Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02158/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 5th March & 4th April 2014	**On 10th April 2014**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR VICTOR UCHE ANUKAM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Patel (5th March 2014) & Mr G Brown (4th April 2014) (instructed by T M Fortis Solicitors)
For the Respondent: Miss C Johnstone (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Respondent, with permission, against a determination of the First-tier Tribunal (Judge Cruthers and Dr J O De Barros) who in a determination promulgated on

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21st January 2014 allowed the Appellant’s appeal against the Secretary of State's decision to deport him to Nigeria.

2. Although the Secretary of State is the Appellant in the Upper Tribunal, for ease of understanding and continuity I shall continue to refer to Mr Anukam as the Appellant and the Secretary of State as the Respondent.

3. Permission to appeal was granted on the basis that it was arguable that the First-tier Tribunal had failed to give adequate reasons for allowing the appeal given the numerous weighty credibility issues found against the Appellant. The matter of whether or not the First-tier Tribunal had made an error of law and if so whether and to what extent the determination should be set aside came before me on 5th March 2014 when the Appellant was represented by Ms Patel.

4. Miss Johnstone made submissions relying upon the grounds and in particular that the decision was inadequately reasoned. She pointed out that throughout the determination adverse credibility issues were taken against the Appellant but then those matters did not appear to have been taken into account when the Tribunal allowed the appeal. Ms Patel sought to defend the determination on the basis that any errors were not material and the weight to be attached to pieces of evidence was a matter for the Tribunal. She argued that the Respondent was simply disagreeing with the First-tier Tribunal’s conclusions and taking the determination as a whole the findings were adequately reasoned.

5. I found the determination to be tainted by material error of law. The Tribunal did not consider the evidence contained in the police report and despite a considerable amount of the determination being taken up with serious adverse credibility findings, the finding that the Appellant is indeed gay is contained in one brief paragraph [15] and unreasoned. Given that his sexuality is a major factor in the appeal the lack of reasoning surrounding that finding goes to the core of the claim and accordingly I set aside the determination in its entirety.

6. Having set aside the determination I indicated that in accordance with Principal Resident Judge Southern’s directions I would proceed to rehear the appeal. However, contrary to those directions the Appellant’s solicitors had thought it appropriate to inform the various witnesses that they need not attend. I was thus prevented from rehearing the appeal on 5th March 2014 and adjourned to a future date. Such behaviour by solicitors is reprehensible. Directions are given for a reason. If the solicitors thought there was a good reason why the rehearing, if there was to be one, should be on another day they should have made that known to Judge Southern. Be that as it may, it was not the Appellant’s or Counsel’s fault and I do not hold it against them.

7. Thus, the matter came before me on 4th April 2014. On that occasion the Appellant was represented by Mr Brown. As credibility is at the

heart of this case I reheard the appeal in its entirety. I pointed out that although this was a full rehearing, the oral evidence given to the First-tier Tribunal remained relevant and I caused copies of Judge Cruthers' Record of Proceedings to be given to both representatives. There has been no challenge to the accuracy of the evidence as recorded in the First-tier Tribunal determination.

8. So far as documentary evidence is concerned I had the original Home Office bundle with Part O of that bundle provided separately as it was missing from my bundle (I subsequently found a loose copy in the file, presumably handed to the First-tier Tribunal) I also had an Annex A and B to the Home Office bundle, served on 17th March 2014 and I had the original Appellant's bundle comprising a total of 223 pages.

9. Given the complex history of this appeal it is appropriate to set the background out in full.

10. The Appellant was born in Nigeria on 20th December 1977. He applied for and was issued with a visa as a family visitor on 11th April 2005 and apparently entered the UK on 4th June 2005. That visa was valid for six months until October 2005. The Appellant overstayed and remained in the UK. On 14th December 2005 he submitted, by post, an application to the Entry Clearance Officer in Nigeria for another visit visa, suggesting in the application form that he was in Nigeria at the time.

11. On 19th January 2006 the Appellant was arrested at a bank where he was attempting to open a bank account using a forged Nigerian passport containing a forged ILR stamp. On 24th February 2006 as a result of his possession of a false instrument with intent he was convicted and sentenced to 8 months imprisonment.

12. The Entry Clearance Officer had asked the Appellant to attend for an interview in connection with the visit visa application on 26th January 2006. Obviously he did not attend. The Entry Clearance Officer refused the application on 28th May 2006 because he believed the Appellant to be illegally in the UK and impounded his passport.

