



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001052

First-tier Tribunal No: HU/04898/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

7th December 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

IK
(Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sowerby, instructed by Catherine Solicitors
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 22 November 2023

DECISION AND REASONS

1. This is the re-making of the decision in the appellant's appeal, following the setting aside, in a decision of 3 July 2023, of the decision of First-tier Tribunal Judge Farmer.
2. The appellant is a citizen of Nigeria, born on 12 February 1980. He entered the UK on 22 September 1999 on a six month visitor visa and overstayed. On 28 November 2001, his former wife, a French national, submitted an application for a UK residence document as a European Economic Area (EEA) national, with the appellant as her non-EEA spouse. She was granted a residence document on 27 March 2002, valid until 27 March 2007, and the appellant was given an EEA residence card in line with her. On 16 October 2006 the appellant divorced his wife. On 25 April 2008 he applied for a permanent residence card on the basis of his retained rights upon divorce. His application was refused on 8 June 2009 because he did not submit evidence to confirm that his ex-wife had exercised treaty rights prior to the divorce and also failed to provide evidence confirming that he was either an employed person or self-employed person in the UK. An appeal against that decision was dismissed on 12 November

2009. The appellant became appeal rights exhausted on 18 December 2009 and on 2 August 2010 he was served with a removal notice as an overstayer.

3. On 29 September 2011 the appellant applied for an EEA residence card as the spouse of a new EEA national partner, ZB, a Polish national exercising treaty rights in the UK, claiming that they had been in a relationship since 2009. His application was rejected on 12 October 2011 for failure to respond to requests for further information. On 15 March 2012 he submitted another application for an EEA residence card as the unmarried partner of ZB. The application was refused, but the appellant successfully appealed against the refusal decision. In a decision promulgated on 10 January 2013, First-tier Tribunal Judge Black accepted that the appellant and ZB had been in a durable relationship since at least December 2009 and had a child together, H, born on 8 March 2012, and that ZB was exercising treaty rights in the UK. On 12 June 2013 the appellant was issued with an EEA residence card valid until 12 June 2018. He did not make any further application thereafter.

4. On 11 February 2019 the appellant was convicted of conspiring/ concealing/ converting/transferring/removing criminal property. That was related to a large-scale fraud perpetrated on NatWest Bank between October 2014 and April 2015, whereby fraudsters assumed the identity of one of the bank's wealthy customers and emptied his bank accounts of just over £2.2 million. The appellant and others were part of a plan to launder significant sums from that fraud and transferred money between June 2014 and July 2016. The appellant was found to have made transfers to an account named Hypertech Nigeria Limited held at the Standard Chartered Bank of Lagos and to have had some association with that company. In addition to the funds transferred to Hypertech Nigeria, he also put £30,000 into an account held by his Polish partner. The appellant was found to have played a leading role in the conspiracy. The appellant was sentenced to five and a half years' imprisonment.

5. On 21 March 2019 a decision was made to deport the appellant pursuant to the Immigration Act 1971 and section 32(5) of the 2007 Act. He was invited to give reasons why he should not be deported. He made submissions on 9 May 2019 on human rights grounds, relying upon his private life and his family life with ZB and H. On 16 July 2020 the respondent requested further evidence of his relationship to ZB. In response the appellant provided information about his relationship with ZB and H, both of whom had settled status in the UK.

6. On 15 October 2019 the respondent signed a Deportation Order against the appellant under section 32(5) of the UK Borders Act 2007 and on 19 October 2021 made a decision to refuse his human rights claim. In that decision the respondent had regard to the findings made by Judge Black, but noted the lack of evidence to show that the appellant's relationship with ZB and H was still subsisting or that ZB and H even remained in the UK since the judge's decision and considered that, in any event, H could remain in the UK with his mother ZB without the appellant. The respondent, further, did not accept that the appellant had been lawfully resident in the UK for most of his life, and considered that his social and cultural integration in the UK was limited and that he could re-establish himself in Nigeria. The respondent considered that, since the appellant's residence card had expired on 12 June 2018 and he had made no attempt to renew it, and since he had provided no evidence to show that his relationship with ZB was subsisting, he no longer had the right to reside in the UK as the durable partner of an EEA national under regulation 8(5) of the EEA Regulations 2016 and had no status in the UK. He had not applied under the EU Settlement Scheme (EUSS) and had not provided evidence that he had acquired a permanent right of residence prior to entering custody. The respondent concluded that there were

no very compelling circumstances outweighing the public interest in the appellant's deportation.

