Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00400/2014

THE IMMIGRATION ACTS

Heard at Field House
On 25th November 2015

Decision & Reasons Promulgated
On 22nd December 2015

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MR BASIL ONYEMAUCHECHUKWU OKAFOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Nnamani, Counsel instructed by Samuel Louis Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 13th August 1958. His appeal against deportation under the Immigration (EEA) Regulations 2006 was dismissed by First-tier Tribunal Judge R G Walters in a decision dated 2nd April 2015.

2. The Appellant appealed on the grounds that the judge had failed to adequately consider all relevant matters set out in Regulation 21(6). Secondly, the judge's finding at [30] was not sustainable given the evidence that confiscation proceedings had been withdrawn. Thirdly, the judge's finding [36] that the Appellant would not be able to resist the temptation of plundering clients' accounts if he were to be employed in a solicitors' office again was perverse. Fourthly the judge's Article 8 findings were unsafe because he had failed to consider the best interests of the child and properly conduct a proportionality assessment.

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3. I granted permission to appeal on 19th July 2015 on the basis that it was arguable that the judge had failed to consider all the mandatory requirements of Regulation 21(6) and only considered the Appellant's health issues.

4. The Appellant's immigration history is as follows: He first arrived in the UK on 11th July 1998 on an EEA family permit. He then left the UK and next entered on another family permit in July 1999. He again left the UK returning in 2000 on a further EEA family permit. The Appellant applied for a residence card on 25th July 2000 and was issued with one until July 2004. On 19th February 2004 the Appellant lodged an application for indefinite leave to remain which was granted on 20th March 2004. The Appellant's application for naturalisation and citizenship was refused in 2008.

5. There was evidence that the Appellant had gone back to Nigeria in 2006. It was not known for sure when he re-entered the UK but he came to the attention of the authorities in 2010, when he was arrested for certain offences and on 5th November 2010 he was convicted at Kingston upon Thames Crown Court for an offence of theft for which he received five years' imprisonment. There was no appeal against the conviction or sentence and the Appellant was released from prison in 2013.

6. The details of the offence are as follows: The Applicant was a solicitor of the Supreme Court and in the course of his practice he in effect defrauded various third parties of a total sum of £663,000. The money was not traceable and therefore the Solicitor's Indemnity Fund had in effect to shoulder the burden.

7. The Appellant's first appeal against deportation was allowed by the First-tier Tribunal and the Secretary of State appealed. Upper Tribunal Judge Peter Lane found that the First-tier Tribunal Panel had erred in law in failing to make findings on the whereabouts of the Appellant's money and failing to consider whether it was proportionate to let a person who had stolen such a large sum and either dissipated it or hidden it from view, to return to the UK and then resist removal on the basis of health needs. Further, the Panel erred in law in their assessment of whether the Appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and in failing to have regard to section 117C of the Nationality, Immigration and Asylum Act 2002 in the assessment of proportionality under Article 8. The matter was remitted to the First-tier Tribunal for rehearing and the Appellant's appeal was dismissed by Judge Walters [the judge].

Submissions

8. Ms Nnamani submitted that although the judge had referred to Regulation 21(6) at [40], his findings at [41] onwards failed to demonstrate that he had applied the Regulation to the facts of the Appellant's case. She submitted that the Respondent had to show serious grounds in this case and it was not clear that the judge had applied a higher threshold test in finding that the Appellant's removal was justified under Regulation 21.

9. Ms Nnamani accepted that the Appellant's age was not a material factor but submitted that, although the judge had gone into the Appellant's health in considerable detail, his findings were inadequate. The Judge had misunderstood the evidence in the 'Businessday' report in finding that the Appellant would have access to a dialysis unit when in fact the village in which he lived was hundreds of miles away from Lagos or Abuja and even further away from the other parts of the country where dialysis was available. The judge's findings at [58] and [59] were unsustainable in the light of the evidence in this report. The judge had not dealt with the issue of whether the Appellant was able to move to be nearer a dialysis unit.

