but not paramount. The children would lose their father if they remained in the UK but the panel was entitled to find that this would not be a disproportionate interference with their Article 8 rights.

18) Mr Forrest referred to the decision of the Upper Tribunal in JO and Others (section 55 duty) Nigeria [2014] UKUT 00517, in which the importance of being properly and adequately informed of the circumstances of a child was stressed. It was recognised, however, that in "…the real world of litigation, the tools available to…" the tribunal might be confined to the application or submission to the Secretary of State and the decision letter. It is noteworthy that in the present appeal in considering the position of the children the panel had before it little evidence about their best interests and virtually no evidence at all relating to the younger child. The panel fully considered what evidence there was and reached a decision in accordance with the evidence and supported by the reasons given.

Conclusions

19) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

20) We do not set aside the decision.

Anonymity

21) The First-tier Tribunal did not make an order for anonymity. We have not been asked to make such an order and under the circumstances we do not consider an order to be necessary.

Signed Date **17 April 2015**

Upper Tribunal Judge Deans