Upper Tribunal
(Immigration and Asylum Chamber)

Badewa (ss 117A-D and EEA Regulations) [2015] UKUT 00329 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 February 2015	.....

Before

THE HONOURABLE MRS JUSTICE THIRLWALL

UPPER TRIBUNAL JUDGE STOREY

Between

MR ADEDAMOLA DANIEL BADEWA

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr K Mak, Solicitor, MKM Solicitors

For the Respondent: Mr E Tufan, Home Office Presenting Officer

The correct approach to be applied by tribunal judges in relation to ss.117A-D of the Nationality, Immigration and Asylum 2002 (as amended) in the context of EEA removal decisions is:

(i) first to decide if a person satisfies requirements of the Immigration (European Economic Area) Regulations 2006. In this context ss.117A-D has no application;

(ii) second where a person has raised Article 8 as a ground of appeal, ss.117A-D applies.

DECISION AND REASONS

1. The appellant, born in November 1995, is a national of Nigeria . He brings an appeal against a decision of the First-tier Tribunal (FtT) comprising Judge Gillespie and NLM Winstanley. On 10 December 2014 the FtT dismissed the appellant's appeal against a decision dated 24 June 2014 expressed as a deportation order against him pursuant to r egulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (hereafter "the 2006 EEA Regulations").

2. The appellant came to the UK in May 2009 in the company of his younger brother on an EEA family permit to join their mother and stepfather. Their stepfather was a Portuguese national. On 1 December 2011 t he appellant was issued with a residence card as the family member of an EEA national valid until 1 December 2016. The appellant's criminal history began in November 2012 when he was arrested for robbery. For this he was convicted and placed on a twelve month referral order. On 6 July 2013 he was convicted of two counts of robbery and one of possession of a knife in a public place. For these offences he was sentenced to 24 months' detention and a training order. Whilst in detention he has received a number of adjudications for violence.

3. The FtT heard evidence from the appellant, his mother and younger brother. The FtT found that all three were unreliable witnesses in relation to his family circumstances in Nigeria which adversely affected their credibility generally. The FtT did not accept that his father in Nigeria had abandoned him. It considered that the appellant's equivocal attitude to his past offending cast doubt on the extent of his willingness to accept responsibility for his wrongdoing. It found that he had not settled into home life in the UK and had fallen into a delinquent lifestyle. The FtT highlighted that d espite being given significant opportunities to overcome difficulties at home, in the form of separate accommodation, an allowance, school and college placements, he had re-offended and continued his resort to violence in a Young Offenders Institute.

4. The FtT stated that it was required to decide the appeal under regulation 19(3) of the 2006 EEA Regulations in respect of whether his deportation was on grounds of public policy or public security. It then recited the principles set out in r egulations 21(2), 21(5) and 21(6). It will assist if before proceeding further we set out the provisions of regulation 19(3)-(5) and regulation 21(1)-(6) respectively:

"19. …

(3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if

(a) that person does not have or ceases to have a right to reside under these Regulations;

(b)the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21; or

(c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B(2).

(4) A person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom .

(5) A person must not be removed under paragraph (3) if he has a right to remain in the United Kingdom by virtue of leave granted under the 1971 Act unless his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

…

Decisions taken on public policy, public security and public health grounds

21. (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

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

(a)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 necessary in his best interests, 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(**11**).

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a)the decision must comply with the principle of proportionality;

(b)the decision must be based exclusively on the personal conduct of the person concerned;

(c)the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d)matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e)a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

…"

5. The FtT considered that the appellant represented a "genuine, present and sufficiently serious threat" to the public interest as was evident from the fact that there existed a "present medium level and sufficiently serious risk to public security and safety, particularly given our finding as to the equivocal nature of the appellant's acceptance of responsibility for his offending …"

6. The FtT concluded by considering whether the deportation was proportionate. It said his deportation would impact upon the best interest s of his brother (born in October 1997) and to a much lesser extent his half-siblings in the UK . It said it accepted his deportation would deprive him of advantages of life in the UK he would otherwise enjoy. At [25] it stated:

"There is a clear public interest in his removal, however, as appears both from the foregoing assessment of risk and from consideration of the public interest question as enacted in sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002. He has not been present in the United Kingdom for a lengthy period of time. He has not shown himself to be integrated into the United Kingdom society, indeed h e is not integrated into the family of his mother. He does not fall within any provisions of section 117C or 117D that might exempt him from removal. His personal circumstances

are evocative of sympathy, both on his account and on account of his younger brother, who will no doubt be affected by separation from his brother and by contemplation of his brother's misfortune. There is, however, no truthful evidence presented to us as to the likely circumstances of the appellant in Nigeria . It is thus not possible to reach any finding that those circumstances would be so adverse as to outweigh the public interest in removal. The family as a whole has, we conclude, attempted to conceal or obfuscate, rather than satisfactorily to evince the personal and family circumstances of the appellant in Nigeria . It would be vain to speculate as to whether, had a satisfactory account be given of circumstances in Nigeria , a different decision on proportionality could be reached. The fact is that no such satisfactory explanation was given."

7. It concluded at [26] that "[t]hese reasons so analysed show both that the appellant may be deported in accordance with the Immigration Rules and that this removal would not be disproportionate for the purposes of general article 8 protection."

Grounds of appeal

8. The grounds as amplifi ed by Mr Mak were threefold. Ground 1 directed its fire at the FtT's sta tement in [25] that " [t] here is a clear public interest in [the appellant's] removal … as appears … from consideration of the public interest question as enacted in Sections 117A to D [of the Nationality, Immigration and Asylum Act 2002, as amended] .. ."

9. This statement was said to evince two errors: making the "public interest" a relevant conside ration when it was not part of r egulation 21(5); and applying s ections 117A – D considerations which were not relevant considerations for the purposes of an appeal under the 2006 EEA Regulations.

10. It was also alleged under the rubric of "Ground 1" that the FtT had failed to take the appellant's age at the date of the offences into account when considering regulation 21(5), and had also failed to make any findings in relation to its overall assessment of the regulation 21(5) factors.

11. "Ground 2" contended that the FtT had wrongly found the appellant to pose a higher level of risk than was established by the evidence. The FtT had made reference to the appellant having been assessed as posing a medium risk and as falling within MAPPA level 1. It was submitted that t hereby the FtT clearly failed to appreciate that MAPPA level 1 was the lowest of the three risk categories. To conclude as the FtT did that the appellant was a genuine, present and sufficiently serious threat , his MAPPA assessment would have needed to be a level 3. If the FtT was minded to depart from the Probation Service's risk assessment , it was required to give reasons justifying that departure.

Our assessment

12. D ealing first with G round 2, we are quite satisfied that the FtT did not depart from the Probation Service's risk assessment which w as that the appellant posed a medium risk; the FtT expressly noted that he had been assessed as a medium risk more than once: see e.g. [22] and [23].

13. Ground 2 appears to assume that the FtT arrived at its conclusion that the appellant was a "present, genuine and sufficiently serious threat affecting one of the fundamental interests of society" solely on his being assessed as a medium risk under MAPPA 1, but that is plainly not how it proceeded. The FtT made clear that that conclusion was based on a number of considerations including the following: that he had re-offended within weeks of being made the subject of a referral order for his first offence; that that re-offending had involved violence (brandishing a knife in robbing two young people); that his resort to violence had continued in the Young Offenders Institute; that he

had not shown he clearly accepted responsibility for his offending; and that he had “squandered” the opportunities he had been given to rehabilitate him and get him into school and college.

14. We would also observe that in any event the MAPPA levels do not identify a hierarchy of risk, but are essentially concerned with risk management arrangements and resources. Although level 3 does identify as an example of the small number of people who may require extra resources “[those] who pose a serious risk of harm”, neither level 1 nor level 2 are defined by reference to the degrees of risk, and it is clear that level 1 can encompass those who are a medium (as opposed to a low) risk.

