



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00441/2017

THE IMMIGRATION ACTS

Heard at Field House
On 20 February 2018

Decision & Reasons Promulgated
On 5 March 2018

Before

THE HONOURABLE MR JUSTICE NICKLIN
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE BLUM

Between

MR OSEGHALE KELVIN OBIOMO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Yong, Counsel instructed by Dotcom Solicitors Ltd
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

[oral decision delivered at hearing]

1. The appellant, Mr Obioma, is a citizen of Nigeria. He is now 38 years old. He claims to have first come to live in the United Kingdom more than twenty years ago but it was not until 19 January 2004 that he regularised his immigration status when he applied for, and was granted, a residence permit of proof of his right to residence as the spouse of a French national. On 26 January 2010, Mr Obiomo was granted a permanent residence card valid until 26 January 2020.

2. Mr Obiomo has several previous convictions dating back to 22 November 2007. However, for the material purposes, on 27 May 2014, Mr Obiomo was convicted at Blackfriars Crown Court of rape and, on 4 July that year, jailed for seven years. On 12 May 2016, the Secretary of State notified Mr Obiomo that she intended to make a deportation order against him on grounds of public policy. Mr Obiomo was invited to make submissions as to why he ought not to be deported. On 4 August 2017, having considered his representations, the Secretary of State decided to make a deportation order pursuant to Regulation 27 of the Immigration (European Economic Area) Regulations 2016. So far as material the Regulations provide:

“15. Right of Permanent Residence

- (1) The following persons acquire the right to reside in the United Kingdom permanently -
- (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
 - (b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years.

23. Exclusion and removal from the United Kingdom

- (6) Subject to paragraphs (7) and (8), 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 -

...

- (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 27.

- (7) A person must not be removed under paragraph (6) -

...

- (b) if that person has leave to remain in the United Kingdom under the 1971 Act unless that person’s removal is justified on the grounds of public policy, public security or public health in accordance with regulation 27.

27. Decisions taken on grounds of public policy, public security and public health

- (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 right of permanent residence under regulation 15 except on serious grounds of public policy and 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 in the best interests of the person concerned, 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(17).
- (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
 - (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;
 - (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.”
- (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person (“P”) 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

- (8) A court or tribunal considering whether the requirements of this regulation are met must in particular have regard to the considerations contained in Schedule 1 and Schedule 1 sets out considerations of public policy, public security and the fundamental interests of society etc."

I do not need to quote Schedule 1 but they set out the various matters that need to be considered.

3. The Secretary of State, in her decision letter, accepted that Mr Obiomo was a family member of an EEA national since his application for a residence card as the spouse of a French national on 19 January 2004 and that he had been resident for a continuous period of five years. As such, the Secretary of State accepted that he had acquired a permanent right of residence under the Regulations. The Secretary of State determined that, as Mr Obiomo was not himself an EEA national, she was not required to justify his deportation on imperative grounds of public security under 27(4), nevertheless she was required to demonstrate that his removal was justified on serious grounds of public policy and public security under Regulation 27(3).
4. In the decision letter the Secretary of State set out the factual basis of her decision before concluding that his removal was justified as a matter of public policy on the grounds of the genuine, present and sufficiently serious threat Mr Obiomo posed to one of the fundamental interests of the UK society and that his deportation was proportionate. Mr Obiomo appealed that decision. His appeal was heard by First-tier Tribunal Judge Maxwell on 19 December 2017 and his reasons were promulgated on 4 January 2018. The judge directed himself to consider Regulation 27(5) in paragraph 13 of his decision and he considered Regulation 27(6) and upheld the Secretary of State's decision.
5. Mr Obiomo's application for permission to appeal was lodged on 18 January 2018. His grounds included the contention that the First-tier Tribunal Judge had failed to identify and make any findings as to the appropriate protection level required under the Regulations. It was contended that under Regulation 27(4) the decision to deport Mr Obiomo was required to be justified on imperative grounds of public security. For that proposition reliance was placed on *Aitjilal -v- SSHD* [2016] UKUT 563 (IAC) [29].
6. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison on 29 January 2018 on the ground I have identified. Other grounds had been advanced before us today, but I am satisfied that we can deal with the case on the basis of the first ground that has been identified. I am satisfied that the First-tier Tribunal Judge has not addressed his mind to the applicable protection level under the Regulations in Mr Obiomo's case and in consequence he has not made the necessary findings as to whether the Secretary of State had demonstrated that Mr Obiomo represented such a threat. That is sufficient to allow Mr Obiomo's appeal.

7. I am not persuaded that the Secretary of State was required to show that Mr Obiomo's removal was justified on imperative grounds of public security. In my view, Mr Obiomo cannot qualify under Regulation 27(4), not because he does not have a qualifying period of residence, but because he is not an EEA citizen. The distinction is drawn in Regulation 27(3) and 27(4) between the EEA citizens and those with the right of permanent residence in the UK. *Aitjilal* is not authority that 27(4) applies to those with a right of permanent residence in the UK. Given the clear distinction drawn in the Regulations, I do not consider that such a construction is permissible. Nevertheless, the Secretary of State would have to demonstrate under Regulation 27(3) that there were serious grounds of public policy and public security justifying his deportation. The First-tier Tribunal Judge made no such findings. In light of those decisions we consider it right to remit the case back to the First-tier Tribunal for reconsideration.

Notice of Decision

The appeal is allowed. The case is remitted to the First-tier Tribunal to be reconsidered afresh before a judge other than Judge of the First-tier Tribunal Maxwell.

No anonymity direction is made.



Signed:

Date: 20 February 2018

Mr Justice Nicklin