Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00472/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th May 2015	**On 27th May 2015**

Before

UPPER TRIBUNAL JUDGE RENTON

Between

YVES ALBAN RAOUL DEGNON DOSSOU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss J Howorth of Irving & Co.
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a male citizen of Benin born on 7th July 1976. He first arrived in the UK on 15th October 2002 when he was granted leave to enter as a student. Subsequently that leave was extended until 31st October 2004. On 12th October 2004 the Appellant married Linda Dossou,

a French national exercising Treaty rights in the UK. On that basis, the Appellant was issued a residence card as confirmation of his right to reside in the UK as the family member of an EA national on 18th January 2005, and on 22nd August 2010 the Appellant was issued with a permanent residence card.

2. On 15th March 2012 the Appellant was convicted at Lewes Crown Court of rape and sentenced to four years' imprisonment. As a consequence, on 13th March 2014 the Respondent decided to make a deportation order against the Appellant under Regulation 24(3) of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). The Appellant appealed, and his appeal was heard by First-tier Tribunal Judge Higgins (the Judge) sitting at Taylor House on 27th August 2014. He decided to dismiss the appeal for the reasons given in his Determination dated 19th October 2014. The Appellant sought leave to appeal that decision, and on 11th November 2014 such permission was granted.

Error of Law

3. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.

4. The Judge decided the appeal in accordance with the provisions of Regulation 21(3) of the 2006 Regulations whereby the Appellant could only be removed on serious grounds of public policy or public security, taking account of the principles set out in Regulation 21(5) whereby the decision to remove must be proportionate, and the factors set out in Regulation 21(6). The Judge dismissed the appeal because although the Judge found that it would not be in the best interests of the Appellant's two children for him to be removed, the public interest outweighed other considerations. The Judge attached considerable weight to a report from a probation officer which stated that in June 2013 the Appellant still presented as a medium risk of serious harm to others on the basis that the Appellant was unwilling to accept any responsibility for his criminal actions and to recognise the impact they might have on his victims. As the Judge stated in the final sentence of paragraph 33 of his Determination, he was satisfied the risk of serious harm the Appellant represented remained unacceptably high and that the Appellant remained a present risk to society.

5. At the hearing, Miss Howorth argued that the Judge had erred in law in coming to that conclusion. She referred to her Skeleton Argument and submitted that the Judge had applied the wrong test. The Judge should have used the "imperative grounds of public security" test given in Regulation 21(4) of the 2006 Regulations to determine the appeal. This was because the Appellant had resided in the UK for a continuous period of at least ten years prior to the relevant decision. Miss Howorth further argued that as there was acceptable evidence of rehabilitation there should not be removal following the decision in **Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC)**. The Judge had

erred in not taking this factor into account, and had further erred in construing a medium risk of re-offending as an unacceptably high risk of offending as referred to in **Essa**.

6. In response, Mr Bramble referred to the Rule 24 Response and argued that the Judge had used the correct test. The period of ten years' residence was to be calculated backwards from the date of the relevant decision which was the decision to deport made on 12th March 2014. The Appellant could only go back to the date when he acquired rights of residence for EEA purposes which would be the date when he married his wife being October 2004. Therefore by the date of decision the Appellant had not acquired ten years' continuous residence. There was no evidence that the Appellant had acquired any Treaty rights prior to his marriage. The opening words of Regulation 21(4) of the 2006 Regulations indicated that the requirement of imperative grounds of public security applied only to EEA nationals who otherwise met the requirements of that Regulation. Regulation 21(4) could only therefore apply to the Appellant from the date of his marriage.

7. Mr Bramble went on to submit that the Judge had not made an error of law in respect of the second ground argued by the Appellant. The Judge had dealt with the risk of re-offending properly at paragraphs 27 and 28 of the Decision. The Judge had considered all the other relevant factors in the context of the decision in **Essa** and had come to a conclusion open to him.

8. I find that there was no error of law in the decision of the Judge and therefore I do not set aside that decision. The Judge decided the issue in the appeal by applying the provisions of Regulation 21(3) of the 2006 Regulations. I note the comment of the Judge that it was common ground at the hearing before him that that was the correct Regulation to apply. Therefore the Judge considered whether the relevant decision had been taken on serious grounds of public policy or public security. Regulation 21(4) would only apply if the Appellant had resided in the UK for a continuous period of at least ten years prior to the relevant decision. The relevant decision was taken on 12th March 2014. It is not in dispute that the Appellant first arrived in the UK on 15th October 2002. I do not agree with the submission of Mr Bramble that time begins to run only from the Appellant's marriage to his EEA national wife in October 2004. That is not provided for in the relevant Regulation. Therefore on the face of it the Appellant had resided for a continuous period in excess of ten years prior to the relevant decision. However, it is clear from the decision in **Essa** that –

> "Periods of penal custody following conviction and sentence and periods of remand in custody that are followed by conviction and a sentence of imprisonment"

cannot contribute towards the acquisition of residence rights. It is not in dispute that the Appellant was so detained from 15th March 2012 by which time he had not resided in the UK for a continuous period of ten years.

9. Miss Howorth has also relied upon paragraph (vi) of the head note to **Essa** which states:

> "If permanent residence has been acquired but a custodial sentence is served in the period of residence between years five and ten, then the period of residence in prison may be counted towards the ten years if the person concerned remains integrated with the host state by reason of home, employment, family and social nexus."

10. It is true that the Appellant achieved permanent residence on 22nd August 2010 which is prior to his custodial sentence and falls within the period of between five and ten years after the required period of residence commenced. However, it was never argued before the Judge that this part of the decision in **Essa** applied, and although there was evidence as to the Appellant's history and circumstances in the UK, none was adduced to the Judge specifically on the point of integration. Therefore it cannot be an error of law for the Judge not to have considered the issue.

11. Finally, the Appellant's propensity to re-offend and hence his risk of serious harm was considered thoroughly by the Judge at paragraphs 32 and 33 of his Decision. The Judge decided to attach considerable weight to the assessment of the probation officer, which was of a medium risk, and the Judge was entitled to come to his final conclusion on this subject which appears in the final sentence of paragraph 33 of his Decision. The Judge fully explained that decision.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order for anonymity and I find no reason to do so.

Signed Date

Upper Tribunal Judge Renton