Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02183/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 July 2014	**On 15th July 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

OLUWAGBEMIGA OLASUMIBO SOWANDE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Singer
For the Respondent: Mr S Whitwell

DETERMINATION AND REASONS

1. Mr Sowande is the appellant before the Upper Tribunal and the Secretary of State is the respondent. He has been granted permission by the Upper Tribunal to challenge a determination of the First-tier Tribunal

promulgated on 10 March 2014, the Tribunal consisting of a panel of First-tier Tribunal Judge Elvidge and Mrs J Holt.

2. I have been gratefully assisted today by the representations made by both representatives, Mr Singer for the appellant and also Mr Whitwell, who appears for the Secretary of State.

3. I am satisfied that the Tribunal which heard this appeal erred in law and I make that finding for the following reasons.

4. The concentration in this appeal has been on what the Tribunal has said at paragraph 44 of its determination. Referring to the appellant they said: "We find that the appellant is only just on balance able to meet the criteria under 399(b) in regard to his partner."The Tribunal is here referring to the Immigration Rules, paragraph 399(b) which provides that:

> Paragraph 398(b) or (c) should apply in cases where the person has a genuine and subsisting parental 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 fifteen 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.

5. Where that paragraph applies, and it does in the case of this appellant with regards to 398(b), which reads

> 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 have been sentenced to a period of imprisonment of less than four years but at least twelve months

one is led on then to paragraph 399B, which provides that limited leave may be granted for periods not exceeding 30 months subject to such conditions deemed by the Secretary of State to be appropriate.

6. The difficulty in this case is exactly what the Tribunal has meant at paragraph [44] by saying that they found that the appellant met the 399(b) criteria. It is difficult because, notwithstanding the clear and unambiguous words with which that finding is expressed, it has not led them on, as Mr Singer urges me to find it should have done and should lead me to do, to a grant of leave under paragraph 399B. Instead, it seems to have led the Tribunal on to make no finding at all in the body of the determination regarding the appeal under the Immigration Rules. It led them in the decision section of the determination to dismiss the appeal under the Immigration Rules, notwithstanding that they found that the appellant had complied with the necessary paragraph, and it led them on to observe, at paragraph [49] that: "If the appellant cannot meet the

requirements of the Rules we have to consider the appeal also under the Article 8 case law…"

7. There are a number of paragraphs in the determination setting out familiar items of jurisprudence in summary and an assessment of proportionality under Article 8. At the beginning of paragraph [49], the Tribunal has left uncertain what it found, notwithstanding that they said in paragraph 44 that the appellant qualified under the Rules.

8. Things are made no better by what the Tribunal says at paragraph [64]:

> we find that the public interest in deportation has not been outweighed within paragraph 399(a). His mother is able to continue to care for David in the UK as his primary carer. While the appellant has a family relationship with his partner for Article 8 purposes, she is of Nigerian origin and there are no insurmountable obstacles for her to relocate there if she so wished. However, we find that that relationship is not based on affection but only on his utility to her in childcare. We find under paragraph 399A that the appellant continues to have strong ties to Nigeria despite his length of residence in the UK. We find as an overall conclusion that the respondent has justified the decision as being necessary and proportionate.

9. I consider that the Tribunal has mixed up the considerations it should have addressed under the Immigration Rules with those under Article 8. As the Court of Appeal has established in *MF (Nigeria)*, there is now a complete code within the Immigration Rules as regards Article 8, which sets out in detail where the balance is to be struck between the public interest and the private and family life rights of applicants and appellants. The problem with this determination is that I have no idea from the paragraph which I have quoted above whether the Tribunal are referring to Article 8 outside the Rules or to the Rules themselves; there would have been no need for them to make an assessment of proportionality where that is implicit within the code provided by the Rules.

10. It is true that in that, in the same paragraph, the Tribunal found that there were no insurmountable obstacles for the partner to relocate abroad with the appellant if she so wished, but that finding cannot sit very easily with their finding at paragraph [44] that the appellant met the requirements or the criteria of paragraph 399(b) with regard to his partner, those requirements including that there were insurmountable obstacles to family life with a partner continuing abroad. This confusion of reasoning leaves one with no clear idea quite what the Tribunal had in mind or what laws at any particular point in its determination it was seeking to apply to the facts of this appeal. It is because of that confusion and uncertainty that I will not follow Mr Singer's recommendation that I should simply allow this appeal under the Rules under paragraph 399B. I am persuaded, and it is fair to say that Mr Whitwell for the respondent did not seek to advocate any other course of action, that this appeal should be remitted to the First-tier Tribunal, there having been virtually a complete breakdown in the delivery of a rational decision by the First-tier Tribunal. None of the findings of fact shall stand.

DECISION

The determination of the First-tier Tribunal is set aside. None of that Tribunal's findings of fact shall stand. The appeal is remitted to the First-tier Tribunal (not Judge Elvidge or Mrs Holt) to remake the decision.

Signed Date 12 July 2014

Upper Tribunal Judge Clive Lane