IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002476

First-tier Tribunal No: DA/00582/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:

15th November 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Godwin Ikenna Nwafor
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr C Yeo of Counsel, instructed by Ineyab Solicitors
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard remotely at Field House on 8 November 2023

DECISION AND REASONS

1. The parties are referred to herein as they were before the First-tier Tribunal.

2. By the decision of the Upper Tribunal issued on 6.10.23, the respondent has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Farrelly) promulgated 15.2.23 allowing the appellant's appeal against the respondent's decision of 12.9.18 to deport him from the UK following his conviction and imprisonment for a total term of 7 years' imprisonment for fraud offences.

3. There is some history to this appeal. The appellant's appeal against the deportation decision was dismissed by First-tier Tribunal Judge Herlihy on 9.8.19. Permission to appeal to the Upper Tribunal was refused by both the First-tier Tribunal and the Upper Tribunal. However, the appellant succeeded in a CART judicial review claim, with the result that the Upper Tribunal remitted the appeal

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to be made afresh in the First-tier Tribunal, resulting in the decision of Judge Farrelly, which is now the subject of this appeal to the Upper Tribunal.

4. In granting permission, Upper Tribunal Judge Owens considered it arguable "*that the judge did not make a finding as to whether the appellant constitutes a genuine, present and sufficiently serious threat to the fundamental interests of society and did not properly grapple with those factors set out at Schedule 1 of the EEA Regulations 2016. It is also at least arguable that the judge did not take into account factors that weighed against the appellant in the proportionality assessment* ."

5. Following the helpful submissions of both legal representatives, I reserved my decision to be provided in writing, which I now do.

6. It is common ground that in 2011 the appellant, a citizen of Nigeria, acquired a permanent right of residence under the 2016 Regulations, on the basis of his then relationship with a German national, from whom he is now divorced. Whilst at [17] of the decision the judge considered whether the appellant had a sufficient length of continuous residence for the highest level of protection (requiring imperative grounds), the judge overlooked the fact that under Regulation 27(4) only an EEA national can acquire the highest level of protection. As a Nigerian national, the appellant could at best only ever have had the middle level of protection, that requiring serious grounds of public policy and public security before taking a 'relevant decision'. However, no material error of law arises from this misunderstanding of the Regulations.

7. The first of the respondent's grounds argues that the First-tier Tribunal failed to provide adequate reasons for findings on a material matter. In particular, it is asserted that "*The FTTJ fails to (make) a finding that the appellant does not pose a genuine, present and sufficiently serious threat to the fundamental interests of society. The FTTJ fails to have regard to the provisions of Schedule 1 of the EEA Regulations 2016 which set out the fundamental interests of society* ."

8. Obviously, the respondent relies on the seriousness of the appellant's offending behaviour as indicative of the threat he poses to the fundamental interests of society, as defined in paragraph 7 of Schedule 1 of the Regulations. Those fundamental interests include where the conduct of that person is likely to cause, or has in fact caused, public offence, and maintaining public confidence in the ability of the relevant authorities to take action to exclude a person with a conviction. Mr Parvar pointed out that given the length of sentence this was a very serious case. He referred me to Schedule 1 paragraph (3) to the effect that the longer the sentence then or more numerous the convictions, the greater the likelihood that the individual's continued presence in the UK represented a genuine, present and sufficiently serious threat affecting the fundamental interests of society.

9. However, the judge did reference Schedule 1 at [18] of the decision and must be taken to have had regard to those requirements even if not expressly stated, unless the contrary can be shown. The judge certainly made an explicit consideration of the seriousness of the offending between [18] and [23] of the decision, concluding that, "*The sentencing remarks indicate the offences were premeditated and consisted of offences over an extended period. Many gullible vulnerable individuals were defrauded. The sentence imposedis indicative of its seriousness* ." I note that there are several other references to the offending behaviour, in particular at [24], [28], [29] and [32] of the decision. Undoubtedly,

the judge did accept that the offending behaviour was serious.

10. Mr Yeo submitted that the grounds are misleading. In respect of this first ground, he argued that the respondent misstates the burden of proof and that it was not for the judge to find that the appellant did not present a threat to the fundamental interests etc., but rather it was for the respondent to demonstrate that he did pose such a threat. Whilst that is accurate, it does not absolve the judge from providing a reasoned assessment of the relevant principles. Regulation 27(5) mandates that "*where a relevant decision is taken on grounds of public policy or public security it must also be take in accordance with the following principles*," namely those set out in (a) to (f) of 27(5).

11. It follows that the judge was obliged to consider the genuine, present and sufficient serious threat issue relied on by the respondent, (Regulation 27(5)(c)), as well as the other principles listed under Regulation 27(5). It is not clear to me that the First-tier Tribunal did make those considerations or took the principles referred to into account. In their submissions, both representatives pointed me to the balancing exercise with adverse factors set out between [19] and [23] and generally positive factors between [24] and [31] of the decision. However, the paragraphs of the decision referred to, together with the other considerations set out in the decision, would all seem to be directed more to the proportionality balancing exercise under Regulation 27(5)(a).

12. Having carefully considered the impugned decision in the light of the grounds and the oral submissions made to me, I am not satisfied that the First-tier Tribunal provided any reasoned conclusion addressing the respondent's contention that pursuant to Regulation 27(5)(c), the appellant presents a genuine, present and sufficiently serious threat to the fundamental interests of society (taking into account past conduct and that the threat need not be imminent). Indeed, reference to that requirement is largely absent from the decision, apart from the penultimate sentence, "*I find the respondent has not demonstrated that he now presents a serious threat*." However, the reasoning for this conclusion is not clear to the reader, who can see that certain factors have been considered in the proportionality balancing exercise but is not informed whether the judge has specifically reached a conclusion as to whether appellant's conduct does or does not represent a genuine, present and sufficiently serious threat, etc., as claimed by the respondent. In the circumstances, I am satisfied that there is a clear error of law in relation to the first ground.

13. I am less persuaded by the second ground, which relates to the finding at [32] of the decision that the appellant's deportation would be disproportionate in all the circumstances. In particular, it is submitted that the decision is absent any specific findings referencing the appellant's age and state of health, or his economic situation, factors expressly referred to in Regulation 27(6).

14. By Regulation 27(6) The judge was required to take into account a wide range of non- exhaustive considerations:

> *27(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."*

15. At [31] of the decision, the judge had regard to the appellant's current relationship accepting that he has, "*a genuine and subsisting relationship with his partner and their children. I also accept that he is integrated into life in the United Kingdom*." At [32] of the decision, the judge concluded:

> *"looking at all of these factors is my conclusion it would be disproportionate to deport the appellant. I reach this conclusion primarily on the length of time he has been in the United Kingdom, passage of time since the offences and how he appears to have reformed. A significant feature also is the genuine family life I find exists. I am mindful of the fact his employment and is seeking to advance himself through education. I also find he has integrated into life here. I find the respondent has not demonstrated that he now presents a serious threat. The appeal is allowed."*

16. As to the considerations to be taken into account expressly cited in Regulation 27(6), the respondent submits "*that there are no reasons associated with the appellant's age or state of health as to why deportation would be disproportionate. Furthermore, there is no reason why the appellant's children may not remain living in the UK with their mother. Contact may be maintained via modern of communication and visits*." However, I note that the considerations referred to by the respondent are no more than examples of relevant factors, as is clear by the phrase " *such as*" in Regulation 27(6).

17. I also accept Mr Yeo's submissions that a careful reading of the decision reveals that the judge did take into account, inter alia, the appellant's family situation, rehabilitation, risk of offending, length of residence, economic circumstances, and integration. With regard to the respondent's second ground as drafted, it has not been demonstrated that age and state of health were particularly relevant to the decision, or that any other relevant consideration was left out of account. In the circumstances, I am not satisfied that there is any error of law in this regard.

18. However, as stated above, I am satisfied that all of these considerations were made in what appears to have been no more than a simple proportionality balancing exercise, whereas the requirements of the Regulations are much more comprehensive and nuanced. Clearly, what is or is not proportionate on the facts of a particular case is interlinked with other considerations such as personal conduct, preventative grounds, offences causing public offence or likely to cause harm to society, or maintaining public confidence in the ability of the authorities to exclude a person with a conviction for serious criminal conduct. These and perhaps other relevant considerations are absent from the decision of the First-tier Tribunal.

19. In summary, I am satisfied for the reasons set out above that the first ground is made out and that the decision of the First-tier Tribunal is flawed for material error of law. Whilst Mr Yeo described the decision as "concise but precise," I find that whilst brevity is commendable, the decision is so concise that it fails to demonstrate whether the appropriate factors and principles under the 2016 Regulations were considered or taken into account. If they were, it is not clear to the reader, particularly the losing party in the appeal.

20. In the circumstances, the decision must be set aside to be remade. I am conscious that this matter has now been before the Tribunals twice and have accordingly given careful consideration to whether it ought to be retained in the Upper Tribunal to be remade in a continuation hearing. However, I am satisfied that no

findings can or ought to be preserved and that the decision needs to be made *de novo*. Inevitably, this will require up to date evidence of the appellant's current circumstances and cannot simply be remade on the facts as they were before the First-tier Tribunal. I am satisfied that given the extent of judicial fact-finding necessary it is appropriate to remit this matter to the First-tier Tribunal as falling within paragraph 7.2 of the Senior President's Practice Direction.

Notice of Decision

The respondent's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside to be remade.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal with no findings preserved.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 November 2023