Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01876/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 December 2015	**On 29 December 2015**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LAWRENCE OKECHUKWU ANEKE
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Kandola, Senior Home Office Presenting Officer
For the Respondent: Mr Ojo, Legal Representative

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

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Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier Tribunal Judge Coleman promulgated on 6 May 2015 ("the Decision") allowing the Appellant's appeal against the Secretary of State's decision dated 1 October 2014 that section 32 UK Borders Act 2007 applies and making a deportation order against him dated 19 September 2014.

2. The background facts so far as it is necessary to recite them at this stage are that the Appellant who is a national of Nigeria arrived in the UK originally as a visitor in 2004. He travelled between Nigeria and the UK in that capacity in 2004 and 2005 before being refused entry in September 2005. He appealed unsuccessfully. He then entered on a false passport in 2007. He was refused entry, prosecuted, convicted and sentenced to eight months imprisonment. He applied for voluntary assisted return to Nigeria on release but then absconded and did not come to light again until July 2012 when he applied for leave to remain as a spouse and father of three children. Whilst that application was pending, he was convicted on 4 December 2013 of an offence of fraud and sentenced to thirty months' imprisonment. I will return to the nature and seriousness of that offence below. That offence led to the making of the deportation order against him. I note at this point that although at various times the Respondent has disputed the genuineness of the relationship between the Appellant and his wife and whether he is in fact the father of all three children, those facts are no longer at issue. The appeal proceeds therefore on the basis that he is in a relationship with his wife who is originally from Nigeria and is the father of three children born in August 2004, February 2006 and June 2011 respectively and therefore now aged eleven years, nine years and four years. The Appellant's wife and children are all now British citizens.

3. The Judge allowed the Appellant's appeal on human rights grounds, finding that deportation of the Appellant would be unduly harsh in light of the position of his wife and children. The appeal was therefore allowed on the basis that the Appellant comes within paragraph 399(b) of the Immigration Rules.

Error of Law Decision and Reasons

4. The Respondent challenges the Decision on four grounds. Ground one concerns a mistake of fact relating to the Appellant's wife's status in the UK. It is submitted that this error is material and fundamentally undermines the Judge's reasoning in relation to whether deportation would be unduly harsh. Ground two concerns the Judge's treatment of the evidence given by the Appellant and his wife. Ground three asserts that the Judge has failed to give appropriate weight to the public interest in deportation. Ground four proceeds on the basis that the Judge has wrongly treated the best interests of the children

as being a paramount factor which cannot be outweighed by the public interest. Permission to appeal was granted by First-Tier Tribunal Judge Reid based predominantly on ground one but was not limited to that ground. I deal with each of the grounds in turn.

Ground one

5. The Appellant's wife is, as noted at [2] above, originally from Nigeria. The Judge in the Decision at [13] notes that she was granted asylum in the UK. At [31] the Judge notes that the Home Office Presenting Officer accepted that she was granted asylum. On that basis, unsurprisingly, the Judge found at [31] that "the fact that she has had reason to fear persecution in Nigeria does clearly constitute insuperable obstacles to her returning there and constitutes it being unduly harsh to ask her to expose herself to any possible risk on that account". The Respondent indicated in the grounds, however, that this is not the correct position. The Appellant's wife was in fact granted indefinite leave to remain by the Casework Resolution Directorate on 9 September 2008. As that letter makes clear, the grant was outside the Rules and because of the strength of connections to the UK and had no link to the asylum claim (save that her case fell under the "legacy programme" by reason of her initial asylum claim). Mr Kandola submitted that although the Home Office Presenting Officer had perpetuated the error by accepting that the Appellant's wife had been granted asylum, this was a mistake and not a concession and the Respondent ought not to be bound by that mistake.

6. Mr Ojo submitted that if this is an error (which clearly it is), it is not material. He began his submissions on the basis that even if the grant was not one of refugee status, there had not been a determination of the asylum claim made on her arrival in 2004 and the Judge did not err therefore in considering that she could not return to Nigeria due to her fear on return. Mr Kandola was however able to assist the Tribunal in relation to the asylum claim by producing a decision of the First-Tier Tribunal dated 27 April 2005 dismissing the Appellant's wife's asylum claim and finding her claim not to be credible. Mr Ojo persisted though in his submissions that the Appellant's wife still feared return to Nigeria. That will become relevant to my consideration of what course the appeal should take hereafter, if I accept that the mistake of fact led to a material error of law. In order to consider the materiality of the error and whether it tainted the findings in the Decision, it is necessary for me to consider the remaining grounds.