10. In relation to family and economic circumstances the judge had considered the Appellant's partner and child, who did not have status in the UK, but he failed to take into account that the Appellant had extended family members who supported the Appellant. The Appellant received assistance from his family in order to survive economically in the UK.

11. The Appellant had been in the UK since 1998 and was granted permanent residence or indefinite leave to remain in 2004. Although, the judge was aware of the Appellant's length of residence he failed to demonstrate that he had taken it into account in his findings on Regulation 21.

12. The judge also failed to take into account the Appellant's social and cultural integration in the UK and that the Appellant had worked prior to setting up his own firm. The judge's assessment of the Appellant's life in the UK was limited to the events since his criminal conviction. It was accepted that the Appellant had returned to Nigeria on numerous occasions. However, the judge's assessment of the Appellant as an individual was lacking. The judge had focused on the offence, which was not enough to show serious grounds. The judge had failed to take into account all factors and to show that he has assessed the individual circumstances of the Appellant. The judge had not demonstrated that there were serious grounds in this case over and above the fact that the Appellant was a threat to the fundamental interests of society.

13. In relation to ground 2, Ms Nnamani submitted that the judge dealt with the whereabouts of the money inadequately. He failed to give reasons for why the Appellant's account was not credible or why he rejected the Appellant's explanations. There were several errors in [20] to [30] and the cumulative effect of each was that the judge's findings were unclear or insufficiently reasoned. If there were considerable funds then the police would have been able to trace the money. The police were unable to do so and that is why the confiscation proceedings were not pursued.

14. In relation to ground 3, Ms Nnamani submitted that the judge's finding, at [36], on the Appellant's propensity to reoffend in the future, was perverse. The Appellant had been assessed as low risk of reoffending and had undertaken courses on reoffending. The judge's finding that the Appellant would not be able to resist the temptation to plunder client accounts was not sustainable in the light of the

probation officer's report and the judge failed to give sufficient reasons why he disagreed with that report. The reasons at [34] and [35] were not sufficient.

15. In relation to ground 4 and Article 8, Ms Nnamani submitted that the judge's findings were inadequately reasoned.

16. Mr Walker relied on the Rule 24 response and submitted that the judge had considered all factors set out in Regulation 21(6). He considered the Appellant's health at [41] to [59]. He considered the Appellant's family life at [68] to [71]. There was evidence that the Appellant had separated from his EEA family member who had given him status. He lived alone and there was no evidence of a relationship with his daughter and partner.

17. The judge's finding at [70] that the receipts representing payments to S were insufficient to show that the relationship with the Appellant, his partner and his daughter subsisted, although it was accepted that the Appellant was S's father. The judge found that there was insufficient evidence to establish family life, but in any event the Appellant's partner and daughter were here unlawfully and therefore there would be no interference in any event.

18. Accordingly, the judge had dealt with health, family life and age. The judge was aware that the Appellant had lived the majority of his life in Nigeria and had been back to Nigeria frequently. The judge had taken into account the Appellant's immigration history at [8] onwards and had therefore dealt with all aspects of Regulation 21(6). The fact that the judge had set out his findings on family life in relation to Article 8 after his assessment of Regulation 21 did not make any difference. When the determination was read as a whole the judge had dealt with all aspects of the Regulation.

19. In relation to ground 2 the judge considered the Appellant's explanation for what had happened to the money and found that there was one piece of documentary evidence, a poster, but no other receipts. The judge found that whilst it was accepted that the Appellant had stood for some form of office this did not satisfactorily explain where the money went.

20. The judge took into account the probation report and the fact that the Appellant's offence was a serious breach of trust. Grounds 2 and 3 were in a sense disagreements with the judge's findings, which were open to him on the evidence, when the decision was looked at as a whole.

21. In relation to the availability of dialysis in Nigeria the judge considered the costs, the fact that the Appellant had accommodation, cousins and a large circle of friends in Nigeria and that dialysis was available throughout the country. If necessary the Appellant could move nearer to a dialysis unit and the judge's finding that the Appellant could obtain treatment was one which was open to him on the evidence before him.

