



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

Appeal Number: DA/00400/2014

THE IMMIGRATION ACTS

**Given orally at Field House
On 21 November 2014**

**Determination Promulgated
On 22 December 2014**

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BASIL ONYEMAUCHECHUKWU OKAFOR

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer

For the Respondent: Miss Nwamka-Nnamani, Counsel, instructed by Samuel Louis Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge Buckwell and Mr Jameson JP, sitting at Taylor House on 20 August 2014, in which by a determination promulgated on 2 September 2014 they allowed the appeal of the claimant, Mr Okafor, against the decision of the Secretary of State to make an order for his deportation to Nigeria as a result of the commission of a criminal offence.

2. The appeal was allowed both under the provisions of the Immigration (European Economic Area) Regulations 2006 and by reference to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
3. The determination sets out the salient facts. The claimant is a citizen of Nigeria, born in 1958, whose immigration history is that he entered the United Kingdom for the first time in July 1998 with an EEA family permit. He then left the country and returned with a second family permit in July 1999. Again he left and once more returned in June 2000, by reference to the EEA family permit. He applied for the issue of a residence card, which was issued in July 2000, valid until 2004. He was stated to be the family member of an EEA national present in the United Kingdom. He was granted indefinite leave to remain, according to the determination, under the EEA Regulations in February 2004. I am unsure of that matter; but it is immaterial for present purposes.
4. An application for naturalisation for British citizenship was, however, refused in March 2008. The claimant returned to Nigeria in March 2006. It is not known for sure when he re-entered the United Kingdom but he came to the attention of the authorities in 2010, when he was arrested for certain offences. On 5 November 2010 the claimant was convicted at Kingston-upon-Thames Crown Court for an offence of theft. He was sentenced to five years' imprisonment. There was no appeal against the conviction or sentence. The claimant was released from prison in March 2013.
5. The offence for which the claimant was imprisoned arose as follows. The claimant was a solicitor of the Supreme Court. In the course of his practice as a solicitor he in effect defrauded various third parties of a total sum of some £633,000. The seriousness of that offence is underlined by the remarks of the judge who sentenced the claimant to imprisonment. Amongst other matters, it was emphasised that because the money in question had not proved traceable, the Solicitors Indemnity Fund had in effect had to shoulder the burden. It seems that the money was dissipated in large part by the claimant in Nigeria.
6. The panel heard evidence in that regard from the claimant. He said amongst other things that he had spent money in Nigeria upon his own medical treatment and particularly upon treatment for a heart condition of his brother. The sums in question mentioned by the First-tier Tribunal at paragraph 23 of its determination amount to a total of some £52,000.
7. At paragraph 25, it is recorded that the claimant was asked some questions about his financial position, to which he replied that he did not have funds to move elsewhere in Nigeria in order to undertake treatment for his renal condition (to which I shall turn in due course). Asked whether he had assets, the claimant referred to a home in his village.

8. The Secretary of State contended that the seriousness of the offence and the consequences of it were such as to make it appropriate to deport the claimant pursuant to regulation 19 of the 2006 Regulations.
9. The claimant's case as put forward to the First-tier Tribunal was essentially as follows. It was contended that he had committed what in effect was a one-off offence which was unlikely to be repeated. He had received appropriate remedial training whilst in prison. He had shown no indication either before or since that offence of committing any other criminal offences. He was as a consequence not a person who represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, such as to render deportation appropriate.
10. Furthermore, in considering the proportionality of the claimant's removal, great emphasis was placed upon his medical state. In short, he is suffering from a serious renal condition which renders him dependent upon very regular dialysis. He is also on a waiting list to receive a new kidney. It seems from the evidence that the claimant attempted whilst in Nigeria to obtain relief from this condition by seeking forms of traditional medicine which did not prove satisfactory and that this lay behind his decision to return to the United Kingdom.
11. The panel noted the seriousness of the offence. That is plain from paragraphs 45 of the determination.
12. At paragraph 51, they noted, as I have already indicated, that the claimant was previously of good character and there was

“no evidence of a suspicion of a commission of any other offence since his discharge from prison. I find that he did take opportunities in prison to undertake further education but we do not find on our assessment of the evidence in the round that on the current facts before us that the claimant represents a genuine, present and sufficiently serious threat to our society to justify removal”.
13. The panel then turned to the issue of Article 8. They set out at paragraph 52 relevant case law. They then noted at paragraph 54 the significant health difficulties that the claimant faced.
14. At paragraph 55, the panel came to the conclusion that if the claimant had not otherwise succeeded in his appeal then “It would have been appropriate for the respondent to consider that the appellant be permitted some discretionary leave pending a potential [kidney] transplant”. The panel noted that the information regarding the need for a transplant was not before the Secretary of State when she took her decision to deport but that nevertheless it was relevant to their consideration of the Article 8 issue.
15. Having set out their conclusions regarding the EEA Regulations at paragraph 57, at paragraph 58 the panel said this:

“Additionally but in the alternative we would find that in the particular circumstances the respondent would not be entitled to apply Article 8 to the ECHR in response to the engagements of Article 8(1) ECHR rights with respect to the family and private life of the appellant in relation to Article 8 ECHR. That aspect of her decision would not be in accordance with the requirements of section 6(1) of the Human Rights Act 1998.”