Role of s ections 117A-D considerations in EEA appeals

15. W e do not consider it can be correct to regard ss.117A-D considerations as inapplicable to an EEA appeal, although we would accept this is not a straightforward matter.

In favour of the view that ss.117A-D considerations are inapplicable it could be said that s. 117A(1) provides that “[t]his Part applies where a court or tribunal is required to determine whether a decision was ma de under the Immigration Acts ” and that a n appeal against an EEA decision is not an appeal under the Immigration Acts, but under the 2006 EEA Regulations which aim to implement Directive 2004/38/EC. In this regard reference could be made to t he Explanatory Memorandum t o the 2006 EEA Regulations stating that:

“These Regulations implement in domestic law Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (“the Directive”). The Directive governs movement rights between Member States”.

(See also s.7 Immigration Act 1988.)

16 . Regulation 2 defines “EEA decision” and regulation 26 provides the right of appeal “under these regulations against an EEA decision ” . It c ould also be observed that although the 2006 EEA Regulat i ons make reference to deportation provisions under s.3(5) of the 1971 Act, what it applies to them is the doctrine of novat i on : e.g. note the words “as if” in regulation 24(3) (“ Whe r e a decision is under regulation 19(3)(b), the person is to be treated as if he were a person to whom section 3(5)(a) of the 1971 Act…applied and section 5 of that Act…are to apply accordin gly . …”) .

17. On the other hand, it can be argued that decisions made under the Immigr a t i on Acts must include EEA decisions because it is s.109 of the 2002 Act that makes provision for an appeal under (the 2006) EEA Regulations. Further for a decision to be made “under” the Immigration Acts it is not the case that it must wholly be so. The EEA Regulations are, in fact, made partly under the European Communit ies Act 1972 and partly under s.109 of the 2002 Act which is one of the Immigration Acts . The vie w that the EEA Regulations mean only to depend on decisions under the Immigration Act novat ionally was not accepted by Jay J in R (on the application of Byczek and Oliviera) v Secretary of State for the Home Department [2014] EWHC 4298 (Admin).

18. In any event, so far as concerns the context of EEA appeals the 2006 EEA Regulations themselves provide expressly at S c h edule 1 that:

“The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the Asylum and Immigration Tribunal as if it were an appeal against an immigration decision under section 82(1) of that Act:

Section 84(1), except paragraphs (a) and (f)…”

19. As a result , human rights grounds under paragraphs (c) and (g) can be brought even against EEA decisions. Human rights grounds are defined in s.84 (c) and (g) in terms of whether a decision is unlawful under s.6 of the Human Rights Act as being incompatible with the appellant's Convention rights. Secti on 117A(1) states that Part 5A app lies where a court or tribunal is required to determine w h ether a decision made under the Immigr a tion Acts " – (a) breaches a person's right to respect for private and family life under Article 8, and (b) as a result would be unlawful under section 8 of the Human Rights Act 1998." Demonstrably, therefore, Part 5A considerations must be relevant to any human rights grounds raised in an EEA appeal.

20 . However, it does not follow that ss.117A-D considerations – or broader "Convention rights" (i.e. ECHR rights) consider ations - per se can be applied to the task of determining whether an appellant meets the requirements of the EEA Regulations . The EEA Regulations are in this respect a self-contained set of legal rules and an appellant cannot comply with the Regulations unless able to show that those rules are met. Not only are the two legal regimes distinct but there are sign i fic a nt differences between them. One example of the difference between the two legal regimes when it comes to issues of expulsion and deportation – and it is one pertinent to this appeal – is that whereas Article 8 jurisprudence permits decision-makers when weighing matters on the public interest side of the scales to have reg a rd to matters of general prevention or deterrence (see e.g. RU (Bangladesh)) in the EU/ E EA context, by regulation 21(5) (d) "matters" which relate to " considerations of general prevention do not justify the decision."

