Upper Tribunal

(Immigration and Asylum Chamber)

Omotunde (best interests - Zambrano applied - Razgar) Nigeria [2011] UKUT 00247(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 May 2011	**25 May 2010**

Before

MR JUSTICE BLAKE, PRESIDENT

SENIOR IMMIGRATION JUDGE GLEESON

Between

PHILIP OLAWALE OMOTUNDE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Ding of Mountain Partnership Solicitors

For the Respondent: Mr Saunders, a Senior Home Office Presenting Officer

1. When applying the judgment of the Court of Justice of the European Union in Ruiz Zambrano (European citizenship) [2011] EUECJ Case C-34/09 OJ 2011 C130/2 and that of the Supreme Court in ZH (Tanzania) [2011] UKSC 4; [2011] 2 WLR 148, in relation to the proposed administrative removal or deportation of one or both of his non-national parents, the welfare of a child, particularly a child who is a British citizen, is a primary consideration.

2. National courts must engage with the question whether removal of a particular parent will 'deprive [the child] of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'.

3. Where there are strong public interest reasons to expel a non-national parent, any right of residence for the parent is not an absolute one but is subject to the Community Law principle of proportionality. There is no substantial difference between the human rights based assessment of proportionality of any interference considered by Lady Hale in ZH (Tanzania) and the approach required by Community law.

4. In this particular context, the Article 8 assessment questions set out in Razgar [2004] UKHL 27 should be tailored as follows, placing the assessment of necessity where it most appropriately belongs in the final question dependent on the outcome of proportionality and a fair balance, rather than as part of the identification of the legitimate aim:

1. Is there family life enjoyed between the appellant and a minor child that requires respect in the context of immigration decision making?

2. Would deportation of the parent interfere with the enjoyment of that family life?

3. Is such an interference in accordance with the law?

4. Is such an interference in pursuit of a legitimate aim?

5. Is deportation necessary, proportionate and a fair balance between the rights to respect for the family life of the appellant and the child and the particular public interest in question?

DETERMINATION AND REASONS

Introduction

1.
This is an appeal from a decision of the First-tier Tribunal dated 13 October 2010 dismissing the appellant's appeal against a deportation decision taken on the basis that he was a foreign criminal within the meaning of s 32 of the UK Borders Act 2007.

2.
The appellant is a national of Nigeria born in December 1962. He first came to the United Kingdom as a visitor in September 1991. He made various applications to remain that were rejected and a decision was made to deport him as an overstayer in September 1996 but he was subsequently granted indefinite leave to remain in December 2002 under a regularisation scheme.

3.
In the year 2004 the appellant had a relationship with Titilayo Thompson. It appears that the couple never lived together in a common household or at least did not do so at any time material to this appeal.

4.
On 20 April 2005 Samuel Toluwalase Omotunde (otherwise Tolu) was born to the couple in Lewisham. His birth was registered on 7 June 2005 with both parents being given as informants; the appellant's address was 62 Boone Street, Lewisham, London SE13 and that of the mother 52 Dolphin Tower Deptford SE8. Although Tolu's father had at the time of his birth been given indefinite leave to remain, Tolu did not become a British citizen at birth because s 50 (9) of the British Nationality Act 1981 did not enable children born outside marriage to trace their nationality status through their fathers in the absence of subsequent legitimation by marriage. This differential treatment of children according to their legitimacy status was the subject of debate, and with the coming into force of the Human Rights Act 1998 in October 2000 it was highly doubtful whether such distinction in terms of nationality status could be justified taking Article 8 together with Article 14 of the European Convention on Human Rights. Parliament removed the distinction by s 9 of the Nationality, Immigration and Asylum Act 2002 but unfortunately this Act did not come into force until July 2006 and then only applied to children born after that date, thus too late for Tolu to benefit. Children born before 1 July 2006 had to acquire British nationality through registration under s 3(1) of the British Nationality Act 1981.

