**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2021-000799
First-tier Tribunal No: HU/01413/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Promulgated**
**On 10 March 2023**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**
**UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ALIYU ATANDA AFOLABI**
**(NO ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**
For the Appellant: Mr T. Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr O. Ogunbiyi, Counsel (Direct Access)

**Heard at Field House on 14 December 2022**

**DECISION AND REASONS**

1. This is an appeal against a decision of the Secretary of State dated 29 October 2020 to refuse a human rights claim made in the form of a request to revoke a deportation order. The appeal was originally heard, and allowed, by First-tier Tribunal Judge Stedman ("the judge"). By a decision promulgated on 30 May 2022, Upper Tribunal Judge Stephen Smith found that the decision of the judge involved the making of an error of law and set it aside with certain findings of fact preserved, directing that the appeal be reheard in this tribunal in light of the partial preservation of the facts reached by the judge. It was in those circumstances that the matter came before us sitting as a panel on 14 December 2022, under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act

2007. Judge Stephen Smith's decision ("the error of law decision") may be found in the **Annex** to this decision.

2. For ease of reference, we will refer to the appellant before the First-tier Tribunal as "the appellant".

*Factual background*

3. For the full factual background, please see the error of law decision. We include only a summary here.

4. The appellant is a citizen of Nigeria and was born in 1965. He arrived as a visitor in 1992, and has largely remained here since then, although beginning in 2018 he has spent lengthy periods in Ireland and Nigeria. Between 2007 to 2010 he held discretionary leave to remain. At other times, he held leave only as a visitor, or had no leave at all.

5. In 2003, the appellant was sentenced to two and a half years' imprisonment for offences of dishonesty, and on 29 October 2008 he was sentenced to five and a half years' imprisonment for complex and high-value fraud offences. On 13 July 2009, the Secretary of State made a deportation order in respect of the appellant's 2008 convictions, pursuant to the automatic deportation regime in the UK Borders Act 2007 ("the 2007 Act"). The appellant's appeal against that order was dismissed on 28 August 2009. While serving his sentence of imprisonment, the appellant was transferred to hospital under sections 47 and 49 of the Mental Health Act 1983, having been diagnosed with paranoid schizophrenia. There is no documentary evidence concerning the appellant's transfer to hospital, but according to paragraph 4.1 of the judge's decision, the appellant's oral evidence before the First-tier Tribunal was that the transfer took place in March 2010.

6. In 2018, the appellant and his British wife, Hannah Afolabi, whom he married in August 2003, moved to Ireland. They were issued with EU residence documentation by the Irish authorities, pursuant, on the appellant's case, to Mrs Afolabi's self-employment under the EU free movement of persons regime. On 21 May 2018, Mrs Afolabi was issued with a Personal Public Service Number. The appellant was issued with a residence card on 16 January 2019. On 15 October 2019 while living in Ireland, the appellant applied for the deportation order to be revoked, on the grounds that Mrs Afolabi's residence in that country conferred an EU right of entry to the UK on him, under regulation 9 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). He also maintained that his Article 8 ECHR private and family life rights were such that it would be disproportionate to maintain the deportation order, on grounds that included his relationships with his children and grandchildren in the UK, and the overall length of his residence. He also relied on his poor mental and physical health. The application was refused on 29 October 2020 in the form of the refusal of a human rights claim, and it is that refusal decision that the appellant appeals against in these proceedings: we shall return to the decision itself in due course.

7. In November 2020, the appellant and Mrs Afolabi moved to Nigeria, albeit, on the appellant's case, temporarily. When they left Nigeria is not entirely clear, since neither the appellant nor Mrs Afolabi could remember in their evidence before us. From Mrs Afolabi's oral evidence, it would have been in late August 2021 at the earliest, since it was "a few weeks" after the hearing before the First-

tier Tribunal on 29 July 2021, which she and the appellant attended remotely from Nigeria. From Nigeria, they returned to Ireland, and then moved back the UK in early December 2022. It is not clear how the appellant was admitted to the UK since he is subject to a deportation order, but we need not make findings on that issue.