21. The above analysis does not, of course, mean that human rights have no part to play in an alysis of an EEA decision. EU law also incorporates human rights guarantees in the Charter of Fundamental Rights (which is now part of primary EU law) many of whose rights are described as co-extensive with ECHR rights; and the Court of Justice of the European Union (CJEU) has long treated ECHR rights as being fundamental principles of EU law . Nevertheless , the human rights dimension of EU law is not to be elided with ECHR rights : see Opinion Pursuant to Article 218(11) TGFEU, C-2/13, December 18, 2014. It has its own autonomous scope of application as part of EU law. Likewise ECHR rights ("Convention rights"), as incorporated into UK law by the Human Rights Act 1998, have their own distinct scope of application . Whilst, therefore, Article 8 consideration s may arise in the context of a determination of whether an appellant meets the requirements of the EEA Regulations or free movement provisions of EU law (in respect of which the Court of Justice has seen that Article to play a role as a general principle informing the meaning of EU provisions (see e.g. Carpenter (Freedom of establishment) [2002] EUECJ C-60/00) , their application in that context is governed by EU law, not by the ECHR or the Human Rights Act or s s .117A-D.

22 . We observe that in regard to what we have just set out – that ECHR considerations cannot be interpolated into decision s as to whether an appellant meets the requirements of the 2006 EEA Regulations - both parties were in agreement. Mr Tufan indeed said that the respondent accepted that the FtT had elide d regulation 21 and sections 117A - 117D considerations and that it was wrong to do so , although he did not consider this was a material error. He drew our attention to paragraph 2.6 of the Immigration Directorate Instructions, Chapter 13: criminality guidance in Article 8 ECHR cases , which states:

"2.6.1 The Immigration Rules and Part 5A of the 2002 Act do not apply directly to EEA nationals. However, Article 8 applies equally to everyone, regardless of nationality, and to consider Article 8 claims from EEA nationals differently, either more or less generously than claims from non-EEA nationals, would breach the common law principle of fairness. Therefore, decisions in relation to EEA

nationals must be taken consistently with Parliament's view of the public interest as set out in primary legislation."

23 . For the purposes of this appeal we are prepared to accept that as an accurate rendition of the legal position that now prevails, but would emphasise that it only purports to describe "Article 8 claims from EEA nationals" , not EEA claims that are subject of an EEA decision as defined in regulation 2 of the 2006 Regulations.

24. It may assist to summarise the main conclusions we have rea ched as to the correct approach to be applied by tribunal judges in relation to ss.117A-D in the context of EEA removal decisions . It is:

(i) first to decide if a person satisfies requirements of the Immigration (European Economic Area) Regulation s 2006 . In this context ss.117A-D has no application;

(ii) second where a person has raised Article 8 as a ground of appeal, ss.117A-D applies.

"Person" in (i) and (ii) above means the person appealing, whether he or she is an EEA national or is the (extended) family member of the EEA national.

2 5 . In light of the above we consider Mr Tufan was correct to concede that the FtT had wrongly treated sections 117A – 117D considerations as having a bearing on the decision it had to make under regulation 19(3) of the 2006 Regulations. It may be, as is suggested by the final part of its sentence in [26] that it only meant to apply s ections 117A – 117D considerations to the separate Article 8 ground before it (whether the EEA decision to deport was contrary to Section 6 of the Human Rights Act), but its reference in [23] to the appellant representing a "genuine, present and sufficiently serious threat to the public interest " [emphasis added] muddied the waters . The opening sentence of the next paragraph ([24]) which state s that "[t]he crucial final consideration under section (sic) 21 is that the removal must comply with the principle of proportionality" continued the confusion .

26 . We also think that the way the way the FtT formulated matters at [21] could , if read in isolation , be understood as if it took into account "considerations of general prevention of crime" contrary to r egulation 21(5)(d). It did not help clarity either that the FtT referred to "sections" of the 2006 EEA Regulations.

27 . Nevertheless (in disagreement with M r Mak and in agreement with Mr Tufan) we are not persuaded that these shortcomings amount to material errors of law.

