Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13970/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 August 2013	**On 4 September 2013**

Before

UPPER TRIBUNAL JUDGE LATTER
UPPER TRIBUNAL JUDGE COKER

Between

OLUSEUN OLUDOTUN ISIAH

Appellant

and

ENTRY CLEARANCE OFFICER, ABUJA

Respondent

Representation:

For the Appellant: Dr A Corban of Corban, Solicitors
For the Respondent: Ms Z Kiss, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the appellant against a determination of the First-tier Tribunal dismissing his appeal against the respondent's decision made on 28 June 2012 refusing his application for entry clearance as a spouse under the provisions of paras

320(7A) and 281 of HC 395. Permission to appeal was granted by the First-tier Tribunal on 16 July 2013.

Background

2. The appellant is a citizen of Nigeria born on 10 August 1967. On 9 May 2012 he applied for entry clearance as a spouse to join his wife in the UK. His application was refused under para 320(7A) on the basis that he had made false representations and failed to declare facts material to his application by stating at 1.3 of the Visa Application Form ("VAF") that he had never been known by any other names. The respondent noted that the appellant had been issued with a six month visit visa in April 2007 and had arrived in the UK on 27 May 2007. On his own admission he stayed in the UK for four years, four months then leaving using an emergency travel document issued by the Nigerian High Commission. On returning to Nigeria he had married his sponsor on 28 September 2011. The respondent took the view that there was very little evidence of the relationship prior to the marriage and he was not satisfied that the marriage was subsisting or that they intended to live together permanently as husband and wife.

The Hearing before the First-tier Tribunal

3. At the hearing before the First-tier Tribunal, the appellant's wife, the sponsor, gave oral evidence and further documentary evidence was produced by both the appellant and the respondent. That evidence included a charge sheet for offences committed by the appellant on 22 December 2010 of using a motor vehicle without third party insurance and driving a vehicle otherwise than in accordance with a licence. His name on the charge sheet is recorded as Isiah Oludotuh and the same name is on the Notice of Fine and Collection Order from Enfield Magistrates' Court dated 11 January 2011 following the appellant's appearance at court.

4. It was argued on the appellant's behalf that he had not been dishonest and that the failure to record his name accurately on these documents arose simply from a mistake by the police or the court in recording his name.

5. The judge noted that on the VAF in answer to 1.3 "other names (including any other names you are known by and/or any other names that you have been known by)", the appellant placed a dash. It was common ground that he had declared at 6.1 that he had travelled to the UK on 27 May 2007 for a visit and overstayed for four years and four months and at 6.9 "whether he had any criminal convictions in any country", he had declared that on 22 December 2010, for an offence described as driving offence, he was fined £350 and this had been paid.

6. Having reviewed the evidence, the judge summarised his findings as follows:

> "73. The Tribunal is therefore satisfied that, through evidence provided by the appellant's side, the respondent has to a high degree of probability proven that in

the United Kingdom when encountering the UK police, and when surrendering his bail to the appropriate Magistrates' Court on 11 January 2011 the appellant was content to adopt as his name Isiah Oludotuh instead of his name Oluseun Oludotun Isiah.

74. It has been said that the appellant had nothing to hide because when obtaining his emergency travel document he used his correct date of birth and full names. This he would have to do because the State of Nigeria would likely have records of his being initially issued with a passport with that date of birth and with those names.

75. The Tribunal is satisfied that by inserting a dash in answer to section 1.3 of the Visa Application Form and in supplying details of his conviction later in the form the appellant has sought to play the situation to his advantage thus enabling him to plead, as he has subsequently done, that he has not been known to the police or to the courts in the United Kingdom by a false name through any act or omission of his own but rather because of an error on the part of the police.

76. That argument does not hold water because of what the Tribunal is satisfied to a high degree of probability would have taken place at the Magistrates' Court on the morning of 11 January two years ago.

77. Therefore the Tribunal finds that the respondent has achieved the appropriate standard of proof upon this issue and the appeal is dismissed under para 320(7A) of the Immigration Rules."

7. When dealing with article 8 the judge made it clear that he found that the appellant had been acting dishonestly. The judge said:

"98. The Tribunal is satisfied that not only was the appellant a considerable overstayer at that time but that when he was encountered by the police he sought to ensure that he would not be identified as an overstayer and referred to the immigration authorities by either permitting the police to mis-record his name or by supplying an incorrect name to them from the outset.

99. To compound matters, and this is the most serious action taken by the appellant in the Tribunal's view, when attending the appropriate Magistrates' Court on 11 January 2011 he did not seek to inform the court that his name was incorrectly recorded on the charge sheet. In doing so the Tribunal is satisfied that he was acting wholly inappropriately. He had the duty of utmost good faith to the court when answering the charge to inform the court of his full name. Additionally, and although at the time he may not have had a driving licence for this was one of the charges he faced, the fine notice reveals that one of the offences was an endorsable offence. He therefore ought to have supplied the court of his full name and of the correct spelling of this so that the court could notify the Driver and Vehicle Licensing Centre, DVLC, in Swansea of this so that if at any time in the future he applied for a licence the endorsement could take effect. Furthermore, as the fine notice itself shows, he ought to have advised the court that his name was incorrectly recorded. These are very serious matters against

the appellant. They add to the weight of the respondent's position and greatly diminish the appellant's position."