*The decision of the Secretary of State under appeal*

8. In her decision dated 29 October 2020, the Secretary of State concluded that there was no evidence that Mrs Afolabi had been economically active in Ireland, such that he did not enjoy a right to reside under the 2016 Regulations. She concluded that, as a "foreign criminal" for the purposes of section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), the appellant could only defeat the public interest in his deportation if he was able to demonstrate that there would be "very compelling circumstances" over and above the two statutory exceptions to deportation, since he had been sentenced to a period of imprisonment exceeding four years. There was no evidence that the appellant had parental responsibility for any minor child in the UK, and no evidence that the appellant's ties with his adult children went beyond normal emotional ties. The appellant's relationship with Mrs Afolabi did not outweigh the public interest in his deportation. The appellant's health conditions did not engage the Article 3 ECHR threshold.

*The decision of the First-tier Tribunal and the preserved findings of fact*

9. The judge reached a number of findings which were not impugned by the errors of law that led to his decision being set aside. Many such findings were little more than a recital of uncontroversial aspects of the chronology of the case, such as the absence of any further convictions following the appellant's 2008 convictions and imprisonment (e.g. para. 11.3), and in any event, only represented the position on 29 July 2021, the date of the hearing below. The judge did not make any findings that the appellant enjoys more than normal emotional ties with his adult children (para. 11.5) but did find that he enjoys "family life" with Mrs Afolabi. The judge accepted, on the evidence before him, that the appellant represented a low risk of re-offending, and that, despite his mental and physical health conditions, the appellant's removal to Nigeria would not engage Article 3 ECHR. He found that the appellant and Mrs Afolabi were well off and would have the means to put in place the necessary private medical care, in the event of his removal to Nigeria. Those preserved findings of fact represent the starting point for our analysis of the contemporary position.

10. No other factors taken into account by the judge in assessing the proportionality of the appellant's removal were preserved: as stated at paragraph 38 of the error of law decision, the proportionality of the appellant's continued exclusion needs to be considered afresh. Similarly, since the judge's analysis of the appellant's ability to meet regulation 9 of the 2016 Regulations involved the making of an error of law, no findings reached by the judge in that context have been preserved. It is necessary for that issue to be determined afresh also.

**THE LAW**

11. The appeal before the First-tier Tribunal was originally brought under section 82(1) of the 2002 Act. We consider that the refusal of the EEA limb of the appellant's application to revoke the deportation order amounted to the refusal of an "EEA decision" (see regulation 2(1)), such that it attracted a right of appeal

under the 2016 Regulations which operated in parallel to the appellant's section 82(1) right of appeal under the 2002 Act.

12. Although the UK has now left the EU and the implementation period came to an end at 11PM on 31 December 2020, this appeal was commenced before then. Pursuant to paragraph 5(1)(b) of Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, the 2016 Regulations continue to apply to these proceedings.

13. Regulation 9 of the 2016 Regulations is set out at paragraph 18 of the error of law decision.

14. Section 32 of the UK Borders Act 2007 ("the 2007 Act") Act defines those, such as this appellant, who have been sentenced to a period of imprisonment of at least 12 months as a "foreign criminal". Pursuant to subsection (5), the Secretary of State must make a deportation order in respect of such a foreign criminal. There are a number of exceptions contained in section 33, the following of which are relevant to these proceedings:

    a. Exception 1: where the removal of the foreign criminal in pursuance of the deportation order would breach the rights of the foreign criminal under the European Convention on Human Rights (section 33(2)(a)).

    b. Exception 3: where the removal of the foreign criminal would breach the foreign criminal's rights under the EU Treaties (section 33(4)).

    c. Exception 5: where a hospital direction or a transfer direction has been given under sections 45A and 47 of the Mental Health Act 1983 ("the 1983 Act") respectively (section

15. To determine whether Exception 1 in section 33 of the 2007 Act applies, it is necessary to have regard to the public interest considerations contained in Part 5A of the 2002 Act.

16. Section 117C(1) of the 2002 Act provides that the deportation of "foreign criminals" is in the public interest for the purposes of determining the proportionality of deportation under Article 8(2) ECHR. The appellant satisfies the definition of "foreign criminal" for the purposes of this section because he is not a British citizen and has been convicted of an offence which led to a period of imprisonment of at least 12 months: see section 117D(2) of the 2002 Act. Section 117C(2) provides:

> "The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal."

