

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: HU/11989/2016**

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 25th May 2018** | **On 12th June 2018** |
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**Before**

**DEPUTY upper tribunal judge ROBERTS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**Moshood Abiola Balogun**

(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Miss Kiss, Senior Home Office Presenting Officer

For the Respondent: Miss Turnbull of Counsel

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of a First-tier Tribunal (Judge A J Blake) allowing the appeal of Moshood Abiola Balogun against the Secretary of State’s decision to refuse to revoke a deportation order made against him. The deportation order was signed on 14th October 2008. The date of the Secretary of State’s decision to refuse to revoke it is dated 28th April 2016.
2. For the sake of clarity, throughout this decision I shall refer to the Secretary of State as “the Respondent” and to Moshood Abiola Balogun as “the Appellant”, thereby reflecting their respective positions before the First-tier Tribunal.

**Background**

1. The Appellant has a protracted immigration history but for the purposes of this decision the following summary is relevant. The Appellant is a citizen of Nigeria born 3rd April 1986. He first came to the notice of the UK Authorities on 21st December 1994 when a request was made by the Family Court for clarification of his immigration status following a residence order application made by his aunt. There was a claim by the Appellant’s aunt that the Appellant’s mother had left him in the UK in 1991. However there was no verification of that claim.
2. By 2002 the Appellant had been placed in the care of social services and it is correct to say that on 25th November 2003 he was granted indefinite leave to remain exceptionally outside the Immigration Rules.
3. On 17th February 2004, 17th April 2004 and 30th June 2005 the Appellant was convicted of possession of cocaine, handling stolen goods and possession of cannabis. None of those convictions attracted a custodial sentence.
4. However on 27th April 2007 the Appellant was convicted on two counts of possession of class A drugs with intent to supply. He received a term of three years’ imprisonment (index offence).
5. Following that conviction, the Appellant was served with a notice of intent to deport. He appealed that decision but his appeal was dismissed by the First-tier Tribunal in a decision promulgated on 13th March 2008.
6. The Appellant became appeals right exhausted and on 14th October 2008 the deportation order was signed and arrangements were put in place to deport the Appellant to Nigeria.
7. The Appellant lodged an application to the European Court of Human Rights and accordingly he was released from immigration detention pending the outcome of that appeal.
8. On 13th December 2010 the Appellant was the victim of a hit and run accident, resulting in him suffering serious injury which required hospitalisation. Nevertheless on 30th June 2011 the Appellant was convicted of possession of class A drugs (cocaine), as well as possessing identity documents with intent to defraud and was sentenced to a term of three months’ imprisonment suspended for 24 months.
9. The Respondent reconsidered the Appellant’s case in the light of his medical condition resulting from the road traffic accident of 2010 but maintained the decision to refuse to revoke the Appellant’s deportation order.
10. Suffice to say however by 28th April 2016 the Respondent accepted that the Appellant’s further submission amounted to a fresh human rights claim. After consideration however she concluded that the further submissions did not amount to grounds on which she would revoke the deportation order. Thus the matter came before the First-tier Tribunal.

**The FtT Hearing**

1. The FtT heard evidence from the Appellant, his wife whom he had married in August 2017, and Mr Joshua Benjamin, a learning and behaviour mentor and part-time youth worker.
2. Medical evidence was submitted on the Appellant’s behalf detailing his ongoing bowel and urinary problems. In addition there was a short psychiatric report detailing suicide ideation but this report was dated September 2009 and was therefore not of recent origin.
3. In addition there was also before the FtT the Respondent’s Reasons for Refusal decision (RFRL) together with a copy of the decision of the First-tier Tribunal which heard the original appeal against the deportation order. The date of this decision is 13th March 2008. The RFRL also referred to the Country of Information Report (COIS) on Nigeria. This referenced the availability of medical facilities there. The FtT after consideration of the evidence, allowed the Appellant’s appeal on human rights grounds.

