Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00545/2013

THE IMMIGRATION ACTS

Heard at Bradford Magistrates' Court	**Determination Promulgated**
On 9 December 2013	**On 22 January 2014**
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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

OSARUMWESE JAMES EKPA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Pickup, instructed by Abbotts, Solicitors
For the Respondent: Mr Diwyncyz, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Osarumwese James Ekpa, was born on 8 April 1974 and is understood to be a male citizen of Nigeria. The appellant was convicted of theft (shoplifting) and of being in possession of a controlled identity document with intent and sentenced to a period of twelve months' imprisonment. By a decision dated 6 March 2013, notice was given of the intention of the Secretary of State to deport the Appellant from the

United Kingdom under the UK Borders Act 2007. The appellant appealed against that decision to the First-tier Tribunal (Judge Fisher and Mrs R M Bray JP) which, in a determination promulgated on 25 June 2013, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. There are two grounds of appeal. The first ground is that "the First-tier Tribunal failed to determine whether it would be reasonable for the appellant's wife and children to accompany him if deported to Nigeria and, if not, to assess the proportionality of breaking up this family". In her oral submissions, Ms Pickup criticised the First-tier Tribunal's determination for the failure to identify and determine what exactly were the best interests of the children in this appeal. The appellant's partner (Sichelesile Dlamini – hereafter referred to as Ms Dlamini) have lived together since 2005. There are two children of the relationship, a son (date of birth 24 February 2003 who is, in effect, the appellant's "stepchild" and who has lived with the appellant since he was aged 2 years) and a daughter (date of birth 7 July 2007, who is the natural child of the appellant and Ms Dlamini). Ms Dlamini herself is a British citizen of Zimbabwean origin. Both children are British citizens.

3. The Tribunal was well aware of its obligations to consider the best interests of the children as a primary consideration under Section 55 of the 2009 Act. They refer also to **ZH (Tanzania) [2011] UKSC 4**. At [22] the Tribunal noted that the respondent accepted that family life existed between the appellant, Ms Dlamini and the two children. The Tribunal went on to record that, "we accepted that [the appellant's] deportation would interfere with that family life. Equally, however, that interference will be in accordance with the law and in pursuit of the legitimate aim of preventing crime and disorder. The issue for us to determine, in those circumstances, is whether the deportation was proportionate." The Tribunal found [20] that the appellant and Ms Dlamini were two "thoroughly dishonest individuals who were prepared to lie to anything about anything if it assists them in their aims and we decided that we could not rely on anything which they told us unless it was supported by other forms of evidence." The Tribunal at [24] accepted that "no distinction can be drawn between the elder child [and the younger child] given that the appellant has assumed responsibility for him over a substantial period of time …" The Tribunal noted at [26] that the appellant's offence was serious but did not involve violence or drugs and was not of a sexual nature. The Tribunal considered in some detail at [26] the aggravating factors in the appellant's offending; the appellant had used his false documents to find three jobs including two working with vulnerable children. The appellant had been able to circumvent checks imposed by the Criminal Records Bureau (CRB). The Tribunal noted the decision of the Court of Appeal in **Benabbas [2005] EWCA Crim 2113** where "the Court of Appeal expressed the view that the public interest in preventing the fraudulent use of passports was of considerable importance and deserved protection and it was intimately bound up with the protection of public order afforded by the system of passports." At [27] the Tribunal considered the appellant's risk of reoffending and gave detailed reasons for concluding that "the risk of reoffending [is] higher than that assessed by the probation officer …" At [29] the Tribunal examined the particular nature of the public interest concerned in this case with the prevention of crime and disorder. The

Tribunal reminded itself of the importance in that public interest of the element of deterrence.

4. At [30] the Tribunal noted that it had "no evidence from schools or a social worker … to show us the likely effect, if any, of [the appellant's] deportation on the children." The Tribunal's conclusions are contained in [32]:

> Having considered the best interests of the children in this case, we came to the conclusion that they were outweighed by the combination of the gravity of the offence committed by the appellant the risk of reoffending and the strong public interest in deterring others from committing offences of this nature. In respect of his relationship with his wife, given that she was aware of his lack of status throughout, and she lived of the proceeds of his offending and had been a party to deception in previous applications, as well as lying before us, we concluded that the public interest by far outweighed their relationship in the UK. The appellant did not show that he had any private life which warranted consideration beyond his family life. We found that his deportation was proportionate and so we dismissed his appeal.

5. The appellant does not submit that the Tribunal fell into the familiar error of having regard to evidence which was not relevant or ignoring relevant evidence. The Tribunal recorded, the factual matrix was limited in detail, especially as regards the children and the effect of the appellant's deportation upon them. Rather, the appellant asserts that the Tribunal failed to articulate the choices before it as regards the removal of the appellant on his own or whether it would be reasonable to expect the entire family to accompany him. In addition, it is asserted that the Tribunal could not properly evaluate the best interests of the children in the proportionality exercise without defining those various scenarios.