17. Section 117C makes provision for exceptions to the public interest in the deportation of foreign criminals in these terms:

> "(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—

> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

18. It is settled law that the best interests of any children involved are a primary factor in any assessment of Article 8.

19. The appellant must prove his case under the 2016 Regulations to the balance of probabilities standard. In relation to the European Convention on Human Rights, it is for the appellant to demonstrate that his removal would engage Article 8(1) of the ECHR, to the balance of probabilities standard. Once he has done so, it is for the Secretary of State to justify any interferences with the rights guaranteed by Article 8(1).

*The hearing*

20. The resumed hearing took place at Field House on 14 December 2022. The parties relied on their bundles from before the First-tier Tribunal. The appellant additionally relied upon a supplementary bundle, which we admitted under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. We also had regard to a letter dated 12 October 2021 from the Department of Justice and Equality in Ireland, which stated that the Minister for Justice considered that the appellant enjoyed a right to reside under EU law in Ireland. Judge Stephen Smith declined to admit that letter for the purposes of determining whether the decision of the judge below involved the making of an error of law (see para. 21 of the error of law decision), but it is, we accept, capable of being relevant to our assessment of the issues in these proceedings.

21. Both parties also submitted skeleton arguments.

22. The appellant and Mrs Afolabi gave evidence; they adopted their statements and were cross-examined by Mr Lindsay.

23. At the outset of the hearing, Mr Ogunbiyi said that he did not plan to call the appellant but would do so if the tribunal indicated that it would be helpful to hear his evidence. We informed Mr Ogunbiyi that it was his decision, acting on instructions, to decide whether to call the appellant. Mr Ogunbiyi's concern, he told us, was that the appellant had suffered a stroke earlier in the year. His speech was slurred, and he may have found the proceedings challenging. We

explained that our role was to ensure that the appellant benefited from any reasonable adjustments as required to facilitate the giving of his evidence and observed that there was no medical evidence demonstrating that he was not fit to participate or that he lacked the capacity to conduct litigation. In the event, the appellant gave evidence in a coherent manner, without manifesting any difficulties. Mr Lindsay's cross-examination was measured, and the tone was appropriate. At one point the appellant appeared to become irritated, and we offered him the chance to pause before resuming. We were satisfied that the appellant was able to, and did, give evidence in a manner not adversely impacted by his health conditions.

24. We do not propose to set out the entirely of the evidence and submissions. We will do so to the extent necessary to reach and give reasons for our findings.

**DISCUSSION**

*The issues*

25. The issues for our consideration are as follows:

a. Does the appellant enjoy a right of entry or residence under the 2016 Regulations, on account of his and Mrs Afolabi's residence in Ireland?

b. If not, are there "very compelling circumstances" over and above the stated exceptions to deportation contained in section 117C of the 2002 Act such that the public interest does not require the appellant's deportation?

26. Naturally, we have considered the entirety of the evidence in this case in the round.

*A. Right of residence under the 2016 Regulations*

27. In order to demonstrate that he enjoys a right to reside under the 2016 regulations, the appellant must first demonstrate that he satisfies the criteria contained in regulation 9. The first criterion of relevance is that contained in regulation 9(2)(a)(i), namely that Mrs Afolabi – or "BC" as the regulation puts it – "is residing" or "so resided" as a self-employed person in Ireland "immediately before returning to the United Kingdom". The appellant does not claim that Mrs Afolabi resided in Ireland in another capacity, or that she held the right of permanent residence. His case is that she ran her own company, Alpha Rock Global Limited ("Alpha Rock"), a property company, as a self-employed person, and that he benefits from regulation 9 accordingly. There are thus two relevant dates; the date of the Secretary of State's decision (29 October 2020), and the date of the hearing before us. In relation to the former, if the appellant is able to demonstrate that Mrs Afolabi was residing as a self-employed person at the date of the Secretary of State's decision, he will succeed in establishing that the Secretary of State erred in her conclusion that, at that point, Mrs Afolabi was not residing as a self-employed person in Ireland. In relation to the latter, if the appellant is able to demonstrate that Mrs Afolabi resided as a self-employed person in Ireland immediately before returning to the UK on 2 December 2022 then he will succeed in establishing that he meets the criteria on regulation 9(2)(a)(i) on that basis. At this stage in our analysis, it is not necessary to determine whether the continuity of Mrs Afolabi's residence in Ireland was broken by her time spent in Nigeria, since that issue only arises for consideration if the

appellant is able to demonstrate that Mrs Afolabi was residing in Ireland as a self-employed person immediately before his most recent return to the UK, in early December 2022.