13. On 8th June 2006 the Appellant claimed asylum on the basis that he was a homosexual and would be at risk in Nigeria.

14. On 13th June 2006 a deportation notice was issued on the basis of his conviction.

15. On 31st January 2007 the Appellant had his asylum screening interview.

16. On 2nd April 2008 the Appellant married Lisette Anastacia Vrutall, a Dutch national resident in the UK.

17. On 30th July 2008 the Appellant had his substantive asylum interview.
18. On 6th November 2008 the Appellant applied for an EEA residence card as the spouse of Lisette Anastacia Vrutall using a false passport in a different name.

19. On 16th June 2009 his asylum claim was refused, a decision against which the Appellant lodged a Notice of Appeal.

20. In light of the Court of Appeal's judgment in HJ (Iran) [2009] EWCA Civ 172 UKBA withdrew the asylum decision at a hearing on 28th October 2009. At the same time it was accepted that the Appellant had not been served with the deportation decision.

21. On 17th September 2010 the Appellant's application for the EEA residence card was refused and on 17th December 2010 at Croydon Crown Court he was convicted of possession/control of false/improperly obtained ID cards, possessing apparatus for making false ID cards and also conspiracy to facilitate the commission of a breach of immigration law. The latter was because his marriage was a sham marriage. He pleaded guilty and was sentenced to 9 months and 15 months imprisonment to be served consecutively making a total of 24 months imprisonment.

22. On 2nd February 2011 the Appellant was informed of his liability for automatic deportation under the UK Borders Act 2007. He completed the questionnaire and statement and in July 2011 asked that his partner Naomi Miki Shika and their two children Chizara Ofentse Anukam and Kenechi Neo Anukam be included as dependents on his asylum claim.

23. The Appellant was again interviewed in connection with his asylum claim on 6th June 2012.

24. On 29th January 2013 a deportation order was signed and the Appellant served with it on 5th March 2013.

25. Those decisions were subsequently withdrawn and the decision to deport the Appellant which is the subject of this appeal was taken on 11th October 2013.

26. In essence the Respondent does not accept the Appellant is a gay man and thus would not be at risk on return to Nigeria. It is the Appellant's case he is a gay man who lives openly as a gay man in the UK but will be prevented from doing so for fear of persecution on return to Nigeria. He also claims that to return him would be a breach of Articles 3 and 8 of the ECHR as he is HIV+ as is his partner and that his partner and the children cannot go with him to Nigeria, his partner being a South African national.

27. What is absent from the chronology set out above is the Appellant's relationship with his partner, Ms Shika. Their statements of evidence and their oral evidence indicate that they met in 2007 and fairly shortly after decided to have a child together. Their first child, a daughter was born on 28th August 2008. Their second child, a boy, was born on 16th July 2010. I was told that the first occasion the family lived together was when they moved to Wigan in 2012. They continue to reside at the same address.

28. It is the Appellant's case that he "commenced being gay around the age of 16" with one of his roommates at boarding school. The Appellant would sneak into the other boy's bed when their other roommates were asleep and they would commit sexual acts. This resulted in fellow students turning against them, being jealous of their friendship, verbally abusing them and accusing them of being gay. They were also both physically attacked by other students.

29. There was one specific incident that the Appellant relies upon in 1996. The Appellant was violently attacked by a gang of four men from his school after he refused to confirm or deny questions about his sexuality. He sustained internal bleeding to his stomach, a bruise to his head and a cut to his right knee and was left at the scene to die. He was taken to the school hospital by a passerby where he was treated for his injuries and given painkillers. He had stitches in his knee and was hospitalised for a week and a half. That is his account as set out at paragraph 6 in his witness statement. At paragraph 7 of his statement the Appellant says that he reported the incident to the police and a copy of the police report is contained in the bundle. He did not give the names of his attackers as they had threatened him. He and his friend continued their relationship, only less frequently than before, until his parents took him out of boarding school after the attack.