**Onward Appeal**

1. The Respondent sought and was granted permission to appeal. The grounds seeking permission are not numbered, but raise several issues set out below. It was said that the FtTJ:
   1. erred in placing weight on the fact that since 2010 there had been no further offending by the Appellant;
   2. erred by failing to resolve a factual conflict on when the Appellant’s relationship with his wife started and therefore the finding that the relationship started prior to the making of the deportation order could not stand;
   3. erred in his finding that the Appellant had “effectively” been resident in the UK for most of his life;
   4. failed to give adequate reasons as to why it would be unduly harsh for the Appellant to relocate to Nigeria and likewise for the Appellant’s wife to either accompany him to Nigeria or remain in the UK if he were to be deported; and
   5. erred in the assessment of the Appellant’s medical condition. The assessment was flawed in that no proper consideration had been given to factoring into the assessment the availability of medical facilities in Nigeria
2. Permission having been granted on all these points, the matter thus comes before me to decide if the FtTJ’s decision discloses such error of law that it requires to be set aside and remade.

**Submissions**

1. I heard submissions from Miss Kiss for the Respondent and Miss Turnbull for the Appellant. Miss Kiss’s submissions kept to the lines of the grounds seeking permission. She sought to emphasise however that the FtTJ’s errors had stemmed from a complete failure to refer meaningfully to the earlier decision made by the FtT, dealing with the original deportation appeal. This failure had led the judge into error in that he had omitted to resolve a material point of conflict in the evidence. This was the failure to resolve the date when the relationship between the Appellant and his wife started.
2. Additionally the judge had materially erred by failing to give proper reasons concerning his findings on the Appellant’s medical condition [201].
3. There had been no proper consideration given as to why it would be unduly harsh for the Appellant’s wife to relocate to Nigeria. There was no consideration at all given as to why it would be unduly harsh for the Appellant’s wife to remain in the UK in the event of the Appellant being deported.
4. Cumulatively the failure to resolve these points had meant that the decision was unsustainable. In view of the fact that the findings were deficient the proper course would be to set aside the decision and remit the matter to the First-tier Tribunal for a full rehearing.
5. Miss Turnbull’s submissions also kept to the lines of the grounds seeking permission. She submitted that overall the judge’s decision was adequately reasoned. She said firstly on the question of rehabilitation, the authorities of **Danzo 2015 EWCA Civ 596** and **Velasquez Taylor 2015 EWCA Civ 845** provided no basis upon which to conclude that the FtTJ had erred when taking into account that there was no evidence that the Appellant had reoffended. The weight to be attributed to that factor was a matter for the judge.
6. So far as the judge’s findings that it would be unduly harsh for the Appellant’s wife to live in Nigeria, the judge gave adequate reasons for this finding at [172].
7. So far as the medical evidence is concerned it is clear that the Appellant’s health condition requires long-term management. The judge found that the Appellant needed a regular annual check-up on the battery life of the implanted sacral nerve stimulator. The internal batteries need to be changed every five to six years. The judge found that the Appellant may need to have further surgery and the sacral nerve stimulator was not available in Nigeria. She submitted therefore that the decision is sustainable and should stand.

