Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00476/2016

THE IMMIGRATION ACTS

Heard at Field House **Oral Decision & Reasons Promulgated**
On 22 November 2017 On 14 December 2017

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

MR DELE UYI AKONEDO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C. Mupara, Counsel, instructed by Chipatiso Associates LLP
For the Respondent: Mr S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 11 January 1968. He is a citizen of Nigeria. He appealed to the First-tier Tribunal against the decision made by the respondent to take action to remove him. The decision was made on the basis of the Immigration (European Economic Area) Regulations 2006 (2006 No 1003). For reasons which I will explain later the judge sought to justify it because there were serious grounds of public policy or public security which entitled the appellant to be removed.

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2. The appellant claims to have entered the United Kingdom in 1999 but he married his Dutch wife, Ms Princess Akonedo, on 28 February 2002. As a result of his marriage he later became entitled to a permanent residence card which he eventually obtained on 8 March 2012. The permanent residence card expires in March of 2022.

3. The circumstances in which the Secretary of State came to the view that the residence card should be curtailed was that the appellant had committed a criminal offence. On 4 June 2015 at Chelmsford Crown Court the appellant was convicted of assisting unlawful immigration into an EU member state and was sentenced to 2½ years' imprisonment. The manner in which the offence was committed was referred to by the judge in paragraphs 16 and 17 of the determination. In essence it is said that one Faith Sunday produced a genuine Austrian identification card in the name of Sarah Akonedo, the appellant's sister-in-law, who is married to the appellant's brother. She was refused entry on the basis that the card did not belong to her. As a result of this the appellant was jointly charged with Ruth Ehioghiren, who is the sister of Sarah Akonedo, of facilitating Ms Sunday's entry into Slovakia. The aid that the appellant gave was assistance, if not actually making, the booking with Ryanair for the flight and secondly delivering both ladies in his car to Stansted Airport. Ms Ehioghiren then proceeded on the same flight as Ms Sunday to Bratislava.

4. It has been a constant feature of the submissions made before me this morning that this was an offence which consisted of no more than booking a ticket for the airline and then acting as a taxi service to the two ladies in the course of this act of dishonesty. That was not the view that was taken by the judge in his sentencing remarks, which are found at B2 and B3 in the bundle. What the judge said is:

> "It is quite clear to me, and from having heard the evidence at the trial, that your involvement in this case was key and not marginal in the way that you have suggested to probation. Indeed, in the probation report, it is quite clear that you, rather than accepting responsibility for this criminal offence, seem to regard yourself as a victim of the offence and you have asserted to probation, really, that it is all down to your brother and facts which you asserted at trial and which the jury disbelieved, broadly, that you were not responsible criminally in the circumstances of this case. Accordingly, I am unable to take into account by way of mitigation any realisation or acceptance by you of your guilt in this case despite the submissions made on your behalf."

5. In my judgment, that was a damning indictment of the appellant's assertion as to his role. It was a role which was not accepted by the jury nor was it a role that was accepted by Mr Recorder Davis-White QC. Without wishing to go into the levels of criminality involved, it is sufficient to say that the appellant's involvement merited a sentence of 2 ½ years' imprisonment, which was not the subject of any successful challenge to the Court of Appeal. Consequently, any attempt to marginalise or reduce the impact of the criminality is something which I firmly reject. There was a criminal offence which was committed and it was a criminal offence which merited a sentence of 2 ½ years.

6. The basis upon which the judge came to his view is in part reflected in the OASys Report. At E8 in answer to the question "*Does the offender accept responsibility for the current offence*?" the writer of the report wrote "*No*" and this was followed by his saying "*Mr Akonedo does not accept responsibility for this offence, claiming that in his culture if you are asked by family members to help them, then you are duty-bound to help*". This response is repeated in essence in what we see at page E31 and in response to which the writer says:

   > "Mr Akonedo is fully capable and motivated to do whatever is required of him. Mr Akonedo just needs to remember that some actions have consequences and these are sometimes not very favourable as he has found out with this offence….Should a member of Mr Akonedo's family from Nigeria contact him and ask for help, he will feel duty-bound in helping them, without fully considering the consequences."