7. The appellant was notified of his right to appeal that decision under section 82(1) of the Nationality, Immigration and Asylum Act 2002. He gave notice of appeal on 2 November 2021. His appeal came before First-tier Tribunal Judge Dhanji on 5 April 2022, by which time he had been released on licence on 8 December 2021 and had, on 23 December 2021, made an application under the EUSS for settled status which was still outstanding. Judge Dhanji, having regard to the appellant's case that he fell within the protection accorded to the family members of EU nationals by Part VI of Directive 2004/38/EC, adjourned the appeal and issued directions for the respondent to provide a supplementary decision letter regarding the potential issue of the appellant being removed under the EEA Regulations.

8. The respondent then issued a supplementary decision letter dated 1 November 2022 in which it was not accepted that the appellant was a person to whom the EEA Regulations 2016 applied, given that he had failed to make an application following the expiry of his residence card on 12 June 2018 and had not acquired a permanent right of residence in the UK. The respondent considered that the appellant's deportation would still have to be considered under the Immigration Act 1971 and the UK Borders Act 2007 because his application under the EUSS had been made after the deadline of 30 June 2021. The previous decision was therefore maintained.

9. The appellant's appeal was heard on 17 February 2023 by First-tier Tribunal Judge Farmer. In a Respondent's Review produced for the appeal, the respondent maintained the position that the appellant's deportation was not to be considered under the 2016 EEA Regulations and that the appeal fell within the deportation regime set out in sections 117C and 117D of the Nationality Immigration and Asylum Act 2002, with the only issue being whether the 'very compelling circumstances over and above' test was satisfied.

10. Judge Farmer, however, decided that the appellant could bring himself within the protection afforded by the EEA Regulations. She was satisfied that the appellant benefitted from the EEA deportation scheme and she accepted that he had acquired a permanent right of residence by 12 June 2018 and therefore qualified for the middle level of protection under Regulation 27 of the EEA Regulations, as a minimum. She went on to find that the appellant had acquired the top level of protection as he had a period of ten years' continuous residence in addition to acquiring permanent residence, and that his deportation decision had therefore to be taken on imperative grounds of public security. The judge was satisfied that the risk of the appellant re-offending was not serious enough to present an imminent threat to the public to justify his deportation, that his ties to the UK had not been broken by his period of custody and that his deportation was not proportionate. She accordingly allowed the appeal under the EEA Regulations in a decision promulgated on 23 February 2023.

11. The respondent sought permission to appeal against Judge Farmer's decision. There was no challenge in the respondent's grounds of appeal to the judge's decision that the appellant benefitted from the EEA Regulations and fell within the EEA deportation scheme. The sole grounds of challenge were that the judge had failed to give adequate consideration to the fundamental interests of society under Schedule 1 of the EA Regulations, that the judge had failed to consider the seriousness of the consequences of re-offending and that the judge had failed to have adequate regard to the fact that any integrative links established by the appellant had been broken by his offending behaviour and imprisonment.

12. Permission to appeal was granted in the First-tier Tribunal on the grounds that the judge had arguably erred in the approach taken to the level of protection under the EEA Regulations. There was no Rule 24 response from appellant.

13. The matter then came before Upper Tribunal Judge Kebede (sitting alone) on 2 June 2023. The Home Office Presenting Officer at that hearing, Mr Tufan, accepted that there was no challenge to the judge's finding that the appellant was a person to whom the EEA Regulations applied and accepted that the second level of protection was applicable to him as a person with a right of permanent residence in the UK. He submitted that, as a non-EEA national, the appellant could not, however, benefit from the highest level of protection under the EEA Regulations and he submitted that the decision had to be re-made applying the "serious grounds of public policy and public security". Mr Sowerby, for the appellant, argued that, whilst it was agreed that the judge had erred by finding that the appellant could benefit from the highest level of protection under regulation 27, the error was not material since the judge had addressed all the issues relevant to the middle level of protection and made positive findings in that regard, so that his decision to allow the appeal could be upheld.

14. Having considered the materiality of the error Upper Tribunal Judge Kebede decided to set aside Judge Farmer's decision to a limited extent, on the following basis:

"17. I indicated to Mr Sowerby that I was minded to conclude that the judge's error was material such that the decision had to be re-made, since the judge must have had the 'imperative grounds' test for the highest level of protection in mind when making her findings on proportionality and the error would thus have had an impact on her ultimate conclusion. I advised him that I would, however, consider the matter carefully and make a decision after a further analysis of the judge's reasoning and conclusions.

