



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

Abdul (section 55 – Article 24(3) Charter) [2016] UKUT 00106 (IAC)

THE IMMIGRATION ACTS

**Heard at Field House, London
On 9 December 2015**

Decision promulgated

.....

Before

The Hon. Mr Justice McCloskey, President

Between

ADEBAYO ABDUL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellant: Mr S Knafler QC and Mr A Grigg (of Counsel), instructed by Wilson Solicitors LLP

Respondent: Mr D Blundell, of Counsel, instructed by the Government Legal Department

- (i) *There is no hierarchy of weight or importance in the various considerations recited in regulation 21(6) of the EEA Regulations. The weight to be attributed to each factor will vary according to the fact sensitive context of the individual case.*
- (ii) *Where it is contended that the decision maker and/or the First-tier Tribunal (FtT) has acted in contravention of section 55 of the Borders, Citizenship and Immigration Act 2009, the Upper Tribunal will scrutinise the degree of engagement with all material evidence and, in*

particular, will search for clear findings in the decision of the FtT of what the best interests of any affected child are.

- (iii) *Article 24(3) of the EU Charter of Fundamental Rights creates a free standing right (although not absolute).*
- (iv) *Where this right is engaged, a failure by the decision maker and/or the FtT to acknowledge it and to decide accordingly may constitute a material error of law.*

DECISION AND REASONS

Introduction

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 12 December 2013, to make an order deporting the Appellant from the United Kingdom. By its decision promulgated on 03 March 2015, the First-tier Tribunal (the "*FtT*") dismissed the ensuing appeal. Permission to appeal to this Tribunal was granted by Upper Tribunal Judge Rintoul in the following terms:

"It is arguable that the [FtT] erred in failing, in the context of an appeal under the EEA Regulations, to have regard to the provisions of the European Charter of Fundamental Rights
.....

Permission is granted on all grounds."

2. The effect of the grant of permission to appeal is that there are two issues to be determined:
 - (i) Did the FtT err in law by failing to conduct (adopting the Appellant's formulation) a composite proportionality exercise and/or, in particular, by failing to properly recognise and give substantial weight to the Appellant's long residence in the United Kingdom and integration in United Kingdom society?
 - (ii) Did the FtT err in law by failing to consider Article 24(3) of the Charter of Fundamental Rights of the European Union (hereinafter "*the Charter*")?
3. I have been assisted by a detailed chronology of material dates and events prepared by the Appellant's representatives. This is attached as Appendix 1. In very brief compass, the Appellant, a national of Nigeria, is now aged 41 years and has been continuously resident here since aged 16. He has two daughters, both British citizens, who are aged 13 and 11 years respectively. He has been convicted of a series of fraud offences, beginning in 2002 and subsequently in 2003, 2006 and 2012. In 2006, the convicting court made a deportation recommendation. Following a series of subsequent challenges, the Appellant avoided deportation and, in February 2011, he acquired a residence card *qua* family member of an EEA national. His offending has attracted custodial sentences, most recently (in January 2012) a sentence of 4 ½

years imprisonment. This was the impetus for the Secretary of State's impugned decision.

Statutory Framework

4. The Secretary of State's decision was made under the framework of the Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations"). Within Part 4 of this measure there are provisions relating to the exclusion and removal of persons from the United Kingdom. Regulation 19(3) provides:

"Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if–

- (a) that person does not have or ceases to have a right to reside under these Regulations;*
- (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21; or*
- (c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B(2)."*

The discrete topic of decisions taken on public policy, public security and public health grounds is addressed in regulation 21, which provides, in material part:

"(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.

(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."

It is common case that regulation 21(3) applies to this Appellant. Thus it was incumbent on the Secretary of State to address the standard of "serious grounds of public policy or public security" and decide accordingly.

First Ground of Appeal

5. The argument developed by Mr Knafler QC on behalf of the Appellant had several inter-related strands. It was submitted that the FtT failed to properly analyse all material factors and, thus, failed to adopt a composite approach in the proportionality exercise; did not properly recognise the strength of the Appellant's long residence and integration in the United Kingdom and, therefore, failed to accord these factors the requisite weight; conducted an inadequate best interests of children assessment; and, in breach of the principle of equal treatment (or consistency of outcomes), reached an outcome which does not bear comparison with other cases.
6. In the now well developed jurisprudence relating to deportation decisions under the EEA Regulations, certain general principles can be readily identified. In Land Baden – Wurttemberg v Tsakouridis [2011] 2 CMLR 11, the issue of integration featured with some prominence in the decision of the Court of Justice of the European Union (CJEU), which stated:

"[24] According to recital 23 in the preamble to Directive 2004/38, the expulsion of Union citizens and their family members on grounds of public policy or public security can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State.