30. The Appellant's next gay relationship was with a fellow student when he was at university. They enjoyed a sexual relationship about which the Appellant gives graphic details in his statement. One night, on his way back to his accommodation from an evening class, as a joke he put an arm round a friend's shoulder but the friend became extremely angry and accused him of indecently touching him. He started to shout and punched him. Two days later that same friend came with a gang of his own friends to the Appellant's accommodation armed with knives and machetes and banged on the door and tried to force their way in. The Appellant jumped through a back window but his would-be assailants saw him and gave chase. The Appellant jumped over a fence but injured his legs on iron bars on the other side. Neighbours called paramedics and he was taken to the local village hospital where he remained for four days receiving treatment for his injuries.

31. After that incident the Appellant realised he could not remain in Nigeria as a gay man. He contacted his aunt Christina in the UK and explained to her what was happening. She was aware of his sexuality. By this time he had graduated from university with a degree in electrical and electronic engineering.

32. With his aunt's agreement the Appellant applied for and was granted a visa to visit her in the UK and he duly entered the UK.

33. In the UK he had enjoyed a sexual relationship with a man called Dipesh in 2005 but that relationship was short lived.

34. In 2007 the Appellant met Michael Todecilla. He never lived with Michael but they spent a lot of time together and had a sexual relationship. That relationship continued until the Appellant's second period of imprisonment.

Findings

35. When considering Deportation appeals MF (Nigeria) [2013] EWCA Civ 1192 and paragraphs 397- 399 of the Immigration Rules are relevant.

36. Paragraph 397 states:-

> (i) "A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be exceptional circumstances that the public interest in deportation is outweighed."

37. In this case the Appellant pleads that paragraph 397 applies to him because he is a Refugee on account of his sexuality. I first have to decide if he is gay as claimed and if so whether he would be at risk on return for that reason.

38. There are a number of significant difficulties with the Appellant's claim which I now deal with.

39. I am fully aware that one cannot assess sexuality based on appearance and demeanour. I am also fully aware that intrusive questioning about sexual practices is of no assistance even though the Appellant in this case has given some graphic details in his statement. Sexuality is something that is enormously difficult to prove. I have in mind the contents of a document from a P McCusker (page 104 of the Appellant's bundle) pointing that out. However, in this case the Appellant has fallen a long way short of crossing even the very low threshold applicable in an asylum appeal. As I indicate below there is

ample evidence that, if genuine he ought to have been able to adduce but did not and a total absence of persuasive evidence that he is gay. That, taken with the fact that he is living in a household with a woman he has described as his partner and two young children, leads me to conclude that this Appellant is heterosexual and claiming to be gay only to advance a false asylum claim in the same way as he has previously made false applications, as noted earlier in this determination.

40. The Appellant uses an odd expression in his statement saying that he "commenced being gay around the age of 16." It is generally accepted that a person is either gay or is not; it is not something that starts or stops. However, I will give the Appellant the benefit of the doubt and assume that he meant that he became sexually active at that age or engaged in sexual experimentation.

41. The Appellant claims that he was at boarding school when he first had a sexual relationship with another student. According to the Appellant he would share his friend's bed in the same room where two other young men slept. That, if true, was extraordinarily reckless. These were not children, but young men. In 1996, when the Appellant says he was attacked he was 18 or 19. I simply do not find it credible that they would have taken such risks, knowing as he did the prevailing hostility towards homosexuality.

42. By way of corroboration, the Appellant provided a police report that he said his uncle obtained from the police station. The authenticity of the police report has not been expressly challenged. However there are difficulties with it nevertheless. In his witness statement the Appellant says that the incident took place in 1996 and that he reported the matter to the police yet the police report makes clear that the incident took place in March 1995 and the person reporting it to the police was the Appellant's father, not the Appellant. The police report indicates that the Appellant's father said that students used juju (magic) on his son and dragged him into uncompleted buildings and started beating him causing internal injuries to his stomach and a cut to his right knee. The report indicates that the identity of the assailants was unknown. The Appellant's account and that recorded by the police therefore differ in significant detail. The Appellant is absolutely clear in his witness statement that it was he who reported the incident to the police; even saying that he did not give the names of those responsible for the beating because they had threatened to kill him if he disclosed the details. The Appellant made no reference in his witness statement to juju.

43. Those very significant discrepancies damage the Appellant's credibility.

44. While superficially capable of corroborating the Appellant's claim, on closer evaluation (to the lower standard) the report is evidence only

that the Appellant's father made a complaint to the police that his son had been attacked by unknown assailants in March 1995. That could have been for any number of motives.

45. The Appellant has claimed that his father did not know about his sexuality. If, as the Appellant claims, he underwent frequent taunts at school about it, it is not credible that such rumours would not have come to the attention of the school and his parents, given that this was a boarding school being privately funded.