28 . In relation to the FtT's reliance on the notion of "public interest" , we are satisfied by its specific elaboration of r egulations 19 and 21 of the 2006 EEA Regulations in [20] – [21], that it was essentially using that phrase as a shorthand for the relevant EU concepts of "public policy and public security" as set out in r egulation 21 (and referred to by the FtT at [20]) and "fundamental interests of society" as set out in r egulation 21(5)(c) (" the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society ") .

29 . Although the FtT did refer to sections 117A – 117D considerations in the context of addressing whether the deportation order was "proportionate" in accordance with regulation 21(5)(a), all the considerations it then proceeded to identify are equally germane to the regulation 21 assessment of his personal circumstances. Further, regulation 21(5) requires the decision-maker to "comply with the principle of proportionality."

30 . As already indicated, we do accept that read in isolation what the FtT said in [21] might be seen to convey that it had erroneously taken into account “considerations of general prevention” , but read together with the preceding paragraph it is clear that all the FtT was seeking to do was to summarise the provisions of r egulation 21. Reinforcing our reading of this determination , even in [21] the FtT stated categorically that its decision was “not based on a policy of general deterrence but is actuated by the personal conduct of the appellant” and the FtT said nothing thereafter to suggest that it did place weight on conside rations of general prevention. There was no material failure to comply with r egulation 21(5)(d).

31 . Insofar as Ground 1 also sought to argue that the FtT failed to take into account all relevant considerations identified in regulation 21(5), age in particular, we are not persuaded that is so. It is true that its reasoning does not refer to each and every criterion specified in r egulation 21(6), but it clearly took into account all of them. Whilst it did not refer expressly to the appellant’s age (Mr Mak in submissions highlighted the fact that the appellant had committed all his offences when still under 18), it is evident that his youth was at the forefront of its mind. It was a factor heavily relied on in the evidence of the witnesses as recorded at [8] and clearly underpinned the FtT’s assessment in [21] – [25]. We remind ourselves that on the FtT findings the appellant had continued beyond the age of 18 to use violence in the Young Offenders Institute where he had been the subject of a number of adjudications.

32 . Two particular factors which were plainly germane to the FtT’s assessment were the appellant’s lack of integration into the UK and the state of the evidence about his family ties to Nigeria . I ts appraisal of both matter s show s close application of the criteria as set out in r egulation 21(6) (“ the person’s social and cultural integration into the United Kingdom and the extent of the person’s links with his country of origin ”). Thus in [25] the FtT noted that he had not been present in the UK for a lengthy period of time and:

“ He has not shown himself to be integrated into the UK society, indeed he is not integrated into the family of his mother.”

3 3 We have already outlined the FtT’s strong dissatisfaction with the evidence given by the appellant and his witnesses regarding his true family circumstances in Nigeria and his relationship with his father there (who it was satisfied had attended his family permit interview, despite denials regarding this by the appellant and his mother). In short, the FtT clearly did take into account all the considerations set out in r egulation 21.

34 . As regards the contention that the FtT failed to make an “overall assessment” of regulation 21 considerations, it seems to us that a proper reading of the decision elicits the very opposite conclusion.

35 . For the above reasons we conclude that despite certain errors the FtT did not materially err in law and hence its decision shall stand.

36 . We would add that even had we found the FtT’s decision to be vitiated by legal error such as to warrant our setting it aside, the decision we would have re-made would have been to dismiss the appeal. No challenge was raised in the grounds to the FtT’s findings of fact and in respect of key matters – in particular the appellant’s lack of acceptance of responsibility for his crimes; his ongoing recourse to violence whilst in detention (it was clearly not accepted that he was merely a victim on these occasions); his lack of integration into UK society; the very limited degree of family life he enjoyed with his mother, brother, stepfather and half-siblings; his untruthfulness about his ongoing

family ties in Nigeria – our firm conclusion would have been that his age notwithstanding, deportation was justified on public policy and public security grounds. We would also have found that his deportation would not breach Article 8 of the ECHR.

37 . For the above reasons:

The First-tier Tribunal did not materially err in law.

Its decision to dismiss the appellant’s appeal must stand.

Signed Date

Upper Tribunal Judge Storey