Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26761/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd December 2015	**On 6th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MR. BILAL FAWAZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss E Daykin instructed by KQ Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Andrew promulgated on 15th May 2015 in which she dismissed an appeal against a decision made by the Secretary of State on 16th June

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2014, to refuse to grant appellant leave to remain in the UK and to give directions under s10 of the Immigration and Asylum Act 1999 for removal of the appellant from the UK.

BACKGROUND

2. The appellant claimed to be stateless but has been found to be a Nigerian national. He claims to have entered the UK in February 2004 accompanied by his uncle, who then abandoned him with a family here. He subsequently went into the care of Hillingdon Social Services and he claimed asylum on 15th May 2004. His claim was refused but the appellant was granted discretionary leave until 2nd April 2006. He did not appeal against the refusal of the asylum claim. He has since made a number of further applications for leave to remain in the UK.

3. On 4th June 2010, the respondent refused an application to extend the appellant's leave, due to his criminality. An appeal against that refusal was dismissed for the reasons set out in determination promulgated by Immigration Judge Miller on 16th August 2010. The appellant then made an application for leave to remain on 17th September 2010 under the ECHR.

4. On 12th July 2012 he made application for leave to remain as the spouse of a settled person. This was refused on 3rd March 2012, with no right of appeal.

5. It was the appellant's application for further leave to remain in the UK made in September 2010, that gave rise to the respondent's decision of 16th June 2014 and the appeal before First-tier Tribunal Judge Andrew.

6. In her decision of 16th June 2014, the respondent set out the appellant's immigration history. She noted that in order to qualify for a period of Leave to Remain in the United Kingdom the applicant, under the Immigration Rules introduced on 9th July 2012, must first show a level of

suitability and good character. The decision letter refers to the suitability requirements and the respondent considered that the application fell for refusal under the suitability grounds as outlined in the Immigration Rules, and specifically, S-LTR.1.5 and S-LTR.1.6.

7. In refusing the application, the respondent noted that the appellant had received 15 convictions for 27 offences between 12th April 2007 and 28th October 2013. These include 8 drugs offences, theft, driving without a licence, driving whilst intoxicated, driving without insurance, failing to provide a specimen, failing to surrender to custody, failing to comply with community orders, breaching conditional discharges and resisting or obstructing a constable. The respondent concluded that the appellant has been identified as an individual whose presence in the UK, is not considered to be conducive to the public good. The respondent also concluded that the presence of the appellant in the UK is not conducive to the public good because his conduct, character, and associations make it undesirable to allow him to remain in the UK.

The decision of First-tier Tribunal Judge Andrew

8. The Judge set out the background at paragraphs [1] to [12] of her decision. At paragraph [21] she found that the appellant is a Nigerian citizen for the reasons set out in the preceding paragraphs of her decision.

9. At paragraphs [24] to [42] of her decision, the Judge considered at some length, the appellant's offending. At paragraphs [24] and [25] she noted the offences for which the appellant had been convicted or cautioned, and which were not therefore in issue. She states:

> *"24. The Appellant accepts that he has, in the past, been convicted of a number of offences. These are detailed in the PNC report which is at pages Ql to Q8 of the Appellant's Bundle. There are a total of 15 convictions for 27 offences: eight offences relating [sic] to Police/Courts/Prisons, 8 drug offences, 8 miscellaneous offences and*

one non-recordable offence. They are referred to in further detail in the statement of PC Macdonald at pages Tl to T23 of the Respondent's Bundle. I accept that the Appellant has never been convicted of supply of drugs and there is no suggestion that any of his convictions were gang related. I accept that the offences of which the Appellant has been convicted are at the lesser scale of criminal offending. This does not, however, take away from the fact that any offence, in particular those relating to drugs, are serious and show a complete lack of respect for the criminal laws of the UK.

25. In addition to the convictions the Appellant has three cautions, one in 2005, one in 2006 and one in 2007 for possession of cannabis."

10. At paragraphs [26] to [34], the Judge considered three incidents in which the Police took no further action and which did not therefore result in a criminal conviction. The respondent's case was that notwithstanding the lack of a criminal conviction, there was sufficient evidence before the Tribunal to establish the appellant's involvement in those three incidents to a civil standard. The Judge considered each of those three incidents in turn, and found that the appellant had been involved in one, but could not be satisfied on the evidence before her, even on the civil standard, that the appellant was culpable in respect of the other two.

