Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2022-003026

UI-2022-003954

[HU/56340/2021]
[HU/56432/2021]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 May 2023	**On 3 September 2023**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

GRACE OLUWAFUNMILAYO JIMOH (FIRST APPELLANT)
OLUWATOYIN WASIU JIMOH (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms M Chowdhury, Counsel instructed by Daniel Aramide Solicitors
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me for the decision to be re-made, following a hearing before me and Deputy Upper Tribunal Judge Davey on 17 November 2022 which resulted in our finding that the First-tier Tribunal ("FtT") erred in law in its decision to allow the appellants' appeals.

2. The appellants had appealed to the FtT against decisions dated 8 October 2021 to refuse their human rights claims, on the grounds of 'suitability' under section S-LTR of the Immigration Rules ("the Rules"), on the basis that their presence in the UK was not conducive to the public good because their conduct, character or associations, or other reasons made it undesirable to allow them to remain in the UK.

3. Albeit that we set aside the decision of First-tier Tribunal Judge Monson for error of law, his decision contains a comprehensive summary of the background to the appeal which I cannot improve upon and I therefore quote aspects of it verbatim as follows:

> "3. The Appellants are both nationals of Nigeria, and Mrs Jimoh is the wife of Mr Jimoh.
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> 4. Mr Jimoh was born in Nigeria on 28 July 1956, and according to the respondent's records he was first granted a visit visa to the United Kingdom on 5 September 2009. Mr Jimoh was then granted a second visit visa on 10 August 2000 which was valid until 10 February 2001. He is recorded as having entered the UK on 12 October 2001 with a visit visa which was valid from 7 June 2001 to 7 December 2001. On 10 December 2001 Mr Jimoh was granted his fourth visit visa, which was valid until 10 June 2002.
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> 5. The respondent's case is that a corrupt caseworker assisted Mr Jimoh in obtaining ILR by deception by raising and backdating to 10 April 2002 a fictitious application by Mr Jimoh for exceptional indefinite leave to enter/remain. The same caseworker then granted Mr Jimoh indefinite leave to remain on 4 September 2002.
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> 6. Despite this, on 7 February 2003 Mr Jimoh is recorded as having being issued a fifth visit visa by an Entry Clearance Officer in Nigeria, which was a multi-visit visa that was valid for two years until 7 February 2005.
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> 7. Mrs Jimoh was born in Nigeria on 28 October 1962, and she was first granted a visit visa on 10 August 2000 which was valid until 10 February 2001. On 7 June 2001 she was granted a visit visa which was valid until 7 December 2001. On 10 December 2001 she was granted a visit visa which was valid until 10 June 2002.
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> 8. The respondent's case is that the same corrupt caseworker assisted Mrs Jimoh to obtain indefinite leave to remain by deception by backdating to 10 April 2002 a fictitious application by her for exceptional indefinite leave to enter/remain; and that the same corrupt caseworker granted her indefinite leave to remain on 18 March 2003.

9. In the meantime, Mrs Jimoh had ostensibly returned to Nigeria, and she applied for and was issued with visit visa to come back to the UK. She was issued with a multi-visit visa on 7 February 2003 which was valid until 7 February 2005. She also apparently applied for visit visas for her four children at the same time, and thus on a date unknown shortly after 7 February 2003 she brought her four children into the United Kingdom with her as temporary visitors, and all of them subsequently overstayed their visas.

10. On 3 November 2006 or 3 November 2016 (the RFRL gives both dates), Mrs Jimoh applied for naturalisation as a British citizen, relying on the grant of ILR that had been made to her on 18 March 2003. The application was refused on 26 January 2017 on the grounds that Mrs Jimoh was not free of conditions on the date of her application.

11. On 4 June 2018, Mrs Jimoh submitted a "no time limit" application. On 31 August 2018, the respondent notified her that she was considering revoking her indefinite leave to remain. Despite Mrs Jimoh bringing a claim for judicial review, her indefinite leave to remain was revoked on 24 September 2019 pursuant to section 76(2). On 19 November 2019, Mrs Jimoh's no time limit application was refused.

