IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27737/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 November 2015	**On 19 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

MARTIN OBIORA UGWUKONAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Chelvan of Counsel, instructed by Theva Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is an appeal against the decision of First-tier Tribunal Judge Foulkes-Jones promulgated on 18 March 2015 dismissing the Appellant's appeal against a decision of the Secretary of State to refuse to grant indefinite leave to remain and to remove the Appellant from the UK, dated 26 June 2014 (served on 2 July 2014).

2. The Appellant is a citizen of Nigeria born on 15 June 1973. He initially entered the United Kingdom in March 2009 with leave to enter as a Tier 1 (General) Migrant and was granted successive periods of leave in that capacity, the last being granted pursuant to an application made on 12 December 2011 and being leave valid until 25 January 2014. Thereafter the Appellant applied for indefinite leave to remain by way of application form SET(O) together with an accompanying letter of representation from his solicitors dated 18 February 2014.

3. The Respondent refused the application with reference in particular to paragraph 245CD(b) and paragraph 322(1C) of the Immigration Rules. Essentially the Appellant's application for indefinite leave was refused on the basis that he had been convicted of two motoring offences. Full reasons for this decision are set out in the Respondent's 'reasons for refusal' letter ('RFRL') and are also reproduced in substance in the decision of the First-tier Tribunal.

4. The Appellant appealed against the decision of the Respondent, and his appeal was dismissed for reasons set out in the determination of the First-tier Tribunal.

Consideration

5. The challenge before the Upper Tribunal does not primarily seeks to impugn the approach of the First-tier Tribunal Judge but focuses on the conduct of Counsel that appeared before the First-tier Tribunal on behalf of the Appellant (not Mr Chelvan). In the fourth section of the decision of the First-tier Tribunal, headed 'The Hearing', at paragraph 1 it is recorded that Counsel "*said that he was not proceeding with the appeal under Article 8 of the 1950 Convention*". It is now said on the Appellant's behalf that such a concession had been made without instructions.

6. In support of that contention the Appellant's solicitors have produced email correspondence detailing a complaint to Counsel made shortly after the receipt of the decision of the First-tier Tribunal via his clerk in chambers. I do not propose to go through the correspondence in its entirety, but there is a response to that complaint from Counsel and it is clear from that response that Counsel did not pursue Article 8 and it is equally clear that he did so without any particular discussion with the Appellant as to whether he should or should not be adopting such a position. Indeed Ms Everett on behalf of the Respondent, having had the opportunity of seeing the email correspondence (which was submitted with the application for permission to appeal) acknowledges that the concession was made before the First-tier Tribunal without instructions.

7. That being the primary ground of challenge, permission to appeal was nonetheless initially refused by First-tier Tribunal Judge Astle on 19 May 2015 on the basis that this was essentially not a mistake on the part of the Judge. However on 15 July 2015 Upper Tribunal Judge Rintoul granted permission to appeal on the basis that it was arguable that the Judge had

in effect "*proceeded to determine the appeal on the basis of a mistake of fact and/or a procedural error, albeit unknown to her, bur which was nonetheless arguably capable of amounting to an error of law*": indeed it is that essential submission that is pressed upon me today by Mr Chelvan pursuant to the grounds of challenge and necessarily in light of Ms Everett's concession as to the factual premise.

8. So far so good, as far as the Appellant's challenge is concerned. However I invited the observations of the representatives in respect of the materiality of the circumstances of the Judge not having engaged with a consideration of Article 8 in his determination. In this regard I pause to note that the Appellant does not seek in any way to impugn the judge's evaluation of his case under the Immigration Rules.

9. The application for indefinite leave to remain made on behalf of the Appellant addressed the circumstances of the offending behaviour that had culminated in the convictions for motoring offences. The letter of representations in support of the application from the Appellant's solicitors dated 18 February 2014 seeks to offer an explanation as to the circumstances of those particular offences. The letter does not otherwise seek to advance any sort of case on behalf of the Appellant by reference to Article 8.

10. The decision having been made by the Respondent to refuse the Appellant's application, the Appellant's solicitors lodged a Notice of Appeal in the usual way to which were attached grounds of appeal. In the opening paragraph of those grounds of appeal the substance of the grounds were listed and that included an allegation "*That the decision breaches the appellant's human rights*".

11. The rest of the grounds primarily then go on to repeat the representations that had been made in respect of the driving offences, but there is nonetheless in the penultimate paragraph of the grounds the following:

> "In addition to the above criteria the Appellant also forms complete private and family life in the United Kingdom. All of his family members are living in the United Kingdom. His younger brother and his family are British nationals."

