Heard at Field House
On 16 October 2003
Written 16 October 2003 _A (Article 8 - Family Life - Proportionality - Mahamood) Nigeria [2003] UKIAT 00120

IMMIGRATION APPEAL TRIBUNAL

Date Determination Notified

30th October 2003

Before

Mr S L Batiste (Chairman)
Mr J A O'Brien Quinn QC

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The Appellant, a citizen of Nigeria, appeals, with leave, on human rights grounds against the determination of an Adjudicator, Mr J P Cameron, dismissing his appeal against the decision of the Respondent on 13 May 2002 to refuse leave to remain as a foreign spouse.

2. Mr S Joseph represented the Appellant. Mr P Deller, a Home Office Presenting Officer, represented the Respondent.

3. The Appellant entered the UK illegally on 14 November 1993 using a passport to which he was not entitled. He applied for asylum on 3 November 1994. His application was refused in March 1997. His appeal to an Adjudicator was heard later that year and dismissed on the basis that his claim lacked any credibility. The appeal was certified and accordingly there was no further right of appeal to the Tribunal.

4. In the meantime, in 1995 he had begun a relationship with Ms O. Their first child was born on 15 July 1996. They were married on 6 August 1997, when his wife obtained a decree absolute in relation to her first marriage. A second child was born on 22 March 1998, and a third child was born on 15 April 1999. He made an application for leave to remain as a foreign spouse in October 1997 and this was refused by the Respondent, as described above, on 13 May 2002. Another Adjudicator heard the Appellant's appeal on human rights grounds against this decision on 8 January 2003. In that determination, with regard to Article 8, the Adjudicator dismissed the appeal on the

basis that there was no reason why the Appellant could not return to Nigeria and make an application from there for leave to enter as spouse in the normal way under the Immigration Rules. Permission to appeal to the Tribunal was granted on 18 March 2003. On 19 September 2003, the Appellant made a new application to the Respondent for indefinite leave to remain on the basis of a published concession, namely that he had been in the UK for more than seven years with children attending school. No decision has been reached in relation to this last application.

5. At the outset of the proceedings, Mr Joseph accepted that the new application under the seven-year concession was not before the Tribunal as there had been no decision on it by the Respondent. Both representatives accepted that the only issue before the Tribunal was the question of proportionality under Article 8, arising from the Adjudicator's conclusion that it would not be disproportionate to expect the Appellant to return to Nigeria and make an application for entry to the UK as a spouse from there in accordance with the Immigration Rules.

6. Mr Joseph argued that the Appellant was the breadwinner of his family and employed in a good position. He was employed by M Ltd and last year earned £31,396. His wife worked part-time and earned about £6000. They owned their own home but it was subject to a mortgage. If the Appellant were returned, even for a limited period, the family would be deprived of much of its income and may require support from public funds. The life enjoyed by the family would be adversely affected and indeed the Appellant might be unable to adduce sufficient evidence of maintenance and accommodation in order to satisfy the requirements of the Immigration Rules. His wife's income alone was insufficient. All this constituted an insurmountable obstacle to the Appellant's return from Nigeria. This was pointed out to the Adjudicator and he was in error in not accepting it.

7. Mr Deller argued that the appeal should fail for three reasons. First, on the evidence, there was no reason why the Appellant could not satisfy the requirements of the Immigration Rules. The judgment as to maintenance would not be made on the wife's income only, but also on the Appellant's earning potential, which in the light of his present employment, was more than adequate for the requirements of the Rules. Indeed there was no evidence that the Appellant's present job would not be held open for him whilst he made his application. Second, as the Tribunal had recently held in several determinations, the question of whether an application for entry would succeed is a decision for the Entry Clearance Officer, who would also have to apply the human rights legislation, and Adjudicators and the Tribunal should not prejudge this decision. Third, the Court of Appeal has held that a spouse should return to his own country to make a proper application, even if it was likely to be refused.

8. We have carefully considered these submissions and the relevant law. The Adjudicator, when assessing Article 8, correctly directed himself to the Court of Appeal in **Amjad Mahmood [2001] INLR** 1. The Court undertook a very thorough review of the Strasbourg jurisprudence on the issue of proportionality and Lord Philips MR summarised the general position as follows.

