Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00076/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 February 2018	**On 13 February 2018**

Before

RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL JUDGE
DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BIODUN [A]
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr Bramble, Home Office Presenting Officer
For the Respondent: Mr Nicholson

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Colvin promulgated on 29 November 2017. We shall refer to the respondent in this appeal as the appellant as he was before the First-tier Tribunal.

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2. The appellant is a citizen of Nigeria. He was born in 1963. He claims to have entered the UK illegally in 1994 but there is apparently a conviction for forgery recorded against him in 1990. During his time in the UK he has been married three times, once to a UK citizen and twice to EU nationals. At the present time he is married to a Dutch citizen living and exercising Treaty rights in the UK. They are now living apart though apparently on good terms. He also has a child aged 12 by another relationship. The child is a British citizen.

3. On 4 March 2009 the appellant was convicted of conspiracy to supply cocaine, a class A drug. In July 2009 he was sentenced to 8 years and 3 months imprisonment. The sentencing judge recommended that he be deported saying, "I have no hesitation whatsoever in concluding that persons such as you, who are prepared to engage in the supply of class A drugs such as cocaine have no place in this society." A confiscation order as made in the sum of £49,000. With accrued interest the debt now stands at over £60,000. In July 2017 an order was made for him to pay at the rate of £5 per week.

4. The issues before the First-tier Tribunal can be summarised as follows; first whether the appellant had acquired a permanent right of residence under regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 regulations") and if so whether the decision could be justified on serious grounds of public policy or public security (regulation 21(3); secondly whether the appellant could succeed on his asylum claim; and thirdly whether the deportation decision was consistent with the appellant's human rights.

5. Judge Colvin allowed the appeal under the first of these headings finding, first that the appellant had a permanent right of residence and secondly that the Secretary of State had not demonstrated that the decision could be justified on serious grounds of public policy or public security. Although not necessary for her decision she went on to consider the asylum claim and human rights. She rejected both claims. The appellant has not challenged these findings. Accordingly the only issue before us is whether Judge Colvin was entitled to allow the appeal under the 2006 regulations.

6. At paragraph 28 Judge Colvin finds that on the balance of probabilities the appellant had acquired permanent residence under regulation 15. She records the evidence and submissions at paragraphs 26 and 27. The appellant was married to a Dutch national exercising Treaty rights on 25 June 2004. He was imprisoned, according to the reasons letter, on 25 March 2009. The appellant maintained that he had been living with his wife for a few months prior to the marriage. He submitted a utility bill in their joint names dated 20 April 2004. The submission was that he had acquired a right of permanent residence during the period January 2004 to January 2009.

7. Mr. Bramble submitted that the starting point should be the marriage in June 2004 as the appellant had not applied for a registration certificate under regulation 17. The other evidence was insufficient to demonstrate a genuine and subsisting relationship prior to the marriage. Accordingly the appellant had only demonstrated 4 years 9 months residence.

8. Mr Nicholson was unable to advise us where the start point of January 2004 in the appellant's submissions to the First-tier Tribunal came from but we noted that the utility bill of 20 April 2004 is in fact a British Gas reminder to pay a bill in joint names dated 6 April 2004. We assume that the payment was in arrears but in any event it demonstrates that some time before April 2004 the appellant and his partner had the account put in joint names. Accordingly we are satisfied that Judge Colvin was entitled to conclude that by March 2009 the appellant had acquired five years permanent residence in accordance with regulation 15(1)(b).

9. Mr Bramble submitted that in finding that the Secretary of State had failed to establish that the test in regulation 21(3) had been met Judge Colvin had failed to take into account all the competing factors. In particular she had failed to note the negative factors in the OAYsys report referred to in the reasons letter. These comments were to the effect that the appellant had failed to recognise the problem he was putting himself into which led him into the custodial sentence he faced. It further noted that the appellant "had demonstrated poor consequential thinking in committing the offences" and failed to consider the wider consequences of the victims of drug misuse. He had said that he did not wish to ask any questions about what was going on as he did not want to lose money.. It also noted that he had completed a Drug Awareness and Social Awareness course while in custody. Mr Bramble submitted that these comments showed that he had not accepted the offence that took place and reflected adversely on his attitude to the offence.

10. Judge Colvin correctly records that a deportation order in respect of a person with a permanent right of residence under the 2006 regulations may only be made on serious grounds of public policy or public security (regulation 2(3)). From paragraphs 29 to 34 she notes evidence. She commences by recording the appellant was convicted of a serious offence and notes the sentencing judge's remarks. She noted that the appellant had not committed any further offences and complied with the terms of his licence. The OASys report assessed the likelihood of his re-offending/reconviction and his risk of harm as 8%. He was not suitable for the Thinking Skills Programme as his risk was lower than that required for the course. The Offender Manager's assessment in January 2016 was that the appellant was at low risk of harm and reconviction. She considered regulation 21(5)(c) and asked whether the appellant represents a genuine and sufficiently serious threat affecting one of the fundamental interests of society. Having addressed the law on the matter at paragraphs 31 and 32 she concluded that the Secretary of State has not established that the test in regulation 21(5)(c) applies so as to justify the deportation decision (paragraph 34).

11. Regulation 21(5)(c) is of course one of the factors to be taken into account when reaching a decision under regulation 21(3). It is not in itself the test. But it is clear that in determining that the principle embodied in 21(5)(c) had not been met Judge Colvin was satisfied that deportation would be contrary to regulation 21(3).

12. It is true that Judge Colvin does not refer to the comments from the OASys report referred to in the reasons letter. However we do not think that there is any error of

law in failing to mention them in the section dealing with the assessment. In the first place we are not satisfied that the sections of the OASys report relied upon by Mr Bramble justify the submission that the appellant did not accept the offence. We read them as the appellant's attitude in committing the offence and not a reflection of his acceptance of his guilt; we noted that the appellant pleaded guilty. Secondly as Judge Colvin noted at paragraph 32, under reference to the judgement of the Court of Appeal in **Straszewski v SSHD and Kersys v SSHD [2016] 1 WLR 1173** the focus is to look at the future not the past. The issue is to be determined solely by reference to the conduct of the offender and the likelihood of re-offending.

13. We should also record that one of the grounds of appeal was that the Judge had found at paragraph 42 that the Secretary of State had yet to consider the best interests of the child, aged 12. The ground goes on to criticise Judge Colvin's treatment of the evidence in relation to the best interests of the child. We do not consider this to be material in light of our decision that Judge Colvin was entitled to conclude that the deportation was not justified on serious grounds of public policy or public security.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date 08 February 2018

Lord Boyd of Duncansby
Sitting as a Judge of the Upper Tribunal