12. On 24 September 2019, Mrs Jimoh was served with a RED.001 notice informing her of her liability to remove her from the UK as she had gained leave to remain by deception. In response to this notice, she submitted on 30 September 2019, as she was permitted to do, a statement of additional grounds as to why she should not be removed. The outcome of judicial review proceedings which ran until 27 September 2021 was that the respondent agreed to make a decision on Mrs Jimoh's statement of additional grounds, and to afford Mrs Jimoh an in-country right of appeal in the event that the human rights claim inherent in the statement of additional grounds was refused.

13. There was no activity so far as Mr Jimoh was concerned until 8 August 2019 when he was notified that the respondent was considering the revocation of his ILR pursuant to section 76. On 24 September 2019, Mr Jimoh's ILR was revoked under section 76 and on the same day he was served with an RED.001 notice informing him of his liability to removal from the UK as he had gained leave to remain by deception.

14. As his wife had done, on 30 September 2019 Mr Jimoh submitted a statement of additional grounds and the culmination of judicial review proceedings was an agreement by the respondent on 27 September 2021 to make a decision on Mr Jimoh's statement of additional grounds, and to give him an in-country right of appeal in the event that the human rights claim inherent in his statement of additional grounds was refused."

4. The respondent's decision letter in each case recorded that in 2007, Alvero Figueirdo was charged with 23 counts of misconduct in a public office. He pleaded guilty to seven of those counts on 3 September 2007 and was subsequently sentenced to 2½ years in prison on 1 October 2007. Home Office investigations identified 259 fraudulent grants of leave to Nigerian

nationals by him and the appellants were identified as two of the beneficiaries of his fraudulent activity.

5. In our error of law decision we concluded that Judge Monson was wrong in law to find at [72] that the revocation of the appellants' ILR was a "punishment", in that the revocation was merely a correction of the position that was obtained by the deception. Nor was the refusal to grant any form of leave a "further sanction" as Judge Monson had found.

Submissions

6. The following is a summary of the parties' submissions made at the hearing before me for the re-making of the decision. No further evidence was called on behalf of the appellants.

7. Ms Chowdhury submitted that the question in the appeal was whether the appellants qualified for some limited leave to remain. The appeal was not concerned with the revocation of their indefinite leave to remain ("ILR").

8. She pointed out that Mr Jimoh last entered the UK on 10 December 2001 and it was in February 2003 that Mrs Jimoh last entered the UK. They went on to have a family life here. They have four children, two of whom are British citizens and two have ILR. They have grandchildren.

9. Their eldest child was born on 30 May 1987 and suffers from bipolar disorder and asthma. There is evidence of how they provide care for their granddaughter, born on 8 November 2008, when their daughter has to go to hospital for her bipolar disorder. At [68] of his decision Judge Monson accepted the evidence as to those care arrangements and the position remains the same, she submitted.

10. I was invited to take into account the fact that the appellants have established their lives here, albeit that that was as a result of the grants of ILR. However, the fraud by the caseworker was discovered in 2007 and it took until 24 September 2019 until the revocation of their ILR (in each case). Therefore, it took 12 years for the Secretary of State to take some action and in that time they established a family life here. They have not returned to Nigeria for at least 20 years, which is to be compared with their family and private lives in the UK.

11. In his submissions Mr Tufan argued that paragraph 276ADE of the Rules (leave to remain on the grounds of private life) was not in play. Ms Chowdhury agreed with that proposition given that Judge Monson found that the appellants could not meet the suitability requirements of the Rules.

12. Accordingly, submitted Mr Tufan, the appellants must establish their cases based on Article 8 of the ECHR outside the Rules. Ms Chowdhury also agreed with that submission.