18. I have taken time to consider the matter more carefully and I remain of the same view. At [41] the judge made it clear that she was considering whether the threat the appellant posed to the fundamental interests of society was justified to the appropriate standard based on the highest level of protection. It is therefore clear that that was the basis upon which she proceeded to make her findings on the threat posed by the appellant and on the proportionality of the Secretary of State's decision. Although the same issues relevant to the lowest and middle levels of protection were considered by the judge, this was not a case where the judge made only positive findings about the appellant such that there was simply no basis upon which she could have found a reason to conclude that he could not succeed under the lowest or middle level of protections. At [43] she noted that the appellant was still minimising his role and involvement in the criminal offending, albeit at [45] she took account of his remorse, and at [51] she was satisfied that he was being untruthful about his family circumstances in Nigeria. The judge did not make a clear distinction in her findings between the levels of protection considered and she did not make any specific findings in the alternative to the extent that it could confidently be said that she would have reached the same decision had she not been approaching the appellant's entitlement to benefit under the EEA Regulations on the basis of the highest 'imperative grounds' level of protection. In the circumstances, I have to agree with Mr Tufan that the judge's error in approaching the appellant's case on the basis of the highest level of protection was a material one which infected all her findings and that the decision has to be re-made by considering the appellant's case under the correct level of protection.

19. As such I set aside Judge Farmer's decision allowing the appellant's appeal on that basis, so that it can be re-made under the correct provisions of the EEA Regulations. As discussed above, the respondent does not challenge the finding that the appellant was a person to whom the EEA Regulations applied and that the second level of protection was applicable to him as a person with a right of permanent residence in the UK. Those

findings are therefore preserved. The decision will accordingly be re-made applying the “serious grounds of public policy and public security” level of protection. The appropriate course is for the case to be retained in the Upper Tribunal for that decision to be re-made.”

15. The matter came before Upper Tribunal Judge Kebede for a resumed hearing on 16 August 2023, but was adjourned as the appellant’s family circumstances had changed and further information and evidence was required.

16. The case eventually came before ourselves sitting as a panel, by which time the appellant had produced a further bundle of evidence and a statement explaining that his relationship with ZB had broken down. In his statement he stated that he maintained a close relationship with his son H but that his ex-partner had recently denied him the right to see or speak to his son and that he had therefore, on advice, made an application to the Family Court for contact and shared custody. He stated that he made that application on 31 October 2023 and that he was awaiting a child contact hearing in the Family Court. He provided evidence of his application having been submitted.

17. Both parties were familiar with the guidance in CJ (family proceedings and deportation) South Africa [2022] UKUT 00336 and the complications in relation to disclosure arising where family law proceedings were involved, but neither sought an adjournment and were content to proceed with the case. Mr Terrell did not wish to cross-examine the appellant and was content to accept his evidence in his statement. Both parties then made submissions before us and relied on their respective skeleton arguments.

18. In his submissions, Mr Sowerby referred to the relevant legal provisions applicable to the appellant, as a person who had acquired a right of permanent residence in the UK, in Regulation 27(3) and 27(5) of the EEA Regulations 2016. He submitted that the appellant posed a very low threat and relied upon the OASys report and further probation services’ reports which provided positive comments about the appellant. As for proportionality and the considerations of the fundamental interests of society set out in Schedule 1, Mr Sowerby relied upon the fact that the appellant had been in the UK since the age of 18 and had studied here and was fluent in English, that he had had no prior pattern of criminal behaviour and that there was evidence of rehabilitation, that he had an impressive prison record and that he had outstanding contact proceedings in relation to his son which were not opportunistic and which were addressed in CJ as potentially amounting to ‘very compelling circumstances’ under Article 8.

19. Mr Terrell submitted that, in regard to the question of risk, there were concerns arising from the comments in the Crown Court Judge’s Sentencing Remarks about the leading role played by the appellant in the fraud and concerns arising from the seriousness of the appellant’s crime and from the extent to which he had downplayed his involvement, as evidenced from the account he gave to the clinical psychotherapist when he was assessed and the account set out in the OASys report. Mr Terrell raised concerns about the statistics given in the OASys report in the risk assessment and submitted that it appeared that the author of the report did not have all of the facts since there was no reference to the leading role the appellant played in the fraud. Aside from the seriousness of the appellant’s crime and the lack of recognition of his culpability, Mr Terrell also relied upon the lack of protective factors such as family influence or financial stability. He submitted that the appellant therefore posed a threat to the public and that the decision to deport him was proportionate. He

submitted that without the matter of the contact proceedings proportionality fell firmly on the side of removal, but even with the contact proceedings it was not clear of the appellant's application had been accepted by the Family Court and if proceedings had actually been initiated.