[25] That is why Directive 2004/38, as follows from recital 24 in the preamble, establishes a system of protection against expulsion measures which is based on the degree of integration of those persons in the host Member State, so that the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be.

[26] In this context, Article 28(1) of that directive provides generally that, before taking an expulsion decision on grounds of public policy or public security, the host Member State must take account in particular of considerations such as how long the individual concerned has resided on its territory, his or her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his or her links with the country of origin.

[27] Under Article 28(2), Union citizens or their family members, irrespective of nationality, who have the right of permanent residence in the territory of the host Member State pursuant to Article 16 of the directive cannot be the subject of an expulsion decision 'except on serious grounds of public policy or public security'.

[28] In the case of Union citizens who have resided in the host Member State for the previous 10 years, Article 28(3) of Directive 2004/38 considerably strengthens their protection against expulsion by providing that such a measure may not be taken except where the decision is based on 'imperative grounds of public security, as defined by Member States'."

As this decision and others make clear, one of the purposes of the underlying measure of EU Law, Directive 2004/38/EC (the "Citizenship Directive") was to establish a more prescriptive regime in the realm of expulsion and removal, containing appropriate safeguards for the person concerned.

7. Mr Knafler's submissions placed particular reliance on two decisions of the United Kingdom courts. The first is B v Secretary of State for the Home Department [2000] EWCA Civ 158, another deportation case in which the Appellant, an Italian national aged 45, had lived in the United Kingdom since aged 7. The Secretary of State proposed to deport the Appellant on the ground that he had subjected his daughter to "*prolonged and systematic child abuse*" between the ages of 12 and 18 years, giving rise to a punishment of five years imprisonment: see [19]. The evidence was that he had a propensity to re-offend, albeit restricted by limited opportunity. Delivering the judgment of the Court, Sedley LJ described the Appellant's 38 years residence in the United Kingdom as a "*factor of real weight*": see [35]. He continued:

"What in my judgment renders deportation a disproportionate response to this appellant's offending, serious as it is, and to his propensity to offend such as it may now be, is the fact that it will take him from the country in which he has grown up, has lived his whole adult life and has such social relationships as he possesses. It would negate both his freedom of movement and respect for his private life in the one place, the United Kingdom, where these have real meaning for him."

See [37].

While the Court acknowledged that the Secretary of State's decision would withstand an irrationality challenge based on Wednesbury principles, it concluded that the decision was unlawful on the ground that it was disproportionate in both EU law and ECHR (Article 8) terms. Ward LJ and Simon Brown LJ expressed their views in essentially the same terms.

8. Mr Knafler also relied on the decision of the Asylum and Immigration Tribunal (AIT) in LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024, a case involving regulation 21(4) of the EEA Regulations. There it was held that the tribunal had erred in law in applying the highest level of protection. The decision continues, at [116]:

"However, even if one judges their reasoning by reference to the second level of protection they erred in our view in failing to consider the particular circumstances of LG's position, his long residence in this country, including more than ten years residence before any offences were committed and his lack of links with Italy."

The effect in law of this failing was assessed thus, at [117]:

"This failure meant that the second Tribunal's assessment of proportionality was fatally flawed. In our view, even acknowledging the seriousness of the offence in 2000, and the possible risk of re-offending, we do not think that expulsion is a proportionate response for someone who came here as a child, has acquired a right of permanent residence in this country, has lived here for some 15 years before the crime was committed and has no significant links with Italy. In such a case we think that public policy considerations should carry little weight."

The appeal of LG was allowed accordingly.