11. At paragraphs [28] to [31], the Judge considered the first of the three incidents and states:

"28. The first non-conviction matter of which I was asked to find the Appellant was involved, to the civil standard, is that referred to in PC Macdonald's statement at NC/4 on 27th March 2010. It refers to an incident outside a night club involving the Appellant who is seen to kick and punch another and stamp on his head. This followed an earlier incident when the Appellant was initially attacked by three males. What is apparent from the CRIS report is that the Appellant ran after the victim (and others) before delivering the assault. The victim declined to provide a statement as did other witnesses and no further

action was taken. The Appellant was charged with possession of cannabis but this charge was dismissed.

29. During the course of his evidence to me the Appellant admitted the assault that had taken place. He said: 'I put my hands up – but it was not me. I was assaulted they ran away – I chased them. The CCTV showed everything. I did not stamp on his head with immense energy. I punched him. I stamped on him. It was my self defence. He could have got up and beat me up. He could have got a knife and stabbed me'.

30. I am asked by the Appellant's representative, in his submissions, to find that there is insufficient evidence before me to show that the Appellant's culpability in this offence was anything more than self defence.

31. I am unable to accept this: during the course of the hearing the Appellant admitted that he had run after his victim: he admitted punching him and stamping on his head. There was no necessity for the Appellant to run after his victim: this was a deliberate decision on his part. Accordingly, and on his own admission I am satisfied that this offence is proved, to the civil standard."

12. Having considered the evidence as to the appellant's offending behaviour, the Judge considered, at paragraphs [35] to [37], the psychiatric report relied upon by the appellant. At paragraph [37], she found that she could place little weight upon the report. The Judge also considered the appellant's offending between July 2010 and October 2013, at paragraphs [38] to [41] of her decision, and noted that the appellant has no convictions since that of 28th October 2013. At paragraph [41] of her decision, the Judge stated:

"41. …. I accept that he has no convictions since that on 28th October 2013 when he pleaded guilty to possession of Class A drugs. This is a year and a half ago. However, I have also to bear in mind that when he last appeared before the Tribunal the Appellant had last committed

> *an offence in Summer 2009, a year previously. However, very shortly after the hearing he went on to commit a further offence. I am unable to be satisfied, on the evidence before me, that the Appellant has, indeed, left his offending behind him. In saying this I have taken full note of the statements/letters from Councillor Zaffar Van Kalwala and Stephen Graham. I have also taken into account the copy photographs handed to me at the hearing."*

13. At paragraph [43], the Judge found that she was satisfied that the respondent has discharged the burden of proving that the appellant's presence is not conducive to the public good.

14. The Judge went on at paragraphs [44] to [58] of her decision to consider the appellant's Article 8 claim both within, and outwith the immigration rules. She was not satisfied that there are insurmountable obstacles to the appellant's family life continuing outside the UK for the reasons set out at paragraphs [45] to [47] of her decision. The appeal under the Immigration Rules was therefore dismissed. At paragraphs [50] to [58] of her decision, the Judge considered the Article 8 claim outwith the Immigration Rules and, again, dismissed the appeal.

<u>The Grounds of Appeal before me</u>

15. The appellant initially advanced five grounds of appeal, but following an initial refusal of permission to appeal by the First-tier Tribunal, the appellant abandoned the first ground, challenging the Judge's finding in relation to the first of the 'non-convictions'. Permission to appeal on what was the third ground of appeal, relating to the Judge's failure to properly consider a letter from Nigeria House and the circumstances in which that letter came into being, was refused by Upper Tribunal Judge Blum on 21st September 2015.

16. Upper Tribunal Judge Blum granted permission to appeal on three remaining grounds. The matter comes before me to consider whether or not the decision of the Tribunal involved the making of a material

error of law, and if the decision is set aside, to re-make the decision if appropriate.

17. At the hearing before me, Miss Daykin relied upon the three grounds upon which permission to appeal has been granted by Upper Tribunal Judge Blum.

18. The first ground advanced by the appellant concerns the adequacy of the Judge's assessment that the appellant's presence in the UK is not conducive to the public good. The appellant submits that in considering whether the appellant's presence in the UK was not conducive to the public good, the judge carried out her assessment without reference to (i) the particular paragraphs of the immigration rules upon which the respondent had based her assessment, (ii) the guidance which was supposed to inform the assessment under those paragraphs and (iii) the submissions made on behalf of the appellant in that respect.