28. The appellant relies on the residence documentation issued by the Irish authorities, and their apparent acceptance that he enjoyed, and continues to enjoy, a right to reside under EU law, as preserved by the EU Withdrawal Agreement. We accept that the Irish authorities appear to have recognised the appellant's claimed EU right to reside as the family member of an EEA national or as a beneficiary of the EU Withdrawal Agreement, on a number of occasions, including: 19 January 2019 (AB60); 26 August 2019 (AB69); 12 October 2021 (see paragraph 21 of the error of law decision), 7 March 2022 and 8 November 2022 (AB2/15).

29. In isolation, the fact that the Irish authorities have accepted that the appellant enjoyed an EU law right to reside as the spouse of Mrs Afolabi is incapable of determining whether she was residing as a self-employed person at the relevant times, namely at the date of the Secretary of State's decision, 29 October 2020, or immediately before returning to the UK in early December 2022. Residence documentation has a declaratory, rather than a constitutive character; it reflects the existence of an underlying right to reside, on the date of issue, and does not have a broader temporal significance. The Irish materials relied upon by the appellant reflect, at their highest, an array of snapshots of the appellant's residence status on the various dates in question. They do not demonstrate in themselves provide evidence of a continuity of self-employment nor can that be inferred in the context of the other evidence in the case.

30. Strikingly, the appellant has not provided details of the materials he provided to the Irish authorities in support of his EU residence applications. When pressed on this issue under cross-examination, both he and Mrs Afolabi were defensive, stating that, if the Irish authorities were content, there could be no challenge in this jurisdiction. We disagree. It is for the appellant to prove that Mrs Afolabi was a self-employed person for the relevant period; relying on punctuated snapshots of another EU Member State's analysis of his residence status, alongside a paucity of other evidence, is insufficient.

31. The appellant has provided minimal supporting documentary evidence concerning Alpha Rock's trading activities in Ireland. We were told that the business was involved in buying and selling properties and letting them. There are some bank statements from September 2018 and company registration documents. The latter simply show that a company was established; they do not show that it was active or traded. The bank statements barely take matters further, and, at most, demonstrate large cash deposits made by Mrs Afolabi some considerable time *before* the relevant time for our analysis, in September 2018. We found Mrs Afolabi's explanation for the paucity of Alpha Rock's financial activity, namely that as a start-up company, the company required capital injections, to lack credibility, in light of the absence of remaining evidence. There are no client documents, such as rental agreements. There are no copies of any publicity or correspondence with clients of the sort one would expect to be readily available in the event that a property company was a going concern. There are no detailed copies of the company accounts, or of bank statements covering the periods represented by the documents issued by the Irish authorities, or relevant to the timeframe of these proceedings, in particular the relevant dates for our analysis, 29 October 2020, or immediately before returning

to the UK in early December 2022. There are some basic incorporation documents, and invoices from an accountant for professional services, but precious little demonstrating that the company itself was active or trading.

32. We remind ourselves at this point, that it was for the appellant to demonstrate that, as at the relevant dates, his wife was self-employed. Having identified the defects in the documentary evidence, we turn to the oral evidence of the appellant and Mrs Afolabi concerning Mrs Afolabi's claimed self-employment. We find that it lacked reliability in a number of significant respects. Even making allowances for the appellant's health conditions, and any difficulties in speech and communication he may experience, he claimed to have very little knowledge of the company itself and was unsure as to whether it is still trading. He said the accountant sent him something to sign, but that knew very few other details about whether the company remained a going concern, contradicting himself on this point throughout his evidence. He refused to name any of the company's clients and said that he could not see how those questions were relevant to the British government. His evidence was defensive, seeking to deflect questions, refusing to engage with them, and on occasion simply refusing to answer questions that were fairly put to him.