22. In response, Ms Nnamani stated that the Appellant would not have access to a dialysis unit because there was not one within a reasonable distance to the village in which he lived. The judge had approached the evidence on the basis that the Appellant could return to the accommodation in his own village, but had failed to address whether the Appellant could access dialysis from where he lived because of the costs and the distance. This may not in itself amount to an error of law, but taken with other factors the judge's finding that the Appellant would have access to dialysis was not sustainable.

23. In relation to the poster the judge's finding that the Appellant had considerable funds available to him was not sustainable given the confiscation evidence. The fact that the police could not find the money meant more likely than not it did not exist and therefore the Appellant's account was truthful. The judge's finding at [30] was perverse.

Discussion and Conclusions

Ground 1

24. Regulation 21(6) provides that the judge must consider the following factors: age, state of health, family and economic circumstances, period of residence, social and cultural integration and extent of links with country of origin.

25. The Judge took into account the Appellant's age [1], his state of health [41] to [61], his family circumstances [62] to [71], his economic circumstances [20] to [30], his length of residence [8] to [10], and his social and cultural integration and links with Nigeria [11] to [19]. When the determination is read as a whole, all aspects of Regulation 21 have been addressed.

26. It is the Appellant's submission that the assessment was inadequate and the Respondent had failed to show serious grounds in this case. It was not clear that the judge had applied a higher threshold test in finding that the Appellant's removal was justified under Regulation 21.

27. I am not persuaded by Ms Nnamani's submission that the judge has misunderstood the evidence in the 'Businessday' report which states that there were 76 dialysis units all over the country. There were 20 dialysis units and 2 transplant units in Lagos. Other south west states had 10 dialysis units and 2 transplant units. Abuja had 8 dialysis units, while the eleven northern states had 14 dialysis units and 3 transplant units. The southern states had 12 dialysis units and the south east had 12 dialysis units, but no kidney transplant facilities.

28. The judge set out various parts of the report at [51] to [54]. It is clear from this report that there are dialysis units all over Nigeria. The judge found at [58] "The Appellant states that his village is hundreds of miles from both Lagos and Abuja, but the evidence from "Businessday" shows that there are dialysis units in many states in

addition to those two cities." This finding was open to the Judge on the evidence before him. The Appellant's claim that there was not a unit within reasonable distance of the village in which he lives was not made out on the evidence before the judge.

29. The Judge found that the Appellant had access to funds and I have dealt with this issue below. Given this finding, the Appellant would not be precluded from travelling such a distance or indeed moving from his village to enable him to have access to treatment. I find that there is no material error of law in the judge's findings in relation to the Appellant's health.

30. The other factors set out in Regulation 21(6) include the Appellant's age. It was accepted that this was not material and the judge had in fact taken it into account. The judge had looked at the Appellant's family situation having found that his partner and daughter were citizens of Nigeria and remained in the UK unlawfully. The judge had assessed the economic situation in relation to the whereabouts of the funds the Appellant stole from clients whilst acting as a solicitor.

31. The judge also had regard to the Appellant's length of residence in the UK having set out his immigration history at [8] onwards. The judge had taken into account the Appellant's social and cultural integration in the UK and in respect of his work as a solicitor. The fact that he failed to refer to his work prior to the commission of offence was not material. There was also evidence that the Appellant had visited Nigeria several times and had cousins living there. Therefore, he was not estranged from his country of origin and re-integration was not an issue. Accordingly, the judge had also dealt with the extent of the Appellant's links with his country of origin.

32. I find that the judge considered all the factors in Regulation 21(6), although arguably he could have set out his decision more clearly and structured it differently. However, on reading the determination as a whole, the judge had taken into account all the relevant factors which were mandatory under Regulation 21(6).

33. I conclude that the judge had properly dealt with Regulation 21(6) and insofar as he had failed to specifically mention any factor that factor was not material to his overall decision. His finding that the Appellant's deportation was justified under Regulation 21 was open to the judge on the evidence before him.