Ground Two

7. In order to consider the remainder of the grounds, it is necessary for me to say something about the offence of which the Appellant was convicted. That is described by reference to the Judge's sentencing remarks at [4] of the Decision. In short, the offence was an extensive fraud involving a scam based on a bogus inheritance claim and directed at elderly victims who between them lost over

£300,000. As noted at [5] of the Decision, the Appellant involved his wife in the fraud although she was not prosecuted in relation to it.

8. The Respondent submits that, when considering the oral evidence of the Appellant and his wife, the Judge has failed to give any weight to the fact that both were implicated in an offence of fraud and deception. Mr Kandola submitted that the Judge needed to consider their deception before according their oral evidence "great weight" [35] and accepting it without qualification. Mr Ojo submitted that the First-Tier Tribunal Judge is the finder of fact and that I should not interfere with the findings on that evidence.

9. The Judge's consideration of the evidence appears at [11] to [18] of the Decision. The main import of the Appellant's and his wife's evidence is on the genuineness of their relationship, the impact of the Appellant's detention on the children and what they consider would be the impact on the family if the Appellant were deported. That is clear from the main finding which the Judge makes on that evidence at [35] of the Decision:-

> "I also give considerable weight to the evidence of both the appellant and his wife. In particular, as I have said, the wife was an impressive and straightforward witness who gave considerable detail in evidence. Her evidence as to the role the appellant takes in the children's lives was entirely consistent with the appellant's own evidence and was not seriously challenged in cross-examination"

10. The genuineness of the family relationships is no longer at issue. It is clear that the evidence was tested by the Respondent's representative in cross-examination. The Judge clearly had in mind that the offence was one of fraud. She was not required to state in terms that this was considered by her when it came to her assessment of the evidence. She was entitled to reach the findings which she did on the evidence, having heard the witnesses. As I note, however, the relevance of that evidence is limited in light of the facts which are now accepted by the Respondent as to the genuineness of the relationships.

Ground Three

11. The Respondent's complaint concerning the Judge's treatment of the public interest in deportation arises from [43] of the Decision, where the Judge says this:-

> "However, I do bear in mind that the appellant was convicted of a very serious offence. He was involved in a massive fraud which took substantial sums of money from vulnerable and elderly people in the United Kingdom. However, against that I must also bear in mind his sentence. The sentence as set out in the sentencing remarks would never have been greater than four years. It is argued by Ms McKenzie that I would have to find compelling reasons to outweigh the public interest in deportation in such an offence. However the Immigration Rules and the 2002 Act does not require such a test to be fulfilled in a case where there is a sentence of under four years. I refer specifically to paragraph 398 which makes it clear that the very compelling circumstances required only arises

> where paragraph 399 does not apply. In this case I have found that on the face of it 399 does apply"

12. That paragraph does not disclose any error of law read in the context in which it is found. What the Judge there finds is that the Appellant does not need to show compelling circumstances over and above those found in paragraph 399 because the Judge has found earlier in the Decision that the Appellant meets the requirements of paragraph 399. As a statement of the law set out in the Rules, that is unobjectionable. Of course, if I accept that the mistake of fact made in relation to the Appellant's wife's status is material and taints the remainder of the Judge's findings, the finding that Appellant could meet paragraph 399 cannot stand and the public interest would need to be weighed in the balance again in the re-made decision. Paragraph [43] does not though disclose any error of law in approach.

Ground Four

13. The Judge deals with the best interests of the three children starting at [38] of the Decision. The Judge there notes that she considers both the best interests of the children and the behaviour and seriousness of the crime which the Appellant committed. The consideration of the impact on the children is made in the context of the Judge having accepted that the family could not relocate to Nigeria. Mr Ojo submitted that the mistake of fact identified at [6] above does not alter those findings. The Appellant's wife and three children are all British citizens and to that extent he is right to submit that the effect of the Appellant's deportation may lead to a separation of the family if the Appellant's wife and children decided not to accompany him. However, the main hurdle to that in the eyes of the Judge was that the Appellant's wife could not go to Nigeria because it was accepted that she had a well-founded fear of persecution there. That finding cannot stand in light of the mistake of fact. Mr Ojo pointed to the letter from the children's headteacher concerning their behaviour whilst the Appellant was detained and to the letter from the eldest child. He submitted that, in finding that the children's best interests outweighed the public interest in deportation, the Judge did not err and furthermore that the mistake of fact already identified would not alter that conclusion. Mr Kandola accepted that this ground and ground three were peripheral to the main ground but submitted that the outcome would be different if the Judge were to consider the case on the basis that the Appellant's wife was not precluded from returning to Nigeria with the Appellant and the children.