33. Mrs Afolabi's evidence was also defensive. She sought to deflect questions concerning the detail of Alpha Rock by, like the appellant, referring to the fact that the Irish authorities were content that she was a self-employed person. She added that the Secretary of State's concerns implied that the Republic of Ireland was unable to perform its functions properly before "giving" status to her and her husband. When pressed as to why there was no broader documentary evidence concerning the day to day operation of the company, Mrs Afolabi said that, as a start-up company, it had not generated much. We reject that explanation, which she eventually resiled from in any event when we asked her to clarify whether the company had tenancy agreements with any of its clients, to which she responded that it did (although there were no such documents in evidence). The absence of evidence is striking in light of the fact that, on the appellant's case, he and Mrs Afolabi had returned from Ireland only days before the resumed hearing.

34. Drawing this limb of the analysis together, we find that the appellant has not demonstrated that Mrs Afolabi was residing in Ireland as a self-employed person at the date of the Secretary of State's decision on 29 October 2020, nor had she been so residing immediately before returning to the United Kingdom, in December 2022 (putting to one side the concerns raised at paragraph 38 of the error of law decision concerning continuity of residence under the Withdrawal Agreement). When viewed in the round with the remaining evidence, the residence documentation issued to the appellant by the Irish authorities is incapable of having the determinative effect for which the appellant contends, nor are we persuaded that, given the serious defects identified, that it could be inferred from the issue of the residence documentation that Mrs Afolabi or the appellant were resident in Ireland.

35. It follows that the appellant has not demonstrated that Mrs Afolabi resided as self-employed person in Ireland at the date of the Secretary of State's decision on 29 October 2020, or immediately before returning to the United Kingdom in early December 2022. The appellant cannot meet the condition contained in regulation 9(2)(a) of the 2016 Regulations, and so is unable to benefit from right to reside under those Regulations. There can also be no question that the EU

exception to automatic deportation under the 2007 Act is met (see section 33(4) of the 2007 Act), nor that the maintenance of the deportation order would breach his rights under the EU Withdrawal Agreement.

*B. The 2002 Act: "very compelling circumstances over and above"?*

36. As a foreign criminal, the public interest considerations concerning the proportionality of the appellant's deportation are contained, in particular, in section 117C of the 2002 Act. Pursuant to section 117C(1), the appellant's deportation is in the public interest. He may only defeat that public interest by demonstrating that there are "very compelling circumstances" over and above the statutory exceptions to deportation.

37. The appellant relies on the cumulative weight the length of his residence here, his family links in the country and those of Mrs Afolabi, the poor state of his health, the time that has elapsed since the commission of the offences for which he faces deportation, his offending-free conduct following his release from prison, defects in the Secretary of State's decision making process (in particular, in relation to whether an exception to deportation under the 2007 Act is engaged), and the best interests of his grandchildren.

38. The appellant did not advance a positive case that either Exception 1 or Exception 2 contained in section 117C(4) and (5) respectively were met. Exception 1 is incapable of being met, since the appellant has not been lawfully resident for most of his life. We had minimal evidence concerning his social and cultural integration but, in any event, we are satisfied that there are no very significant obstacles to his integration in Nigeria, or as the case may be, Ireland. The appellant has extensive links with Nigeria and lived there for many months from late 2020 until the late summer or early autumn of 2021; the precise dates are unclear, and both witnesses had a distinct lack of recall, unsupported by proper documentary evidence. For present purposes, those details are of secondary importance; what is clear is that the appellant would be well placed to integrate in Nigeria upon his return. The appellant is familiar with the culture and customs of Nigeria, and as found by the judge below, would be able to use the family's considerable wealth to secure the necessary medical provision (as, we observe, he has done in the past). Indeed, following Judge Stedman's finding that the appellant would be able to fund any medical treatment he requires in Nigeria, the appellant has been recorded by the NHS Lambeth Community Stroke Team as having opted to remain in Nigeria and attend stroke rehabilitation treatment there, following a recent stroke he is said to have had: see the letter dated 4 October 2022 at page 9 of the appellant's supplementary bundle.