7. The conclusion that is reached as to the risk of reoffending is set out in the summary sheet found at E29. In relation to lifestyle and associates, the link which is suggested to the risk of reoffending, it is said in response to that question "*Yes*" and that obviously sums up what is said in the passages to which I have referred earlier. When it comes to the Predictor Scores Percentage and Risk Category, it is perfectly true that the writer considered that the probability of proven reoffending was low. It is this factor which is almost the exclusive consideration relied on in this appeal by Mr Mupara but, for reasons which are apparent, one has to look at the report in its totality.

8. In effect, what the report was saying was this was a weak man who may be led into temptation and particularly led into temptation if he is asked by members of his family to do something which is unlawful. That was exactly what happened in this case. It was not a case where he acted for gain. There is no suggestion that he made any profit out of what happened. He is leagues away from being a criminal trafficker of people for profit but then so was the sentence. As the judge noted in paragraph 21 of his determination, "*Parliament has seen fit to increase the maximum sentences from seven years then to ten years and now to fourteen years*" but the range seen in the sentencing guidelines is a range between three and fourteen years. That reflects, in my judgment, the seriousness which is attached to this type of offence.

9. Mr Mupara relies upon the fact that the appellant was only sentenced to two and a half years as being an indication that in relation to the range of offences of this category his offending was low. I agree that his offending comes at the lowest edge of the guidelines but that, on its own, fails to acknowledge that this is a serious offence and which merited a serious sentence for a first offender of 2 ½ years' imprisonment. That was the way the judge approached this case in the First-tier Tribunal. He said in paragraph 19:

   > "The Recorder continued to state that having heard the evidence at the trial, he took the view that the appellant's involvement in the case was key and not marginal in the way that the appellant had suggested to probation. He formed the view that in the probation report it was quite clear that rather than accepting responsibility for his criminal offence, the appellant seemed to regard himself as the victim of the offence

> and that he has asserted to probation that it is all down to his brother. The Recorder comments, however, that this clearly was not accepted by the jury and the jury found him to be criminally responsible."

I mention this passage because, in my judgment, it is an entirely accurate summation of what the sentencing judge was saying. There is nothing in paragraph 19 of the determination which is a departure from the way the Recorder approached this offence and his approach towards sentencing.

10. The judge then went on to deal with the OASys assessment and in paragraph 28 he records:

> "I can find no evidence that Mr Akonedo's lifestyle is linked to his offending and he does not knowingly mix with other criminals. However, if his version of events is to be believed then I believe that should the situation arise and another one of his many brothers or sisters asks for help again then he may feel duty-bound to assist."

That was what the OASys Report said and it was an accurate quotation from it. The judge then accepts that the risk of offending is stated to be low. That was the material that was before the judge in relation to the OASys Report.

11. He then went on to consider what risk factors there might be. In paragraph 35 he records the evidence of the appellant. He states that:

> "[The appellant] was asked if his family was in debt and said that they were to the extent of about £14,000 which was owed in rent to the council. He states that he is paying that off at between £300 and £400 per month."

It was said by Mr Mupara that the appellant did not mention £14,000 and that he mentioned debts owing to the council of some £3,842. In fact, I have consulted the Record of Proceedings and when asked about his debt the appellant did in fact say that it was £14,000 and Mr Kotas, who appears on behalf of the Secretary of State, also has a record that this was the level of debt about which the appellant gave evidence. It is said that this level of debt was in fact in relation to a student loan but there is no evidence of this and he also submitted that the appellant did not know the level of his student debt.

12. However, whatever the level of student debt, the fact remains that the appellant was asked about the extent of his indebtedness and gave the answer "*£14,000*". It is, however, accepted in the documents that were provided that the amount of debt owed in rent was some £3,800 odd. That appears from pages 56 and 57. In fact, the account is a running account which runs backwards so it is page 57 which states the original debt on 29 June 2015. That was at a level which was only £897 and when one sees as the weeks go by that the level of debt is increased and that there are virtually no payments being made, this is obviously consistent with the fact that the appellant was in prison at the time and that no other source of rent payment appears to have been made apart from those payments which are very occasionally seen. So, at the beginning, at the top of page 56, one sees that by 2 January 2017 the level of debt had risen to £3,873.88. The appellant was released on 14 November 2016 and we can see

that there was one payment that was made of £400 at about the time of his release or shortly after which showed a reduction in the amount of indebtedness.

