Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00030/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 October 2018	**On 9 November 2018**

Before

UPPER TRIBUNAL JUDGE FINCH
UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KE
ANONYMITY ORDER MADE

Respondent

Representation:
For the appellant: Mr Mannan, Counsel
For the respondent: Mr Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the respondent.

1. We have made an anonymity order because this decision refers to the circumstances of children, who have been the subject of family proceedings.

2. The appellant ('the SSHD') has appealed against a decision of the First-tier Tribunal ('FTT') dated 30 July 2018, in which it allowed the respondent's appeal against the SSHD's decision dated 11 January 2016 to deport him pursuant to the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regs').

Background

3. The respondent is a citizen of Nigeria. He arrived in the UK as a student in 2004 but overstayed his visa. He married a citizen of Latvia (and therefore an EEA citizen) in July 2007 and they have two children.

4. The respondent was granted an EEA residence card on 21 July 2014. On 11 March 2015 he was sentenced to 16 months imprisonment for actual bodily harm against his wife. In light of this offence, the respondent was served with notice of deportation on 11 January 2016.

FTT

5. The FTT described the background events that led the appeal in considerable detail by describing in comprehensive terms the sentencing judge's remarks, the respondent's witness statement dated 25 August 2016 and his wife's witness statement dated 28 April 2016. The wife's statement is said to have been made within family proceedings. There has been no confirmation that the family court provided permission for this to be disclosed in the FTT.

6. In summary, the respondent was convicted of the index offence after a trial, at which his wife gave evidence against him. The index offence took place after a history of the police being called to the home by the wife on many occasions from 2007. At the time of their 2016 statements, the respondent was pursuing contact proceedings to see his children. There had been no contact between the respondent and his wife or children since the index offence. His wife's 2016 statement makes it clear that she opposed in robust terms, the respondent's application for contact and her statement sets out in graphic detail her account of sustained abuse toward her on the part of the respondent for the duration of their marriage.

7. At the hearing before the FTT on 16 July 2018, the respondent attended with his wife and submitted updated statements. Each statement is brief and extends to no more than half a page. They both contain very similar wording to the effect that all the problems

have been resolved and the family have been living together happily as a family unit. The respondent also relied upon an undated letter from Snaresbrook Crown Court confirming that the restraining order imposed on 29 April 2015 was lifted on 2 July 2018. The FTT's record of proceedings makes it clear that the family unit began living together a week before the FTT hearing on 17 July 2018. The FTT was nonetheless satisfied by the wife's "*categorical assurance*" that she had not been coerced or induced into reversing her position.

8. The FTT observed at [17] that the evidential picture dramatically changed. Prior to the hearing itself, the respondent had "*a hopeless case*" as he was subject to a restraining order and the family court proceedings were making no progress. At the hearing itself the respondent produced "*the three biggest metaphorical rabbits out of a hat*": his updated statement, his wife's updated statement and "*above all*" her attendance. The FTT accepted that there had been family reconciliation and made findings of fact at [21] to [23]. However these follow the FTT's self-direction that "*this is a ten-year imperative ground case*".

9. The FTT concluded "*with a heavy heart, and with no hope of a happy outcome*" that given, inter alia, the reunification of the family unit and the probation officer's downgrading of risk to low, the appeal "*must succeed*" despite the family's unpromising history. The FTT therefore allowed the appeal.

Appeal to the Upper Tribunal

10. The SSHD appealed to the Upper Tribunal ('UT') on the basis that:

    (i) The respondent had not acquired 10 years lawful residence, and as such the FTT applied the wrong test - imperative grounds of public security ('imperative grounds'), rather than serious grounds.

    (ii) The FTT failed to direct itself to the entirety of the respondent's concerning behaviour toward his wife or take into account the absence of evidence of rehabilitation.

11. Permission to appeal was granted by FTT Judge Davies. The reasons for this are unhelpful as they are mistakenly based upon this being a non-EEA deportation case.

12. Pursuant to directions the SSHD filed and served a skeleton argument in which he submitted, inter alia, that as a non-EEA citizen, the respondent was unable to benefit from enhanced protection on imperative grounds. In a skeleton argument drafted by the respondent's solicitors, it was submitted that the FTT was

entitled to treat this as an imperative grounds case, and having done so, made findings of fact open to it.