39. In relation to Ireland, should the appellant choose to return to the country, he lived there from 2018 onwards, until his recent return to the UK (save for the intervening period in Nigeria). There is nothing before us to demonstrate that he would not be able to resume or re-establish his life there. The appellant is not able to meet Exception 1.

40. Nor can the appellant meet Exception 2. The issue here is whether it would be "unduly harsh" for Mrs Afolabi either to accompany the appellant to Ireland or Nigeria, or to remain here in his absence. In this respect, Mrs Afolabi's evidence was that she has strong links in the United Kingdom. She owns properties here, some of which are mortgaged, and has many family links in the United Kingdom. She is British. She impressed upon us in her evidence her strong desire not to have to leave this country. While we accept that Mrs Afolabi's strong preference

may well be to remain in the United Kingdom, nothing in her evidence gets remotely close to demonstrating that it would be "unduly harsh" for her to return to Ireland or Nigeria with the appellant. She has lived for extended periods in both countries with the appellant. She is clearly a woman of considerable means; she reluctantly revealed when questioned during her oral evidence that her annual UK-based income is in the region of £100,000. During her periods of absence from the United Kingdom, she was able to entrust the running of her business affairs to another person; we find she would be able to do so were she to accompany the appellant to leave the United Kingdom. She would, of course, be able to make return visits as required, travelling between here, Nigeria and Ireland, as she and her husband have been doing regularly for some time. We find that it would not be unduly harsh for Mrs Afolabi to accompany the appellant to either country.

41. There is no basis to conclude that it would be "unduly harsh" for Mrs Afolabi to remain in the United Kingdom in the absence of the appellant. The very links and roots which she emphasises prevent her from leaving the country would place her in good stead for surviving in the appellant's absence.

42. In his evidence, the appellant emphasised the relationships he enjoys with his adult children, and with his grandchildren. There is insufficient, reliable evidence before us that he enjoys any such relationships. We therefore do not address this point further.

43. The appellant cannot, we find, satisfy Exception 2.

44. It follows that the appellant is not able to demonstrate that there are "very compelling circumstances" by reference to what may be described as particularly strong examples of having met either of the statutory exceptions, as sometimes a person seeking to resist deportation is able so to do. This analysis forms the backdrop to our proportionality assessment.

45. We conclude our analysis by conducting a full proportionality assessment of the appellant's prospective removal, for the purposes of Article 8(2) ECHR.

46. Factors militating in favour of the appellant's removal include:

    a. The deportation of foreign criminals is in the public interest.

    b. The more serious the offence committed by a foreign criminal, the greater is the public interest in the deportation of the criminal. The appellant committed very serious offences, meriting a single five and a half year sentence in respect of a £600,000 fraud committed against an individual victim, and a further, concurrent sentence of four a half years for similar offences concerning a different victim. The sentencing judge described the appellant as demonstrating a level of sophistication and described fraud of this nature as a professional activity.

    c. The offences which triggered this deportation action were not the appellant's first fraud offences. He was convicted of obtaining property by deception in January 2003 and sentenced to two and a half years' imprisonment.

d. The appellant has been subject to a deportation order made in July 2009 and has re-entered the country in breach of it on a number of occasions.

e. The appellant does not hold leave to remain. At best, his immigration status has been precarious, and for most of his time in the country, has been unlawful. His private life attracts little weight.

f. At the time the appellant married Mrs Afolabi, on 13 August 2003, she should have been aware of his January 2003 convictions, and could have had no legitimate basis to conclude that his immigration status was anything other than precarious (at best). There is no evidence that the appellant was lawfully resident in the UK at that time. The relationship therefore attracts little weight (see section 117B(4)(b) of the 2002 Act).

g. As a serious criminal, the appellant is incapable of meeting either of the statutory exceptions to deportation contained in section 117C of the 2002 Act, nor does he meet the substance of those exceptions. He would not face very significant obstacles to his integration in Nigeria; he is familiar with the customs and culture of Nigeria, and has spent considerable – and recent – lengths of time residing there. Similar observations apply in relation to the possibility of the appellant returning to Ireland.

h. There is no evidence that the deportation order under the 2007 Act was made at a time when the appellant had been transferred from prison to hospital. The appellant's evidence to Judge Stedman was that he was transferred to prison in March 2010 (see para. 4.2). The deportation order was made in July 2009.

i. There is no evidence that the appellant's deportation would adversely impact any children; his assertions that it would are wholly without evidence.

j. The appellant does not enjoy any EU law-based right to reside or enter the UK.

k. The appellant has been granted residence documentation by the Irish authorities. There are no barriers to him resuming life in that country.

