The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: OA/09241/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On July 6, 2016	**On July 12, 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR ISAAC OLUWATOYIN TUGBOBO
(NO ANONYMITY DIRECTION)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Spurling, Counsel, instructed by W Legal Limited
For the Respondent: Mr Bramble (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria. On April 8, 2014 the appellant submitted an application for entry clearance as a spouse. The respondent refused his application initially on July 14, 2014. As finances were an issue in this

application and a challenge had been made to the minimum income requirement of £18,600 a further decision was taken on October 3, 2014. That latter decision upheld the original decision and further refused the application for not meeting the financial requirements of the Rules. The respondent refused the application under paragraph 320(11) HC 395 and under Appendix FM as well as finding no exceptional circumstances to allow the appeal outside of the Rules.

2. The appellant appealed that decision under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on August 4, 2014.

3. The appeal came before Judge of the First-tier Tribunal Kelly (hereinafter referred to as the Judge) on June 23, 2015 and in a decision promulgated on November 26, 2015 he refused the appellant's appeal on all grounds.

4. The appellant lodged grounds of appeal on December 23, 2015 submitting the Judge had erred in his approach to paragraph 320(11) HC 395, best interests of the child and article 8 ECHR.

5. Permission to appeal was granted by Judge of the First-tier Tribunal Landes on May 27, 2016 finding the grounds arguable.

6. In a Rule 24 response dated June 14, 2016 the appellant opposed the appeal arguing the Judge had considered the evidence and had rejected the appellant's arguments and made findings open to him.

7. The matter came before me on the above date and I heard submissions from both representatives.

8. No anonymity direction has been made.

SUBMISSIONS

9. Mr Spurling adopted his grounds of appeal and submitted there had been an error in law. He submitted the three areas where there was an error in law were:

    a. Approach to paragraph 320(11) HC 395.
    b. The Judge's approach to the best interests of the Child.
    c. Article 8 generally

10. Mr Spurling argued that the Judge had erred by approaching the decision under paragraph 320(11) HC 395 as if it was mandatory rather than discretionary. Whilst the suitability requirements in Appendix FM Section S-EC1.4 were not directly relevant they did give a yardstick on how the respondent should approach the issue of custodial sentences. He submitted

the Judge had demonstrated in paragraphs [23] to [25] of his decision that he had confined himself to Wednesbury principles whereas he should have considered more and in particular the fact the conviction was more than seven years old. Whilst the Judge accepted criminal conduct dissipated over time he submitted the Judge had failed to explain how long it would take for such conduct to dissipate and merely applied the Wednesbury test of reasonableness. In giving permission Judge of the First-tier Tribunal Landes identified the Judge rather than using his own discretion may have merely applied a general reasonableness test and in doing so failed to have regard to the fact that under Section S-EC 1.4 where a sentence of under twelve months was imposed then after five years it should be ignored.

11. Mr Spurling further argued that the Judge's findings in paragraph [21] were wrong in law because the Criminal Court did not make deportation orders and had not done since automatic deportation orders came in over nine years ago. The continued exclusion was akin to a deportation order and in upholding the decision under paragraph 320(11) HC 395 the Judge failed to give regard to the best interests of the child.

12. As far as article 8 ECHR was concerned Mr Spurling submitted the Judge did not assess family life correctly. He had been wrong to find that family life was brittle. This was a family who despite being separated had continued their relationship and there was now a child from that relationship. Although he reminded himself of the law and, in particular, SS (Congo) [2015] EWCA Civ 387 he failed to consider paragraph [39] of that decision in its totality and merely took into account those aspects that supported his decision. The State had an obligation to promote family life and the Judge had failed to recognise this in his decision. The child was in the United Kingdom as was the child's mother and whilst the Judge referred to the best interests of the child in paragraph [32] of his decision he failed to state why those factors are outweighed by negative factors. This was a matter recognised by Judge of the First-tier Tribunal Landes who gave permission.

13. Mr Spurling invited me to grant permission.

14. Mr Bramble adopted the Rule 24 response dated June 14, 2016 and submitted there was no material error in law. As regards the approach in paragraph 320(11) HC 395 he submitted the Judge exercised his discretion as evidenced by paragraphs [21] and [23] of his decision. He considered the respondent's approach was correct and then gave his reasons for doing so and demonstrated he had in mind this appellant's circumstances. In his opinion the offence was serious as evidenced by the custodial sentence imposed and his decision was not simply on Wednesday principles but based on his own assessment of the case.

15. Whilst the Judge may have approached the issue of deportation incorrectly this did not infect his decision under paragraph 320(11) HC 395.