19. Miss Daykin submits that the Judge failed to have regard to the respondent's published policy set out in the 'Modernised Guidance 'General grounds for refusal Section 1 – Version 20' as in force from 6th January 2015, and Chapter 13 of the Immigration Directorate Instructions. Both had been referred to in the appellant's skeleton argument *(at Section E)* that was before the Judge. She was unable to identify anything in the guidance that would weigh in favour of the appellant and which the appellant would say, the Judge had specifically disregarded.

20. Second, in considering the ability of the appellant's partner to live in Nigeria, the Judge, irrationally, found that there was simply a 'wish' on the part of the appellant's wife not to go to Nigeria. The appellant submits that on a rational reading of the travel advice issued by the Foreign Office, the appellant's wife would not be safe in Nigeria. Before me, Miss Daykin referred to the guidance issued by the Foreign Office and she submits that the guidance plainly advises against all travel to

certain areas of Nigeria. She was unable to point to anything within the guidance that advises against any travel to Lagos.

21. Third, the Judge failed to have regard to the significant delays on the part of the respondent and those delays were relevant to the assessment of proportionality under Article 8 ECHR. The appellant submits that the Judge fails to make any reference to the delay of more than four years in resolving the appellant's application for humanitarian protection, and the further four-year delay in considering his application for leave to remain in the UK. Before me, Miss Daykin submits that the application for humanitarian protection made by the appellant in 2006 was not resolved until 2010, a delay or four years. Thereafter the application made by the appellant in September 2010 was not resolved until February 2014, a further significant delay of almost four years. She submits that the judge failed to have regard to the delay in considering whether the removal of the appellant from the UK is proportionate to the legitimate aim sought to be achieved.

22. The respondent has filed a Rule 24 response dated 13th October 2015 that was adopted by Mr Whitwell. The respondent opposes the appeal and Mr Whitwell submits that there can be no doubt that the Judge found that the appellant is a persistent offender who shows a particular disregard for the law. He submits that it was open to the Judge, following a careful consideration of the evidence, to find that the respondent has discharged the burden of proving that the appellant's presence in the UK is not conducive to the public good. He submits that the appellant's reliance upon the failure of the Judge to make specific reference to the guidance, is an argument as to form over substance, because the Judge has taken account of relevant factors such as the number of offences committed, the seriousness of the offences, the timescale and frequency and any steps taken by the appellant to address the cause of the offending. Mr. Whitwell submits that the Judge has considered the guidance in substance.

23. Mr. Whitwell refers to paragraph [15] of the decision and the conflicting information as to whether the appellant was born in Lagos or Minna. He submits that whether the appellant is removed to Lagos or Minna, the advice issued by the Foreign Office is simply "See our travel advice before travelling". He submits that it is in that context that the Judge was required to consider whether there are insurmountable obstacles to the appellant's family life continuing outside United Kingdom. He submits that the Judge plainly had regard to the Foreign Office advice at paragraph [46] of her decision and at paragraph [57], carefully considered the evidence given by the appellant's wife in reaching her decision.

24. Finally, Mr. Whitwell submits that whilst there have been some delays in reaching a decision on the applications made by the appellant, the question of delay was not one that was advanced with any vigor before the Judge and it is unsurprising therefore that there is no reference to it in the decision of the Tribunal. Mr. Whitwell submits that in any event, the appellant did not enjoy any valid leave to remain in the UK and the only expectation that he and his partner can have had, is that the appellant's immigration status was precarious, and the appellant is someone who might not be permitted to remain in the UK. He submits that the appellant and his partner entered into, and developed their relationship knowing of that. The appellant had made a number of applications all of which had been refused.

Discussion

25. It is useful to begin by setting out the relevant suitability requirements that are set out in the Immigration Rules.

> **Section S-LTR: Suitability-leave to remain**
>
> S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.7. apply.
>
> ....

> S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law.
>
> S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.