9. As noted above, one discrete limb of this ground of appeal concerns the best interests of children assessment carried out by the FtT. The arguments on behalf of the Appellant reminded this Tribunal of its decision in JO and Others (section 55 duty) Nigeria [2014] UKUT 517 (IAC) and, in particular, the duty imposed by section 55 of the Borders, Citizenship and Immigration Act 2009 (the "2009 Act") on the decision maker (in the first instance) and the tribunal (on appeal) to identify all facts and factors bearing on the best interests of any affected child. To this I would add that the next step is to make clear findings relating to the child's best interests. These are essential pre-requisites to a proper balancing of all factors, including the public interest, in the proportionality exercise. In this context, the parties' submissions also drew attention to the decision of this Tribunal in MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC).
10. Peart v Secretary of State for the Home Department [2012] EWCA Civ 568, another decision to which Mr Knafler directed my attention, is an illustration of an assessment by the Court of Appeal that the tribunal below erred in its application of section 55 in failing to give sufficient consideration to what was in the child's best interests or to give the child's welfare the degree of importance it merited: see [15]. The second error of law identified by the Court of Appeal, namely the tribunal's failure to assess the totality of the factors bearing on the Appellant's family and private life and "to consider the overall significance of the different individual relationships" in play (see [16] – [17]), is also worthy of note. I observe that these are plainly fact sensitive.
11. The submissions of Mr Blundell on behalf of the Secretary of State highlighted the importance of considering the decision of the FtT in substance and as a whole, in accordance with the exhortation of the Court of Appeal in AD Lee v Secretary of State for the Home Department [2011] EWCA Civ 348 at [17]:

"[Counsel] criticises the form in which the Judge has expressed his conclusion ...

He contends that it prioritises the case for deportation and considers only whether the impact on the family is so great as to outweigh it, when it ought to be approaching the issues in the opposite order, prioritising [his client's] interests and asking whether they are outweighed by the case for deportation. It seems to us that, at least in the present context, this is a matter of form, not of substance

Provided both the child's interests and the case for deportation have been properly appraised, the question whether one outweighs the other can be approached from either direction."

Mr Blundell further submitted that the exercise of comparing the factual frameworks of different cases urged on the Tribunal by the Appellant is inappropriate. He also reminded the Tribunal of the decision in EO (Nigeria) v Secretary of State for the Home Department [2014] EWCA Civ 1418 at [8]. Mr Blundell's central submission on the first ground of appeal, in substance, resolved to the contention that this Tribunal should guard against the temptation of microanalysis and excessive forensic examination of the decision of the FtT.

12. There is one piece of evidence which has a particular bearing on this ground of appeal, namely the report of the independent social worker, to which I now turn. This report was received in paper form by the FtT. Based on interviews of all of the protagonists and the consideration of other materials, the report focuses particularly on the relationship between the Appellant and his younger daughter, aged 11 years. It contains the following material assessments and conclusions:

- (a) While children form attachments to any consistent care giver who is sensitive and responsive in their social interactions with them, the quality of the social engagement is more influential in developing that attachment than the amount of time spent. In the Appellant's case, the quality of his interaction with his daughter when they are together is so positive and involves such a high degree of involvement that their relationship has grown and flourished in consequence.
- (b) The Appellant has taken positive steps to initiate a relationship between his daughter and her half-sister (the Appellant's older daughter, aged 13).
- (c) The Appellant and this daughter have *"a strong, close relationships and (that) their relationship is both meaningful and valuable to both of them"*.
- (d) This relationship is extremely important to the Appellant's daughter who *".... sees what he offers her in terms of emotional and psychological support as being essential to her positive functioning and complementing, not duplicating, what her mother offers"*.
- (e) The Appellant *".... has consciously thought about the manner of his interaction with [his daughter] as she has grown older and more mature [she] is very emotionally and psychologically dependent on her father presently, because of all he is able to offer her"*.
- (f) The loss of the Appellant from his daughter's life would be *"very psychologically difficult to manage and would be like an abandonment to her"*.
- (g) Research establishes the importance of the continued presence of a person contributing substantially to a child's emotional stability, security and self-esteem.

- (h) Research further demonstrates that the deportation of the Appellant would render his daughter more likely to show signs of depression and experience feelings of loss and sadness. Long distance contact would be no substitute.
- (i) Research also establishes the phenomenon of *“significant behavioural changes amongst most children who had experienced parental deportation ...”*
- (j) Such children have *“a consistently lower score on a variety of moral indexes.”*
- (k) Moreover, such children *“... are, on average, more likely to be academic under-achievers more likely to experience behaviour problems at school such as having difficulty paying attention or being disobedient”*
- (l) The extreme distress which the Appellant’s daughter is likely to suffer in consequence of his deportation *“... will endure in some form beyond the immediate and medium term”* and is unlikely to be adequately managed by her mother, giving rise to a deleterious impact on this relationship also.