Discussion

20. The starting point in this appeal is that the respondent has not challenged the question of whether the appellant falls within the EEA Regulations 2016 and thus potentially benefits from the 'serious grounds' threshold in Regulation 27(3). That was confirmed by Mr Terrell in his skeleton argument. That is therefore not a matter which we are to re-visit.

21. The main issue for us to decide is whether the serious grounds of public policy and policy security in Regulation 27(3) have been made out by the respondent. It is the appellant's case that they have not, since his personal conduct does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and because the respondent's decision does not comply with the principle of proportionality.

22. Turning to the first issue and the level of threat posed by the appellant, we are mindful of the seriousness of the appellant's offending, noting the length of his sentence and the comments of the sentencing judge who found that he "played a leading role in this conspiracy" and that this was a case of "high culpability" involving a conspiracy spanning a period of over two years, involving significant amounts of money and characterised as having "a sophisticated nature and significant planning". Whilst we acknowledge and accept that the offence was a serious one, Mr Terrell accepted that past conduct alone was not sufficient to show that the appellant posed a threat to society and the question we have to ask ourselves is whether the appellant is likely to re-offend.

23. It was Mr Terrell's submission that we could not be satisfied from the evidence before us that the appellant would not re-offend, in particular because of his lack of recognition of his culpability and the absence of any protective factors.

24. We do note, as Mr Terrell submitted, that the OASys report completed on 10 May 2022 and the clinical psychological assessment report of 26 January 2022 refer to the appellant denying his culpability for the offending. The clinical psychologist assessment refers to the appellant deferring responsibility for the crime onto a friend whom he claimed persuaded him to receive some money into his bank account without him having appreciated the source, nature or quantity of the funds until after the transaction had occurred. That is reflected in the OASys report which refers, at paragraph 2.11, to the appellant not accepting responsibility for the offence and maintaining his innocence, and at paragraphs 11.10 and 12.9 to him being in complete denial of having committed the offence, claiming to have naively helped a friend by keeping money his account, and to not being able to see any wrong-doing. As Mr Terrell submitted that account bears little resemblance to the details provided in the Judge's Sentencing Remarks about the nature of the appellant's offending and the role he played in the fraud.

25. Nevertheless, the OASys report refers at page 37 to a change in the appellant's attitude in that he stated that he would like to address his behaviour and, at page 39 paragraph 7.1, to him having fully achieved an improved ability to recognise the

victim's perspective and needs. The report makes many positive comments about the appellant's attitude and behaviour. At paragraph 4.10 the assessor notes the appellant's educational qualifications, positive attitude to work and prospects of job opportunities. At paragraph 10.8 reference is made of the roles he played in prison, including an equalities peer worker and elected prison council chairman. At page 37 reference is made to his good behaviour, to the numerous courses completed in custody and to him receiving an award for his work as a peer mentor. At page 31 the appellant is assessed as a low risk of re-offending, as on page 33.

26. Those positive conclusions are further reflected in the appellant's probation assessment from the author of the OASys report, in her email of 5 April 2022 to the appellant's solicitor, at page 122 of the appeal bundle before the First-tier Tribunal. In that email, written some four months after the appellant's release on licence, the appellant's probation officer referred to the appellant having been assessed as low risk of re-offending and to his positive engagement with the probation services, to his past achievements and good behaviour in prison including receipt of a Sheriff High Award in June 2021, and to the numerous job opportunities he currently had.

27. Mr Terrell submitted that it was not clear that the author of the OASys report was actually aware of the appellant's leading role in the fraud or whether she had the Judge's sentencing remarks. However page 3 of the OASys report lists the sources of information for the OASys assessment and it seems from that that, whilst the author did not have the Judge's comments, she did have a post-trial report and, as paragraph 2.1 suggests, was aware of the evidence against him. We see no reason to conclude that the assessor was not aware of the full extent of the crime for which the appellant was convicted and sentenced.

28. It is also relevant to note that Judge Farmer was prepared to accept that the appellant, having previously minimised the nature of his offending, had, by the time of the hearing before her on 17 February 2023, shown genuine remorse and appeared to understand that what he had done was wrong. Although her overall risk assessment was set aside, such observations remain undisturbed, particularly since she had the benefit of hearing from the appellant in person.

29. We also have the benefit of a more recent probation report, completed on 13 November 2023, at page 54 of the appellant's current appeal bundle, entitled 'Response to Supervision Report (RTS)', which speaks of the appellant in positive terms and refers to his positive engagement with his licence and his motivation to seek secure long-term employment and undergo training. Whilst the report refers to the potential risk to the public of a financial nature, the conclusion is that he poses a low risk of re-offending and a low risk of harm. A further clinical psychological assessment dated 8 November 2023 refers to the appellant having expressed regret for his criminal offending, blaming himself and taking full responsibility and wishing to move forward and contribute to the workforce.