5.
On 29 April 2008 the appellant was convicted of two counts of conspiracy to make fraudulent claims for tax credits and transfer of criminal property obtained during the conspiracy. He was remanded in custody on that date and sentenced to two and a half years' imprisonment at the Crown Court, Croydon on 27 June 2008. The judge's sentencing remarks and the indictment indicate that the conspiracy lasted between July 2004 and March 2005 and involved a total of £2 million of benefit from which a sum of £1 million was extracted by the conspirators. The judge was critical of the ease by which fraudulent claims could be made without any system for checking operated by Her Majesty's Revenue and Customs without in any way suggesting that this constituted mitigation for dishonest people. The appellant was not the leading light of the conspiracy but was associated with others who were. He was drawn into the wrongdoing to the tune of about £41,600. The judge applied his mind to, but decided not to make, a recommendation for deportation of a number of the conspirators who had children in this country noting that the children did not choose their mother or indeed their father. In the appellant's case the judge noted "You have a young child who you are a carer for". He recognised that deportation was entirely a matter for the Home Secretary. In fact shortly after the sentence was imposed provisions of the UK Borders Act 2007 came into force with the consequence that the appellant's deportation was automatic under s 32 subject to an exception under s 33(2)(a) where removal would breach a person's rights under the European Convention on Human Rights.

6.
The Home Office alerted the appellant to the fact that he was eligible for deportation and from late 2008 conducted an investigation into the care arrangements for Tolu during his father's imprisonment and what arrangements were to be made for him in the event of the appellant's deportation.

7.
The appellant had served the custodial part of his criminal sentence by about August 2009 but was thereafter held in immigration detention pending a decision on deportation. It appears he had been refused bail during this period but on 22 April 2010, two days after a decision had been made to deport him, he was released on bail and returned to his address at Boone Street and has remained living there to the date of this appeal.

8.
In substance, the appellant indicated that during his period in custody he had made arrangements for Tolu through a team of carers he had assembled and called Team Tolu. These included Titilayo's sister Stella Ogonsaya (Stella) who lived in the Hammersmith area and three pastors associated with the appellant's religious community, a husband and wife team David and Lydia Olurunniwo and Mobogolegi Carew. In an undated questionnaire completed when he was in detention he indicated that he was unable to give the Home Office up to date information about Titilayo's immigration status as he was not currently in contact with her. He repeated that she was unwilling to communicate with him in September 2009 but indicated in response to a direct question on 22 October 2009 that she had not renounced interest in her son and maintained a contact through Stella. He indicated that Tolu would remain in the United Kingdom if the appellant were to be deported.

9.
From the documentary information gathered by the Home Office in pursuance of its enquiry the following picture emerged as to Tolu's education:

(i)

He started at his nursery class of St Margaret's Lee Church of England School in Lewisham after Easter of 2008. The offer was made to the father at his address in October 2007.

(ii)
Tolu did not receive an offer to enter St Margaret's reception class so sometime early in 2009 he was transferred to a private school run by the church group, the Kings Kid Christian School, New Cross. The fees for this school were paid by Team Tolu. In October 2009 the school informed the Home Office that Tolu's mother was dropping him off and collecting him.

(iii)
In about January 2010 Tolu transferred to the Melcombe Primary School, Fulham Palace Road, London W6 where he made good progress in his first term. The appellant stated that the reason for the move was that Team Tolu could no longer afford the school fees at the Kings Kids School. Melcombe School was close to Stella's address.

10.
For completeness we can indicate that at the hearing before us the appellant was able to produce documentary evidence that was not challenged and we accept is accurate. He told us that Tolu continued to attend Melcombe Primary School after the appellant was released from custody and Tolu returned to live with him at 62 Boone Street. However this involved a substantial cross-London journey from Lewisham to Hammersmith. Some nights Tolu would spend with his aunt Stella in Hammersmith. His school was concerned that a young child was having to make such a long journey and the Headteacher secured Tolu's admission into a school much closer to the Lewisham area. Tolu attended this school until 8 April 2011 and a fortnight later he was offered a place and started attending the St Matthew Academy, St Joseph's Vale, London SE3 very close to the appellant's address. On the application form the appellant is given as the first contact and his address the one to which correspondence should be sent; the mother as the second contact with an address in Abbeywood London SE2.