13. The other letter in the relevant part of the bundle is found at page 54. It is a letter from Harlow Council dated 20 October 2016. It deals with the current outstanding debt and the court costs and those together totalled £3,842.78. There was in fact no additional written evidence in relation to the paying off of the debts between January 2017 and the hearing before the judge although I accept that the appellant says that he was paying off that debt at the rate of between £300 and £400 a month. That was the evidence about his debt.

14. We then go to look at some answers that were provided to the judge in relation to relatives in Nigeria. Ms Akonedo was giving evidence and she was asked whether she had any relatives in Nigeria and she replied "*Yes, my dad's mum.*" In addition to that she was asked whether her father went to see his mother on trips he made to Nigeria and she replied "Yes". Ms Akonedo is the appellant's daughter.

15. The judge then came to his conclusions. He concluded that the offence of assisting unlawful immigration into an EU member state was a sufficiently serious one to justify the appellant's removal on serious grounds of public policy or public security. This is the correct test to be applied in relation to a person who has acquired a permanent right of residence. That was found in Regulation 21 of the Immigration (EEA) Regulations 2006, which provides in 21(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."

The Rules have now been changed by the introduction of the 2016 Rules but those did not apply in the circumstances of this case. In any event, they are substantially the same.

16. The crucial finding in relation to the determination of the First-tier Tribunal Judge is that in paragraph 55 he records:

> "I accepted that the OASys Report finds the chances of the appellant reoffending to be low but I was concerned with his inability to accept his guilt as evidenced by his disagreement with the Recorder's remarks as to his role."

17. I shall deal with this point separately. I have already pointed out what the Recorder said in relation to his offending. The Recorder categorised him as taking a key part in what occurred. In paragraph 31 of the determination the judge notes the cross-examination of the appellant. He was asked whether he agreed with the Recorder that he was a key player in the attempt to gain entry to Slovakia for Ms Sunday. He disagreed with the Recorder when he suggested that he was. In my judgment, those words are perfectly plain and it is a disagreement that the appellant has always had with the way his case was approached by the Recorder and, in my judgment, it is not open to the appellant to assert that he was not a key player and certainly he is not

able to assert that he was not lawfully subjected to a sentence of imprisonment of 2 ½ years.

18. So, when it comes to what the judge had said in paragraph 55, I entirely accept that the appellant had always sought to minimise his involvement. Indeed that was the essence of the submissions that were made on the appellant's behalf by Mr Mupara. He sought to say that this was an offence which was at the lowest level and that it should therefore not have attracted the classification made by the judge as justifying deportation on serious grounds of public policy or public security. I reject that submission and I reject the criticism made of the judge's remarks that the appellant disagreed with the Recorder's remarks as to his role. I am satisfied that the appellant certainly did.

19. The judge went on to say in paragraph 55:

> "I was also concerned about possible familial pressure from the appellant's siblings in the UK and possibly relatives in Nigeria who might attempt to get him to repeat this behaviour."

20. Once again, that comment was entirely justified by reference to the evidence that the appellant himself gave as to his relatives in Nigeria and the passages found in the OASys Report which expressly refer to the fact that the appellant, through weakness, might be persuaded to go along with suggestions that were made by members of his family. This could not have been more clearly demonstrated than at page E8 where it was said: "*Mr Akonedo does not accept responsibility for this offence, claiming that in his culture if you are asked by family members to help them, then you are duty-bound to help.*" Mr Mupara suggested that that merely referred to helping out a family member and had nothing to do with helping out a family member in perpetrating criminal offences. That is certainly not what the OASys Report was directed towards and nor is it what we know to have been the circumstances of this offence, which were that, through weakness, the appellant merely went along with what his relatives were saying. Indeed, he sought to blame his brother as being the one who was most responsible. Accordingly, this challenge to the First-tier Tribunal's determination also fails.