47. Factors mitigating against the appellant's deportation include:

a. The appellant has not reoffended since his release from hospital (to which he was transferred while serving his sentence of imprisonment) on 11 February 2011.

b. The appellant has been diagnosed with paranoid schizophrenia in the past (although there is no contemporary medical evidence in the form of a medical report addressing this issue or its present impact). He has recently had a stroke (although, again, there is no medical report addressing the extent of this condition or the appellant's prognosis).

c. The appellant is now in his mid 60s. He has lived in the UK, on and off, since 1992.

d. The appellant speaks English and is financially independent. These are statutory considerations under section 117B(2) and (3) of the 2002 Act, although ultimately are of neutral value in any overall assessment.

48. Weighing the 'for' and 'against' factors, we find that the factors in favour of the appellant's deportation outweigh those telling against it. The appellant committed two serious crimes and was sentenced to a lengthy period of imprisonment in 2008. The sentence of five and a half years' imprisonment exceeds the threshold to be treated as a serious criminal under section 117C of the 2002 Act, namely four years, by a considerable margin. We accept that the passage of time since the commission of those offences is now relatively lengthy and that, during that time, the appellant has not reoffended. There would appear to be a degree of rehabilitation by virtue of the fact he has not committed any further offences, although we note that the appellant has never expressed any degree of remorse for his conduct, nor has he demonstrated any positive steps that he has taken to accept responsibility for what he has done. It follows, therefore, that the weight attracted by this consideration is minimal.

49. The appellant has been married for nearly 20 years to a British citizen. His deportation, or the maintenance of the deportation order made against him, will necessarily have a significant impact on Mrs Afolabi. Her strong desire is to settle in this country and to bring the days of international travel that have characterised recent years of married life with her husband to an end. The appellant's deportation will place a significant obstacle ahead of the couple's plans to retire in this country, where they planned to be close to Mrs Afolabi's business interests and any family they may have (albeit that there is no evidence of Article 8 "family life" with any other persons in the jurisdiction of the United Kingdom). That will inevitably be a significant blow for this couple's life together. However, the choice that faces Mr and Mrs Afolabi is one which will not prevent them from ever seeing, or living with, each other again; they enjoy the prospect of being able to continue family life in Ireland or Nigeria. Both are familiar with Ireland, having lived there for some time (albeit not in a manner which satisfies us that they were economically active for the purposes of the EU Treaties). Similarly, they are both familiar with Nigeria, having spent considerable period of time from 2020 to 2021 in the country. It is, of course, the country of the appellant's nationality. The couple have extensive financial means available to them and there is no suggestion that any medical conditions experienced by the appellant would not receive appropriate treatment, either in Ireland or Nigeria.

50. The factors relied upon by the appellant do not, in our judgment, amount to "very compelling circumstances" over and above the statutory exceptions to the public interest in the deportation of foreign criminals.

51. We therefore dismiss this appeal.

**Notice of Decision**

The decision of Judge Stedman involved the making of an error of law and is set aside.

We remake the decision, dismissing the appeal.

No anonymity direction is made.

Signed Stephen H Smith Date 13 January 2022

Upper Tribunal Judge Stephen Smith

**TO THE RESPONDENT**
**FEE AWARD**

We have dismissed the appeal and therefore there can be no fee award.

Signed Stephen H Smith Date 13 January 2022

Upper Tribunal Judge Stephen Smith

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: UI-2021-000799

**THE IMMIGRATION ACTS**

**Heard at Field House**
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Appellant

**and**

**ALIYU ATANDA AFOLABI**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Ms E. Everett, Senior Home Office Presenting Officer
For the Respondent: Mr O. Ogunbiyi, Counsel

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Stedman ("the judge") promulgated on 17 August 2021, allowing an appeal against her decision dated 29 October 2020 to refuse a human rights claim made in the context of a request to revoke a deportation order.