6. Ms Pickup relies on the judgment of the Supreme Court in **Zoumbas [2013] UKSC 74**. Drawing on previous jurisprudence, the Supreme Court set out at [10] the legal principles which arise in cases such as these:

> 10.In their written case counsel for Mr Zoumbas set out legal principles which were relevant in this case and which they derived from three decisions of this court, namely *ZH (Tanzania)* (above), *H v Lord Advocate*2012 SC (UKSC) 308 and *H(H) v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338. Those principles are not in doubt and Ms Drummond on behalf of the Secretary of State did not challenge them. We paraphrase them as follows:

(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in

order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

At [13], the Supreme Court added a further consideration:

We would seek to add to the seven principles the following comments. First, the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is made. The evaluative exercise in assessing the proportionality of a measure under article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases": EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159, per Lord Bingham at para 12. Secondly, as Lord Mance pointed out in H(H) (at para 98) the decision-maker must evaluate the child's best interests and in some cases they may point only marginally in one, rather than another, direction. Thirdly, as the case of H(H) shows in the context of extradition, there may be circumstances in which the weight of another primary consideration can tip the balance and make the interference proportionate even where it has very severe consequences for children. In that case an Italian prosecutor issued a European arrest warrant seeking the surrender of a person who had earlier broken his bail conditions by leaving Italy and ultimately seeking safe haven in the United Kingdom and had been convicted of very serious crimes. This court held that the treaty obligations of the United Kingdom to extradite him prevailed over his children's best interests. The third principle in para 10 above is subject to the first and second qualifications and may, depending on the circumstances, be subject to the third. But in our view, it is not likely that a court would reach in the context of an immigration decision what Lord Wilson described in H(H) (at para 172) as the "firm if bleak" conclusion in that case, which separated young children from their parents.

7. I find that the Tribunal has carried out a careful examination of all the relevant factors concerned with the children's best interests. The Tribunal may not entirely have fulfilled the requirement to "ask oneself the right questions in an orderly manner" (**Zoumbas** at [10] above) because it does not state in terms that the only likely scenario in this appeal is that the appellant will be deported whilst Ms Dlamini and the children remain in the United Kingdom. However, the Tribunal has not fallen into the trap of undervaluing the interests of the children as a consequence. Although it would have been helpful if the Tribunal had stated precisely the scenario or scenarios it was contemplating in its Article 8 assessment, there are clear indications in the determination that the Tribunal accepted that Ms Dlamini and the children would remain in the United Kingdom. At [25] and whilst considering the Court of Appeal's decision in **SS (Nigeria) [2013] EWCA Civ 550** the Tribunal wrote, "the child in **SS** would not have to move to Nigeria as he would continue to be looked after by his mother, who was his primary carer, as he had whilst the appellant

was in prison. Given that the children in the appeal before us are British citizens, the same would apply to them." I find that passage is a clear indication that the Tribunal did not contemplate the entire family returning to Nigeria with the appellant.

8. I find also that the Tribunal was well aware that, ideally, children are best brought up by both of their parents (see [24]). The detail with which the Tribunal considered the public interest indicates to me that the Tribunal was well aware of the gravity of any decision which would, in effect, break up this family. The Tribunal was aware also that it was not dealing with a "usual" serious offence, that is one involving violence, drugs or sexual activity. The fact that deportation where such offences may be involved is very often justified does not, of course, mean that an offence which does not have any of those aggravating factors cannot lead to deportation. I find that the Tribunal had a very clear idea of the importance of deterrence in considering an offence of this sort and it clearly took an extremely dim view of the appellant's immigration history and both his and his partner's propensity to tell lies when it suited them. I find that the Tribunal addressed those issues in the correct manner; they do not seek to punish the appellant (and, by extension, the children, who are blameless of their parents' conduct) for having a poor immigration history but instead examined the question from the perspective of the public interest.

9. Ms Pickup did not disagree when I suggested to her that this was an appeal where the facts demanded that the appeal must be allowed on Article 8 ECHR grounds and that no other outcome was possible. In my judgment, the Tribunal has been aware throughout that deportation would lead to the appellant being separated from children with whom he has an active relationship. It based its decision on all the all of the available evidence, that is the oral and written evidence of the appellant and his partner. The Tribunal's failure to state in terms what the children's best interests required does not, in my judgment, undermine its conclusion.

10. The second ground of appeal challenges the determination for what is said at [30]:

> The appellant placed no evidence from schools, or a social worker, before us to show the likely effect, if any, of his deportation on the children. If deported it would be open to him to apply for the revocation of the order and then to return to the UK under the Immigration Rules. Mr Nyawanza [for the appellant] referred us to paragraph 320(11) of the Immigration Rules in that regard. However, as we pointed out to him, that provision is discretionary in its application.

As the grounds point out, the Immigration Rules would effectively prevent the appellant from applying for entry clearance for at least ten years. The appellant asserts the Tribunal's comments at [30] has distorted its Article 8 ECHR analysis.

11. I do not agree with that submission. What the Tribunal says in the determination regarding the discretionary nature of paragraph 320(11) is strictly accurate. More importantly, I do not consider that the Tribunal's comments about the appellant returning to the United Kingdom having been deported form any part of the ratio of its analysis as regards the best interests of the children or Article 8 ECHR generally.

This is not a case in which the possibility of applying for entry clearance from abroad has tipped the balance against the appellant.

12. Although it would have been helpful if the Tribunal had stated clearly what it considered to be the children's best interests and how those interests might be affected by his removal from the family unit, I am in no doubt that the Tribunal had in mind only one possible scenario (the appellant's deportation whilst the family remained in the United Kingdom). Its conclusion that the best interests of the children (which are, as the Tribunal clearly observed, to be brought up by both their parents) were here outweighed by a combination of serious countervailing factors which are described in the determination at [32]. In the circumstances, I find that the appeal should be dismissed.

DECISION

13. This appeal is dismissed.

Signed Date 4 January 2014

Upper Tribunal Judge Clive Lane