16. The Secretary of State sought and obtained permission to appeal that decision on a number of grounds. The first concerns the issue of the claimant’s financial circumstances. It is contended that the claimant failed to provide an explanation as to what he did with the money that he had obtained fraudulently from third parties. The grounds submit “As he has not paid the money back it is submitted that he may still be benefiting from it”. This led to the assertion that whilst the claimant may have been found to have been of good character previously “his subsequent offending clearly shows he was not. There was planning and preparation in advance of the actual theft of the money so this was not a one-off opportunistic crime”.
17. The panel’s findings on the issue of funds are, I consider, somewhat problematic. I have taken account of the submissions Miss Nnamani has put forward in this regard. It is plain from a number of passages in the remarks of the sentencing judge that the view may well have been taken that it was not possible to recover any money because it was dissipated. The matter, however, is far from clear, particularly when one looks at the details of sums expended in respect of the claimant’s own health needs in Nigeria and those needs of his brother, which were recorded by the panel.
18. It is perfectly possible for a Tribunal to come to the conclusion that the entirety of the £600,000 or more has in effect been lost and that no significant part of these funds would be available to the claimant, were he to be required to return to Nigeria and pay for the health treatment there. However, it is in my view imperative that proper findings of fact should be made on this issue and I find myself in agreement with the submission of the Secretary of State that the determination is flawed for this reason.
19. A further matter arises from this. If, following investigation, it does turn out that the entirety of that money has been lost, then that is an issue which falls to be considered in the context of whether deportation would be appropriate under the 2006 Regulations. I say that, because it reveals an aspect of this case which the panel did not take into consideration; namely, whether it is proportionate to let a claimant who has stolen such a large sum and either dissipated it or hidden it from view, to return to the United Kingdom and then resist removal on the basis of his health needs.
20. The second matter is whether or not the relevant requirements of the Regulations have been met in this case. In other words, is this a case where the personal conduct of the claimant represents a genuine, present and sufficiently serious threat affecting one the fundamental interests of society?
21. The panel came to the conclusion that the claimant would not repeat his offence. In doing so, they failed to have regard to the submissions of the Secretary of State set

out in the letter of refusal, upon which the Presenting Officer relied at the hearing. It is true, as Miss Nnamani says, that paragraph 41 of the decision letter is in error in assuming that the applicant did not undergo relevant training programmes whilst in prison. I do not, however, consider that that materially affects the thrust of paragraphs 43 and 44 of the decision letter, where the Secretary of State set out the nature of the offence and that "It is considered reasonable to conclude that you are likely to reoffend should you find yourself in need of finances in the future and continue to pose a risk of harm to the public or a section of the public".

22. And then at paragraph 44:

"The seriousness of the offence in the light of the full circumstances of its perpetration is indicative that you pose a significant threat to the safety and security of the public of the United Kingdom. It is considered that should you reoffend your offence will be of a similar or more serious nature and that your deportation is justified on serious grounds of public policy."

23. In other words, what the Secretary of State was saying was the frequently encountered and well-established principle that a person who may be at low risk of reoffending may nevertheless pose a threat by reason of the nature of the offence that he or she has committed, such that, if recommitted, there would be serious consequences.

24. Miss Nnamani, with her characteristic thoroughness, attempted to counter this by saying that, taken in the round, the panel's conclusions were sound. It is, however, my view that they were not. This is not to say that, on a re-evaluation of the matter, the view could not be taken that, in all the circumstances and having appropriate regard to the Secretary of State's views, the claimant may still not be found to represent a sufficiently serious threat. But any such finding would need to be taken by express reference to all relevant matters, including, importantly, the views of the Secretary of State, representing the public interest. This was not done by the panel.

25. I turn finally to the issue of Article 8. Any problems with the Article 8 findings would, I agree with Miss Nnamani, be immaterial, if there were no errors in relation to the EEA Regulations. However, for the reasons I have given, that is not the case.

26. So far as Article 8 is concerned, the panel in my view committed two discrete but related errors. Firstly, it is with respect impossible to reconcile the comments made at paragraph 55 of the determination regarding the potential appropriateness of being granted some discretionary leave pending a potential transplant with the firm and unparticularised statement in paragraph 58 that deportation would violate Article 8 of the ECHR. This is particularly so, given that the case law referred to in paragraphs 52 and 54 is somewhat partial.

27. The second error that the panel committed was in not having regard to the matters required to be looked at by reason of Part 5A of the Nationality, Immigration and Asylum Act 2002. That set of provisions came into force at the end of July 2014, with

immediate effect. The hearing in the present case took place on 20 August. In particular, section 117C has important things to say regarding the view that Parliament has expressed of where the public interest lies in the case of a person who has committed a criminal offence leading to a sentence of imprisonment of four years or more.

28. For these reasons, I find that there are material errors in the determination of the First-tier Tribunal. I have considered whether it is appropriate to proceed at the Upper Tribunal level to reconsider the relevant matters and make findings of fact where appropriate. In all the circumstances, I do not consider that it is appropriate. There is a need for fresh-fact finding in this case and the application to those facts of the relevant law. The nature and extent of that task are such that I consider it is in all the circumstances proportionate for this matter to be remitted to the First-tier Tribunal, for an entirely fresh consideration of all relevant issues.
29. For these reasons the Secretary of State's appeal is allowed.

Signed

Date

Upper Tribunal Judge Peter Lane