> "I have drawn the following conclusions as to the approach of the Commission and the ECHR to the potential conflict between the respect for family life and the enforcement of immigration controls.
>
> 1. A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
> 2. Article 8 does not impose on a state any general obligation to respect the

choice of residence of a married couple.

3. Removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe Article 8 rights provided there are no insurmountable obstacles to the family living together in the country of origin of the family members excluded, even where this involves a degree of hardship for some or all members of the family.
4. Article 8 is likely to be violated by the expulsion of a member of the family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.
5. Knowledge on the part of one spouse at the time of the marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
6. Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the state whose action is impugned.

9. Laws LJ added an important corollary to this in paragraph 26. He said

> "No matter that the immigrant in the individual case, having arrived here without the required entry clearance, may be able to show that he would have been entitled to one, or even that the Home Office actually accepts that he meets the [Immigration] Rules' substantive requirements; it is simply unfair that he should not have to wait in the queue like everyone else. At least it is unfair unless he can demonstrate some exceptional circumstances which reasonably justifies his jumping the queue."

10. The Court of Appeal in **Isiko [2001] Imm AR 291** also concluded that the Respondent was entitled to regard as important the integrity of the immigration regime as a whole, and expressly approved the above observations by Laws LJ. The Court of Appeal in **Razgar [2003] EWCA Civ 840** further underlined the importance of the margin of appreciation that should be given to the Respondent's policy as expressed in the Immigration Rules.

> "When it comes to deciding how much weight to give to the policy of maintaining an effective immigration policy, the Adjudicator should pay very careful deference to the view of the Secretary of State as to the importance of maintaining such a policy."

11. In **Ekinci [2003] EWCA Civ 765**, the Court of Appeal considered and rejected the proposition that if an applicant were unlikely to be able to satisfy the requirements of the Immigration Rules, it would in itself be disproportionate to return him in order to make an application in accordance with the Rules. Simon Brown LJ held:

> "It would be a bizarre and unsatisfactory result if, the less able the Applicant is to satisfy the full requirements for entry clearance, the more readily he should be excused the need to apply…… True it is that "the protection of human rights is not a reward for virtue and the with holding or dilution of them is not a penalty for vice," but that is not to say that a person's immigration history is any relevant consideration when striking the balance between his Article 8 rights and countervailing public interest in maintaining effective immigration control."

12. The Tribunal has also considered, in this context, the extent of the Adjudicator and Tribunal's task. In **[2003] UKIAT 00078 G Algeria** it held

> "We should not prejudge the Entry Clearance Officer's decision or assume that he would breach Article 8 when making that decision. The issue before us, as for the Adjudicator, is whether it would be disproportionate to require the Appellant to return to Algeria to make a visa application for entry to the UK as a spouse in accordance with the Immigration Rules."

13. We have applied these principles to the present appeal. The Appellant came to the UK by deception and delayed a year before even making his asylum application, which was then dismissed for lack of credibility. At no point during his stay would he have been entitled to asylum and thus the policy of the Respondent, to discourage illegal entry by deception and queue jumping, is properly engaged. His wife must have been aware of his precarious immigration status when they began their relationship, and they married after his application for asylum had been refused by the Respondent. Having said that the Appellant has lived here now for many years and he has a family and a home and a good job in the UK. His wife works part-time. There is no evidence that his present employers would not be willing to re-employ him on his return. Be that as it may, given his actual earnings and his potential earnings in the future in the UK, there is no reason why an application for entry by him from Nigeria should be turned down. There is no evidence either that the process will be unduly protracted. Thus on the facts an application is likely to succeed, but even if it were not, the Adjudicator was entitled to conclude that it would be proportionate to expect the Appellant, as a person who had entered the UK by deception, to have to return home and make a proper application for entry from there, notwithstanding the other countervailing factors in the balancing exercise. In suggesting that the requirements for entry clearance present an insuperable obstacle to the Appellant returning to the UK legally, Mr Joseph misunderstood both the facts, and indeed the reference in Mahmood to "insuperable obstacles," which properly relates to the different issue of whether the Appellant's family could return to his home country with him.

14. For the reasons stated above we conclude that the Adjudicator's decision was properly open to him and is fully sustainable. Accordingly, this appeal is dismissed.

Spencer Batiste
Vice-President