Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13651/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 November 2017	**On 25 January 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OGECHI UGORJI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr B Abekoya, Atlantic Solicitors

DECISION AND REASONS

1. As in these proceedings the Secretary of State for the Home Department has been granted permission to appeal against the decision by the First-tier Tribunal to allow Mr Ugorji's appeal, it is the Secretary of State who is the Appellant before the Upper Tribunal. However, it is convenient to refer in this decision to the parties as they were before the First-tier Tribunal.

2. The Appellant is a citizen of Nigeria born on 17 September 1982. He appeals against the Respondent's decision to refuse his human rights claim dated 15 April 2016 and the decision of 21 May 2015 refusing to revoke the deportation order made under Section 5(1) of the Immigration Act 1971.

The Appellant's immigration history

3. The Appellant arrived in the UK some time in June or July 2004. In 2005, he submitted a visa application in a slightly different name and date of birth. The application was refused and the passport impounded. On 1 September 2007, the Appellant presented a false Nigerian passport containing a false indefinite leave to remain vignette to a nursing agency to seek employment. On 18 September 2007, the Appellant was arrested at his employer's address. On arrival at the police station he stated that his real name was Ugorji Ogechi and his date of birth was 17 December 1982. He was subsequently charged with four offences. On 10 October 2007, he was convicted at Norwich Crown Court and sentenced to ten months' imprisonment for each offence, to run concurrently, and recommended for deportation. The Appellant's application under the assisted voluntary return - early release scheme was approved on 21 November 2007.

4. On 26 February 2008, the Appellant's representative submitted further submissions based on Article 8 of the ECHR. On 14 March 2008, the Appellant was removed/returned to Nigeria. On 3 June 2008, the Appellant was excluded from the UK by the Secretary of State on grounds that his presence was not conducive to the public good for reasons of criminality. However, the Home Office were unable to confirm whether the Entry Clearance security systems were updated with this information or whether the Appellant was made aware he was excluded from the UK.

5. On 21 August 2008, the Appellant submitted a visa application, as the spouse of a British citizen, to the Entry Clearance Officer in Lagos. On 18 September 2008, his visa application was refused because of his criminality in the UK and because checks revealed that he had made a previous application in a slightly different name and date of birth. He was given a right of appeal which he exercised. On 9 September 2009, his appeal was allowed. The judge found that the Appellant's wife was a credible witness despite concerns over the Appellant's criminal convictions, illegal entry and use of someone else's identity to gain employment. On 5 October 2009, the Appellant was granted leave to enter which expired on 5 January 2012.

6. On 3 February 2011, the Appellant was convicted of disorderly conduct and he received a conditional discharge. On 19 December 2011, the Appellant applied for further leave to remain under Article 8. On 20 February 2012, the Appellant was arrested on suspicion of theft and issued with a notice as an overstayer, but this was withdrawn in light of his outstanding application. On 16 February 2015, the Appellant was served with a decision to make a deportation order in accordance with Section 5(1) of the Immigration Act 1971. On 17 March 2015, the Appellant's representative raised submissions under Article 8 of the ECHR.

7. The application for leave to remain on the basis of Article 8, dated 19 December 2011, was refused under paragraph 322(5A)(b) of the Immigration Rules on 18 May 2015. It was undesirable to permit the

Appellant to remain in the UK because he was a persistent offender who showed disregard for the law. There was no concession that the Appellant would otherwise meet the requirements of the Immigration Rules. The application to revoke the deportation order was refused because the Appellant's human rights claim had been refused.

8. The Appellant has a son who is a British citizen born on 3 February 2008. In the decision of 18 May 2015, the Respondent concluded that the Appellant did not have a Zambrano derivative right of residence and in considering Article 8 the Respondent looked at paragraph A362 and paragraphs A398 to 399D of the Immigration Rules and Sections 117A to 117D of the 2002 Act. The decision letter is based on the fact that the Appellant is a foreign criminal. Further, the decision to refuse the Appellant's human rights claim was certified under Section 94B of the Nationality, Immigration and Asylum Act 2002 and the Appellant has been removed from the UK.

9. The Respondent sent a further decision letter to the Appellant dated 15 April 2016 taking into account the further submissions made. The Respondent considered the Appellant's Article 8 family and private life and the contact he had with his young son. It was concluded that it would not be unduly harsh for his son to remain in the UK in the primary care of his mother whilst the Appellant was returned to Nigeria. The decision to deport was maintained.

The First-tier judge's preserved findings

10. The Appellant's appeal was allowed by First-tier Tribunal Judge Colvin on 23 May 2017. On 28 September 2017, I found that there was an error of law in the decision to allow the appeal because the judge failed to deal with Article 8. The appeal was limited to one on human rights grounds. I set the decision aside.