12. It is the case that the First-tier Tribunal Judge before recording the concession made before him by the Appellant's Counsel identified in the opening paragraph of his decision that "*The Appellant also appealed under Article 8 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms*".

13. So, it is clearly the case that as *a matter of form* the issue of Article 8 had been raised in the Notice of Appeal and was, at least at the commencement of the hearing, a matter recognised to have been raised.

14. However, the information provided in support of the appeal by way of a witness statement and an Appellant's bundle (forwarded to the Tribunal

under cover of a letter dated 5 March 2015 for use before the First-tier Tribunal) contains little way by way of detail in respect of the Appellant's private and/or family life in the UK. Again the witness statement for the main part rehearses the events surrounding the Appellant's motoring offences, before including a single paragraph, paragraph 12, at the end of the statement to this effect:

> "In addition to the above criteria I also form complete and private family life in the United Kingdom. I established my own business in the United Kingdom. I don't rely on public funding or benefits. My subsistence is attached to the UK. Therefore it's my main home."

15. The supporting evidence contained in the Appellant's bundle submitted before the First-tier Tribunal contains nothing that is relevant to any of those matters referred to either in the grounds of appeal or the Appellant's witness statement in respect of human rights. There is no detail about his business. There is no detail of the way he is able to support himself without recourse to public funds or benefits. And there is nothing about his family or any other personal relationships enjoyed in the United Kingdom.

16. Disregarding for a moment the error of Counsel in making a concession that he had not been instructed to make, it seems to me that it is pertinent to question on what basis Counsel might have been instructed to advance an Article 8 case given the lack of any detailed particulars of the Appellant's private and/or family life and the complete absence of any supporting documentation in that regard?

17. Be that as it may, as I have observed, the matter of Article 8 was formally before the Tribunal and it was withdrawn from the Tribunal on the basis of a concession that was not duly authorised by the Appellant.

18. Mr Chelvan for his part emphasises the importance of procedural propriety. Ms Everett, mindful of the contents of the Rule 24 response herein which raises the issue of materiality, invites me to be cautious in this regard and indeed suggests that she would not be confident in making the submission that the Appellant's Article 8 case was so 'thin' that it could be characterised as being wholly without merit to an extent that the failure to address it by the First-tier Tribunal could be said to be an immaterial error.

19. It is primarily on the basis of that concession by Ms Everett that I am persuaded – albeit with some hesitation - that I should not conclude that the failure of the Tribunal to address Article 8, (a failure which arose through no express error on the part of the First-tier Tribunal Judge but on the basis of an inappropriate concession by Counsel) should be characterised as immaterial. To that extent the Appellant has not had any sort of hearing in respect of his Article 8 rights and accordingly it is appropriate that I set aside the decision because the First-tier Tribunal proceeded on the basis of a factual misconception serious enough to amount to an error of law, and such misconception deprived the Appellant

the right of a full and fair hearing on the matters appropriately raised in his appeal.

20. The decision of the First-tier Tribunal is accordingly set aside. There having been no proper exploration of any of the relevant factual issues it is most appropriate that the matter be reheard before the First-tier Tribunal.

21. However the remaking of the decision before the First-tier Tribunal is confined to the Article 8 issues, the decision in respect of the Immigration Rules made by the First-tier Tribunal Judge not having been impugned. Indeed, whilst Mr Chelvan was clear to emphasise that he was not instructed to concede the case under the Immigration Rules, he quite properly acknowledged that the issues under the Rules had been dealt with and were no longer 'live' in the proceedings; in such circumstances he was overt in raising no objection to the issues being limited to Article 8 on rehearing.

22. I note that some further materials have been filed before the Upper Tribunal in respect of the Appellant's circumstances in contemplation of advancing his Article 8 case, but it may well be that with further advice the Appellant may wish to revisit those materials and more particularly revisit the substance of his witness statement which continues to be somewhat short in detail as to the full extent of his private life in the United Kingdom. However those matters are ultimately a matter for the Appellant and his advisors, and I make no specific Directions.

Notice of Decision

23. The decision of the First–tier Tribunal contained a material error of law in consequence of which the Appellant's appeal was not considered on human rights grounds. The First-tier Tribunal's decision to dismiss the appeal is accordingly set aside.

24. There was however no material error of law in respect of the First-tier Tribunal's decision under the Immigration Rules. Accordingly the decision in the appeal is to be remade only in respect of human rights grounds. The decision is to be remade before the First-tier Tribunal by any First-tier Tribunal Judge other than First-tier Tribunal Judge Foulkes-Jones.

25. No anonymity direction is sought or made.

The above represents a corrected transcript of an ex tempore decision given at the conclusion of the hearing.

Signed Date: 14 January 2016

Deputy Upper Tribunal Judge I A Lewis