21. The judge went on to say:

> "I was also concerned with the extensive level of debt faced by the appellant's family and the possible temptation for the appellant to take part in similar behaviour again because of his financial troubles."

It is said on the appellant's behalf that he was in no way motivated by financial gain in the offence that he committed. I entirely accept that. That is not, however, the point that the judge was making. He heard evidence that there were extensive debts. Whether that was right or wrong is not for me to say. All I can say is that this was the level of debt that the appellant admitted to in his evidence as recorded by the judge in his note of it. It is accepted that the council debt was nothing like as great as that and that stood at £3,800 odd pounds but nevertheless the point that the judge

was making was that where there are grounds for temptation and where is a person who is subject to temptation then that was a possible risk. He was saying no more than that and was identifying it simply as a risk factor.

22. In paragraph 56 of his determination he concludes:

> "Having considered all the evidence, I find that there is a real risk that the appellant may well reoffend by committing crimes of a similar nature."

If there is to be a challenge of that finding it has to be a challenge on the basis that it is perverse or irrational, that there was no basis upon which a judge properly considering the evidence could lawfully come to that conclusion.

23. In my judgment, there was no unlawfulness or irrationality in the conclusion at paragraph 56. It is true that he did not regard the assessment of the risk of reoffending, which was stated to be low, as determinative but then it was not determinative and for the reasons which I have given there was ample material in the OASys Report to suggest that the risk had to be looked at holistically, as it was by the judge in his determination. In those circumstances, when he concludes in paragraph 70 that the offending amounted to 'serious grounds of public policy or public security' justifying the appellant's deportation, he was both applying the right test and was relying on a finding of fact as to the nature of the offending which was properly open to him.

24. In my judgment, the nature of this type of offence should not be overlooked. It is true that it is not one of the categories sometimes referred to as being particularly serious crimes but that does not mean to say that it is *not* a serious offence and it *is* an offence which undermines the system of immigration control and accordingly does undermine '*one of the fundamental interests of society*'. It poses a sufficiently serious threat affecting one of those fundamental interests. The judge was able to conclude that the offending fell into that category.

25. He then went on to deal with the balance that had to be struck/ The balance that had to be struck was that the appellant is married to a Dutch national and they have been living in the United Kingdom for many years. They have four children. The judge recorded in paragraph 64 that s.55 of the Borders, Citizenship and Immigration Act 2009 required him to consider the best interests of the children as a primary consideration and he did so particularly by reference to the appellant's two younger children, his sons, who were born in 2000 and 2007 respectively. He also noted that the appellant's two elder daughters are not dependent on him as they are over 18 years of age and attending university.

26. The judge made it perfectly plain that he entirely rejected the respondent's submission that the appellant was not in a genuine and subsisting parental relationship with his children. The respondent had submitted that the appellant's removal would not have a significant impact on the children of the family. I find it difficult to understand how that submission could have been made but the judge emphatically disagreed with it and found that the appellant's removal would have a

devastating effect on the family and that would include his wife, who requires considerable assistance due to her disability.

27. Accordingly, it cannot be said, as is asserted in the grounds, that the judge did not take into account the interests of the children but he considered, as he did expressly in paragraph 70 of the determination, that notwithstanding the effect that this would have on the appellant, his wife and two younger children that the appellant's criminal offence and real risk of reoffending outweighed that damage and thus, on the proportionality balance, it justified the appellant's removal.

28. I entirely agree that this is a regrettable consequence as far as the effect on the family is concerned but that, unhappily, is what happens when there is criminal offending. The criminal offending is aggravated by a failure to recognise properly that the offending took place and the judge was right, in my judgment, in relying upon that as one of the factors which was in his mind when considering whether there was a future risk. I do not find that the judge reached a decision which was irrational and the submissions that were made on the appellant's behalf were in effect an attempt to reopen the argument which Mr Mupara quite properly and forcefully made before the First-tier Tribunal Judge but which the judge did not accede to.

29. In those circumstances my decision is that the judge made no error of law and accordingly the determination of the appeal should stand.

DECISION

The First-tier Tribunal Judge made no error on a point of law and his determination of the appeal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL