IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-001847**
HU/19539/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 16th August 2022	**On the 11 October 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

DAVID NGAHFI SIENI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms N Malik instructed by Thompson & Co Solicitors

DECISION AND REASONS

1. The Secretary of State made the application for permission to appeal but I will refer to the parties hereinafter as described before the First-tier Tribunal, that is Mr Ngahfi Sieni as the appellant and the Secretary of State as the respondent. The appellant is a citizen of Cameroon born on 2nd February 1987. According to a status questionnaire dated 11th April 2008 he entered the United Kingdom in 1998 and asserted that he joined St Anthony's Academy School on 9th November 1999. His mother is said to

be a German national exercising treaty rights in the United Kingdom in accordance with European Community law.

2. Between December 2002 and 21st July 2010 the appellant received six convictions for various offences including shoplifting, burglary, attempted robbery and possession with intent to supply class C drugs. He was also convicted of driving offences. On 1st April 2005 at Bournemouth Crown Court the appellant was convicted of robbery and sentenced on the same day to eight years' detention in a young offender's institution (subsequently reduced to seven years). An application for a residence card on 3rd April 2007 was refused on 30th May 2008. A further application for a residence card was voided as an inappropriate application on 5th November 2008. On 30th May 2008 the appellant was issued with a decision to make a deportation order under the provisions of Regulation 21 of the 2006 Regulations. His appeal against the decision to deport him from the UK was subsequently dismissed on 21st August 2008 and his appeal against that dismissal was refused on 17th September 2008. On 25th November 2008 the appellant sought a High Court review which was granted on 17th December 2008, but that reconsideration was then struck out on 9th February 2009 and in December 2010 the appellant withdrew his application to the Upper Tribunal and he became appeal rights exhausted.

3. He was not removed on 10th November 2008 owing to disruptive behaviour and was granted bail on 12th January 2009 from immigration detention. The appellant had thus been in detention between 2005 and 2009.

4. On 16th June 2010 at Croydon Crown Court the appellant was again convicted of robbery and possessing an intimidation firearm and he was sentenced to an extended sentence of thirteen years comprising a custodial term of ten years' imprisonment and an extension period of three years.

5. On 11th February 2015 his case was reconsidered by the Secretary of State and he was issued with a decision maintaining his deportation from the UK in accordance with the principles of the Immigration (European Economic Area) Regulations 2016 and the European Convention on Human Rights. His then legal representatives made representations. Finally a consent order was agreed on 3rd May 2016 to revoke the deportation order and the subsequent decision letters of 11th February 2015 and 8th January 2016. Nonetheless, a further decision was issued under Section 32(5) of the UK Borders Act 2007 on 24th August 2018 and a subsequent supplementary decision letter dated 4th October 2021 was issued addressing the request of a reconsideration of the deportation under the 2016 EEA Regulations because of the mother's German citizenship. It was submitted that the decision should have been made under Regulation 27 of the 2016 EEA Regulations. That was categorically rejected by the Secretary of State in her decision of 4th October 2021.

6. That letter outlined that the applicant had provided no valid proof to show that he was currently dependent on his EEA national sponsor and it was

not accepted that he was a family member for the purpose of the 2016 EEA Regulations. That letter confirmed that the appellant had not shown that he could not meet his essential needs without the financial support of the EEA national. Indeed it was stated by the representatives that his relationship with his partner and two children did not preclude dependency.

7. First-tier Tribunal Judge Cameron considered the appeal on 19th November 2021 and promulgated a decision on 23rd February 2022.

8. In essence the judge accepted that the appellant had been dependent on his mother because of a decision issued on 30th May 2008 to make a deportation order in accordance with the Regulation 21 [41] although he accepted that when the appellant's appeal was dismissed, the appeal did not deal with the issue of "whether he was a dependant under the EEA Regulations and it would appear that the issue was never then properly dealt with" [43].