46. The Appellant says that he had another active sexual relationship with a man whilst at university and he describes, in detail, an incident when he says he was attacked. As corroboration for that attack the Appellant called, as a witness, Mr Dennis Ukpanwanne. He filed a witness statement, which he adopted as his oral evidence and was cross-examined. In his statement the witness says that he was at university with the Appellant and they were friends. He suggests that he thought it curious that throughout his time at university the Appellant did not have a girlfriend and he suspected therefore that he was gay. He and others all accused him of sleeping with another man. He then describes the incident of the attack. He says that on that particular day in 2004 he was returning from doing his laundry when he noticed an odd atmosphere. He asked a few neighbours what was going on and was told that the Appellant had been attacked by a group of armed men. "Rumour had it that he was caught having sex with another male and that he might have died from the attack. But a few hours later, we found out that he was still alive and responding well to treatment." He described how, later that night, the Appellant was brought back to his house limping and that he and a few other neighbours went to check on him to see how he was.

47. That is in stark contrast to the Appellant’s own account that he was in hospital for four days. That contradictory evidence seriously damages the credibility of the Appellant’s account.

48. The credibility of that claim is further damaged by the Appellant’s claim that despite his attackers being armed with knives and machetes and determined to force their way into his property to cause him harm and giving chase when they saw him climb through a window, they gave up after he jumped over a fence. They must have done because he was lying there with injured legs until assisted by neighbours and taken to hospital. It makes no sense that his pursuers would have given up so easily.

49. The differences in the accounts and its inherent lack of credibility lead me to conclude that it did not take place. In reaching that conclusion I am fully aware of and take into account the objective and background evidence relating to gay men in Nigeria.

50. It is remarkable that despite these attacks and abuse the Appellant was able to complete both his secondary and university education in Nigeria before applying for leave to enter the UK.

51. With regard to the Appellant's claimed relationship with Michael; this was said to be a long-standing and serious relationship but there is virtually no evidence to confirm there was a relationship at all. The Appellant says in his witness statement that Michael wrote a statement and produced copies of his passport and various bills which he gave to the Appellant's solicitors for the 2009 appeal. The Secretary of State has produced the short statement that Michael produced for that hearing but there are no identification documents. Michael did not give evidence before me or the First-tier Tribunal; I was told because the relationship is over. Whilst I appreciate the Appellant is now with a different firm of solicitors, there is no reason why those various documents, if they existed, could not have been obtained and included in the papers for this appeal and yet they were not.

52. Despite the claimed importance in his life to the Appellant of Michael there is not one single photograph of him or of him with the Appellant. The Appellant has claimed that he does not like his photograph being taken but that reservation apparently does not apply to photographs of him with his children, of which there are several in the bundle.

53. I am told that Michael accompanied the Appellant to the appeal hearing in 2009 when the decision was withdrawn but again there is no evidence to corroborate that save the assertions of the Appellant and his uncle. This leads me to doubt that the Appellant was ever in a relationship with Michael as he claims, despite the evidence of Ms Shika and the Appellant's uncle.

54. The Appellant says that he is an active homosexual and openly gay in the UK. However, during his asylum interview he was asked about his life as a gay man in the UK and was asked if he attended any gay clubs or venues. He was able to name hardly any and those he did was unable to say where they other than in the vaguest terms that they were in the west end of London. He was unable to specify any gay websites. Perhaps not every gay man may wish to visit clubs or websites but it is generally considered to be one of the advantages of a free society.

55. If the Appellant is, as claimed, living an active life as a gay man in the UK and living openly as a gay man then he would have been able to produce numerous witnesses to that effect, neighbours, friends from the gay community and he would have been able to display knowledge of the gay community at his asylum interview. The absence of evidence severely damages the credibility of his claim.

56. In saying this I have taken further account of the evidence of the Appellant's partner, Ms Shika and that of his uncle. Ms Shika made a statement and gave oral evidence. Her evidence was that they met in June 2007. When they met she told him that she was South African and had only been in the UK a short time and they exchanged phone numbers. They then started to meet up and talked about their love of children. She says the Appellant asked her if she was interested in having children with him and she said she was very interested and they therefore commenced a sexual relationship. She became pregnant in December 2007 and she said the Appellant was delighted. He accompanied her to the various medical appointments and after the birth of the first child, a girl, they continued with their relationship until she became pregnant with her son. After she conceived she said they ceased their sexual relationship.