This report was not challenged by any other evidence.

13. In its decision, the FtT, in summarising the documentary evidence available to it, referred to the aforementioned report and quoted from certain passages which have a correlation to parts of [12] above. In a later passage, in its consideration of the best interests of children issue, the FtT stated:

“[The report] ... refers to academic research showing the importance of children maintaining a relationship with their fathers. The Presenting Officer accepts that this would be in the best interests of both [children]. I too accept that but, even if the Appellant were to remain living in the UK, the Appellant will not be able to maintain an active and positive relationship with his daughters if he resumes a life of crime and risks further lengthy terms of imprisonment. There is a significant risk of him continuing to do so and this must be taken into account when assessing the impact of his deportation. Conversely if the Appellant relocates to Nigeria, he does have the option of maintaining the relationship through regular indirect contact via Skype etc”.

[my emphasis]

At this point of its decision, the FtT’s assessment of the children’s best interests terminates and the Judge embarks upon a balancing exercise and the formulation of a series of conclusions. These include a recognition that the Appellant’s departure from the United Kingdom would have an (unspecified) *“adverse impact”* on the children. This is followed by the statement in the concluding paragraph:

“.... The family life of the Appellant and that of his children will be placed in some jeopardy by his removal and the potential effect on the children is undoubtedly the strongest factor in his favour.”

[Emphasis added.]

14. In my judgment, the FtT failed to engage properly with the assessments and conclusions of the expert concerned. I agree with Mr Blundell that, where issues of

this kind are concerned, it will rarely be appropriate for an appellate tribunal to conclude that the evidence under scrutiny was simply disregarded by the lower tribunal. This conclusion is not open to this Tribunal in the present case, since the judge was clearly aware of the expert report. However, the best interests of children exercise, where it falls to be performed, is one of unmistakable importance and gravity. It is not enough to pay lip service to the evidence bearing on this issue. Rather, an appellate tribunal will invariably search for indicators that the lower tribunal has fully considered the evidence, has understood it and has properly engaged with it. I find no such indicators in the present case. The short sentence confining the expert evidence to a rehearsal of academic research demonstrating the importance of children maintaining “*a relationship*” between the Appellant and his children with their father fails to satisfy these elementary touchstones. While the FtT was probably correct to conclude that “*regular indirect contact via Skype etc*” would secure the aim of the maintenance of “*a relationship*” between the Appellant and his children, the use of the indefinite article is striking. This falls well short of a proper assessment of the children’s best interests and, further, represents a manifest dislocation from the detailed and undisputed expert evidence.

15. Furthermore, the appellate tribunal will always search for a clear formulation, or identification, of the best interests of the child or children concerned in the decision of the first instance tribunal. This should normally be the subject of a clear finding or findings, all material evidence first having been examined. I consider that this too is lacking in the decision of the FtT. This failure flows naturally from the main shortcoming identified above. Finally, the conclusion of the FtT that the removal of the Appellant from the United Kingdom would (merely) place the family life enjoyed by the children and him “*in some jeopardy*” is simply unsustainable. Their family life, as enjoyed and experienced by the three persons involved, would be decimated, left hanging by the thread of occasional long distance communications.
16. This analysis impels to the inexorable conclusion that the challenge based on section 55 of the 2009 Act must succeed. Furthermore, the materiality of this error of law is beyond plausible dispute, given the obvious importance of the children issues in the proportionality assessment. Accordingly, the Appellant’s challenge to the decision of the FtT succeeds.
17. In proceeding to consider the second element the first ground of the Appellant’s challenge, I consider that the standard in play is that of proportionality. The distinction between the standards of proportionality and rationality was highlighted by this Tribunal in its recent decision in R (SA) v Secretary of State for the Home Department (Human Rights Challenges: Correct Approach) IJR [2015] UKUT 536 (IAC), at [20] particularly:

“At this juncture, it is appropriate to recall that many human rights decisions involve balancing exercises. These are evaluative processes which normally entail weighing the individual, personal interests of the person concerned with some competing public interest or interests. For immigration judges the dominant Convention right in this respect is Article 8. It is a truism that in a large majority of Article 8 challenges in the immigration sphere the question to be determined by the tribunal is that of proportionality, the last of the stages specified in R (Razgar) v SSHD [2004] 2AC 368. In such cases the question for the Tribunal is not whether the impugned decision is irrational or is vitiated by the application of

the Wednesbury principles or is procedurally unfair or contravenes some other public law standard. The correct question is, rather, whether the decision is a disproportionate means of pursuing the legitimate aim in play. If "yes", the conclusion is that the Convention right has been breached: not that the decision is unlawful on account of some public law misdemeanour."

