Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06431/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Determination Promulgated**
On 23rd January 2015	**On 30th January 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR S A
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Draycott (instructed by Paragon Law)
For the Respondent: Mr A McVeety (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellant, with permission, against the determination of First-tier Tribunal Judge Colyer promulgated on 18th October 2013 by which he dismissed the Appellant's appeal against the Secretary of State's refusal to revoke a deportation order. Permission was granted by a Judge of the First-tier Tribunal on the basis that the Judge may have made an error of law in that he may have failed

to take into account all of the evidence with regard to the best interests of the Appellant's child and may have gone behind concessions made by the Respondent concerning the nature of the family life of the Appellant.

2. The circumstances of this appeal are somewhat unusual in that the Appellant has already been deported to Nigeria.

3. The Appellant was born on 22nd September 1984. He came to the UK in February 2004 using a forged South African passport in somebody else's name. He applied for leave to enter as a businessman. When that was refused he claimed asylum but then withdrew the claim. He was given leave to enter but required to report the following day for removal. He absconded. He was then arrested in February 2010 and on 26th February 2010 convicted at Nottingham Crown Court of possession of a false identity document with intent (the false passport) and of dishonestly making false representations (attempting to use a store card that did not belong to him in 2009 while pretending to be the owner).

4. The Appellant was sentenced to 8 months and 12 months imprisonment, to be served concurrently.

5. On 13th August 2010 the Appellant was released from his custodial sentence but detained by the immigration authorities. On 27th August 2010 he was released from detention subject to reporting conditions. In December 2010 a deportation order was signed. He appealed against the deportation and his appeal was heard by Judge Frankish and Mrs Schmitt on 14th February 2011. They dismissed the appeal and the Appellant was in fact deported to Nigeria on 14th September 2011 after a number of unsuccessful applications for leave to remain which were treated as applications to revoke the deportation order.

6. Further submissions were made on the Appellant's behalf once he had been removed leading to a decision on 13th May 2013 refusing to revoke the deportation order.

7. Prior to the conviction and subsequent appeal against the deportation order heard in 2011, the Appellant had formed a relationship with a British citizen and they had a child together born shortly before his imprisonment. The child was born on 26th January 2010. Judge Frankish heard conflicting evidence from the Appellant and his partner as to the duration of their relationship such that he concluded that the relationship was not as long-standing and settled as the Appellant claimed, particularly noting that the child's birth certificate contained false information as to the Appellant's place of birth (the USA) and also gave different addresses for the Appellant and his partner. In the concluding paragraph of Judge Frankish's determination he found that the evidence indicated that it was a far from settled and stable relationship. A witness, a friend of the Appellant, had referred to ups and downs in the relationship which had to be patched up and the Judge found that cohabitation had been of far shorter duration than claimed and even then only of a partial nature. He noted that the Appellant and his partner should have known that he had no right to be in

the UK and that the Appellant had been found to be, while not the cleverest, a willing and active fraudster. The Judge commented that the Appellant expected his child to be a trump cared to secure his remaining in the UK; which he was not. He found that the interests of the Appellant's partner and child were overridden by the public interest in his deportation.

8. The Appellant did not appeal against that decision.

9. It is not the decision to deport him nor is it Judge Frankish's determination which is before me. This is an appeal to the Upper Tribunal in relation to the decision of Judge Colyer to dismiss the Appellant's appeal against a decision not to revoke the deportation order.

10. I heard detailed and lengthy submissions from Mr Draycott on that point.

11. Mr Draycott submitted that this was a finely balanced appeal. The First-tier Tribunal had not given sufficient attention to s.55 and neither had Judge Frankish in the earlier decision. He quoted from the President of the Upper Tribunal's decision in JO & Ors (section 55 duty) Nigeria [2014] UKUT 00517 (IAC) from January 2012 indicating that section 55 had to be grappled with.

12. Where the judge referred to the case of a A D Lee [2011] EWCA Civ 348, he argued that he erred because it is quite clear from ZH (Tanzania) [2011] UKSC 4 and other cases that a child cannot be held responsible for his parents offending behaviour and he argued that the Judge in this case had done precisely that.

