



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/04442/2015

THE IMMIGRATION ACTS

**Heard at Manchester
On 7 March 2016**

**Decision &
Promulgated
On 25 April 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

**O C O
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Adelakun, Solicitor at Arndale Solicitors
For the Respondent: Ms Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me pursuant to permission having been granted by First-tier Tribunal Judge Grant-Hutchinson dated 28 July 2015. The appeal relates to a decision of First-tier Tribunal Judge Heynes

promulgated on 13 May 2015. The Judge at the First-tier Tribunal had dismissed the Appellant's appeal against the Respondent's decision to deport the Appellant pursuant to Regulation 19 of the Immigration (European Economic Area) Regulations 2006 and to refuse to issue a residence card as the family member of an EEA national exercising treaty rights. The protection claim was also dismissed.

2. The Judge had considered the written and oral evidence of the Appellant and his wife, an EEA national. At paragraph 20 of the Judge's decision the Home Office Presenting Officer is noted to have accepted that the relationship was genuine and that the Appellant's wife was exercising treaty rights. The Appellant had three children, one from a previous relationship and thereafter twins born in March 2015 with his wife.
3. The Appellant had been convicted of a serious offence involving Possession of Class A drugs with intent to supply. He was given a sentence of 36 months imprisonment (32 months in some of the documents).
4. The Judge considered the Appellant's claim for asylum and concluded that it was a complete fabrication and dismissed it. The Appellant's representative had not made submissions in respect of asylum or Articles 2 and 3 of the European Convention on Human Rights.
5. The Judge concluded that there were clear grounds based on public policy and security grounds in respect of the Regulations as to why the Appellant had to be deported and why the decision to refuse him a residence card were the correct and proportionate decisions.
6. The Appellant's grounds of appeal raised several matters and in clearly set out reasons Judge Grant-Hutchinson said that it was arguable that the Judge misdirected himself:
 - (1) In not properly assessing the Offender Manager's letter dated 8 May 2015 which shows that the Appellant was at a low risk of reoffending and low risk of harm;
 - (2) By going behind the sentencing remarks of the sentencing the Judge who found the Appellant to have been good character when he did not find this to be so;
 - (3) By failing to assess the Appellant's ties to Nigeria;
 - (4) By failing to take into account his wife and children's interests in coming to his decision.
7. At the hearing before me Mr Adelakun relied on his written submissions (undated but received by the Tribunal on 4 March 2016). He said that in so far as the Rule 24 Reply from the Respondent was concerned (which raised issues as to why there was no OASYS report) the report had been sought but there had been a delay. That is why instead there was the letter from the Manager. An e-mail was produced to confirm this, but I noted this e-mail was not before the Judge. In so far as the best interests

of the children was concerned, the complaint was that the Judge had only set out their best interests in one and a half lines. The error was that the Judge had not considered the best interests of the children. There were other parts of the Regulations such as Regulation 21(5)(a) taking about proportionality.

8. Ms Johnstone in her brief focused submissions said that she relied on the Rule 24 Response. It was up to the Appellant to produce the OASYS report. It is not an error of law not to consider evidence that was not produced. In relation to the children, there was consideration of them. There was no independent report such as a social workers report. There was no evidence that he was the dominant or primary carer of the twins who were recently born. The findings were open to the Judge.
9. After hearing Mr Adelakun in reply I had reserved my decision.
10. Despite the attractively put submissions by Ms Johnstone, in my judgement there is a material error of law in the Judge's decision.
11. The Offender Manager's Report had said that since his release from prison (which was over 2 years prior to the hearing before the Judge) the Appellant was motivated to find employment, he had attended all appointments on time and had engaged well with supervisions visits. The Manager concluded that there was a low risk of reoffending and that the Appellant posed a low risk of harm. This was significant evidence. It also showed the Appellant's behaviour and positive attitude for some three years since he was released from prison. There had been no re-offending.
12. In addition there was evidence in the form of the sentencing remarks of Her Honour Judge Kushner QC which noted that the Appellant was of previous good character and that he had behaved well whilst in custody including engaging with training and educational courses. He and his co-accused had apparently been nothing other than model prisoners.
13. There was in addition the evidence in respect of the family life that this Appellant had, albeit the twins were born recently and the Appellant only had contact with his child from his previous relationship.
14. The Judge's decision is to be commended for attempting to focus on the real issues, but in my judgment the errors of law identified in the grant of permission and then highlighted further during the Appellant's oral and written submissions before me have been made out.
15. Whilst the fact that the Appellant had been convicted of a very serious offence was the pertinent issue and was made more serious by the Appellant being an over stayer, there still had to be proper consideration of the various positive aspects of the evidence which the Appellant had put forward. All of this was in the scales against the weighty public interest issues, public policy and security issues.

16. I conclude that although the Judge was entitled to take into account that he had decided that the Appellant's protection claim had been fabricated, he was not entitled to go behind the important evidence from the Offender Manager or indeed the sentencing remarks which appeared rather unusually to speak of the Appellant in good terms, despite the serious sentence which was imposed. Additionally in my judgment the best interests of the children were not given the prominence that Statute in the form of section 55 Borders, Citizenship and Immigration Act 2009, that the EEA Regulations refer to and that the case law refers to, despite the great weight that the public interest merits in respect of deportation appeals.
- 17 In the circumstances, albeit with some hesitation but particularly because of the children connected to this case, I conclude that there is a material error of law. I therefore allow the Appellant's appeal. There will be a rehearing at the First-tier Tribunal relating to deportation, the EEA Regulations and Article 8 ECHR. For the avoidance of doubt, the protection claim remains dismissed which was not the subject of an appeal in any event.

Notice of Decision

The decision of the First tier Tribunal Judge contains a material error of law. The decision dismissing the appeal is set aside.

The matter is remitted to the First-tier Tribunal for rehearing.

An anonymity direction is made.

Signed

Date: 21 March 2016

Deputy Upper Tribunal Judge Mahmood