57. She then described an incident concerning the Appellant's friend, Michael with whom the Appellant spent a lot of time. She recalls being suspicious that he had another girlfriend and was horrified to see the Appellant and Michael kissing passionately in a car outside her house. She describes checking his mobile phone and seeing a lot of photographs of the two of them and she then describes challenging the Appellant who confirmed that he was gay, had never been interested in her and just wanted a child.

58. When the Appellant was released from prison, because she was struggling with the children, according to her, it was agreed that he would include her and the children as his dependents on his asylum claim. This would mean that the family would have NASS support and accommodation and as a result they all live together. She said that he is fully committed as a father to the children but they have no relationship together.

59. In contrast the Appellant in his oral evidence said that Ms Shika had never met Michael but her evidence was that she had met him many times.

60. The Appellant was unable to recall whether he and Ms Shika had discussed their status in the UK. He did not think he had told her about his sham marriage. He did not know if she had ever been married (like him she was also convicted of entering into a sham marriage). He was unable to say why she was not mentioned or involved in his 2009 appeal when she had had his child by then.

61. I approach Miss Shika's evidence with considerable caution. She has everything to gain by being believed and by the Appellant being successful in his asylum claim. She is a South African National who has no right to be in the United Kingdom and indeed has also been convicted of entering into a sham marriage with an EEA national and attempting to obtain a residence card through that. Her honesty

therefore has been proven to be lacking. If, as has been suggested, she is simply a surrogate mother for the Appellant, then it was rather an unusual way to go about surrogacy. They were apparently having a normal sexual relationship for a considerable period of time and I have grave doubts that this has in truth ceased.

62. The Appellant's demonstrable continued commitment to Ms Shika, as seen in the fact that they all live together, that he has made her a dependent on his asylum claim and the length of time that they have had, even on their own dubious evidence, a sexual relationship leads me to find that they are in truth a couple with two children together. The absence of any reliable evidence about Michael leads me to doubt that that was ever a relationship.

63. I also find it highly significant that when asked at a previous hearing whether he was homosexual or bisexual the Appellant was adamant that he was homosexual. Again that does not ring true given the nature of his relationship, even on his own evidence, with Ms Shika.

64. It is also significant that the first time he claimed to be gay was in 2006 after being convicted of a criminal offence. I do not believe that he was unaware that a claim of homosexuality could give rise to a claim for asylum. He is clearly knowledgeable about means of entry to the UK because he had already applied for one visit visa and sought to apply for a second.

65. Furthermore, the Appellant has consistently displayed a total absence of honesty. He has been convicted of fraudulent use of a passport. When asked about that he prevaricated. He was asked why he was opening a bank account and whether it was for wages to be paid and he said it was not. He said he needed it so that he could pay college fees by direct debit. He said that the college would only accept payment from him; they would not accept it from his uncle. That is wholly incredible.

66. When asked about the false passport he said that it was not the passport that was false, rather it was the stamp in it. He then acknowledged after a question from me that the passport must have been false because his own passport had been sent to the Embassy in Nigeria. He initially claimed not be able to remember. He could not remember how he got that passport or how much he paid for it. I do not believe him.

67. With regard to his application for the second visit visa he claimed that he had applied for an extension and that he had followed the procedure for that and that because he was extending the visa he just had to tick boxes. That is obvious nonsense. It is perfectly clear that what he was applying for was another visit visa. The visa application form gave his

address as being an address in Abuja. He was clearly trying to deceive the Entry Clearance Officer into thinking that he was in Nigeria.

68. The Appellant was asked whose the address in Abuja was that he had written on the Visa Application Form and he said that it was his uncle's. He was asked why he had used his uncle's address rather than his parents’ and he said he had never really lived at his parents’ house because he was at boarding school and then at university. However, in his screening interview when asked for his address he had given his parents’ address.

69. The Appellant gave false information at his screening interview. He gave a different name for his father and said that he had never met him since he had been born and that his mother was deceased. In fact both of his parents are very much alive and living together in Nigeria. The Appellant claimed not to know how that information appeared in the screening interview. He also told the officer at the screening interview that he had no siblings whereas elsewhere he maintains that he has two sisters in the USA and a brother in Nigeria.