30. In addition to this positive evidence indicating a change in the appellant's recognition of his own culpability, we consider that there are protective factors which would act as a deterrent from the appellant re-offending. Whilst Mr Terrell referred to the fact that the appellant's family ties in the UK had not previously prevented him from offending, his circumstances have now changed and in our view he has a strong incentive to follow a lawful path in order to assist him in his attempts to enable contact with his son through the family courts. We agree with Mr Sowerby that the evidence does not suggest that the contact proceedings are in any way opportunistic. The appellant's relationship with his son was referred to in the OASys report and it

appears that he had a stable family life with his partner and son until the recent break-up. The importance to the appellant of retaining his close relationship with his son is apparent throughout the further probation reports and there has not been any challenge to the suggestion that the appellant played an active role as a father to his son. That is specifically referred to in the 'Response to Supervision Report (RTS) of 13 November 2023 which, at page 55 of the appeal bundle, makes clear that the appellant's contact with his son was an ongoing issue when the current probation officer was allocated his case in July 2023. Pages 56 and 57 provide further details in that regard. As for the appellant's financial situation, we take account of the fact that he is not currently permitted to work, but we note the positive indications in relation to employment prospects in the OASys report and the further probation reports.

31. We take these matters as positive factors in assessing the level of threat the appellant continues to pose to society and we consider that the concerns Mr Terrell expressed in that regard have been adequately addressed. We note, as Mr Sowerby raised in his submissions, that the appellant was treated by the sentencing Judge as a man "of good character", and we consider that the evidence adequately demonstrates that he is now sufficiently rehabilitated and motivated to pursue a lawful and responsible life-style. We accept, therefore, that the appellant does not present a genuine, present and sufficiently serious threat affecting the fundamental interest of society as listed in Schedule 1(7) of the EEA Regulations.

32. On that basis alone the respondent has failed to demonstrate serious grounds of public policy or public security justifying the appellant's deportation under the EEA Regulations. There is nothing in the evidence to suggest that his deportation would otherwise comply with the principle of proportionality for the purposes of regulation 27(5)(a), and we refer in that respect to our findings below on proportionality in the context of Article 8. Accordingly the respondent's decision is in breach of the appellant's rights under the EEA Regulations 2016 (as saved).

33. It is relevant to note, however, that the appellant's right of appeal arises under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and that considerations under the EEA Regulations are therefore to be considered in the context of an Article 8 proportionality assessment rather than as an appeal made directly against a decision under the EEA Regulations. It is not in dispute that the appellant has a genuine and subsisting relationship with his son, H, and he has an established family and private life in the UK, so that Article 8 is engaged. The decision in relation to the EEA Regulations would, it seems, be sufficient in itself to render the appellant's deportation disproportionate, but in any event we go on to consider all other relevant factors.

34. The appellant has lived in the UK for 24 years, without lawful residence for much of that time, but with the benefit of residence under the EEA Regulations for over ten years. As already mentioned, that is no longer challenged by the respondent. For the reasons we have given, the appellant has sufficiently demonstrated that he does not pose a serious threat to the fundamental interests of society. He has served his sentence in prison for his criminal offending and has an impressive prison record. He has had a stable family life with his EEA national partner and his son until recently and, significantly, he has commenced contact proceedings in the Family Court in relation to his son. In accordance with the guidance in CJ (family proceedings and deportation) [2022] UKUT 336 and the authorities cited in paragraph 1 of the headnote to that case, and given the undisputed nature of his relationship with his son, the proper course would be for the appellant to be granted a period of leave at least until the outcome of the contact proceedings. Given the Upper Tribunal's indication in

paragraph 3 of the headnote to CJ, and considering all the circumstances, it can be concluded that there are very compelling reasons sufficient to outweigh the strong public interest in deportation.

35. The appellant should be aware, however, that his position remains tenuous in that he would not have the benefit of the protection afforded to him by the EEA Regulations 2016 in the event of any further criminal offending and that, in such event, his position may well be re-assessed following the conclusion of proceedings in the family courts. For the present purposes, however, and as matters stand currently, the respondent has failed to demonstrate that the appellant's deportation would be proportionate and the appellant succeeds under the EEA Regulations and on Article 8 grounds.

Notice of Decision

36. The decision of the First-tier Tribunal having been set aside, the decision is re-made by allowing the appellant's appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 November 2023