9. At paragraph 45 the judge found on the balance of probabilities that the appellant "was dependent on his mother as a child and this appears to have been accepted by the respondent by the very fact that they issued the notice to make a deportation order under the EEA Regulations 2006" and as a result the judge concluded that he was "satisfied on a balance of probabilities that the respondent should have dealt with the current decision under the EEA Regulations 2016".

10. The judge reviewed the appellant's immigration and offending history noting that the Secretary of State did not accept that he should be dealt with under the Immigration (European Economic Area) Regulations 2016 whilst the appellant maintained they were applicable and that imperative grounds (the highest level of protection) applied. The judge noted the evidence he had heard from the record company who had signed the appellant, found he had put his offending behind him, was an inspiration to other artists, made passing reference to his very serious criminal offending and that he was providing a positive role. He noted the appellant's probation officer letter dated 17th November 2021 and that although the appellant had 'one further conviction for driving under the influence of drugs, he has essentially remained offence free and in particular has not committed any further offences warranting imprisonment'. He found the appellant had turned his life around. The judge then stated at 59:

> *"59. This threat must be justified to the appropriate standard based on the level of protection the individual has acquired (serious/imperative grounds, etc). Therefore, the greater protection afforded to the individual the more substantial the reasons in favour of deportation need to be.*
>
> *60. Even if I was incorrect in relation to the imperative grounds after taking account of the evidence available to me, I am not satisfied when all of the issues are taking into account that the appellant does not represent a genuine, present,*

and sufficiently serious threat affecting one of the fundamental interests of society.

61. After taking into account all of the evidence available I am satisfied that when the factors in favour of the appellant are balanced against the respondent's legitimate aim that the appellant has shown that there are very compelling circumstances outweighing the public interest in his deportation."

11. The grounds for permission to appeal set out ground 1 asserting a material misdirection of law under the EEA Regulations. It was submitted that a decision was made refusing the appellant an EEA residence card on 30th May 2008 when the appellant was aged under 21 but the judge decided that the instant decision made in August 2018 should have been considered under the EEA Regulations. However, in 2018 the appellant no longer met the requirements of Regulation 7(b)(i) or Regulation 7(b)(ii) as a family member of an EEA national because he was no longer aged under 21 and could not demonstrate he was dependent on his mother a German national. At 32 the judge noted that the appellant's submission was that his application should have been considered under the EEA Regulations but no evidence was submitted in support of this assertion.

12. The reasons for refusal letter at paragraph 35 clearly set out that because the appellant was in paid employment, he could no longer be considered as a dependant on his mother and therefore he was not an extended family member for the purposes of the EEA Regulations.

13. Further, at 60 the judge erred in considering that the appellant benefits from the highest level of protection and that his deportation may therefore only be justified on the basis of imperative grounds of national security. The judge had failed to appreciate that the appellant could not benefit from Regulation 27(4) because he is not an EEA national; he is Cameroonian.

"27(4) A relevant decision may not be taken except on imperative grounds of public security in respect <u>of an EEA national</u> who—

(a) [has a right of permanent residence under regulation 15 and who] has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989".

14. It was clear that Regulation 27(4) could only apply to an EEA national and the appellant would be unable to benefit from the highest level of protection afforded by 27(4).

15. Further, the judge failed to reason that the appellant did not pose a genuine, present and sufficiently serious threat to the fundamental interests of society and failed to give any basis for his decision in the light of the appellant's history of very serious and persistent offending. The judge failed to consider the seriousness of the consequences of reoffending in line with **Kamki [2017] EWCA Civ 1715**. It was submitted that the consistency of the appellant's offending was in itself strongly indicative of a propensity to reoffend and the potential consequences of reoffending were serious. The appellant's offending started in January 2001 when he received a reprimand and between 5th December 2002 and 21st July 2010 he received six convictions for fifteen offences.

16. In making a finding that the appellant posed a low risk of reoffending the judge failed to consider the seriousness of the consequences of reoffending in line with **Kamki**. It was submitted that the extremely serious nature of the appellant's index offence demonstrated the potential consequences of reoffending were serious.