13. Mr Tufan relied on decision of the Supreme Court in *R (on the application of Agyarko and Ikuga v Secretary of State for the Home Department* [2017] UKSC 11 about 'unjustifiably harsh circumstances' outside the specific Article 8 Rules.

14. Although it was accepted that there was delay on the part of the Secretary of State in making the decisions to revoke ILR, the delay was different from the delay in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41. In this case the appellants were complicit in a fraud for the gain of both of them.

15. Mr Tufan relied on the decision of the Upper Tribunal ("UT") in *RLP (BAH revisited – expeditious justice)* Jamaica [2017] UKUT 330 (IAC), a decision of a former President of the UT, in particular the guidance given which states that:

> "In cases where the public interest favouring deportation of an immigrant is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision making process is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under Article 8(2) ECHR."

16. Mr Tufan also referred to *Reid v Secretary of State for the Home Department* [2021] EWCA Civ 1158 but accepted that that was a different type of case relating to deportation. It was also accepted that these appellants had not been prosecuted for any offences.

17. In terms of section 55 of the Borders, Citizenship and Immigration Act 2009, and the appellants' daughter, although she has mental health problems, she is an adult and appears to live a "full life". Although the appellants do play a part in their grandchild's life that does not make the decision disproportionate. He submitted that social services could step in if necessary, relying on BL *(Jamaica) v The Secretary of State for the Home Department* [2016] EWCA Civ 357 in terms of the relevance of the role of social services, in particular at [53]. It was submitted that there was nothing in the appellants' favour in terms of section 55.

18. In reply, Ms Chowdhury pointed out that the cases relied by the respondent are deportation cases, and these appeals are not concerned with deportation. Many of the cases involve serious criminality on the part of the appellants which is not the situation here.

Assessment and conclusions

19. I have not found the 'delay' cases cited on behalf of the respondent involving criminal convictions helpful. As Ms Chowdhury submitted, those cases involved appellants with criminal convictions which these appellants do not have.

20. Similarly, although Mr Tufan referred to *RLP* in terms of delay, he also very fairly pointed out that the decision of the Court of Appeal in *MN-T (Colombia) v Secretary of State for the Home Department* [2013] EWCA Civ 893 was not cited to that Presidential panel and was thus not considered by it. Whether the decision in *RLP* must be considered *per incuriam* as a result is not a matter for me in this decision as I did not hear argument on the point. I confine myself to saying that I have not found the decision in *RLP* of assistance in this appeal.

21. We said in the error of law decision that the findings of fact made by Judge Monson are to stand, save as infected by the error of law. Accordingly, the following are the comprehensive findings of fact that are to stand, with paragraph numbers of Judge Monson's decision in brackets.

- Notwithstanding the shortcomings in the respondent's evidence, the respondent has discharged the burden of proving, on the balance of probabilities, partly through damaging admissions made by the appellants in their oral evidence, that they obtained ILR by engaging in fraud [58], [60].

- Although the respondent's account of Figueirdo's criminal activity is based on hearsay, there is no reason to suppose that the hearsay evidence is inaccurate or unreliable. It acknowledged in closing submissions on behalf of the appellants that they did not qualify for ILR on their true immigration histories, and it is inherently unlikely that a false immigration history would have been created for them by a caseworker so as to enable them to qualify for ILR unless the caseworker had received some financial inducement from the appellants for this purpose [61].

- Although the records of the visit visa applications had not been produced, the appellants have each admitted that they each used a different passport for their visit visa applications, and that each passport had a different date of birth for each of them from the dates which are said by them to be their true dates of birth, and so they have thereby admitted that, as alleged in the RFRL, the dates of birth given for them in their visit visas do not match what they claim to be their true dates of birth [62].

- It is too much of a coincidence that each of them should separately have been issued with Nigerian passports that by accident contained incorrect dates of birth for each of them. Neither of them gave a credible explanation as to how it came about that they were accidentally issued with passports that did not contain their "true" dates of birth [62].