Further, it is timely to recall the correct approach in a proportionality assessment. It involves consideration of the following questions:

- (i) Is the objective sufficiently important to justify limitation upon a fundamental right?
- (ii) Is the measure rationally connected to the objective?
- (iii) Could a less intrusive measure have been adopted?
- (iv) Has a fair balance been struck between individual rights and the interests of the community?

See Bank Mellat v HM Treasury (No 2) [2013] UKSC 39, at [20].

18. I refer also to the more recent consideration of these principles by the Supreme Court in R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57, at [23]-[33]. Having regard to the profound reflections on proportionality in Keyu and Others v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69, there is clearly scope for further development and refinement in the role of the court, or tribunal, in cases involving the proportionality of an interference with a Convention right.
19. This dimension of the Appellant's challenge involves the submission that the FtT erred in law by giving insufficient weight to the twin factors of the Appellant's long residence in the United Kingdom and his integration in UK society. I consider that, properly analysed, the contention formulated by Mr Knafler was that the FtT was obliged to accord greater weight to these two considerations and was thus mandated by the decisions in B and LG and CC. It seems to me that these decisions, at their zenith, go no further than holding that, in a particular factual matrix, long residence in the United Kingdom, coupled with a right of permanent residence in one of the cases, may qualify for the allocation of significant weight in the proportionality balancing exercise. Thus a lower tribunal could be considered to have erred in law if the appellate court or tribunal, forming its own view of proportionality, makes this assessment.
20. To summarise, I consider that neither the Court of Appeal in B nor the AIT in LG and CC purported to formulate any legal principle or rule to the effect that the factors of long residence and integration must invariably attract substantial weight. My analysis of these decisions is that the Court of Appeal and AIT, giving determinative weight to these stand out factors, decided that deportation was not appropriate and necessary to its legitimate aim on the particular facts. Furthermore, the consideration that the appellate court was the ultimate arbiter of proportionality and that

proportionality is a sharper tool than its common law cousin rationality shines brightly in the judgments of the Court of Appeal in B, particularly that of Sedley LJ. As he noted at [27]:

“... Once we have taken the primary facts from the IAT, this is a case in which we are as well placed as that tribunal to decide what to make of them.”

This analysis also disposes of the inequality of treatment argument. In short, no disparity arises when one is comparing apples with pears.

21. I consider that Mr Knafler’s argument on this discrete issue is further confounded by the statutory language. Regulation 21 of the EEA Regulations imposes two particular duties on the Secretary of State and, on appeal, the tribunal. First, the principles enshrined in regulation 21(5) must be applied. Second, the inexhaustive list of factors in regulation 21(6) must be considered. These include “*the person’s length of residence in the United Kingdom [and] the person’s social and cultural integration into the United Kingdom*”. The duty imposed is to consider these factors. This mirrors recital (23) of Directive 2004/38/EC which, in the context of considering expulsion, states:

“The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.”

The corresponding substantive provision of the Directive is Article 28, which is couched in precisely the same terms. So too is the equivalent part of Regulation 21.

22. I consider that neither the Directive nor the transposing measure contains any indication that the factors of long residence and integration automatically qualify for greater weight than other material considerations. Furthermore, while the factors of long residence and integration are specifically recognised in the regime created, they are the gateway to increased protection against expulsion via the higher criteria. To conclude, I consider that there is no hierarchy in the weight to be attributed to the factors evaluated in the Regulation 21 exercise. The quantum of weight to be allocated to each factor will vary according to the fact sensitive nature of every case.
23. It follows from the above analysis that it is open to this Tribunal, in principle, to hold that the decision of the FtT infringes the principle of proportionality if it considers that greater weight should have been given to the factors of long residence and integration. This being an Article 8 ECHR challenge, I consider this to be the correct formulation of the question: to be contrasted with the tests which one would be posing in a judicial review challenge or a pure error of domestic law appeal (per Edwards v Bairstow [1956] AC 14) with no EU or human rights overlay, that is to say (in shorthand) whether the decision of the lower tribunal and/or the decision maker is vitiated by irrationality or a failure to take into account all material considerations or permitting the intrusion of something immaterial, or a combination of any of these vitiating agents.