13. He then argued that in terms of the Article 8 proportionality assessment, the Judge had incorrectly stated where the burden of proof lay. He also argued that the Judge had incorrectly referred to this Appellant's serious criminal offending, which he argued it was not, particularly when the sentencing Judge had not referred to it being a very serious offence when he was in the best position to assess that. I pause at this stage to indicate that these are not attractive submissions. It is clear that the Judge did not misstate the burden and standard of proof and it ill behoves an Appellant or his advocate to minimise the offences. They were significant enough to attract immediate custodial sentences for a first time offender and serious enough to merit deportation. Such issues were dealt with in the first appeal in 2011.

14. Mr Draycott then referred to paragraph 93 of the determination where Judge Colyer said that the Appellant, by his criminal activities, had damaged the lives of a number of innocent victims including the Appellant's partner and his young child. Mr Draycott suggested that it was an error of law to say this without explaining who the other victims were and he submitted that the public had not suffered by his behaviour. Again, I find this a singularly unattractive submission. It is not simply offences of violence that damage society. Fraud and document offences do also. They damage the whole fabric of society; that is why they attract custodial sentences.

15. Mr Draycott referred to paragraph 64 of the determination where Judge Colyer stated that the Appellant had been in prison from February 2010 when the child was six weeks old until August 2012. In fact he was released in August 2010 and he thus made a factual error in assessing that the couple had only lived together for a matter of weeks between his release from prison and deportation. Mr Draycott referred to the Letter of Refusal which accepted that he had been released in 2010 and that they had lived together for 11 months. That however, while a factual error cannot be material given all the other issues and it is still, at 11 months, a very short time living with a very young child who was less than two years of age when the Appellant was deported.

16. Mr Draycott then argued that comparing this appeal with the facts of MF (Nigeria); MF had committed grave offences and yet won the appeal. He argued that the extant case is a finely balanced case and the best interests of the child required this Appellant to succeed. He referred to the two witnesses who gave evidence before the First-tier Tribunal submitting that insufficient weight was given to their evidence and also that insufficient weight was given to the expert evidence of the independent social worker, Christine Brown.

17. He argued that the damage to the child was ongoing in this case as it was more than three years since the Appellant had been deported and thus the disproportionate interference in the Appellant and his wife and child's family life was continuing.

18. Finally he argued that the delay by the Respondent in making the decision should also have been taken into account.

19. In his submissions Mr McVeety argued that this was a case where I should be looking at the big picture not picking out peripheral matters. This was not an appeal against the decision to deport the Appellant. That had been found to be in the public interest, not a disproportionate interference in any of the family's Article 8 rights and deportation had taken place. Those matters had already been adjudicated on in 2011. Similarly, any argument by Mr Draycott that the Appellant had not committed any further offences was irrelevant as he was not even in the UK.

20. In relation to section 55 he argued that case law had moved on from ZH (Tanzania); Lady Hale herself had said herself in Zoumbas [2013] UKSC 74 particularly, that ZH (Tanzania) was regularly being misquoted.

21. This case was about the effect on the child of the refusal to revoke the deportation order not the effect on the child of the original decision to deport. He submitted that the Judge had considered all the facts in this case in considerable detail; had not misdirected himself in law and had made no error of law material to the outcome.
22. In response Mr Draycott argued that the matters relating to the original conviction must be relevant to a decision whether or not to revoke the deportation order.

23. I have read the determination, the subject of this appeal and the earlier determination together with the Letter of Refusal with care and find very little attractive in Mr Draycott submissions.