16. In so far as article 8 was concerned it was clear the Judge considered the best interests of the child along with relevant case law. He argued the Judge's consideration in paragraphs [34] and [35] demonstrated he had taken into account all matters and the decision was open to him. He submitted there were no errors in law.

17. In response Mr Spurling reiterated the points he had made earlier and invited me to remit the matter to the First-tier Tribunal with preserved findings on Appendix FM matters.

18. I reserved my decision.

DISCUSSION AND FINDINGS

19. The Judge was dealing with a spouse entry clearance appeal.

20. Both the appellant and sponsor had provided the Tribunal with a witness statements dated November 28, 2014. In his statement the appellant accepted he had made mistakes in the past "as a young and eager teenager would in search of a better life". He had come to the United Kingdom on a visa valid from January 13, 2005 until January 13, 2007 but this only enabled him to remain in the United Kingdom for six months at a time. He was almost 20 years of age when he entered the United Kingdom and by the time he overstayed (as he did) he was no longer a "young and eager teenager."

21. He met the sponsor in 2005 and it seems from the sponsor's statement that she knew the appellant had overstayed because she stated at paragraph [7] of her statement that "one of the reasons for him overstaying his visa was our relationship as he did not wish to be separated from me despite knowing that he had overstayed his visa."

22. The Judge noted that in addition to overstaying, he had committed a criminal offence relating to the use of a British passport that did not belong to him. He received a sentence of six months and despite submitting an application to remain in July 2008 he was removed from the United Kingdom on November 9, 2008 although he indicates that he left voluntarily. According to his application form he made unsuccessful out of country visit applications on December 23, 2011 and February 12, 2012.

23. The respondent concluded that the criminal offence committed on October 29, 2007 for which he was sentenced to six-months imprisonment and his overstay demonstrated he had contrived in a significant way to frustrate the

intentions of the Immigration Rules and refused his claim under paragraph 320(11) HC 395.

24. There was documentary evidence in two bundles (appellant and respondent bundles) before the Judge that the relationship was genuine and the sponsor travelled to see the appellant on November 9, 2011, July 16, 2012 and November 4. 2013 when they married. Those visits took place in the United Arab Emirates. His application was submitted when the sponsor was expecting their child and was twenty-two weeks pregnant.

25. It was against this background that the Judge had to consider the appellant's appeal. The Judge carefully recorded the background and evidence in his decision including Mr Spurling's detailed submissions. At paragraph [13] he noted three factors that Mr Spurling submitted mitigated the effect of his behaviour in the United Kingdom and the fact that upholding the decision would be to exclude the appellant from his daughter.

26. Mr Spurling's first submission is the Judge did not demonstrate sufficient regard to these factors when considering what to do under paragraph 320(11) HC 395. Mr Bramble submits that he has not just applied a reasonableness test but has had regard to the factors before him. Paragraphs [21] to [23] of the decision are the relevant paragraphs I must have regard to when considering whether there has been an error in law.

27. The Judge in refusing the appellant's appeal under paragraph 320(11) HC 395 had regard to the following matters:

    a. His poor immigration history. He had deliberately overstayed and established a family/private life whilst here unlawfully.
    b. He committed a criminal offence to deceive an employer into giving him work and to give the impression he was a British subject and entitled to be here.
    c. He left the United Kingdom in November 2008 and when this application was submitted in April 2014 he had been out of the country for 5½ years.
    d. His attempts to remain and/or enter the United Kingdom in July 2008, December 2011 and February 2012 had been unsuccessful.
    e. The effect of his criminal behaviour and sentence would dissipate and mitigate over time.
    f. The circumstances of the offence and the sentence imposed were significant despite the sentence being only six-month's imprisonment.

28. Mr Spurling's submission is the Judge failed to properly exercise his discretion and in effect simply endorsed the respondent's refusal letter.

29. In PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC) the Tribunal held that the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance. The Tribunal noted the guidance on the application of paragraph 320(11) to be found in Entry Clearance Guidance under the heading "Refusals", in relation to aggravating circumstances, provided that aggravating circumstances includes using an assumed identity. The guidance goes on to state: "All cases must be considered on their merits, the activities considered in the round to see whether they meet the threshold under paragraph 320 (11), taking into account family life in the UK and, in the case of children, the level of responsibility for the breach.

30. Whilst this is guidance given to entry clearance officers the Judge when considering such cases has to be have regard to the surrounding circumstances and whilst Mr Spurling has submitted the Judge failed to do this I am satisfied that he did. The Judge had clearly recorded the approach advanced to me today by Mr Spurling, in his decision, and when he considered whether to exercise his discretion he considered those matters that were relevant.