24. I apply this approach to the decision of the FtT in the following way. The Judge began with the unexceptional self-direction that, pursuant to Regulation 21, it was incumbent upon him to consider factors such as “(the Appellant’s) *length of residence in the UK, social and cultural integration into the UK*”. He then noted in particular:

“The Appellant has resided continuously in the UK since 1990 and he has integrated into the UK during that period in a positive way such as through his studies”

Next, the Judge gave consideration to other factors bearing indirectly on the Appellant’s connections with the United Kingdom, in particular his enduring links with family members in Nigeria and his ability to re-establish himself in his country of origin if obliged to return there. The Judge then considered the circumstances of the Appellant’s two children in the United Kingdom. This was followed by his acknowledgement of a previous positive assessment of the Appellant by an earlier tribunal prior to his most recent offending. At the conclusion of these passages, the Judge stated:

“I conclude that the Appellant’s removal is justified under the EEA Regulations in the interests of public security.”

He then gave separate consideration to the question of proportionality in the context of Article 8(2) ECHR. In doing so, he observed that this exercise was one overlapping considerably with that which he had conducted under regulation 21. I consider that there is indeed a significant merger between these two exercises and the contrary was not contended.

25. The ultimate conclusion of the FtT was that the public interest must prevail. The discrete public interest engaged was that of public security. The scales tipped in favour of the public interest on account of the seriousness of the Appellant’s offending, his role in the offences, the repeated nature of his offending, the protracted period during which he had offended, his previous failures to rehabilitate, his abuse of trust and his neglect of his children’s interests. Drawing all of these factors together, the FtT concluded that the statutory test of “*a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*” was satisfied. This, in the FtT’s assessment, outweighed the factors on the other side of the scales. For the reasons given in [14] and [15] above, I consider the proportionality assessment and conclusion of the FtT to be legally flawed. The flaws identified permeate and infect the exercise in its entirety. While I have rejected the terms in which this aspect of the Appellant’s challenge was advanced, in this sense and to this extent this discrete feature of the Appellant’s case also succeeds.

Second ground of appeal: EU Charter of Fundamental Rights

26. The Charter entered into force, in tandem with the Lisbon Treaty, on 01 November 2009. Constitutionally, it is one of the three dominant instruments of governance of the EU. Notably, one of the recitals in its preamble proclaims the necessity of strengthening the protection of fundamental rights. This is reflected in its contents. Thus while many of its provisions approximate closely to the European Convention

on Human Rights and Fundamental Freedoms (the “ECHR”), the reach of the Charter is more expansive. In some specific instances, it goes demonstrably further than the ECHR. Furthermore, it enshrines rights which the ECHR does not contain, such as economic and social rights, cultural rights and others belonging to the realms of the environment, consumer protection and criminal justice. The adoption of the Charter is, by some measure, the most important development in human rights protection in Europe since the introduction of the ECHR over 60 years ago.

27. Article 24 of the Charter bears the title “The Rights of the Child”. Under this banner, it provides:

- “(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
- (2) In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.*
- (3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless this is contrary to his or her interests.”*

I have highlighted paragraph (3), as this is the provision of Article 24 which the Appellant invokes. Having regard to the gateway provisions of Article 51, it is clear that, by virtue of the EU law context, Article 24 applied to both the underlying decision of the Secretary of State and that of the FtT on appeal. This was not in dispute. The parties were also agreed that Article 24(3) extends beyond the narrow context of disputes relating to the residence of and contact with children.

28. Article 24 has been considered by the CJEU. In Deticek v Sgueglia [2009] EUECJ C-403/09 the Court gave consideration to the interpretation of Council Regulation (EC) 2201/2003. This concerns jurisdiction and the recognition and enforcement of judgments in matrimonial matters and, specifically, the question of whether this permits a provisional child custody measure in certain circumstances. The Court, having noted that the Charter features in the preamble to the Regulation, described the rights of the child contained in Article 24 as “*fundamental*”, at [53], continuing:

“[54] One of those fundamental rights of the child is the right, set out in Article 24(3) of the Charter, to maintain on a regular basis a personal relationship and direct contact with both parents, respect for that right undeniably merging into the best interests of any child.