<u>Ground 2</u>

34. The Appellant's first appeal against deportation was remitted to the First-tier Tribunal by Upper Tribunal Judge Peter Lane on the basis that the previous Tribunal had erred in law in failing to make findings on the whereabouts of the Appellant's money. Accordingly, the judge cannot be criticised for assessing the Appellant's evidence as to the whereabouts of the funds the Appellant had stolen whilst working as a solicitor.

35. The grounds submitted with the application for permission suggest that the judge was not entitled to look behind the fact that the Crown Court confiscation proceedings were withdrawn. Ms Nnamani relies on the fact that confiscation proceedings were withdrawn in her submission that the judge's findings at [30] were perverse.

36. The fact that confiscation proceedings were withdrawn does not preclude the judge from making findings as to the whereabouts of the money the Appellant stole. The police were unable to trace the money, but that does not mean, on the balance of probabilities, that the Appellant has indeed spent it or dissipated it as he claimed. The judge was tasked with enquiring into the whereabouts of the money by Upper Tribunal Judge Peter Lane and the judge carried out that assessment on the basis of the evidence before him and the oral evidence of the Appellant.

37. The Judge found that the Appellant had not satisfactorily proved, on the balance of probabilities, that the money had been dissipated. He found that the Appellant may well have considerable amounts of funds available to him in Nigeria from the proceeds of his crime.

38. This finding was not perverse given that the Appellant stole £633,000 and produced an election poster as the only piece of documentary evidence to corroborate where the money went. The judge also found that the Appellant's explanation for where the money had gone was not credible and gave adequate reasons for this conclusion at [22] to [29].

39. The finding on whether the Appellant had access to funds was relevant to whether the Appellant could access dialysis treatment and therefore it was essential that the judge made findings on that point and why the appeal had been remitted by the Upper Tribunal. The withdrawal of the confiscation proceedings was a matter to be taken into account, but it was not determinative as to the whereabouts of the funds. I am not persuaded that ground 2 has any merit.

<u>Ground 3</u>

40. The Judge found at [36] that "… the nature of the Appellant's offence involved such a serious breach of trust that he poses a threat by reason of the nature of that offence despite the finding by the Probation Officer of a low risk of re-offending. I do not accept that the Appellant would not be able to resist the temptation of plundering client accounts if he were ever to be employed, as he proposes, in a lawyer's office again."

41. In coming to this conclusion, the Judge took into account the Probation Report, the courses the Appellant had attended in prison and his oral evidence that he hoped to gain employment as a lawyer. The Judge did not take the view that the Appellant was unlikely to re-offend because the Appellant commenced stealing from his clients within weeks of setting up his firm and continued stealing after he went back to Nigeria.

42. The judge's finding at [36] was open to him on the evidence before him and he gave adequate reasons at [34] and [35].

Ground 4

43. In relation to Article 8, the judge had regard to Section 117C of the Nationality, Immigration and Asylum Act 2002 and specifically referred to it at paragraph 72. Again, the judge could well have structured his findings more appropriately in order to demonstrate the factors he had taken into account, but the fact remains that the Appellant had failed to establish family life in the UK. There was insufficient evidence to show that the Appellant had a subsisting relationship with his partner and daughter, who in any event, were in the UK unlawfully and could return to Nigeria as Nigerian citizens.

44. The Appellant's private life such as it was with his extended family members and work could be replicated in Nigeria given his access to funds and accommodation and therefore the judge's finding that his deportation was proportionate was open to him on the evidence, particularly having regard to the significant public interest in deporting foreign criminals.

Conclusion

45. Accordingly I find that there was no material error of law in the judge's decision and the decision dated 2nd April 2015 shall stand. The appeal was properly dismissed under the Immigration Rules and on human rights grounds.

Notice of Decision

The Appellant's appeal to the Upper Tribunal is dismissed on all grounds.

No anonymity direction is made.

Signed *J Frances* Date 11th December 2015

Upper Tribunal Judge Frances

Fee Award

I have dismissed the appeal and therefore there can be no fee award.

Signed *J Frances* Date 11th December 2015

Upper Tribunal Judge Frances