70. Undeterred by time in prison, the Appellant then entered into what he knew to be a sham marriage with an EEA national so that he could lodge what he knew to be a fraudulent application for a residence card, using yet another false passport. He was, at the same time as being convicted for entering a sham marriage, also convicted of possessing equipment to make false identity documents. The Appellant, at the hearing, claimed not to remember where that false passport came from either.

71. It is quite clear that the Appellant and the truth are virtual strangers. He has no difficulty whatsoever in lying and deceiving the authorities repeatedly and is undeterred by imprisonment. I am led to conclude that I can place no reliance on anything he tells me.

72. As Ms Shiko has herself been convicted of dishonesty and, as I have already indicated has every reason to want the Appellant to be successful, I therefore find that I can place no reliance on her evidence either. I simply do not believe the assertions of these two that they knew so little about each other.

73. I now turn to the evidence of the Appellant’s uncle. He gave evidence in a straightforward manner and if it were not for the other difficulties I might have attached weight to what he said. He said that he knew Michael and he knew the Appellant and Michael to have been in a long-standing relationship. He supported the Appellant although he did not like the fact that he is gay and wishes that he was not. He travels regularly to Nigeria. He does have property there but usually stays with relatives. It was he who obtained the police report and confirmed the incident with a policeman at the station. He explained that it was

important for a Nigerian man to continue his lineage by having children and that is why the Appellant had children with Ms Shiko. He had met her on frequent occasions when they lived in London but less so now they live Wigan. He confirmed that Ms Shiko is in contact on a fairly regular basis with the Appellant's parents because she is the mother of their grandchildren. With regard to Michael he said that he first met him in about 2006 and saw him quite often but did not know when the Appellant had last seen him.

74. What is significant about this witness's evidence is that he had produced a statement to support the Appellant in the Appellant's 2009 appeal and yet made no mention whatsoever of (a) Ms Shiko or (b) the fact that he had a child in the United Kingdom, which by that time he had. That I find is because the Uncle is prepared to help his nephew in any was he can to stay in the UK and his evidence is tailored accordingly. I note the uncle's evidence that he encouraged the Appellant to go to college in the UK knowing full well that he was an overstayer and so was not entitled to study. He did not advise the Appellant to regularise his position.

75. The statement signed by Michael for the 2009 proceedings suggests that he and the Appellant had been together as a couple since April 2007 having met in a park. That statement is extremely brief and does not indicate that the couple were in a sexual relationship and of course he has not appeared to give evidence in the present appeal proceedings. There is, as I have indicated above, a total absence of any other evidence which it would be reasonable to expect such as photographs.

76. There are also further difficulties for the Appellant's case caused by the uncle's evidence about the Appellant's family's situation in Nigeria i.e. that the Appellant's parents are alive and well.

77. It is clear from what the Appellant said at his screening interview that he sought to minimise the extent of his family connections in Nigeria by saying that he had not seen his father since he was born, that his mother was deceased and that he had no siblings. I asked the Appellant what his father did in Nigeria and he said he was a trader and his mother is a housewife. He said that he did not know why he had been sent to boarding school; he was the only one in the family who had. It is significant that the Appellant's parents were able to finance him at boarding school and then through university where he obtained a degree in electronic engineering. Furthermore the police report refers to the Appellant's father as being "Chief" Anukam. I asked the uncle the significance of that. He told me that "Chief" is a title conferred by the King to show a person's position in society. It is an honour bestowed on an individual in recognition of his contribution to the community. The Appellant's uncle is also a Chief. In his case it was because he had built a block of classrooms and that is how he came to be given the

title. He was unable to say exactly why the Appellant's father had been given the title but confirmed that he would have done something similar. He said it was an indication of high status in Nigeria akin to a British knighthood. As with the British knighthood, the wife is also given a title; in Nigeria it is "Lolo". This would indicate that the Appellant's family has significant position and status in Nigeria.

78. Taking all of the evidence into account and after applying anxious scrutiny to it, for all the above reasons I do not find the evidence of the Appellant or witnesses reliable so far as his sexuality or events in Nigeria are concerned. I find that the Appellant is not gay and is living with his female partner and their two children as a family unit. Having concluded as I have that the Appellant is not gay; his appeal against deportation on asylum grounds fails.