14. Having regard to [38] to [43], I am not satisfied that the Judge can be said to have erred in her treatment of the children's best interests. She has weighed the impact on the children against the Appellant's behaviour both in terms of his immigration history and his offending. However, I am quite unable to accept that the mistake of fact identified at [6] above has no impact on the outcome. It is clear from [39] that the Judge finds that the best interests of the children are served by being brought up by both parents. Although it is right to say and Mr

Kandola accepted that the Appellant's wife and children cannot be forced to return to Nigeria with him, the Judge proceeded on the basis that they had no choice but to stay in the UK without him because of her perception as to the risk to the Appellant's wife's on return to Nigeria. Once that is taken out of the equation, the finding that it would be unduly harsh for the Appellant's wife and children to accompany him to Nigeria cannot stand. Whether they would do so may also be material to the finding that it would be unduly harsh for them to remain in the UK without him.

15. I am satisfied that the Judge made an error in relation to the Appellant's wife's status in the UK. As noted at [5] above, that led the Judge to conclude without more that it would be unduly harsh for the Appellant's wife to return to Nigeria. The Judge thereafter considered at [32] the impact on the Appellant's wife and children on the assumption that they would remain in the UK without the Appellant and at [37] on the basis that the children would accompany the Appellant to Nigeria which would entail separation from their mother. Thereafter, as noted at [14] above, the Judge considers the best interests of the children on the basis that they should be brought up by both parents but in so doing, did not consider whether that could occur in Nigeria because the Judge was constrained by the mistake of fact to find that the Appellant's wife could not go to Nigeria. It cannot sensibly be said therefore that the mistake of fact makes no material difference to the finding that it would be unduly harsh to deport the Appellant. The finding that the Appellant's wife could not return to Nigeria is a central and fundamental part of all aspects of the Judge's reasoning on this issue. Accordingly, the Judge has made a material error of law. The Judge's finding that the deportation of the Appellant would be unduly harsh must be set aside and revisited.

Re-making of the Decision

16. Mr Kandola submitted that if I accepted that the Decision contained a material error of law, then I could proceed to re-make the Decision based on the evidence before me. He submitted that this was so whether I found there to be only the error identified in ground one (as I have done) or on all grounds. He did not however oppose a remittal to the First-Tier Tribunal if I considered that to be the appropriate course.

17. Mr Ojo submitted that I should remit the appeal to the First-Tier Tribunal if I were to find for the Respondent only on the first ground (on the assumption that the error is material) or on all grounds. He submitted firstly that the facts of the case have progressed as the Appellant's wife is now pregnant again with her fourth child and has medical complications associated with that pregnancy. That pregnancy and the birth of the fourth child will exacerbate the problems of the wife caring for the children alone which the Judge identifies in the Decision. He also submitted that, notwithstanding the First-Tier Tribunal's decision that the Appellant's wife's asylum claim was not credible, she would still wish to provide evidence that she is at risk on return to Nigeria.

18. I have considered whether I should resume a hearing before me to take that further evidence or remit to the First-Tier Tribunal. I have reached the conclusion that the appeal should be remitted. The mistake of fact which I have identified as the error of law in the Decision is central to the assessment of whether it is unduly harsh for the Appellant to be deported on the basis that the Appellant's family may be able to accompany him. There are no findings by the First-Tier Tribunal in relation to that because the Judge accepted that the Appellant's wife could not return. There has been no testing of the evidence in relation to whether she could and would accompany him or any consideration of the impact on her and the children if she were to do so or the proportionality of deportation if she were not to do so in circumstances where it would be open to her to do so.

19. For the foregoing reasons, I am satisfied that the Decision does involve the making of a material error of law. Accordingly, I set aside the Decision. I remit the appeal to the First-Tier Tribunal for the Decision to be re-made. Neither party submitted that any of the previous findings should stand and in light of the fundamental nature of the mistake of fact which has led me to find an error of law in the Decision, it would not be appropriate for any of the findings to remain intact. I note however that the Respondent did not challenge and no longer disputes the genuineness of the Appellant's relationship with his wife or parentage of the children.

DECISION

The First-tier Tribunal decision did involve the making of an error on a point of law.

I set aside the Decision. I remit the appeal to the First-Tier Tribunal for re-hearing. No findings are preserved.

Signed  Date 15 December 2015

Upper Tribunal Judge Smith