13. At the beginning of the hearing we attempted to discern which items of documentary evidence were available to the FTT. Given the FTT's observations at [4], it is regrettable that for the purposes of this appeal neither party made any attempt to submit a paginated bundle of evidence available to the FTT. Mr Mannan accepted that the only evidence available from the probation service was summarised at [14]. Mr Bramble checked his file and confirmed that the FTT was provided with a copy of the court's letter confirming the lifting of the restraining order. Mr Mannan and Mr Bramble were unable to assist us with whether the family court had given permission for documents such as the wife's 2016 witness statement to be submitted to the FTT.

14. Mr Bramble relied upon the SSHD's skeleton argument and grounds of appeal. Mr Mannan relied upon the skeleton argument prepared by his solicitors.

15. After hearing from both representatives, we reserved our decision.

Error of law discussion

16. Mr Mannan was unable to cite any authority to support his submission that imperative grounds could be said to apply to a non-EEA citizen such as the respondent in this case. As regulation 21 of the 2006 Regs makes clear imperative grounds only apply "in respect of an EEA national" whereas serious grounds apply "in respect of a person with a permanent right of residence". The FTT erred in law in finding that the imperative grounds test applied when as a non-EEA citizen the serious grounds test applied to the respondent.

17. LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024 clarifies that a clear distinction is required to be drawn between the three levels of protection against removal introduced in the 2006 Regs, each level being intended to be more stringent and narrower than the immediately lower test – see also 6.179 of the Ninth Edition of Macdonald's Immigration Law and Practice, the wording of regulation 21 itself together with Article 28 of the Citizens Directive.

18. The FTT's findings of fact and conclusion that the appeal "*must succeed*" are inevitably predicated upon the FTT's erroneous self-direction at [17] and [18] that that the imperative grounds apply. We accept Mr Bramble's submission that having directed itself to the wrong legal test, which is discernibly different to the serious grounds test, the FTT's findings are infected by this error and unsafe. The

language used by the FTT demonstrates that a clearly reluctant conclusion was reached, driven at least in part by the application of a threshold that the SSHD had to meet, which was set too high.

19. Even if we are wrong about this, the respondent was unable to demonstrate a continuous period of 10 years residence for the purposes of the 2006 Regs - see B v Land Badem-Wurttemberg and SSHD v Vomero (Directive 2004/38/EC), Joined Cases C-316/16 and C-424/16. In this case it would be necessary to count back from the deportation order dated 18 January 2016. The respondent may have been in the UK in January 2006 but he was here unlawfully, having overstayed a student visa granted for 12 months in 2004. Further and notwithstanding some encouraging remarks by the probation service, the respondent's integrative links appear weak given his imprisonment, behaviour toward his family and extended lack of contact with his family.

20. In addition, as pointed out in the grounds of appeal, the FTT referred to a probation service assessment of risk from August 2016 said to point to the respondent being a medium risk of harm to his ex-partner and any future partners but a low risk of reoffending within two years. The FTT was clearly influenced by this evidence – see [24] of the decision. We invited Mr Mannan to take us to the evidence that supported this conclusion but he was unable to do so. He submitted that there was no reason to go behind this finding of fact. We are very concerned that the FTT did not have any up to date assessment of risk in support of the claim that the wife was genuinely committed to the relationship given the particular circumstances: the evidence it did have described a medium risk of harm; but the most recent independent risk assessment was almost two years old by the time of the FTT hearing; the letter confirming the lifting of the restraining order gives no reasons for this at all; there was a longstanding pattern of abuse beyond the index offence followed by a long period of separation and only an extremely recent and short period of living together of one week.

Final points

21. We raised the possibility with the representatives that the reunification of the family might be described as a "new matter" requiring the consent of the SSHD given the complete absence of contact as at the date of the deportation decision. Mr Bramble however submitted that if consent was necessary it was given implicitly as the witnesses were cross-examined at length regarding their reunification.

Remedy

22. We have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and have decided that this is an appropriate case to remit to the FTT. There will need to be fresh findings of fact in light of the appropriate test to be applied for an EEA family member with permanent residence.

23. In addition, the party wishing to rely upon evidence from the family proceedings shall need permission from the family court to do so. Any evidence should be properly placed in an indexed and paginated bundle. The FTT may also wish to give further careful consideration to what extent the respondent seeks to rely on any "new matter".

Decision

24. The FTT decision contains a material error of law and is set aside. The appeal is remitted to the same FTT.

Signed: *UTJ Plimmer*
Ms M. Plimmer
Judge of the Upper Tribunal

Date:
31 October 2018