79. For the same reasons he cannot rely on Article 3. Although he is HIV+ he is healthy on antiretroviral drugs and the evidence is that the necessary drugs are available in Nigeria. He comes nowhere near to reaching the level of illness that would cause him to succeed on Article 3 grounds, indeed even if he were suffering from AIDS with a limited lifespan he has family in Nigeria who could support and care for him.

80. So far as the appeal against deportation otherwise is concerned, paragraph 397 refers to the ECHR and in that regard Article 8. MF (above) tells us that the Immigration Rules are a complete code. I thus refer to paragraph 398.

81. The relevant part of paragraph 398 provides:-

> "Where a person's claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they had been sentenced to a period of imprisonment of less than 4 years but at least 12 months;"

82. And Paragraph 399 provides

> "This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British citizen; or
> (ii)the child has lived in the UK continuously for at least seven years immediately preceding the date of the immigration decision; and in either case

(a)it would not be reasonable to expect the child to leave the UK; and
(b)there is no other family member who is able to care for the child in the UK;

or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i)the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and
(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK".

83. Paragraph 399A provides:-

"This paragraph applies where paragraph 398(b) or (c) applies if –

(a)the person has either lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

(b)the person is aged under 25 years, he has spent half his lifeliving continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties in the UK and loss has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK".

84. A person who comes within these provisions will be granted limited leave to remain.

85. None of the above provisions benefit this Appellant. He comes within paragraph 398(b) but not within any of the provisions of paragraph 399 or 399A. Neither his partner nor his children are British citizens or settled in the UK; indeed they have no leave to be in the UK at all.

86. That being the case, I am told by paragraph 396 that:-

"Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007."

87. And by paragraph 397 that where deportation would not be contrary to the UK's obligations under the Refugee Convention or the ECHR:-

> "it will only be exceptional circumstances that the public interest in deportation is outweighed".

88. Mr Brown argued that there were exceptional circumstances in this case. The exceptional circumstances were that this is a young family. The Appellant is Nigerian and his partner South African. They cannot all be returned to either country and therefore deportation will necessarily split the family. Furthermore, both the Appellant and his partner are HIV+ and receiving antiretroviral drugs. The best interests of the children in this case require maintenance of the status quo which means allowing the Appellant to remain in the UK and that on an assessment of proportionality the balance should fall in favour of the Appellant.

89. I disagree. There is nothing exceptional about this case. This is a couple, guilty of serious offences, particularly so given that they relate to immigration law. Both have displayed flagrant breaches of UK law, the Appellant repeatedly and despite having dependant children and previous imprisonment. Neither have any reason to be in the UK. Both have sought to deceive this Tribunal and the Home Office making a false claim about the Appellant's sexuality. The Appellant has sought to conceal the circumstances of his family in Nigeria. Neither the Appellant, his partner, nor the children are British or settled in the UK or indeed here lawfully. The children of course are innocent of wrongdoing. However, the fact remains that they are neither settled nor British nationals. They are liable to removal to South Africa with their mother. They are very young and their main ties are to their parents. The case of Zoumbas [2013] UKSC 74 makes clear that the best interests of children, whilst a primary consideration, are not the paramount consideration that they are in family proceedings. Furthermore, the interests of British children are to be afforded greater weight (ZH (Tanzania) [2011] UKSC 4) (village Tanzania) than those of non-British nationals as in this case.

90. Furthermore, I am told by MF (above) that the Immigration Rules are a complete code. Absent any exceptional circumstances, if an Appellant cannot bring himself within one of the exceptions contained in the Rules then the public interest requires deportation.

91. The Appellant's history and offending behaviour in this case is so serious that only deportation is appropriate. Whilst I appreciate that the best interests of the children would be to live with both parents, the circumstances for them are unsettled and in any event they may be required to go to South Africa with their mother. The children are both very young and will continue to be cared for by their mother. There was no suggestion that she was incapable of caring for them adequately. So far as their mother is concerned, the case as put to me, although I

disbelieved it, is that she is not emotionally connected to the Appellant and therefore is not in a position to argue that she has Article 8 family life with him.

92. Having found for the reasons stated at the beginning of this determination that the First-tier Tribunal made an error of law and having set its decision aside, having reheard the evidence my conclusion is that there is no reason why this Appellant should not be deported to Nigeria. The appeal to the Upper Tribunal is allowed such that the Appellant's original appeal against the decision to deport him is dismissed.

Signed   Dated 9th April 2014

Upper Tribunal Judge Martin