[55] Article 20 of Regulation No 2201/2003 cannot be interpreted in such a way that it disregards that fundamental right.

[56] In this respect, it is clear that the wrongful removal of a child, following a decision taken unilaterally by one of the parents, more often than not deprives the child of the possibility of maintaining on a regular basis a personal relationship and direct contact with the other parent.

[57] Article 20 of Regulation No 2201/2003 cannot therefore be interpreted in such a way that it can be used by the parent who has wrongfully removed the child as an instrument for

prolonging the factual situation caused by his or her wrongful conduct or for legitimating the consequences of that conduct.

[58] *It is true that, under Article 24(3) of the Charter, an exception may be made to the child's fundamental right to maintain on a regular basis a personal relationship and direct contact with both parents if that interest proves to be contrary to another interest of the child."*

This analysis gave rise to the following conclusion:

"[59] It follows that a measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interest underlying that fundamental right."

29. In a later decision, McB v El E [2010] EUECJ C-400/10, a case which had a Hague Convention context involving the disputed return of a child from the United Kingdom to the Republic of Ireland, the CJEU said the following, at [60]:

"It must also be borne in mind that Article 7 of the Charter, mentioned by the referring court in its question, must be read in a way which respects the obligation to take into consideration the child's best interests, recognised in Article 24(2) of that Charter, and taking into account the fundamental right of a child to maintain on a regular basis personal relationships and direct contact with both of his or her parents, stated in Article 24(3) (see, to that effect, Case C-540/03 Parliament v Council [2006] ECR I-5769, paragraph 58). Moreover, it is apparent from recital 33 in the preamble to Regulation No 2201/2003 that that regulation recognises the fundamental rights and observes the principles of the Charter, while, in particular, seeking to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter. Accordingly, the provisions of that regulation cannot be interpreted in such a way that they disregard that fundamental right of the child, the respect for which undeniably merges into the best interests of the child (see, to that effect, Case C-403/09 PPU Detiček [2009] ECR I-0000, paragraphs 53 to 55)."

There was some focus in the arguments of counsel on the "undeniably merges into" part of the above passage. In my judgment, taking into account its approach in Deticek, to which explicit reference is made, the Court was not suggesting that Article 24(3) adds nothing of substance to Article 24(2).

30. I am of the opinion that Article 24(3) creates a free standing right. It may, of course, be viewed as the unequivocal articulation of a concrete "best interests" right and, on this analysis, is a development, or elaboration, of Article 24(2). Furthermore, given the exception formulated in the final clause of Article 24(3), the nexus with Article 24(2) is unmistakable. However, I consider it clear that Article 24(3) was designed to create a discrete right, an analysis which is harmonious with general principles of EU law. These include the well known principle that every part of a measure of EU law is presumed to have a separate and individual effect and impact. Article 24(3) may also be viewed through the prism of the principle that where one has an amalgam of specific and general provisions, the former should normally be considered in advance of the latter. This construction is further fortified by the Commentary of the Charter of Fundamental Rights of the European Union (published by the EU Network of Independent Experts on Fundamental Rights), at p207:

“..... Children are no longer considered as mere recipients of services or beneficiaries of protective measures but rather as rights holders and participants in actions affecting them.”

31. Notwithstanding that Article 24(3) of the Charter was canvassed in the Appellant's written argument at first instance, the decision of the FtT is silent on this issue. This failure is reflected in the submissions of Mr Blundell which, reduced to their essential core, advanced the contention that no material error of law had been committed. The outworkings of this argument were that the FtT was clearly aware of the issue of separation of the Appellant from his children, something which is, in Mr Blundell's words, an “*ever present*” in cases of this kind.
32. The main flaw in this argument, in my view, is that it overlooks the profound nature of the flaw in the decision of the FtT. In short, the Judge failed to acknowledge the existence of a right conferred on both children by one of the constitutional measures of EU law. *Ipsa facto*, he also failed to appreciate that this has been characterised a “*fundamental*” right in the jurisprudence of the CJEU. If this error had been avoided, it is as a minimum possible, as Mr Knafler argued, that the Judge's analysis in the passages to quoted in [13] above would have been quite different. In particular, it seems to me inconceivable that the vague “a relationship” and the limp “*in some jeopardy*” assessments would have featured. I conclude, accordingly, that the FtT's error of law on this issue cannot be dismissed as immaterial.