**Consideration of Error of Law**

1. The FtT was faced with a young man who had spent a great deal of his life in the UK but had served a three-year term of imprisonment for dealing in class A drugs. This resulted in a deportation order being made. Following the making of the deportation order, the Appellant was the victim of a hit and run accident requiring admission to hospital and was left with medical problems which will require ongoing management.
2. To allow this appeal the judge was required first of all to give consideration to, and make clear findings on, the circumstances set out in paragraph 390 and 399A, as reflected in Section 117C of the Immigration Rules. Therefore it was necessary that the judge make clear findings on whether the Appellant met the three limbs of paragraph 399A, otherwise the exception could not apply.
3. The first point of conflict arose on whether the Appellant has been lawfully resident in the UK for most of his life. The FtTJ referred to this point by simply saying that he found that “the Appellant had effectively lived the whole of his life in the UK” [199]. Nowhere do I see that the FtTJ has grappled with the evidence relating to this point when arriving at that conclusion. There was evidence that the Appellant was granted indefinite leave to remain only on 25th November 2003, and by October 2008 there was a signed deportation order in existence. It is incumbent upon the judge to make a finding on whether or not the Appellant has been “lawfully” resident in the UK for most of his life, not “effectively” resident here.
4. A second point of conflict arises in respect of when the relationship between the Appellant and his wife started. I find the judge’s analysis on this point fails to take into account and resolve the conflicting evidence that was before him. Whilst the judge has mentioned the previous decision made in March 2008 I find that there has been no meaningful engagement with it.
5. Although the 2008 decision is not binding on the judge, nevertheless the judge should have kept in mind that the appeal before him was a Revocation appeal. The previous decision which contained properly reasoned judicial findings, was part of the evidence relied upon by the Respondent in opposing the revocation application. The findings of the 2008 Tribunal therefore should have been the starting point for the judge’s own findings. Good reasons need to be given for departing from those findings.
6. A reading of the 2008 decision shows that, at the time, that Tribunal concluded that a relationship in the Article 8 sense did not exist between the Appellant and the woman whom he has subsequently married. The evidence before the judge in the instant case amounts to saying that the Appellant and his wife were in a relationship as early as 2005. That in itself is in conflict with the evidence of the Appellant’s witness Mr Benjamin, who is reported in his statement as saying that he had known the Appellant and his wife since they “started their relationship in 2015.” It is therefore incumbent upon the judge to make a clear finding on this matter. It is a material error not to do so because any relationship started whilst the Appellant’s immigration status is precarious, carries little weight.
7. I accept that the judge makes a finding at [170] saying that there was a genuine and subsisting relationship between the Appellant and his wife at a time when the Appellant was lawfully in the UK, but it is hard to see what evidence led to this conclusion. Certainly there is nothing to show that the judge has resolved the conflicting evidence outlined above.
8. I find that following on from that the judge has not even given consideration as to why it would be considered unduly harsh for the Appellant’s wife to remain in the UK in the event of the Appellant being deported.
9. The final point raised by the Respondent centres on the judge’s approach to the evidence concerning the Appellant’s medical needs. It is said that if he returned to Nigeria he would be unable to access proper medical care on account of his chronic bowel and urethral problems. The judge says that he took into account all of the medical reports contained in the bundle. He considered on the available evidence that the Appellant would not be able to access such facilities in Nigeria (as the ones he attends in the UK), and that the Appellant “might” need further surgery in the future [200-201].
10. I find that the FtTJ has taken the wrong approach in his assessment of the medical evidence. The approach to be taken is not whether similar or equally good facilities are available in Nigeria. The test is whether there is an absence of appropriate treatment in a receiving country, and the lack of access to such treatment would result in the deportee being at risk of being exposed to a serious, rapid and irreversible decline such as to amount to very compelling reasons. I find force in Miss Kiss’ submission that the FtTJ erred in a failure to take into account [71] of the RFRL which outlines evidence from the COIS that Nigeria has medical facilities with hospitals in Abuja and Lagos both having urology departments.
11. I find that cumulatively therefore that there are material errors in this decision such that it cannot stand. It must be set aside to be remade.
12. I gave consideration to the proper forum for this matter to be reheard. I took the representatives’ views into account. Because of the amount of judicial fact-finding necessary to re-make the decision, I conclude in the interests of justice that the matter must be returned to the First-tier Tribunal for a fresh hearing. I am unable to preserve anything from the original decision.

**Notice of Decision**

The decision of the First-tier Tribunal is hereby set aside for material error. The decision will be remade in the First-tier Tribunal before a judge other than Judge A J Blake.

No anonymity direction is made.

Signed C E Roberts Date 09 June 2018

Deputy Upper Tribunal Judge Roberts