In the Upper Tribunal
(Immigration and Asylum Chamber)

Appeal No: UI-2024-000261
UI-2024-000262

First-tier Tribunal No: EA/50054/2023
EU/55504/2023

THE IMMIGRATION ACTS

Heard at Field House
On 5 March 2024

Decision & Reasons Promulgated

18th March 2024

Before

UPPER TRIBUNAL JUDGE LANE
HIS HONOUR JUDGE HANBURY
SITTING AS A DEPUTY JUDGE OF THE UPPER TRIBUNAL

Between

ADEOLA AKEEM ODUKOYA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant/respondent: Ms. McKenzie, a Home Office presenting Officer.
For the Respondent/appellant: Mr Adewoye, a legal representative

DECISION AND REASONS

Introduction

1. In this appeal the parties will be referred to by their designations before the First-tier Tribunal (FTT) notwithstanding that their roles are reversed. Thus, the Home Office will continue to be referred to as "the respondent" notwithstanding he is the appellant in the appeal to the Upper Tribunal (UT). The appellant before the FTT will continue to be referred to as "the appellant" in the UT.

2. The respondent appeals against FTT Judge Norris's (the judge's) decision on 12 December 2023 to allow the appellant's appeal against the respondent's decision, served on 19 December 2022, to make a deportation order and to refuse his EUSS application. The judge decided that the offences the appellant had committed between January 2018 and August 2019 were not of such gravity as to fall within the category that they would cause revulsion amongst members of the public. A high level of protection attached to this appellant as a person who can only be deported on serious grounds of public policy and public security as the judge considered the appellant further within regulation 27 (3) of the Immigration (European Economic Area) Regulations 2016 (2016 Regulations), although the burden of proof rested on the appellant to show that the respondent's decision to make his deportation was disproportionate.

3. On 25th of January 2024 FTTJ Boyes gave permission to appeal that decision because he considered it to be at least arguable that the appellant did not qualify under the 2016 Regulations and/or that the judge had decided the appeal based on matters unsupported by evidence including objective evidence.

The hearing

4. Ms Mackenzie, who had not appeared below, said that the judge had elevated the appellants' degree of protection to a higher level than was warranted by his status. That status had not been established. The appellant's spouse's status remained unclear. In any event, as had been pointed out, the appellant had not given clear evidence to support his elevated status. We were referred to paragraph 10 and 26 of the decision and to regulation 15 (1) (b) of the 2016 regulations. For the respondent it was not accepted that the appellant had the elevated status afforded to those with a "permanent right of residence" in the UK including "family members" of the nationals but rather fell to be considered as a person with the lowest level of protection under the

2016 regulations, i.e. as someone who was not entitled to be deported solely on economic grounds (see regulation 27 (1) (2) and (3)). The evidence did not establish that the appellant had been here for the qualifying period of 5 years continuous residence for the purposes of regulation 27 (3), reference is also having been made to regulation 15 (1) (b) of the 2016 regulations.

5. Mr Adewoye argued that there was no challenge to the appellant's status as a cohabitee of an Irish citizen, which, he said, "seemed to be at the crux of the appeal". The onus was on the appellant to establish his 5 years of continuous residence in the UK, but he had done so. It was argued that he had a residence card but not a permanent right of residence. This was sufficient to propel his status to the higher level of protection referred to above. The judge's findings at paragraph 16 were referred to and other parts of his decision where the judge concluded that the appellant had been in the UK since 2015. Therefore, he could only be deported if there were "serious grounds of policy or public security" for the purposes of regulation 27 (3). The judge had reached conclusions that were open to him on the evidence, therefore.

6. As to ground 2, it was not accepted that this undermined both the high level of protection the appellant had achieved and the need for proportionality to be maintained in the ultimate decision. The UT was referred to the schedule 1 of the 2016 regulations which set out a number of considerations of public policy, public security and the fundamental interests of society that must be considered where regulation 27 applies. The appellant had secured employment and was at low risk of re-offending (see paragraph 40 of the decision and the appellant's witness statement at page 45). We were also referred to the OASYS assessment at page 131 (where he is said at page 418, question 12.8, to have been "very motivated").

7. By way of reply, Ms McKenzie said that the appellant had not established that he was rehabilitated. In support of this proposition, the tribunal was referred the case of **Kamki [2017] EWCA Civ 1715**. That case was referred to at paragraph 6 of the grounds. A low risk of reoffending did not mean that there was no risk-it still being appreciable. The seriousness of the appellant's offending had not been addressed by his representatives.

Discussion

8. At the hearing Ms McKenzie conceded that the respondent's grounds of appeal did not challenge the judge's conclusion that the appellant's enhanced status was supported by the policy paper known as "The Joint statement of 8 May 2019 between the UK Government and Government

of Ireland on the Common Travel Area" (the Joint Statement). That was published in relation to the common travel area agreement between Britain and Ireland in 2019. She was asked whether she wished to apply to amend her grounds given that the respondent had not accepted that joint statement had any impact on this appellant's status, but she declined to take that opportunity. However, she argued that the judge's conclusion under regulation 27 (3), which provided that those with could only be removed on serious grounds of public policy and public security, was unjustified. She said that this was because the sponsor's evidence was unclear, and the judge had not accepted that evidence. Therefore, the judge was not entitled to conclude that the appellant had been living with his wife for a continuous period of five years Mr Adewoye submitted.

Conclusions

9. Because the judge's decision that the appellant was entitled to the benefit of the joint statement is unchallenged before the UT, this alternative basis for reaching the decision to uphold the appellant's appeal does not fall to be considered by us.

10. Were we to consider the decision in relation to regulation 27 (3) we would have had serious questions as to the correctness of his findings. In particular, the judge misconstrued regulation 27(3) and/or misapplied it to the facts in this case. It appears than those facts did not support the high level of status afforded to the appellant.

11. Even if the appellant was afforded the elevated status that he sought, it was nevertheless strongly arguable that he fell to be deported given the gravity of his offending and the judge's mistaken conclusion as to his low risk of reoffending and the prospects of his rehabilitation.

12. We are conscious that an appellate tribunal should hesitate before interfering with the fact findings made by a tribunal of first instance, but it is telling that the judge expressed his own misgivings about the qualify the evidence (see for example paragraph 40 of his decision at page 15). It was not correct to conclude that the appellant had a low risk of reoffending without first identifying that the appellant had secured a means of addressing his debt problems which were believed to be among the reasons for the appellant's past offending.

13. We have reached the conclusion therefore that the judge had not properly dealt with the appellant's risk of reoffending, which was not insignificant. Even if he was to be treated as a rehabilitated individual, which for the purposes of this appeal we are prepared to accept, the findings were not based on proper assessment of the evidence and

there remained a material risk to the public of his reoffending. It is noteworthy that the judge regarded the appellant's evidence, including the important evidence given by his partner Miss Malebe (see paragraph 16 of the decision), with scepticism. The consequences to the public of the appellant's reoffending would be serious and the judge expressed concern about the evidence of the appellant's rehabilitation in relation to financial matters at paragraphs 35 and 38, which refer to the appellant's financial situation. Good intentions are insufficient by themselves to bring about his rehabilitation. It was not appropriate for the tribunal effectively to abdicate responsibility for making decisions on these matters to professionals such as probation officers. It was for the judge to reach a reasoned decision on risk of the appellant reoffending in the future and this he has failed to do. It is an omission of such significance that we find that the First-tier Tribunal's decision should be set aside.

14. We invited submissions on ultimate disposal. Neither party invites us to retain the appeal when a *de novo* reappraisal of the evidence is required. Mr Adewoye did not seek to persuade us that the finding relating to the appellant being fully rehabilitated and posing no identifiable risk to the public could be maintained. In the circumstances, we consider the appropriate course is to return the appeal to the First-tier Tribunal to remake the decision.

Notice of Decision

The respondent's appeal is allowed.

The decision of the FTT's is set aside.

The appeal is returned to the FTT. None of the judge's findings of fact shall stand. The FTT is to hear the appeal *de Novo* to be heard by a judge other than Judge Norris.

No anonymity direction is made.

Signed [redacted] Date 11th March 2024

Deputy Upper Tribunal Judge Hanbury