11.
The Home Office enquiries revealed the fact that the mother had no certain immigration status but had at some point applied for an EEA Family Permit through connection with her brother-in-law but had not claimed Tolu as her dependant in that application. The appellant had been consistent in his description of the care arrangements in his communications with the Home Office, the Trial Judge and the Probation Officer making the OASYS assessment of him on conviction.

The decision to deport

12.
In the decision letter of 12 April 2010 the Home Office gave reasons why it did not accept the appellant's human rights claim. It noted that the appellant had now been in the United Kingdom for approximately eighteen years, eight of which were pursuant to lawful residence. He had a minor previous conviction in April 2006 for soliciting for taxi hire services for which he was fined £100.

13.
With respect to Tolu, having recited the care arrangements as described by the appellant, the decision letter states as follows:

"You claim to be the sole carer for your son prior to your incarceration and you maintain that you will be his sole carer after you are released. It is noted that you are in good health and there are no known

reasons why your son could not join you in Nigeria. Should you feel that this is not possible for your son to accompany you to Nigeria, it is believed that you could maintain your relationship with him using modern means of communication, similar to those you may have used while serving your custodial sentence. In the same way you could also maintain contact with your other family members living here. You further state that there are no court orders to state that you are the sole carer of your son. You claim that you and Titilayo Thompson decided access amicably. Your son is subject to deport action as your family member and will be served with a notice of decision to make a deportation order against him. He will be given a right of appeal against the deportation decision and will also have the option to accompany you voluntarily which will enable him to leave the United Kingdom and return to Nigeria without being made the subject of a deportation order".

The letter then noted that Tolu (described by his given name of Samuel) was not British and was not entitled to the right of abode. He was old enough to adapt to life in Nigeria. There were educational opportunities for him in Nigeria. It continued:

"Given that the education will be freely available to Samuel (Tolu) in Nigeria the Secretary of State does not believe that re-location would interfere with his family life for the purpose of Article 8. If Samuel does not join you in Nigeria it is noted that you would like him to remain in the United Kingdom with his aunt Stella … and that he can use modern channels of communication to keep in contact with you similar to those used whilst you were serving your custodial sentence. He can also make regular visits to see you…. Your son would be able to resume any education that he is currently receiving in his mother tongue. For these reasons it is not accepted that the decision in question would give rise to any interference with your family or private life.""

Other parts of the letter indicate that any interference with family life that might result from the appellant's deportation was permissible and proportionate in pursuit of the legitimate aim for the prevention of disorder and crime and the protection of health and morals.

The decision of the First tier Tribunal

14.
The appellant appealed the decision to deport him to the First-tier Tribunal, who heard the appeal on 4 October and gave its decision nine days later. The appellant, Stella, Pastor Carew and another friend of the appellant Mr Fashode gave oral evidence. The Tribunal was unimpressed by the appellant's evidence as to the arrangements for Tolu and the degree to which his mother had contact with him. They were unimpressed by the evidence of the church witnesses in whose statements the appellant was described as honest, and on the central question in the appeal decided as follows:

"23. We do not accept that the appellant's deportation would necessarily interfere with his family life. As of the date of the hearing the appellant's son is a Nigerian national with no leave to remain in the United Kingdom. While a registration application has apparently been made we are not in a position to predict the outcome of that application.

