



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/04442/2015

THE IMMIGRATION ACTS

Heard at: Manchester
On: 8th August 2017

Decision Promulgated
On: 9th August 2017

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

Okechukwu Clement Okoli
(no anonymity order made)

Respondent

For the Appellant: Mr Harrison, Senior Home Office Presenting Officer
For the Respondent: Mr Adelakun, Arndale Solicitors

DETERMINATION AND REASONS

1. The Respondent, Mr Okoli, is a national of Nigeria born on the 10th March 1985. On the 20th February 2017 the First-tier Tribunal (Judge Chambers) allowed his deportation appeal with reference to the Immigration (European Economic Area) Regulations 2006 (The Regs). The Secretary of State now has permission¹ to appeal against that decision.

¹ Permission was granted by the First-tier Tribunal (Judge Shimmin) on the 11th January 2017

Background and Matters in Issue

2. The reason that a national of Nigeria is able to place reliance upon the Regs is that Mr Okoli is a family member of a Portuguese national exercising treaty rights in the UK. Her name is Ms Erica Da Conceicado De Almeida Ramos. It is accepted that Ms Ramos and Mr Okoli are married, are in a genuine and subsisting relationship and indeed that they have two children together. So it was that when Mr Okoli was convicted, on the 9th February 2012, of possession with intent to supplying almost half a kilo of Class A drugs (heroin and cocaine), the legal framework to be applied in deporting him was that set out in Regulation 21:

‘21. – (1) In this regulation a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who –

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989⁽¹⁾.

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles –

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

...'

3. It was uncontentious that Mr Okoli had not accrued a permanent right of residence, and so did not benefit from any enhanced protection from removal. The burden lay on the Respondent to show, *inter alia* and in accordance with Reg 21 (5)(c), that the personal conduct Mr Okoli represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society.
4. When the matter came before the First-tier Tribunal, the evidence presented was that Mr Okoli lived with Ms Ramos and their twin children. She testified that he was a good father and looks after the twins when she is working. The Tribunal accepted this evidence and found there to be a "necessary and valuable role" in his children's lives. The Tribunal was also told that Mr Okoli has another child from a previous relationship, a four year old boy living in Wales with his mother. He travels to visit him there once every month.
5. As to his offending the Tribunal had regard to the fact of the conviction for what was undoubtedly a serious offence, to the sentencing remarks of the Judge, and to an OASys report prepared by the offender management service. This was described as "positively favourable" to Mr Okoli. It did not suggest that there was any risk of reoffending, and set out the steps that he had taken to rehabilitate himself, which included taking advantage of training and educational opportunities. On the basis of this material the First-tier Tribunal was not satisfied that the Respondent had shown there to be a genuine, present and sufficiently serious risk affecting one of the fundamental interests of society: the appeal was accordingly allowed.

The Challenge

6. The Secretary of State for the Home Department submits that the approach taken by the First-tier Tribunal reveals the following errors of law:
 - i) Undue weight placed on the OASys report. Whilst it was accepted that the report did indicate that there was a low risk of

reoffending, it could not be determinative of that matter. In the Secretary of State for the Home Department's submission Mr Okoli "clearly had a propensity to reoffend" such that the burden in respect of Reg 21(5)(c) was discharged;

- ii) In its assessment of proportionality the First-tier Tribunal had failed to give reasons as to why it would be unduly harsh for his family if he were to be removed from the UK

Discussion and Findings

7. The focus of the grounds is the OASys report. Mr Harrison pointed out that such reports can rarely if ever be considered determinative of the propensity of an individual to reoffend. He submitted that the reasoning in the determination was brief and that the Tribunal appeared to have uncritically accepted the conclusions in the report. I accept that this is a fair assessment. The reasoning appears to be confined to paragraph 26 of the determination, and it cannot be said that the Tribunal subjected the OASys assessment to detailed scrutiny.
8. I cannot see however, that there is any material error in that. Unlike the report in Vasconcelos (risk-rehabilitation) [2013] UKUT 00378, the global conclusion that there was a "low risk" of reoffending did appear to be justified on the basis of any sort of analysis of this report. The NOMS assessment was that Mr Okoli had an 8% chance of reoffending within a year, and a 15% chance of reoffending within two. Of course, at the date of the appeal before Judge Chambers, this optimistic assessment had proved justified, since there had been no reoffending since Mr Okoli was released in late 2012. Judge Chambers also took into account the sentencing remarks, and the oral evidence of Mr and Mrs Okoli, in making the clear finding that Mr Okoli had taken clear steps to rehabilitate himself, and there was not a propensity to reoffend. Crucially, as the determination notes at paragraph 26: "the contention of the Respondent to the contrary is not made out". This was the real difficulty for Mr Harrison in pursuing the Secretary of State's case. All of the evidence pointed towards rehabilitation having been effected, and there was no evidence at all - bar the conviction itself - that Mr Okoli presented any sort of threat at all. On the basis of Reg 21(5)(e) the Tribunal was entitled to conclude that this in itself was not enough to establish a "genuine present and sufficiently serious threat".
9. As Mr Harrison acknowledged, the finding of the Tribunal on risk was at the heart of the appeal. If the alleged risk could not be made out, Mr Okoli succeeded in his appeal. It follows that I need not address the second ground raised.

Decisions

10. For the reasons set out above I am not satisfied that the decision of the First-tier Tribunal contains a material error of law. The decision is upheld.
11. I was not asked to make an order for anonymity and on that facts of the case I see no reason to do so.

Upper Tribunal Judge Bruce
8th August 2017