Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00189/2019

THE IMMIGRATION ACTS

Heard at: Manchester CJC	**Decision & Reasons Promulgated**
On: 13 September 2019	**On: 17 September 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

CHRISTIAN [O]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Karnik, Counsel
For the respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Nigeria, has appealed against a decision of the First-tier Tribunal ('FTT') dated 29 May 2019, in which it dismissed his appeal against a decision of the respondent dated 25 March 2019 to deport him pursuant to the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regs'). The appellant is the spouse of a Dutch national exercising Treaty rights in the United Kingdom ('UK').

2. The decision to deport is based upon the appellant's conviction of conspiring to supply a Class A drugs on 13 February 2015 and his sentence of imprisonment of nine years.

3. The decision of the FTT is detailed, comprehensive and in many respects carefully drafted. However, near the beginning of the decision at [12] the FTT said this:

> "the burden of proof on every factual issue lies on the appellant, and the standard of proof required is the balance of probabilities".

4. At the hearing before me Mr Tan accepted that it was an error of law to place the burden of proof on the appellant. The central issue to be determined, as noted by the FTT at [23], was whether the appellant's deportation is justified on grounds of public policy for the purposes of regulation 21 of the 2016 Regs. Arranz (EEA Regulations – deportation – test: Spain) [2017] UKUT 294 (IAC) makes it clear that the burden of proving that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society such that his deportation is justified on grounds of public policy, rests on the respondent.

5. As noted by the Upper Tribunal ('UT') in Arranz, although the overarching EU Directive is silent as to burden of proof, there is a binding general principle that the burden of seeking to restrict rights conferred by the Directive should lie on the member state. The UT said this at [43]*:*

> "We consider that, logically, the reasoning of the Court of Appeal in Rosa, which was concerned with a decision which would require the removal of the Appellant from the United Kingdom, extends to exclusion and removal decisions made under Regulation 19. We can identify nothing in the Directive, the Regulations or in principle impelling to a different assessment. It follows that the legal burden rested on the Secretary of State of establishing, on the balance of probabilities, that the removal of the Appellant from the United Kingdom was justified on public policy grounds."

6. Although Mr Tan accepted that the legal burden of proof rested on the respondent, he submitted that in substance and when the decision is read as a whole, there was no material error of law because the FTT would have come to the same conclusion.

7. It has therefore not been disputed that the FTT's first reference to burden of proof - in [12] of its decision - in relation to regulation 21 of the 2016 Regs is incorrect. The misstatement here that the appellant bore the burden of proof, the standard being the balance of probabilities is unambiguous and unqualified. It is not remedied in any other part of the decision. I note that the FTT considered that the appellant had the burden of proof "*on every factual issue*". The question of whether the appellant's threat is genuine, present and sufficiently serious involved a mixed factual and legal assessment. I acknowledge that in [23] the FTT makes reference to removal being "*justified*". It is of course necessary to consider the decision of the FTT as a whole, rather than in isolated fragments. The FTT nowhere refers to the respondent bearing a burden of proof. Nowhere in the decision does the FTT

use language to indicate that it is for the respondent to establish that the threat posed by the appellant is genuine, present and sufficiently serious, and for her to justify the measure. The burden of proof is referred to again at [20] but entirely in the context of Article 8 of the ECHR, and therefore does not assist. There is therefore no use of explicit language that can properly be construed as a recognition of the respondent's burden of proof under the 2016 Regs, sufficient to correct the misstatement of the burden of proof in [12] of the decision. Reading the decision as a whole, I are satisfied that the essential thrust of the critical passages is that the appellant had not persuaded the FTT that his removal was not satisfied on grounds of public policy.

8. The FTT has made many straightforward findings of fact that appear to me to logically follow from the evidence available to it including the finding that the appellant has a propensity to reoffend and his family have been able to cope reasonably well whilst he has been in prison. However, I cannot be certain that these findings would have been made, if the FTT had properly directed itself to the burden of proof. Although the appellant faces an uphill task, this is not a case in which it can properly be said that there could only be one outcome or the FTT would inevitably have reached the same conclusion. One of the appellant's children has special needs. The appellant himself appears to suffer from serious medical difficulties. Significantly, the appellant's risk of reoffending has been assessed to be low by the probation officer. Whilst a judge is entitled to reach a different view on this matter, there remains the possibility that if the correct burden of proof is applied a judge might agree with the probation officer's assessment. For those reasons I am satisfied that the FTT has made a material misdirection in law regarding the burden of proof and the findings need to be remade.

Disposal

9. Both representatives agreed that in the event that I found that the accepted misdirection as to the burden of proof is material, the decision should be remade by the FTT. I 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 I have decided that this is an appropriate case to remit to the FTT.

Decision

10. The decision of the FTT involved the making of a material error of law. Its decision cannot stand and is set aside.

11. The appeal shall be remade by FTT de novo, by a judge other than Judge Tully.

Signed: *UTJ Plimmer* Dated: 13 September 2019
Judge of the Upper Tribunal