11. The following findings were preserved:
    (a) The deportation order was made on the basis of the Appellant's conviction in October 2007 when he used false documents to obtain work. He was sentenced to 10 months' imprisonment and recommended for deportation by the sentencing judge. The sentencing judge's remarks were not available some 10 years later.
    (b) The first time a deportation order was considered was in May 2015 on the grounds that the Appellant's presence in the UK is not conducive to the public good. The Appellant was not liable to automatic deportation.
    (c) The Appellant returned to Nigeria in March 2008 on a voluntary basis. He was granted entry clearance in 2009 after a successful appeal to the Tribunal. There was no evidence to show that the Appellant or the Tribunal were aware of any exclusion order. The Appellant's previous conviction in 2007 did not prevent him from obtaining entry clearance.
    (d) It was not reasonable to uphold the deportation decision on the grounds that the Appellant's presence in the UK is not considered to

be conducive to the public good solely in relation to the conviction in 2007.

(e) The Appellant was not a persistent offender and the refusal under paragraph 322(5A)(b) was unlawful.

(f) The Appellant and his ex-partner have a son, F, born on 3 February 2008 who is a British citizen. His parents remained in a relationship until August 2010. The Appellant made an application to the Family Court in December 2010 and a court order, made in October 2012, granted the Appellant supervised contact with his son for two hours a month at Great Yarmouth Family Contact Centre.

(g) The Appellant complied with this order and in March 2016, a review by the Great Yarmouth Family Contact Centre stated, "Over the last few months it has become apparent that contact between Mr Ugorji and his son has progressed immensely. There is clear evidence to suggest that they have become closer and F enjoys time spent with his father. There is a bond between father and son and one that I feel will become stronger as time goes on."

(h) The Appellant had sought more contact hours with his son and was about to enter into mediation with his ex-partner in 2016 at the time he was deported. There was evidence that he had remained in contact with his son since his removal in May 2016 and he is genuine in stating that he wishes to play a role in his son's life.

Submissions

12. The Appellant did not submit any further evidence in accordance with directions and relied on the material before the First-tier Tribunal. Mr Abekoya relied on a postage receipt and submitted that the Appellant had sent a card to his son on 5 September 2017 and 16 November 2017. He submitted that the issue was whether the Appellant could be said to be exercising family life with his child in the UK. There was evidence in the Appellant's bundle that he bought gifts and other items for his son and he contributed to his upkeep. The Appellant had regular contact for two hours per month and this would have increased had he remained in the UK. The Appellant remained actively involved with his son.

13. Mr Melvin submitted that the decision to deport was lawful, although he accepted that section 117C did not apply. The Applicant had been erroneously allowed to enter the UK as a spouse. It was only when he committed a further offence that deportation action was pursued. The Appellant had lived with his child and mother for only 18 months and the marriage failed before the expiry of his visa. The Appellant had contact with his son for two hours per month since October 2012. There was little evidence from F who was now 10 years old. This was insufficient evidence to show that family life was engaged. The Appellant would have to show that there was evidence that he would be granted further access. Two hours contact a month did not outweigh his criminality. The Appellant did not have a genuine parental relationship and did not have a major influence in his child's life. There was little evidence of contact since the Appellant returned to Nigeria. The Appellant's Article 8 rights did not outweigh the deportation order.

14. Mr Abekoya submitted that the deportation order was not made until 19 February 2016. It could not have been made on the basis that the Appellant's presence in the UK was not conducive to the public good. The deportation order was unlawful. The Appellant had made genuine efforts to have contact with his son and had established family life. It was in the best interests of his son to maintain his relationship with his father.

Discussion and conclusions

The deportation order

15. The Respondent's decision to deport the Appellant was made on the basis of his conviction in 2007 for which he was sentenced to a term of imprisonment of 10 months. He was not subject to the automatic deportation provisions and he was not a foreign criminal. The Appellant was not a persistent offender and the Respondent did not rely on section 117C of the 2002 Act.

16. In her letter of 21 May 2015, the Respondent states that she has decided to make a deportation order because the Appellant's presence in the UK is not conducive to the public good (section 3(5) of the 1971 Act). However, the deportation order relies on section 3(6) of the 1971 Act; he is liable for deportation following the recommendation by the judge.

17. I am of the view that the Respondent cannot rationally rely on section 3(5) because the Appellant has been granted leave to enter the UK as a spouse notwithstanding his conviction in 2007. The Appellant is eligible for deportation because the court made a recommendation for deportation. But this means only that power arises under section 5(1) of the 1971 Act in that the Respondent may make a deportation order. The reason given for her deciding to do so, that the Appellant is a persistent offender, is now accepted to be unsustainable. Therefore, the decision to make a deportation order is fatally flawed.

