



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

Appeal Number: OA/13594/2014

THE IMMIGRATION ACTS

**Heard at Field House
On Tuesday 20 October 2015**

**Determination Promulgated
On Wednesday 21 October 2015**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MARKUS BAKO MAKAN
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mrs Williock-Briscoe, Senior Home Office Presenting Officer

For the Respondent: Ms Cole, Legal Representative

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal.
2. The Appellant is a citizen of Nigeria. He appeals the Respondent's decision to refuse to admit him on 18 September 2014 as the family member of an EEA (Romanian) spouse.
3. The Appellant was in the UK previously from 2001. He was arrested in 2004 in connection with a sham marriage which he was about to contract in a false name and charged with conspiracy to make a false statement. He was convicted and sentenced to 21 months imprisonment. The sentencing Court recommended deportation action. He was deported to Nigeria on 4 August 2005.
4. The Appellant then spent a period of time in the United States. In 2010, he married his Romanian spouse in Romania and was issued with an EEA residence permit on that account. They have two children who are Romanian citizens.
5. The Appellant's wife has found work in the United Kingdom and the family arrived on 18 September 2014. The Appellant's wife and children were admitted but the Appellant was refused admission on the basis of the extant deportation order.
6. The Appellant's appeal against the decision was allowed by First-Tier Tribunal Judge Hodgkinson in a decision promulgated on 27 July 2015 ("the Decision") under The Immigration (European Economic Area) Regulations 2006 (as amended) ("the EEA Regulations). The Respondent sought permission to appeal relying on the case of Latif (s120 - revocation of deportation order) [2012] UKUT 78 (IAC) on the basis that the Appellant was required to seek revocation of the extant deportation order prior to seeking admission and could not circumvent this requirement by raising the issue on appeal.
7. Permission to appeal was granted by First-Tier Tribunal Judge Andrew on 14 September 2015 on the basis that the Judge had no jurisdiction to allow the appeal, the Appellant not having applied to revoke the deportation order against him. The matter comes before the Upper Tribunal to determine whether the First-tier Tribunal Decision involved the making of an error of law.

Decision and reasons

8. The essence of the Respondent's appeal is that by reason of regulation 19(1A) of the EEA Regulations, the decision to refuse to admit the Appellant whilst he was the subject of a deportation order was correct and the Judge therefore materially erred in allowing the appeal under

the EEA Regulations. Mrs Williock-Briscoe submitted that the reference there to deportation order encompassed not simply a deportation order under the EEA Regulations but also a deportation order made under the Immigration Acts.

9. Mrs Williock-Briscoe founded her submissions on Latif. She accepted that the case is not directly on point as it relates to a refusal of entry clearance based on the mandatory grounds under the Immigration Rules which do not apply to the Appellant's case. She submitted however that it applied by analogy procedurally on the basis that the Appellant should first have sought revocation of the deportation order before seeking admission.
10. Ms Cole founds her submission that there is no material error of law in the Decision on Home Office guidance to Criminal Caseworkers which was in force at the date of decision and before the Judge. That guidance makes clear that where re-entry is sought to the UK in EEA cases where a deportation order remains in force, the application for admission is to be determined on the principles in the EEA Regulations and not rejected outright on the basis of the extant deportation order. In other words, the reference to "deportation order" in regulation 19(1A) is restricted to a deportation order under those Regulations. Latif is of no assistance to the Respondent. It follows that the decision not to admit the Appellant was made on the wrong basis and to that extent there is no material error of law in the Decision. The Respondent's decision was on that view not in accordance with the law for failing to follow the guidance and refusing to admit simply on the basis of the extant deportation order.
11. That is however not the end of the matter. Mrs Williock-Briscoe submitted that if I found that the Respondent had refused to admit on the wrong basis under the EEA Regulations, then, relying on the guidance referred to above the proper course was for the Judge to remit to the Respondent to re-take the decision whether to admit based on a consideration of whether the Appellant represents a genuine, present and sufficiently serious threat to the UK rather than going on to make the decision himself on the basis of very limited evidence as to that risk and where criminal records checks had not been carried out by the Respondent. Ms Cole accepted that this course was open to the Judge. The issue is whether there was an error of law in not taking that course.
12. There was no dispute between the parties before the First-Tier Tribunal that the Appellant's relationship with his spouse was genuine. The issue of whether the Judge was wrong not to remit to the Respondent relates to the issue of whether the Appellant represents a current threat. Although there was evidence of a criminal records check in relation to Romania, there was no evidence of checks in relation to his time in Nigeria following deportation or during the period that he resided in the United States. The guidance

to which I refer above indicates that, when considering whether to admit a person in the Appellant's position, the issue of whether they constitute the requisite level of threat on public policy or public security grounds should be assessed under the EEA Regulations. There was no such assessment and limited evidence of any checks for further offences. The Judge relied solely on the Appellant's evidence that he had not committed any further offences. Although the offence of which he was convicted occurred over ten years ago, the Appellant has not been in the UK for that period and there was limited evidence to permit an assessment by the Judge as to the risk which the Appellant might now pose.

13. I am satisfied that the Decision contained a material error of law in not remitting the matter to the Respondent for a decision under regulation 21 of the EEA Regulations. The proper course is to set aside the Decision and to allow the appeal to the extent of remitting the matter to the Respondent to re-determine the application to admit by reference to that regulation. I was told by Ms Cole that an application to revoke the deportation order has now been made by the Appellant to the Home Office and the decision whether to admit can presumably be re-taken in conjunction with that application.
14. I note that the Appellant is currently residing in Romania with his children who are therefore separated from their mother. The decision should therefore be re-taken as soon as practically possible. I have considered whether to give a direction as to the timescale in which a further decision should be taken. I have however concluded that this would not be appropriate as I recognise that when that can be done may be dependent on matters outside the control of the Respondent such as the response to criminal records checks.

DECISION

The First-tier Tribunal decision did involve the making of an error on a point of law to the extent of failing to remit the matter to the Respondent for further decision. I set aside the Decision and re-make the decision in the appeal by allowing it to the extent of remittal to the Respondent for her to re-take the decision whether to admit in accordance with regulation 21 of the EEA Regulations.

Signed



Date 21 October 2015

Upper Tribunal Judge Smith