17. Ground 2. The judge failed to give adequate reasons for findings on a material matter, that is very compelling circumstances.

18. At 61 the judge found that the public interest in the appellant's deportation was outweighed by very compelling circumstances. It is submitted that in the light of the fact that the appellant was not an EEA national nor a dependant of an EEA national given the length of the appellant's sentence that this was the correct threshold, as set out at paragraph 398 of the Immigration Rules, but the judge had failed to give reasons for this finding.

19. At the hearing before me Mr Tufan submitted that the appellant may have been a dependant at some point historically but there was no suggestion that the appellant was currently a dependant. If the judge was correct in finding the appellant was entitled to a high level of protection because he was not an EEA national, that was an error of law.

20. There was an absence of relevant findings in relation to very compelling circumstances. Rehabilitation was not the total answer.

21. Ms Malik submitted there was no material error of law and invited me to consider the conclusions of very compelling circumstances. First, she stated that the judge had referred to all the relevant documentation although agreed there was no analysis regarding his children. She considered that the findings of the judge did address very compelling circumstances. She accepted that there was no analysis of any reintegration into Cameroon (as raised by the respondent's underlying decision between paragraphs 46 and 98), but submitted that the judge had considered the seriousness of the offending and understood the seriousness of past offending. She noted that the judge had not engaged with the OASys Report but had referenced a Probation Services letter. All

the evidence allowed the judge to come to the conclusion that he did that the appellant had turned his life around.

22. She went on to submit that at the time of his arrest in 2004 he was a family member exercising treaty rights. She suggested that he may have acquired permanent residence in line with **LG (Italy) [2008] EWCA Civ 190**. She submitted that he was first imprisoned in 2004 at the age of 17 years and accepted that he was not dependent when in prison.

23. She noted that he had made an application in 2007 as a dependant of an EEA national which was refused. He had committed a further offence in 2010 at the age of 27 years and was in prison until 2014. The decision letter concluded that his custodial sentence ended on 27th May 2015 and he was detained under immigration powers until his release on 29th July 2015.

24. She submitted that the judge may have considered whether to apply imperative grounds but also found at [60] that he did not represent a genuine and present threat.

Analysis

25. In relation to the EEA Regulations it is clear that the judge failed to grapple with the essential question of whether the EEA Regulations actually applied let alone whether the imperative grounds applied which they do not for the reasons set out above in relation to Regulation 27(4). Nor did the judge address the question raised by the Secretary of State of whether in order to qualify under the EEA Regulations, the appellant had continued to be dependent on his mother as he was now 35 years old.

26. The appellant was convicted of robbery on 1st April 2005 (when 18) and sentenced to 8 years detention. Regulation 3 of the EEA regulations 2016 confirms that continuity of residence is broken when a person serves a sentence of imprisonment (and there appears to be no length of sentence specified) or (inter alia) when a deportation order is made.

27. Although the appellant asserts he entered the UK in 1998, even if as the judge states he had been recorded as being at school in 1999 there was no information as to the dates or whether he returned to Germany. It is for the appellant to show that he secured 5 years in the UK in accordance with the EEA Regulations prior to his incarceration and there was no evidence that he had done so in order to secure permanent residence in accordance with Regulation 15(1)(b).

28. This issue was particularly relevant bearing in mind that the appellant had in effect been in prison from 2004/2005 until his release in 2007 (at the age of 20) and during this time he cannot have been, as Ms Malik agreed, dependent on his mother. The appellant had experienced, as the judge recorded, rejections to his applications for an EEA residence card as the

dependant of his mother in both 2007 and 2008 (at the ages of 20 and 21 years).