24. Further Tolu's mother currently has no leave to remain in the United Kingdom. The appellant stated that she was still awaiting a decision on her application to remain in the United Kingdom as an extended family member of an EEA national. In these circumstances we consider that the appellant has the option of taking Tolu to Nigeria with him and there was no evidence to suggest that Tolu's mother would object to this. This would be the case regardless of whether Tolu is registered as a British citizen or not. Given Tolu's age, the fact that Nigeria is an English-speaking country and that he has not long started school and that he has a range of relatives in Nigeria including a grandmother

and a half-sister we do not consider that it was unreasonable for Tolu to accompany the appellant regardless of his nationality.

25. The respondent is required to apply Section 32(5) of the 2007 Act to the appellant owing to the sentence he received following a criminal conviction and therefore the decision is lawful. We also consider that the decision is necessary in that it is taken with the legitimate aim of the prevention of disorder and crime.

26. We find that the decision was proportionate for the following reasons. We attach weight to the appellant's fairly lengthy residence in the United Kingdom and the fact that his son was born here and attends primary school. The appellant has also claimed to undertake voluntary work for his church and for his home town in Nigeria ... We consider that many letters of support produced on the appellant's behalf and the fact that he has been assessed as being at low risk of re-offending.

27. … From the sentencing remarks we deduce the following. Most of the false tax credit claims were based on non-existent disabled children under one. The Sentencing Judge said that the fraud netted some £2 million of which £1 million was extracted.

28. The case was described by the Sentencing Judge as 'organised crime' and there were references to the money being disposed of in Nigeria. The appellant's role in the conspiracy was not the least significant, compared with the others convicted, according to the aforementioned remarks and the sums involved. We accept that the appellant's son is a primary consideration however given the lack of evidence before us to suggest that the appellant was likely to be separated from his son in the event of deportation, we conclude that the respondent's concerns outweighed the appellant's human rights."

15.
Five days after the Tribunal promulgated its decision, the Secretary of State registered Tolu as a British citizen pursuant to s 3(1). We are aware that the current UKBA Guidance cited in Macdonald's Immigration Law and Practice Eighth Edition, Volume 1, paragraph 2.55, footnote 3, indicates that:

"The main general criteria for discretionary registration are that the child's future should clearly be seen to lie in the United Kingdom and that there are close connections (either through a parent or otherwise and that the child of 13 or over has lived in the United Kingdom for two years)."

(Cited in the decision of the Administrative Court in R (on the application of Mansoor v The Secretary of State for the Home Department [2011] EWHC 832 (Admin), 23 March 2011 at [21] and the subject of comment at [42]).

16.
Permission to appeal was granted by the Upper Tribunal on 3 February 2011 on the basis that it was arguable that the interests of the appellant's child were not given adequate consideration in the light of the guidance of the Supreme Court in ZH (Tanzania) [2011] UKSC 4.

Error of Law

17.
The First-tier Tribunal did not have the benefit of the guidance in ZH (Tanzania) . We are satisfied that its examination of the impact of the appellant's proposed deportation on Tolu and its conclusion as to proportionality at [28] were both inadequate. The child's welfare is a primary consideration irrespective of the criminal wrongdoing of his father and any diminished credibility that the father's

evidence alone might have as a result of that conviction. A fair assessment of his ties to the United Kingdom and where his best interests lay was needed. There was evidence before the Tribunal that the mother was in close and regular contact with Tolu (if not the appellant) and had the care of him that day. His aunt had already played a significant role in his life. If Tolu could not lawfully have been deported as a member of his father's family, an assessment was needed whether it would have been reasonable to expect him to relocate to Nigeria with the loss of those ties. The fact that there is an educational system in Nigeria does not resolve what this child's best interests are. The Tribunal did not consider the effect of separation of mother and child. It did not assess his educational interests or the consequences for those interests if the appellant were to remove him to Nigeria.

18.
We do not understand that the evidential picture of the care arrangements was in significant dispute. The Home Office appears to have accepted that the father was the primary carer of Tolu who was living in his household, indeed that was the basis on which it concluded that it would deport Tolu as a family member. The appellant had never submitted to the Home Office that the mother had abandoned any interest in the child, and he accepted in his oral evidence that whilst he was in prison the mother may have visited the child frequently. Stella indicated that the mother came four or five times a week when Tolu was at Hammersmith to see him. Since it was not clear that the mother was to be removed to Nigeria as well, Tolu's removal from the United Kingdom would separate him from the ability of regular contact with his mother and his maternal aunt as well as interrupting the schooling that he had commenced in this country where he was born and spent his entire life. If Tolu were to be left behind he would lose his daily contact with his father and primary carer.

19.
In the light of the above, Mr Saunders did not resist the contention that the Tribunal's reasoning on this critical question was inadequate in the light of the case law. We accordingly find there has been a material error of law; we set aside the decision of the Tribunal and remake it.

Remaking the decision: our assessment of the facts

20.
Although the directions of the Upper Tribunal had envisaged that in the event that we found an error of law the decision could be remade without hearing evidence, and no witness statement had been served, the appellant gave evidence at our invitation. As already indicated, he was able to satisfy us as to the current educational arrangements for Tolu and produced documents, for which he could not have anticipated he would be asked, dealing with his care of the child. This supports the consistent picture that he plays a prominent role in Tolu's life and is the primary carer of his son.

21.
We found the appellant's answers to be clear, detailed and evidentially supported. His evidence was not challenged by Mr Saunders. The picture that he presented of Tolu's care arrangements had been those that he had consistently indicated previously to those in authority since his arrest and conviction. It was also consistent with the evidence in the witness statement of Stella.

22.
Though it would undoubtedly have been helpful for the Home Office and the Tribunal to have heard from the mother, we see no basis for concluding that the absence of her evidence undermines the consistent picture that the appellant was the lead personality in caring for Tolu and making arrangements for his future, albeit that the mother maintains contact with her son and had not abandoned her interest in him. We see no reason to reject Stella's evidence that mother remains in

touch and regularly sees Tolu. We therefore reached a different view as to the credibility of the appellant’s account of the care arrangements for Tolu than did the First-tier Tribunal.

23.
We also have the considerable advantage over the First-tier Tribunal that we now know that the Secretary of State had decided that Tolu should be registered as a British citizen. It is very unfortunate that this important decision had not been taken before the hearing of the deportation appeal, or that intimation could not have been given to the Tribunal that the application was likely to be successful. The exercise of discretion to register such a child as a British citizen is essentially based on the conclusion that the child’s future should lie in the United Kingdom. It follows that exercising that discretion in Tolu’s favour was wholly inconsistent with the basis of decision explained six months earlier that he would be deported to Nigeria with his father, as someone with no right of residence in this country.

24.
It may also have been that the Tribunal could have been given greater assistance by the legal team of the appellant to the effect that any refusal of registration of Tolu and his intended deportation as a family member would probably have been contrary to the Human Rights Act in this respect, because of the discrimination based upon his illegitimate status and a delay in implementing Parliament’s intentions to rectify that situation.

25.
The picture that emerges from the evidence as a whole is that of a bright six year old child, born and resident in the United Kingdom, and whose future is now recognised by the Secretary of State to lie in the United Kingdom by reason of his discretionary registration as a British citizen. He has had a difficult three years as a consequence of his father’s criminal wrongdoing and has attended four different nursery and primary schools before recently being admitted to an Academy school where he has the prospect of remaining throughout the remainder of his primary and secondary education.

26.
We have no doubt that a period of educational continuity and stability is in his best interests. The present position is that he lives with the appellant at 62 Boone Street and attends school nearby. The appellant states that Tolu's mother collects him from school on Friday and regularly has staying contact over the weekend. He was able to supply us with the mother’s current address. We accept the evidence that his father has taken an active and dominant lead in Tolu's care before, during and after the prison sentence he has served. We see no indication that this was in any sense a contrived picture of parental concern. It is reflected in the arrangements made for schooling and care of Tolu, when the appellant was unable personally to take care of his son while in prison.

27.
The mother’s precise relationship with Tolu is less clear as she has not made a statement, been called as a witness or has been recorded as expressing a view. We note that she apparently took Tolu to school on the day of the hearing before the First tier in October and as a consequence it would not have been possible for mother to have taken the child to school in Lewisham and collected him at the end of the school day and also to give evidence in Dorking. The Home Office were themselves in contact with mother in connection with her residence permit application. We are told that this is still outstanding after some two years and there is no evidence that the Home Office has written to her asking for her views.

Remaking the decision: interference with family life

28.
We conclude that deportation of the father to Nigeria would deprive Tolu of his dominant carer throughout his young life, and seriously interrupt his daily care arrangements. We reject the submission that family life hitherto enjoyed between an active parent and a small child could be appropriately maintained by telephone calls or other 'modern methods of communication' from Nigeria. We note that this Tribunal reached a similar conclusion in LD (Article 8- best interest of child) Zimbabwe [2010] UKUT 278 (IAC). Difficult as the issues in a case such as the present are to decide, their resolution is not assisted by wholly unrealistic suggestions such as this.

29.
If it is justified to interfere with the right of respect for family life because of a contrary compelling public interest, so be it and the fact of electronic communication may provide some means of continued contact, but the internet and telephone calls do not substitute for the daily care, engagement and attendance on a young child that is the essence of family life in this context.

30.
We pay particular attention to the decision of the Supreme Court in ZH Tanzania , without lengthening this determination by the citation of substantial extracts from it. It governs our approach to this case. We note the importance attached to nationality as an indicator of where the child's best interests lay. Tolu cannot be deported as a member of his father's family and it would not be reasonable to expect him to accompany his father to Nigeria where there is no evidence of social ties or equivalent care.

31.
We further recognise that Tolu's British nationality is not merely an aspect of what his best interests are, but may also afford him a right to reside in his own country in both national and European Law see Case C-34/09 Ruiz Zambrano where the Court of Justice in its ruling concluded:

"Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen." [Emphasis added]

32.
As a result of this decision national courts must engage with the question whether removal of a particular parent will 'deprive [the child] of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'. We conclude that either requiring Tolu to live in Nigeria or depriving him or his primary carer would undermine his rights of residence. The Court of Justice did not have to consider how Article 20 would be applied if there were strong public interest reasons to expel a non-national parent. We would conclude (subject to any further guidance from the CJEU or the Court of Appeal) that any right of residence for the parent is not an absolute one but is subject to the Community Law principle of proportionality. We doubt whether there is a substantial difference between the human rights based assessment of proportionality of any interference considered by Lady Hale in ZH (Tanzania) and the approach required by Community law.

Remaking the decision: proportionality

33.

We recognise that the welfare of the child is not a trump card or the paramount consideration in considering the deportation of his father. The analysis of Lady Hale at [26] and [28] and Lord Kerr at [46] indicates that it can yield to the rights of others where a contrary course is convincingly demonstrated by the public authority, which bears the burden of justification. We further take account of the decision of the Court of Appeal in Lee [2011] EWCA Civ 348 29 March 2011 at [26] to [27] where the conduct of the drug offending father justified his deportation and indefinite separation from his young son, despite the child's best interests.

34.
This is a case of automatic deportation where the Secretary of State has no discretion and the principle of N (Kenya) [2004] EWCA Civ 1094; [2004] INLR 612 that weight must be afforded to the Secretary of State's policy does not apply as it would in a case of discretionary deportation: see MK (deportation - foreign criminal - public interest) Gambia [2010] UKUT 281 (IAC); [2011] Imm AR 70 and contrast BK (Deportation -public interest) Ghana [2010] UKUT 328 (IAC); [2011] Imm AR 109.

35.
The assessment of proportionality is a matter for us, in the light of the judge's sentencing remarks and the analysis of the public interest engaged, and on the facts of the particular case: see RG (Automatic deport – section 33(2)(a) exception) Nepal [2010] UKUT 273 (IAC); [2011] Imm AR 84. We recognise that there can be a public interest in deporting both those who are personally dangerous or a persistent threat to public order and others whose offending may be a single instance but its nature and seriousness make deportation appropriate as a mark of public disapproval and the protection of public order by the deterrent effect on others. Equally we recognise that "seriousness" in this context is not to be judged by the threshold for automatic deportation, but the gravity of the offending as assessed by its place in the criminal calendar.

Remaking the decision: conclusions

36.
In the light of the foregoing we now re-examine this case using the guidance given by Lord Bingham in R (Razgar) [2004] UKHL 28, [2004] 2 AC 368 as endorsed in EB (Kosovo) [2008] UKHL 41, [2009] I AC 1159 to structure our reasoning. We take account of the fact that the original questions were addressed to a wide variety of family and private life, where the appellant had no immigration leave to enter or remain. The present context is the more familiar one in deportation cases of lengthy residence in the UK and eight years residence with indefinite leave to remain.

37.
We have tailored the questions to this particular context, and have placed the assessment of necessity where it most appropriately belongs in the final question dependent on the outcome of proportionality and a fair balance rather than as part of the identification of the legitimate aim.

38.
We accordingly ask the following questions:

1.
Is there family life enjoyed between the appellant and Tolu that requires respect in the context of immigration decision making?

Yes: Father has been resident here for 18 years and was lawfully resident at the time of Tolu's birth here.

2.
Would deportation of the father interfere with the enjoyment of that family life?

Yes: If father is deported and Tolu remains in the United Kingdom, as he is entitled to, he loses his parent and dominant carer. If Tolu joins father voluntarily in Nigeria he loses his home, his school, regular contact with mother and aunt and his friends, and the benefit of being brought up in the country of his birth, as a British citizen, with all the benefits which flow from that upbringing. Telephone/email contact is no substitute for the active care and contact Tolu now enjoys with both parents while in his father's care.

3.
Is such an interference in accordance with the law ?

Yes it is required by s 32 of the UK Borders Act 2007, subject to our assessment of the human rights claim under s.33.

4.
Is such an interference in pursuit of a legitimate aim ?

Yes: deportation of the father is a measure reasonably connected with the interest of public safety and protection of public order and the rights of others. It is not necessary to demonstrate that the appellant presents a personal risk to others and is likely to personally re-offend. Public safety may be promoted by the deterrent effect of deporting those liable to it, provided the deportation is necessary and proportionate.

5.
Is deportation necessary, proportionate and a fair balance between the rights to respect for the family life of the appellant and his child and the particular public interest in question?

It is in this context that we make our assessment of the weight to be attached to the seriousness of the offending and the proportionality of a deterrent effect. We note that the appellant has not been convicted of an offence of serious intentional violence or sexual misconduct; nor is this an offence of importing or dealing in class A drugs or people trafficking where deportation as a measure to deter others may have particular efficacy. We note that the appellant is not a recidivist offender and is not assessed to have a high risk of re-offending. We take account, however, of the fact that the appellant participated as a mature adult in a serious fraud on public revenue to the tune of £41,600 in his personal case, but that he was not considered by the trial judge to be the dominant personality in the overall conspiracy of a much greater value.

We consider that Tolu has a strong claim to continue to enjoy the support of his father and continue to be brought up in the United Kingdom. Such a course is in his best interests and his rights as a British citizen and a citizen of the European Union.

39.
In all the circumstances of the appellant's case and the best interests of his child we do not consider that the interference with the family and private life can be justified by the public interest identified in this case. Deportation of the appellant would not be a proportionate measure and is not a fair balance between the competing interests.

40.
We remake the decision by allowing the appellant's appeal from the decision of 20 April 2010.

Signed

Mr Justice Blake

President of the Upper Tribunal,

Immigration and Asylum Chamber