24. Judge Colyer's determination is lengthy and detailed. He conducts a thorough examination of the relevant law and case law as well as the facts of the case. He correctly refers to the previous determination of Judge Frankish which has not been appealed and therefore stands. He correctly refers to that as his starting point and looks to see what has changed since then. Looking at the big picture, and I agree with Mr McVeety that that is what must be done, this is a case where a criminal was deported having had the opportunity to appeal and lost despite having a partner and child back in 2011. The child in question was less than two years of age when his father was deported. Since that time, in the intervening three years the child has lived with his mother and she has brought him up as a single parent. Judge Colyer refers at some length to the evidence, recommendations and conclusions reached by the independent social worker. It is rather surprising that she felt able to accept a three-year-old child's voiced opinions. However, she does say and the judge recites from her report, that although he is only three years of age his self presentation and articulation is that of an older and self-assured child. He can articulate his thoughts to the extent that it is easy to engage with him and hold a conversation in which he clearly stated his views, as young as he is. Elsewhere it is said that the child is doing very well. Clearly, given her comments about him he has thrived in the three years in the sole care of his mother since his father was deported. The reality of this case is that this child's father left his life when he was less than two. He would have no meaningful relationship with his father. At most he is a voice at the end of a telephone. In the intervening three years he has seen his father only once when he and his mother travelled to Nigeria when she married the Appellant.

25. The fact that the Appellant's wife chose to travel to Nigeria and marry him knowing that he was subject to a deportation order and had been deported and may therefore not be allowed to come back was a choice that she made. It is trite law that a British citizen has the right to marry but not a right to bring in the spouse of their choice if the spouse does not meet the Immigration Rules. In this case she knew full well that he was subject to a deportation order and that he had already lost his appeal against that. If she does not wish to live with him in Nigeria then she has to face the prospect of conducting her marriage across continents.

26. Taking the determination of Judge Colyer as a whole it is quite clear that a great deal of attention was given in the determination to the situation of the child, his best interests, section 55 and the contents of the independent social worker's report. However, it is also clear that the evidence in this case did not permit a conclusion that the child is suffering by being deprived of his father in his everyday life.
27. UK legislation and the Immigration Rules specifically provide for foreign national criminals to be removed from the United Kingdom. It is now well

established that it is in the public interest that they should be removed and not permitted to return for a long time. Foreign nationals know when they choose to commit crimes in the United Kingdom that there is every chance that they will be deported and be unable to come back. That is the price they pay for criminality. While it is true that a child cannot be held responsible for the actions of its parent that does not mean that the child's best interests will hold sway. As has been said repeatedly, and indeed was said by Judge Frankish in 2011, the best interests of a child are a primary consideration not the paramount consideration. They are not a trump card. In this case it was acknowledged by Mr McVeety that a child's best interests are, absent countervailing factors, to be brought up by two parents in a loving household. However, those best interests can and are regularly outweighed in deportation proceedings where the public interest in deportation outweighs the child's best interests. There is nothing particular about the child's best interests in this case beyond the general premise that it is better for a child to be brought up by two parents. There was no evidence whatsoever that this child has suffered harm as a result of his father's deportation, indeed the evidence is to the contrary. He has clearly thrived and his mother must take the credit for that. Furthermore, it is significant that any harm that would flow from deportation, in terms of the grief that might flow from separation is harm that would occur on or shortly after deportation. In a case like this, where the child is an infant, such emotional harm would be minimal and would fade with the passage of time. The way in which this child has thrived is testament to the absence of harm. Any detrimental effect therefore, particularly to a very young child does not increase as time passes, rather it decreases.

28. This appeal is against a decision to refuse to revoke a deportation order and like the original appeal against the decision to deport itself is wholly without merit. The First-tier Tribunal Judge did not make an error of law which could have led to a different outcome.

29. While the Judge made an error in terms of the length of time the Appellant had lived with his child after his release and before he was deported, the fact is he still only lived with him for11 months and the child was an infant. That error was not material to the outcome given the child’s age at the time.

30. The delay by the Respondent, if indeed there was a delay, is also not relevant as no effect flowed from it. Indeed, it was Mr Draycott’s case that the ongoing separation was the harm and in that respect the delay would have strengthened his case had it had merit, which it does not.

29. The appeal to the Upper Tribunal is dismissed.

Direction regarding anonymity – rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the Appellant, his wife and the child are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This

direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.

Signed Dated 26th January 2015

Upper Tribunal Judge Martin