- The appellants' ability to deploy "replacement" passports while at the same time keeping hold of their "old" passports was an essential step in facilitating the fraud. The appellants' immigration histories would have been reflected in their old passports, showing that neither of them had accrued seven years' continuous residence in the UK as of 10 April 2002. Conversely, the replacement passports, into which the

ILR stamps were placed, concealed the appellants' true immigration history as they did not have any entry or exit stamps in them as visitors [63].

- Although Mrs Jimoh sought to place responsibility on her husband, she at the same time claimed to have signed the application for ELR/ILR allegedly made on 10 April 2002. She was not telling the truth about such an application being made, not only because there was no evidence of such an application, but also because it is inconsistent with the oral evidence of her husband, who said that after his failed application in January 2002, he then made an application in September 2002, which ties in with the hearsay evidence that his application for ILR was first raised on 4 September 2002 [64].

- Mrs Jimoh did not behave as someone who genuinely believed that she qualified for ELR or ILR, as she admits that she went back to Nigeria and applied for visit visas for both herself and her children to come back to the UK in 2003 [64].

- The respondent has made out her case on 'suitability' and the appellants, therefore, are not eligible to qualify for leave to remain on private life grounds under the Rules [65].

- The appellants have not discharged the burden of proving on a balance of probabilities that there would be very significant obstacles to their reintegration into life and society in Nigeria [65].

- The appellants have not put forward sufficiently cogent evidence to show that the welfare and well-being of any of their grandchildren would be imperilled by their enforced departure [67].
- There is a lack of independent evidence to confirm Mrs Jimoh's account of the current living arrangements with regard to her eldest child and her 12-year-old daughter, but she is broadly telling the truth on this issue [68].

- However, the fact that the local council and/or the Oxleas NHS Trust are trying to find suitable independent accommodation for their daughter and granddaughter shows that the supportive role played by the appellants is not essential for either of them [68].

- The evidence of the appellants being beneficiaries of a fraudulent conspiracy involving a large number of irregular migrants from Nigeria was uncovered at the latest in 2007 but no action was taken against the appellants until after more than 10 years had passed [69].

- In correspondence the respondent has offered no explanation or excuse for this delay. The respondent has simply acknowledged that under the Policy Guidance on Revocation of Indefinite Leave, Version 4.0, 19 October 2015, indefinite leave will not normally be revoked where the deception in question occurred more than five years ago [70].

22. Given that the appellants are not able to meet the requirements of the Article 8 Rules in terms of suitability, I have considered whether paragraph GEN.3.2 of the Rules applies, namely whether there are exceptional circumstances which would render refusal of leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the appellants, a relevant child or another family member whose Article 8 rights it is evident would be affected by the decision to refuse leave to remain.

23. As regards the application of GEN.3.2. I have considered the decision of the Supreme Court in *R (on the application of Agyarko and Ikuga v Secretary of State for the Home Department* [2017] UKSC 11, following which paragraph Gen.3.2 was inserted into the Immigration Rules. It is only necessary for me to quote [60]:

> "It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above".

24. In the proportionality assessment, even if the appellants are not able to meet the specific requirements of the Article 8 Rules, it is nevertheless relevant to consider aspects of the Article 8 Rules that they can meet.

25. In terms of paragraph 276 ADE(iii), they both appear to have been in the UK for over 20 years now. The dates of their latest arrival given in the decision letters are identical, being 7 February 2003, at least that is the date given of the last grants of entry clearance as visitors. In submissions on behalf of the appellants the dates were given as 2003 and 2001, respectively. Of course, the failure to meet the suitability requirements means that they cannot meet any aspect of paragraph 276ADE although their length of residence is relevant to proportionality.

26. Also relevant to proportionality is whether there would be very significant obstacles to integration in Nigeria, but this is a matter that was decided against the appellants by Judge Monson. That finding at [65] of his decision is a preserved finding.