Omnibus Conclusion

33. Having found that the decision of the FtT is infected by two material errors of law, I order that it be set aside.
34. The Upper Tribunal is fully equipped to re-make the decision and the appeal is, therefore, retained in this forum for such purpose.
35. If either party wishes to propose any specific case management directions, this must be effected in writing not later than 15 January 2016. Directions and/or a case management review may follow.

Seamus McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 15 December 2015

APPENDIX

<u>Date</u>	<u>Event</u>
29/08/1974	Appellant born in Nigeria
14/07/1981	Appellant entered UK for the first time
16/11/1981	Leave to remain in the UK granted until 31/10/1982
06/10/1982	Leave to remain in the UK granted until 31/10/1983
21/10/1983	Leave to remain in the UK granted until 31/10/1984
17/07/1984	Appellant returned to Nigeria
31/07/1990	Leave to remain in the UK granted for 6 months
22/08/1990	Appellant re-entered UK to find school
09/11/1990	Appellant returned to Nigeria
13/12/1990	Leave to remain in the UK granted for 6 months
31/12/1990	Appellant re-enters UK for a third time and is granted leave to remain in the UK until 30/10/1992
04/11/1992	Appellant granted leave to remain in the UK until 31/10/1993
17/09/1993	Appellant granted leave to remain in the UK until 31/10/1994
18/11/1994	Appellant granted leave to remain in the UK until 31/10/1995
31/08/1995	Appellant granted leave to remain in the UK until 31/10/1996
1996	Appellant married AO, (British National)
11/11/1996	Appellant granted leave to remain in the UK until 31/10/1997
31/10/1997	Appellant becomes over-stayer
2001	Appellant begun relationship with RT (Swedish National)

<u>Date</u>	<u>Event</u>
07/09/2001	Application for leave to remain on basis of marriage to AO (British citizen)
12/11/2001	Application refused
18/07/2002	Appellant had daughter A with RT
January 2003	Appellant divorced AO
18/04/2003	Appellant married RT
27/01/2004	Appellant had daughter M with British National SW
04/07/2004	Appeal (Appeal 1) against refusal of application made on 07/09/2001
18/08/2004	Appeal dismissed
07/09/2004	Appeal Rights Exhausted
17/05/2005	EEA Application submitted on grounds of Appellant's marriage to EEA national
15/11/2005	Application Refused
03/02/2006	Appeal (Appeal 2) heard against refusal of application made on 17/05/2005
04/03/2006	Appeal dismissed
10/05/2006	Appeal Rights Exhausted
06/12/2006	Conviction- 2 counts of conspiracy to defraud (3 years imprisonment)
21/07/2008	Served with notice to make deport order
20/01/2009	Appeal (Appeal 3) against decision to make deportation order
30/01/2009	Appeal dismissed
06/04/2009	Appeal rights exhausted
11/09/2009	Application to revoke deportation order submitted

<u>Date</u>	<u>Event</u>
06/10/2009	Application refused
01/12/2009	Appeal (Appeal 4) heard against refusal of application to revoke deportation order
10/12/2009	Appeal allowed
21/12/2009	Deport Order Revoked
18/02/2010	EEA Application submitted
17/09/2010	Application refused
11/11/2010	Appeal (Appeal 5) against refusal of EEA application heard
16/11/2010	Appeal allowed
08/02/2011	Issued EEA residence card
27/01/2012	Conviction- Conspiracy to defraud (54 months)
16/12/2013	Served Reasons for deport
16/02/2015	Appeal (Appeal 6) against decision to make deportation order
03/03/2015	Appeal dismissed by Immigration Judge Talbot
17/03/2015	Application made for permission to appeal to the First Tier Tribunal
30/03/2015	Application for permission to appeal to First Tier Tribunal Refused by Immigration Judge Parks
09/04/2015	Application made for permission to appeal to the Upper Tribunal
24/06/2015	Application for permission to appeal to the Upper Tribunal Granted by Upper Tribunal Judge Rintoul
21/08/2015	Notice of Hearing issued
09/09/2015	Upper Tribunal Hearing listed