8. The judge went on to consider in the alternative whether the appellant had shown that he could meet the requirements of para 281 and for the reasons summarised in [79]-[81] he was satisfied that he could. When carrying out the balancing exercise required by article 8, the judge was satisfied that the refusal of entry clearance was neither disproportionate nor was it unreasonable for his wife either to join him in Nigeria until a fresh application could be made or for her to remain in the UK while he submitted such an application.

The Grounds and Submissions

9. In the grounds it is argued that the judge erred in law by concluding that para 320(7A) applied to family applications for settlement, erred by classifying what the appellant had done as falling within para 320(7A), had been wrong to find that the appellant had used a different identity whilst in the UK, had erred in finding that the allegation was proved to a high standard, reached a finding of fact not properly open to him and had failed to carry out the balancing exercise under article 8 correctly.

10. At the hearing before us Dr Corban crystallised the submissions into an argument firstly that when carrying out the balancing exercise under article 8 the judge had failed to take into account the nature of the statement made when looked at in the context of the evidence as a whole, having accepted that the appellant and sponsor's marriage was genuine and subsisting. The appellant had disclosed in his application that he had overstayed and that he had been convicted of a driving offence. This was not a case where he had adopted a different identity. Secondly, he argued that there was no adequate basis for the judge's findings. There had been no attempt to mislead so far as his address or date of birth was concerned and the finding that the appellant had deliberately given the wrong name simply flew in the face of the evidence. He submitted that there was no evidence to support a finding of dishonesty. It was unreasonable to expect the appellant to make a fresh application in these circumstances.

11. Ms Kiss submitted that the judge had prepared a carefully reasoned determination. The submissions made on the appellant's behalf had been rejected including the assertion that it was the police who had made a mistake about the appellant's name. The judge made specific findings to the contrary. These were properly open to him for the reasons he gave. When considering article 8 the judge considered all relevant matters and reached a conclusion properly open to him. He was entitled to take into account his finding that the appellant had used deception when stopped by the police for the specific purpose of trying to ensure that he was not identified as an overstayer and had noted that the appellant's wife, whilst a long-established resident in the UK, was originally from Nigeria and had returned there to marry the appellant and spend time with him [102].

Discussion

12. The issue for us is to consider whether the First-tier Tribunal Judge erred in law in such a way that requires his decision to be set aside. Dr Corban did not pursue the argument in the grounds that the provisions of para 320(7A) did not apply to family applications for settlement. There is no substance in this ground. His argument in respect of the decision was that there was no adequate evidence to support the judge's findings that the appellant had made a false representation in support of his application. It is correct that the appellant disclosed that he had overstayed following his previous visit and that he had been convicted of driving offences. However he put a dash at 1.3 when asked to disclose whether he had any other names he was known by or had been known by. It is clear that when he was stopped for a driving offence in December 2010 his name had been recorded as Isiah Oludotuh both on the charge sheet and on the notice of fine issued by the Magistrates' Court.

13. The appellant's full name is Oluseun Oludotun Isiah. The misrecording of his name was to give a family name as a given name and to use only one of his given names and then with a different spelling. It was for the judge to decide as a question of fact whether this was simply a mistake or whether a different name was given deliberately. The judge considered this issue with care and we are satisfied that he reached a finding of fact properly open to him on the evidence. It was open to him to make the point that the appellant would have been asked to confirm his identity at the Magistrates' Court and he must have accepted the name as on the charge sheet: see [68]. Dr Corban's submissions to us, whilst attractively put, were in substance an attempt to re-argue issues of fact where the judge's decision was properly open to him for the reasons he gave.

14. It was also argued that in the light of the judge's findings that the marriage was genuine that the judge had erred in his assessment of proportionality under article 8. The judge did take into account as a factor in the appellant's favour that he and his wife were married and that they intended to live permanently with each other. However, he was entitled to balance that with the fact not only that the appellant had been a long-term overstayer but when encountered by the police had sought to ensure that he would not be so identified by either permitting the police to misrecord his name or by supplying an incorrect name to them from the outset. The judge also referred to and was entitled to take into account that the appellant must have misled the Magistrates. The judge took into account the impact of his decision on the appellant's wife but was entitled to note that, although she was a long-established resident in the UK, she had returned to Nigeria for the marriage and to see the appellant. We are satisfied that the judge's assessment of proportionality was properly open to him for the reasons he gave. In summary, we are not satisfied that the judge erred in law.

Decision

15. The First-tier Tribunal did not err in law and its decision stands.

Signed Date: 3 September 2013

Upper Tribunal Judge Latter