27. In terms of paragraph GEN.3.2.(2) and the best interests of any "relevant" child, the appellants four children are all now adults. According to the first appellant's witness statement her grandchildren were born in 2008, 2018 and 2020. The grandchildren meet the requirement in GEN.3.3 (2)(a) that

they be under the age of 18 at the date of the applications by the appellants. GEN.3.3 (2)(b) requires that it be "evident from the information provided by the applicant" that any of them "would be affected by a decision to refuse the application". GEN.3.3.(1) requires that the best interests of any relevant child be taken into account.

28. The only one of the grandchildren that it is specifically said would be affected by the refusal of leave to remain is IJ, born in 2008, because her mother has bipolar disorder and the appellants are needed to care for her when her mother is admitted to hospital. However, Judge Monson found at [68] that the fact that the local council and/or the Oxleas NHS Trust are trying to find suitable independent accommodation for their daughter and granddaughter shows that that supportive role played by the appellants, which he accepted, is not essential for either of them [68].

29. Mrs Jimoh refers in her witness statement to her employment as a care assistant and as a nurse in the UK, for over 17 years in total. Mr Jimoh has worked for Royal Mail for a similar period of time. However, it must be the case that they worked when they had ILR that they were not entitled to.

30. I also note what is said in Mrs Jimoh's witness statement about her taking medication for her thyroid and that she suffered a stroke in September 2021 in respect of which, as at the date of the witness statement (14 December 2021), she was recovering. There is evidence in the form of a discharge notification from King's College Hospital dated 9 September 2021 in relation to her having suffered a stroke. However, I was not referred to any updated medical evidence in respect of Mrs Jimoh and no submissions were made suggesting that she could not receive treatment for any medical condition in Nigeria.

31. There is no doubt that the respondent delayed for a very significant period of time before taking steps to revoke the appellants' ILR. It is also a preserved finding by Judge Monson (at [70]) that the respondent has offered no explanation for the delay, from 2007 when she can be taken to have been aware of the appellants' deception until the decisions to revoke their ILR (in 2019). That delay is relevant to the proportionality of the decision in the case of each appellant (see *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41). The appellants' private life will have become more entrenched in that time. There is little, if any evidence of family life beyond the family life that the appellants have with each other, even accepting that they may well have a close relationship with their minor grandchildren and IJ in particular. I accept, however, that their family relationships in the UK constitute a strong element of their private lives which will have deepened during the period of the delay.

32. However, the appellants have enjoyed the benefits of ILR to which they were not entitled, including in terms of the private lives they have built up in the UK. They would be able to maintain contact with their family

members in the UK from Nigeria where they would be able to reestablish their private lives, albeit without the close contact with family members in the UK.

33. In my judgment, the evidence does not establish that the respondents' decisions would result in unjustifiably harsh consequences for the appellants, or anyone else affected by the decision.

34. A consideration of s.117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") does not reveal a different outcome in Article 8 terms. Indeed, s.117B(4) requires that little weight be given to a private life established by a person at a time when they are in the UK unlawfully, which these appellants were for a considerable period, because they were not entitled to the leave that they obtained by deception. Likewise, s.117B(5) applies because their immigration status was inevitably precarious given their lack of entitlement to ILR.

35. Assuming that they are financially independent, which may no longer be the case, and accepting that they are able to speak English (see s.117B(2) and (3)) only means that those are neutral factors in the proportionality assessment , rather than positive factors in their favour.

36. In summary, considering all the circumstances including the delay by the respondent, and noting the preserved findings of fact, I am not satisfied that there are exceptional circumstances which would render refusal of leave to remain for the appellants a breach of Article 8 because such refusal would result in unjustifiably harsh consequences for them or anyone else. A consideration of section 117B of the 2002 Act does not reveal a different outcome.

37. The decision of the respondent is not disproportionate in Article 8 terms for either appellant bearing in mind the strong public interest involved in the maintenance of effective immigration control.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made, dismissing the appeal of each appellant.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 21/08/2023