26. The suitability requirements at S-LTR.1.5 make it plain that the presence of an applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm **or**[1] they are a persistent offender who shows a particular disregard for the law. At paragraph [24] of her decision, the Judge refers to the 15 convictions for 27 offences that were not in issue. She states:

> *"24. .... I accept that the offences of which the Appellant has been convicted are at the lesser scale of criminal offending. This does not, however, take away from the fact that any offence, in particular those relating to drugs, are serious and show a complete lack of respect to the criminal laws of the UK."*

27. In my judgment, it is clear that the Judge did not proceed upon the basis that the appellant's offending behaviour had caused serious harm. She found that the convictions were at the lesser scale of criminal offending. However, she plainly found that the appellant is a persistent offender who shows a particular disregard for the law. Importantly, this sub category of S-LTR 1.5 is narrowed to matters which do not cause serious harm.

28. Although there is no express reference in the Judge's decision to the matters set out in the Modernised Guidance or Chapter 13 of the Immigration Directorate Instructions, it is plain that what is required is a

[1] My emphasis

case-specific assessment of a number of factors, including the number of offences committed, the seriousness of those offences including the degree of public nuisance, the pattern of offending, and the timescale and frequency within which the offending occurred. As set out in Chapter 13 of the Immigration Directorate Instructions, a "persistent offender" means a repeat offender who shows a pattern of offending over a period of time. This can mean a series of offences that escalate in seriousness over time, or a long history of minor offences.

29. In my judgement, a persistent offender who shows a particular disregard for the law might be shown in a number of different ways. The Judge clearly found that the appellant was a persistent offender given the number of offences for which he had been convicted. It might be that a persistent offender shows a particular disregard for the criminal justice process by, as here, the number of offences for which he is convicted and, as found by the Judge, the demonstration of a complete lack of respect for the criminal laws of the UK by reference to the types of offences for which he is convicted. In my judgement it was open to the Judge to find that the fact that the appellant's convictions were at the lesser scale of criminal offending, did not take away from the fact that any offence, in particular those relating to drugs, are serious and show a complete lack of respect to the criminal laws of the UK.

30. Whether someone is "a persistent offender with a particular disregard for the law" is not simply a matter of crude arithmetic or totting up. At paragraphs [24] to [42] of her decision, the Judge carefully considered the number and frequency of the appellant's offending and the evidence available to her in the form of a psychiatric report and the explanations provided by the appellant to place that offending into context.

31. Having carefully considered all of the evidence before her, in my judgement, it was open to the Judge to find as she did at paragraph [43] of her decision that she was satisfied that the respondent has discharged the burden of proving that the appellant's presence in the

UK is not conducive to the public good for the reasons given. I accept the submission made by Mr. Whitwell that the appellant's reliance upon the failure of the Judge to make specific reference to the guidance, is an argument as to form over substance. In my judgement, the Judge has taken account of relevant factors identified in the guidance and the Judge has considered the guidance in substance. Miss Daykin was unable to point to anything within the guidance that the Judge had failed to consider and would weigh in favour of the appellant.

32. Turning then to the Judge's assessment of the Article 8 rights of the appellant and his wife, I am satisfied that the Judge has taken all relevant matters into account before deciding that there are no 'insurmountable obstacles' to family life continuing in Nigeria. At paragraph [46] of her decision, the Judge makes reference to the Foreign Office advice to which she had been referred. There is no reason to believe from a careful reading of that paragraph that the judge failed to take all relevant matters into account. The judge has clearly accorded weight to each relevant matter. Weight is a matter for the fact-finding judge.

33. In my judgement, the appellant's claim that it was irrational for the Judge to describe the appellant's partner's stance as merely a "wish on her part not to go", amounts to no more than a disagreement with the Judge's findings of fact regarding 'insurmountable obstacles'. The Judge properly directed herself having considered the evidence relied upon by the appellant. Paragraph [47] of the decision must be read as a whole in light of what is said in the preceding paragraphs, and indeed the evidence of the appellant's wife that is referred to at paragraph [57] of the Judge's decision. The Judge accepted that it may not be easy for the appellant's wife to travel to Nigeria with him. It was open to the Judge to find that "there is nothing in the evidence to show that this amounts to an insurmountable obstacle but rather it is a wish on her part not to go". To put that finding into context one must read what is said by the Judge at paragraph [57] of her decision:

> *"57. It is a matter for the Appellant's wife as to whether or not she accompanies the Appellant to Nigeria. In an earlier letter in the Respondent's Bundle at page S8 the Appellant's wife says: 'the last thing I would like to say is that I would follow Bilal anywhere that he goes as the thought of life without him isn't even a life I would want to live….' She then goes on to say that she could not go at that particular time because her nan is unwell. However, the fact-remains that on 2nd April 2014 the Appellant's wife was willing to follow him. I am satisfied that, on the balance of probabilities, she would be likely to do so if he were to be removed now. I accept that it would not be easy for her to do so given that it would mean leaving the life she has in the United Kingdom. However, she must have been aware that this was a step she may have to take when she decided to form and continue to build, the relationship she has with the Appellant."*

34. In my judgement, it was open to the Judge to find that it may not be easy for the appellant's wife to travel to Nigeria with him, but she was also entitled to find that there are no insurmountable obstacles. The Judge clearly considered the relevant circumstances in a sensible and practical manner, having had regard to the Foreign Office advice.

35. I turn finally to the relevance of the delay in the respondent's decision making. The appellant cites **EB (Kosovo) [2008] UKHL** in support of the proposition that the House of Lords in that case decided delay was potentially relevant in three ways, and that in this case, the lengthy delay had arguably given rise to a sense of permanence and a legitimate expectation that the appellant would be granted leave to remain.

36. The delay was referred to by the appellant in paragraph [28] of the appellant's skeleton argument that was before the First-tier Tribunal. The appellant submitted, at paragraph [28] of the skeleton argument *"…the Rules contain no mechanism by which the Tribunal can consider the effect of the appellant's removal on those with whom he enjoys private and family life, no mechanism for considering the benefit to the*

community (both financial and as described in the letter of Cllr Zaffar) and no mechanism for considering the significance of the delays on the part of the SSHD".

37. I accept that the respondent's delay in reaching decisions did not feature as a significant part of the appellant's case before the First-tier Tribunal, and it is perhaps unsurprising therefore that the Judge makes no reference to the delay in her decision. I have considered whether the failure to consider the delay amounts to a material error of law that is capable of affecting the outcome of the decision.

38. In an assessment of proportionality, the Tribunal decides how much weight is to be attributed to competing considerations in determining how the balance should be struck between the public interest and protected individual rights: *see inter alia, Huang v Secretary of State for the Home Department [2007] UKHL 11 and EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41.*

39. In **EB (Kosovo)**, the House of Lords considered a case where, through an erroneous decision and a delay of four years, a 13-year-old asylum seeker had been deprived of the benefit of the policy according to which he would have been given leave at least until his 18th birthday. Their Lordships held that delay in determining an application could affect it, in that the applicant might develop closer personal ties and a tentative quality of a relationship would be diminished as time elapsed and enforcement did not take place. Delay could diminish the weight to be accorded to the requirements of firm and fair immigration control if it resulted from a dysfunctional system which yielded unpredictable, inconsistent and unfair outcomes.

40. At paragraphs [7] to [11] of her decision, the Judge refers to the appellant's immigration history. The Judge carried out a full proportionality exercise at paragraphs [52] to [58] of her decision before coming to a conclusion, taking into account, as she was required to,

sections 117A and 117B of the 2002 Act as amended. The Judge had regard, at paragraph [53] of her decision to the time spent by the appellant in the UK.

41. In my judgment, a system which operated, as it had in this case, could not be said to be "unpredictable, inconsistent and unfair as between one applicant and another" or as yielding "inconsistency of treatment between one aspiring immigrant and another". The appellant's leave to remain in the UK expired in April 2006 and the applications that he has since made to regularise his presence in the UK have all failed. Any failure by the Judge to expressly refer to the delay in decision making on the part of the respondent, would not in my judgement make any difference to the decision, and does not amount to an error of law.

42. I do not accept that the Judge left out of account any material consideration or took into account any immaterial consideration. She undertook a balanced assessment of the facts resulting in a conclusion that was open to her.

43. In those circumstances in my judgement, there is no material error of law in any of the respects advanced on behalf of the appellant and the decision of First-tier Tribunal Judge Andrew, stands.

44. The appeal is dismissed.

Notice of Decision

45. The decision of the First-tier Tribunal did not involve the making of an error of law and the appeal is dismissed.

46. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

As I have dismissed the appeal, there can be no fee award.

Signed

Deputy Upper Tribunal Judge Mandalia