29. As set out in the letter of 30th May 2008, giving reasons for deportation, it was specifically stated that at the time of his arrest on 2nd December 2004 age 17, his status was that of a family member of an EEA national exercising treaty rights but:

> *"Neither you nor your family members had any form of permanent residence in the United Kingdom at that stage. On 3rd April 2007 you made an application for an EEA residence card as the son of an EEA national who is exercising treaty rights in the United Kingdom. However, you failed to provide satisfactory evidence showing that your mother was exercising the aforementioned rights."*

30. This specifically stated that under Regulation 15 he may only require a permanent right of residence when he had resided in accordance with the 2006 Regulations, being a qualified person or a family member of a qualified person under Regulation 7. It was specifically determined he had not obtained a permanent right to reside in the UK under the 2006 Regulations. Nor I note was there confirmation that the mother at this point had obtained permanent residence. There was no firm indication as to whether the mother was exercising treaty rights throughout the period between 1999 and the date of his first incarceration.

31. From 2010 the appellant was imprisoned again until April 2015 and was thus released when he was nearly 28 years old.

32. Although the judge notes that it was telling that the Secretary of State's May 2008 decision was issued under the EEA Regulations that decision at the same time specifically refused him a residence card let alone on permanent residence grounds. The judge makes no reference to this and merely relies on the fact that deportation letters were issued on the basis of the EEA Regulations. Even if that had been the case prior to the 2018 decision, the 2018 refusal of the human rights claim specifically rejected that the appellant should be entitled to the protection of the EEA Regulations 2016 and again this was specifically repeated in a supplementary letter of 4th October 2021. Further, it was pointed out that the evidence the appellant provided undermined any claim to be dependent on the mother. At no point did the judge engage with that point.

33. The judge at paragraph 46 conspicuously failed to address the issue of whether the appellant was currently dependent on his mother and failed to address paragraph 35 of the Secretary of State's refusal letter of 24th August 2018 that he did not fall to be considered under the EEA Regulations at all as he was not an EEA national. Nor did the judge address the Secretary of State's statement, "Your case does not fall to be considered under the EEA Regulations as you are not an EEA national nor are you the dependant of an EEA national which you have demonstrated

by providing evidence of your paid employment, which therefore reinforces the fact that you are self-sufficient".

34. Secondly, in relation to very compelling circumstances the judge failed to set out in a structured balance sheet approach when finding that there were very compelling circumstances outweighing the public interest in his deportation and his reasoning was deficient. At 56 the judge stated as follows:

> *"56. As indicated the appellant's index offence is clearly a serious one. He was released in 2015 and although he has one further conviction for driving under the influence of drugs, he has essentially remained offence free and in particular has not committed any further offences warranting imprisonment."*

35. The judge did not date this latter offence but it occurred on 20th March 2017. The judge's conclusion appeared to be based on the fact that the appellant had "turned his life around" but made no attempt to engage with the points raised by the Secretary of State in her decision from paragraphs 46 to 98 as to whether the appellant could, for example, be able to reintegrate back into Cameroon society despite a review of the evidence with reference to qualification under the EEA Regulations. That was inadequate. There was no proper engagement with, as indicated by the Secretary of State, the principles in **Kamki.** Even if the appellant poses a low risk of reoffending the judge failed to consider the seriousness of the consequences of reoffending. The extremely serious nature of the appellant's index offence, demonstrated that the potential consequences of reoffending were serious. Indeed, albeit there was the probation officer's letters, which were cited by the judge, there was a wholesale absence that any treatment of the OASys Report (albeit elderly). The decision did set out the documents at paragraph 3 but the judge failed to reference the OASys Report which, albeit dated 2014, confirmed that the appellant continued to pose a risk of serious harm to the public. and

36. In relation to the EEA Regulations even if they did apply, which I do not accept is made out for the reasons given above, the judge made no attempt to classify and analyse the factors in Regulation 27(5) and (6) if, as it was asserted, that he had allowed the appeal on the basis that the appellant was afforded the lowest level of protection.

37. There was a wholesale absence of relevant findings in this decision in relation to very compelling circumstances and, owing to the nature and extent of the absence of findings, and the misdirection in relation to the EEA Regulations issue the matter will be remitted back to the First-tier Tribunal.

38. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier

Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

No anonymity direction is made.

Signed Helen Rimington Date 8th September 2022
Upper Tribunal Judge Rimington