31. Paragraph 320(11) states where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:

    a. overstaying; or
    b. breaching a condition attached to his leave; or
    c. being an illegal entrant; or
    d. using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not); and there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process

32. In this case the Judge placed great weight on the fact the appellant had overstayed a considerable period and had used deception by using an assumed identity. This was not a decision written simply stating "I endorse the respondent's refusal letter" but it was in fact a decision that took into account submissions put forward on his behalf but ultimately the Judge concluded that he had contrived in a significant way to frustrate the intentions of the Rules. The Judge having set out the relevant factors then

concluded in paragraph [23] that he would not exercise his discretion in the appellant's favour and that was an option clearly open to him.

33. In giving permission Judge of the First-tier Tribunal Landes referred to Section E-EC 1.4 of Appendix FM. However, the wording of that section differs to the wording in paragraph 320(11) HC 395 as it states,

> "The exclusion of the applicant from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 12 months, unless a period of 5 years has passed since the end of the sentence." The test being applied by the Judge in this appeal was not "conducive to the public good" but was in fact whether he had "contrived in a significant way to frustrate the intentions of the Rules."

34. The difference being that Section S-EC are mandatory reasons to refuse whereas paragraph 320(11) HC 395 is discretionary and as the Judge recognised the longer the period is from the offence the more the effect of it dissipates. The Judge clearly was aware of this when he considered whether to exercise his discretion and I therefore find Mr Spurling's first ground of appeal is not made out and the decision to refuse under the Immigration Rules was open to the Judge.

35. During the hearing I raised with Mr Spurling whether in fact the Judge had made what I referred to as possible Robinson obvious errors particularly in respect of the requirement to have an English Language certificate. Appendix FM-SE(D) clearly states that any specified documents must be submitted with the application form. The Judge found the English Language certificate issued on August 14, 2014 met the Rules but as the application had been submitted on April 8, 2014 then clearly that could not be the case. The English language certificate was not even obtained until after the initial refusal letter. The application under the Rules should have failed and there are potentially issues over the specified evidence required to meet the financial requirements. I indicated to the representatives that as there had been no cross-appeal this would not have any bearing on my consideration of the error of law and I simply record these issues by way of completeness.

36. The second and third grounds of appeal are connected as they related to the Judge's approach to the best interests of the child and article 8 ECHR. Mr Spurling's submission was two-fold namely the Judge had not properly considered the best interests of the child and thereafter he had not carried out the proportionality assessment correctly. In giving permission to appeal Judge of the First-tier Tribunal Landes said that the failure by the Judge to specifically consider the State's positive obligation to respect family life may amount to an error.

37. It would be wrong to pluck one line from a decision especially in circumstances where the article 8 assessment was addressed between paragraphs [24] and [39] of the decision.

38. The Judge started by setting out the test as set out in Razgar [2004] UKHL 00027 and he then referred to the Court of Appeal decision of SS (Congo) [2015] EWCA Civ 387. At paragraph [27] the Judge specifically refers to what Richards LJ said and that "what was in issue in relation to an application for entry clearance for leave to enter is more in the nature of an appeal to the State's positive obligations under article 8 rather than the enforcement of its negative duty."

39. Accordingly, to suggest the Judge did not have regard to this positive obligation would be wrong as he had this obligation in his mind before he considered the merits of the application. He expanded on what those positive obligations were in paragraph [28] and at paragraph [29] he reminded himself that the interests of the child had to be considered. The Judge is not required to set out verbatim previous judgements although in this case the Judge spent a considerable amount of print doing just that. He demonstrated an engagement with the principles between paragraphs [34] and [39] of his decision and he then made findings based on those principles.

40. I remind the parties this was an out of country appeal and when the application was made this child had not even been born. However, the Judge clearly allowed some latitude on the evidence and gave reasons why he did not find exclusion disproportionate in this part of his decision. The Judge also had regard to Section 117B of the 2002 Act which he was obliged to do. He had regard to the child's age and the circumstances in which the relationship had begun including the fact they married in the knowledge that he had been refused permission to remain or entry clearance on three occasions. He also recognised the option available to the parties.

41. Mr Spurling's submission effectively was to criticise the Judge for refusing the appeal because a child had now been born. If the birth of a child meant all appeals should be allowed then existing case law would have to be re-written.

42. The Judge considered all the factors and gave reasons for refusing the application under article 8. He clearly had regard to the child's best interests as demonstrated by the careful balancing act he undertook. I find no error in the Judge's approach to this issue.

43. This was a well written decision that followed a hearing where there was no Home Office representative. The Judge clearly was aware of the issues being raised and addressed them accordingly in his decision. There is no error in law as the findings made were all open to him.

DECISION

44. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I uphold the original decision.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

No fee award was made.

Signed Dated

Deputy Upper Tribunal Judge Alis