Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/10683/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 October 2017	**On 27 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

MR IDRIS OLASUNKANMI OLADIPUPO
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Michael West, Ineyab Solicitors
For the Respondent: Mr P Naith, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge Mr R G Walters promulgated on 25 January 2017. Although, for reasons I will come to shortly, in the header and case reference there appear to be a second and a third appellant, there is only one appellant in the current appeal to the Upper Tribunal today.

2. That appellant, Mr Idris Oladipupo, was born on 14 March 1977 and is a citizen of Nigeria. He has two daughters who I understand were both born in the United Kingdom. His wife, and the mother of both the

daughters, is Miss Modinat Ayoka Tijani. She currently has the benefit of a Tier 1 Entrepreneur visa which is valid until 13 July 2018.

3. The appeal from the refusal of leave to remain was brought under the provisions of private and family life in the Immigration Rules and under Article 8 outside those Rules. Judge Walters dismissed the appeal on both bases.

4. On 15 August 2017, Judge Doyle gave permission to appeal. For present purposes I need only recite paragraphs 3 and 4 of the grant of permission.

> "3. At [4] of the decision the judge records that that parties agree that the second and third appellants have not made an application for leave to remain and the respondent has no power to consider an application which has not been made. On that basis the judge finds that there are no valid appeals for the second and third appellants. It is arguable that amounts to a material error of law. It is arguable that the Tribunal has jurisdiction to consider an appeal against a decision which the respondent should not have made and it has not been withdrawn.
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> 4. The judge's proportionality assessment is found between [57] and [71] of the decision. His findings there focus on the second and third appellants. Little is said of the first appellant. It is arguable that a more carefully reasoned balancing exercise is required."

5. Mr West, represents the appellant today, but also seeks to speak on behalf of the so-called "second and third appellants". It is regrettable that Miss P Glass who acted for those appellants before the First-tier Tribunal is not herself here today because the way in which Mr West has sought to develop the grounds requires revisiting a concession which was made on behalf of all three "appellants" in the First-tier Tribunal.

6. The judge records the following in paragraph 4 of the decision.

> "In the first appellant's reasons for decision letter the respondent writes 'As your two children (the second and third appellants) have no leave to remain in the United Kingdom they have both been added to your application and will be considered together'. Both representatives agreed that the respondent had no powers to consider an application which was not before her. It follows that she could not make a decision on such an application and it follows from that the second and third appellants have no valid appeals."

7. What Mr West says to me today is that I should read down that paragraph and find a more limited concession than appears on its face. He submits that although both representatives agreed that the respondent had no powers to consider an application which was not before the Secretary of State, that was as far as the concession went. He submits that the following sentence (where the judge asserts the second and third appellants have no valid appeals) is akin to a separate adjudication made by the judge of his own motion.

8. I do not think that Mr West's submission can be correct on any reading of the paragraph. I expressly asked Mr West whether Counsel then acting invited the Tribunal of its own motion still to hear the appeal and he said he was not able to make that submission. It seems to me that paragraph 4 represents the correct recording of a full and unambiguous concession that the judge was only to deal with the appeal of the first appellant and not for any appeal (valid or otherwise) which the judge might have had jurisdiction to entertain. Mr West did not invite me to adjourn the appeal to make enquiry into what may have transpired in the First-tier Tribunal, or to solicit a witness statement from counsel then acting. He recognised, I suspect, that such ventures would have proved futile.

9. The judge duly proceeded to act upon the concession and dealt with the matter solely by reference to the position of the first appellant. The legitimacy of such a reading of the decision is made explicit from paragraph 72 of the decision where the notice of decision appears. It is clearly written in the singular and states that the appeal (namely that of the first appellant) is dismissed on human rights grounds.

10. Although Mr West made his submissions with circumspection, an appellant (especially one with the benefit of specialist legal advice) may not re-open a point expressly conceded with the First-tier Tribunal. I do not consider that the fact that the so-called "second and third appellants" can constitute a legitimate criticism of the decision. The judge was not invited (whether by counsel then acting for the appellant or otherwise) to deal with the position of the second and third appellants. Quite the contrary, he was expressly encouraged not to do so. Nothing that has been said to me this morning leads me to conclude that there is any material error of law in the judge doing exactly what he was asked by those acting at the time and limiting his adjudication solely to the position of the current appellant.

11. That then leaves the second matter which Mr West has argued, namely that there is a material error of law in the judge failing properly to exercise his judicial function on the question of proportionality: balancing on the one hand the human rights interests

of the appellant and on the other the public interest in the maintenance of proper immigration control.

12. The primary point made by Mr West is that if one looks at the analysis of the judge in paragraphs 57 and following, greater prominence is given to the position of the so-called "second and third appellants" rather than to the appellant himself. It is suggested that there was insufficient weight accorded to the disadvantage which might be afforded to young girls when leaving to travel to Nigeria and that insufficient weight was given to the fact that the elder of the two children was on the cusp of moving into full-time education. It is suggested that the judge failed to have regard to the impact on fracturing an existing family unit in the United Kingdom.

13. Mr Naith, for the Secretary of State, submits that although the discussion is brief, there is sufficient to indicate that the judge took all relevant factors into account and carried out that balancing exercise. If one reads holistically paragraphs 57 and following there is a clear understanding by the judge of all the relevant factors that were in play. One unusual feature of this case is that the judge was only dealing with a relatively short period of time as Miss Tijani's leave to remain lasted until 13 July 2018. The judge stated in paragraph 64:

> "I find that the best interests of these children would be to remain with the first appellant and their mother. Although their mother has leave to remain as an entrepreneur until 13 July 2018 I found her evidence wholly unbelievable concerning her supposed business and its profits. Technically of course Miss Tijani cannot be removed before 13 July 2018 but hopefully she will have regard to the best interests of her children and go with them and the first appellant to Nigeria."

14. The judge rightly makes the point that for the preponderance of the time that the first appellant has been in this country his immigration status was precarious. This is recited in paragraph 69. The judge was entitled, as he did, to afford little weight to private life established over that period.

15. In my assessment having heard submissions and reviewed the decision thoroughly there is nothing in the proportionality assessment carried out by the judge which can conceivably amount to a material error of law. It must therefore follow that neither of the grounds as developed by Mr West before me today has merit and this appeal must in consequence be dismissed.

Notice of Decision

(1) Appeal dismissed and decision of First-tier Tribunal affirmed.

(2) No anonymity direction is made.

Signed *Mark Hill* Date 26 October 2017

Deputy Upper Tribunal Judge Hill QC