Article 8

18. Despite that, the Appellant cannot succeed under the Immigration Rules on suitability grounds: he is currently the subject of a deportation order.

19. The Appellant is the father of a British citizen child born in February 2008 and they lived together as a family until August 2010. The court ordered that Appellant have supervised contact with his son for two hours per month from October 2012. There was no contact from November 2012 to February 2014. Since then the Appellant has had two hours contact per month until he was deported to Nigeria in May 2016.
20. I find that the Appellant has established family life with his son. The Appellant's deportation amounts to an interference with family life and the consequences are of such gravity so as to engage Article 8. The Appellant's son is deprived of his father's presence and from developing

his relationship with him. There is professional opinion evidence before me to the effect that the parental relationship between the Appellant and his son is genuine and is one that has "progressed immensely".

21. Given my conclusions above, the interference is in accordance with the law and necessary in a democratic society. The issue therefore is whether the interference with family life, that would be brought about by the decision under challenge, is proportionate. I have taken into account section 117B of the 2002 Act in coming to my conclusions.

22. It is in the best interests of the Appellant's son, F, to remain in the UK with his mother. She is his primary carer and he has lived with her all his life. F will not be required to leave the UK as a result of the Appellant's deportation. It would not be reasonable to expect F to leave the UK.

23. It is F's best interests to be able to continue to have contact with his father. The Appellant's relationship with F's mother has broken down and she prevents the Appellant from having telephone contact with F. His only means of contact since his removal to Nigeria has been by several cards sent by post. The Appellant's partner visited him in Nigeria in September 2017 and brought back items for F.

24. There was significant delay since the original application was made in 2011. During this time, the Applicant has developed a genuine relationship with F and bought him toys and items of clothing. He has also sent money to F's mother on a weekly basis by standing order and, on occasion, larger amounts by cheque. It is reasonable to assume that if the Appellant had not been removed in May 2016 he would have continued contact with his son.

25. The Appellant is in a genuine relationship with his son and they have begun to form a close bond. I acknowledge that two hours supervised contact per month at the Great Yarmouth Family Contact Centre is not sufficient to show that the Appellant is actively involved in F's upbringing and their family life is limited. However, the Appellant is F's father and he has taken all necessary steps to keep in contact with his son notwithstanding the breakdown of his relationship with F's mother. I find that the Appellant has a genuine and subsisting parental relationship with his son. The Appellant's deportation means that F will no longer be able to see his father once a month.

26. The weight to be attached to the public interest in deportation is significant and substantial. I am not assisted by the absence of the sentencing remarks, but the Appellant has been convicted of a serious crime. I find that the weight to be attached to the public interest, as engaged by the Appellant's offending, is reduced by the eight year delay in making the deportation order and in part by his re-entry to the UK, notwithstanding his conviction. The judge who allowed the Appellant's appeal against the refusal of entry clearance was aware of his conviction and, presumably, the recommendation of the court since this was part of

his sentence and the Respondent refused entry clearance on the basis of his criminality.

27. This is an unusual case and one which is finely balanced. The Appellant committed a serious offence ten years ago. Since he committed that offence he has been allowed to re-enter the UK. He received a conditional discharge for a further offence in 2011. It was not similar to the offence that led to his deportation. I find that the weight to be attached to the public interest is reduced by the delay and the Appellant's re-entry into the UK.

28. The weight to be attached to the Appellant's family life is similarly limited. He has had two hours contact with his son at the contact centre from February 2014 to May 2016. The Appellant is F's father and he has developed a genuine relationship with him. It is in the best interests of a child to be with both parents. F has a relationship with his father worthy of protection. I find on balance in favour of the Appellant.

29. Put another way, for the reasons I have set out, there is protected family life between the Appellant and his son so that Article 8 is engaged. It is in the best interests of the child that he has face to face contact with his father. That contact has been limited but the evidence establishes that the relationship continues to develop and is of importance to the child. In striking a balance between the competing interests in play the only matters speaking in favour of the Respondent's case are the fact of the deportation order and the consequence that the Appellant cannot meet the requirements of the Immigration Rules. But the significance of the deportation order falls away, as I have explained, because the deportation order is accepted to be not sustainable as the Appellant is not, and should not have been regarded as a persistent offender.

30. I have regard to the provisions and ambitions of section 117B(6). In the case of a person who is not liable to deportation (and the Respondent accepts that the deportation order in place cannot be justified, having accepted that section 117C does not apply) the public interest does not require a person's removal where, as is the case here, he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK.

31. Taking into account all the evidence before me, I find that F's best interests and the Appellant's right to family life outweigh the public interest. I allow the appeal on human rights grounds.

Notice of Decision

The appeal is allowed

No anonymity direction is made.

J Frances

Signed Date: 24 January 2018

Upper Tribunal Judge Frances