2. I will refer to the appellant before the First-tier Tribunal as "the appellant" in this decision.

3. Although the UK has now left the EU and the implementation period came to an end at 11PM on 31 December 2020, this appeal was commenced before then. Pursuant to paragraph 5(1)(b) of Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, the 2016

Regulations continue to apply to these proceedings. For the purposes of the coherence of this decision, where relevant I will proceed as though the United Kingdom were still a Member State of the EU, as was the functional position during the implementation period under the Withdrawal Agreement (*Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community,* October 2019) at the time of the Secretary of State's decision and the institution of this appeal.

*Factual background*

4. The appellant is citizen of Nigeria born in 1965. He arrived in this country in 1992 as a visitor. Save for a brief period from 2007 to 2010 when he held discretionary leave to remain, he has largely resided in this country unlawfully.

5. In January 2003, the appellant was convicted of obtaining property by deception and sentenced to two and a half years' imprisonment. On 29 October 2008, he was sentenced to five and a half years' imprisonment for two counts of conspiracy to defraud. That led the Secretary of State to make a deportation order, which was signed on 13 July 2009.

6. The appellant did not leave the United Kingdom until May 2018, when he accompanied his British wife, Hannah Afolabi, to Ireland, where they lived together until November 2020. The couple moved to Nigeria in November 2020 and were still there at the date of the hearing before the judge on 29 July 2021. The appellant's case is that the move was temporary.

7. The basis of the appellant's application to revoke the deportation order was that he benefited from an EU right of entry to the United Kingdom under regulation 9 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). His wife had been exercising Treaty Rights in Ireland and he had been issued with a residence card as the family member of a Union citizen, pursuant to the transitional provisions contained in the Withdrawal Agreement. In addition, he contended, it would be unduly harsh to prevent him from enjoying access to his children and grandchildren who remain in the UK.

8. The Secretary of State was not satisfied that Mrs Afolabi, whom I shall call "the sponsor", had been economically active in Ireland. She also considered the appellant to be outside the scope of regulation 9, as the sponsor was living in Ireland, rather than the UK. In relation to the revocation of the deportation order, pursuant to paragraph 391(b) of the Immigration Rules, the appellant's deportation order could only be revoked on grounds arising from the United Kingdom's obligations under the European Convention on Human Rights ("the ECHR"). There was no presumption as to revocation and the public interest in the maintenance of the appellant's deportation order outweighed the reasons relied upon by him for its revocation. There was no evidence that the appellant's relationship with his children and grandchildren engaged Article 8 ECHR, and in so far as the appellant's relationship with his wife was concerned, the maintenance of the deportation order would have no effect on the continuation of that relationship, as they would be able to continue living in Ireland together.

9. The appellant had relied on medical grounds for his admission to the UK. The Secretary of State rejected that aspect of the claim, as did the judge. There has been no challenge to that aspect of the case, and I say no more about it.

*The decision of the First-tier Tribunal*

10. The hearing before the judge was conducted remotely. The appellant and the sponsor participated and gave evidence from Nigeria. Mr Ogunbiyi, who also appeared before me, made submissions on their behalf. The judge's decision is silent as to whether the parties, or indeed the First-tier Tribunal, had sought to comply with the then leading guidance on hearing evidence from abroad in *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 00443 (IAC) at [21.d].

11. The judge found that the appellant's circumstances engaged regulation 9 of the 2016 Regulations. At [8.6] the judge said the respondent's reasons for rejecting the appellant's claim to engage regulation 9 were "difficult to justify in the light of the production of an EEA Family Permit [*sic*] which the appellant had submitted with his letter and which is present in the respondent's bundle". In fact, the appellant had submitted an Irish *EEA Family Member Residence Card*, not an *EEA Family Permit.*

12. The judge then proceeded on the basis that the appellant had acquired the right of permanent residence in an EU Member State because "he has been given five years" by the Irish authorities, and that he benefitted from enhanced protection from removal and expulsion. The judge found that the sponsor had been economically active in Ireland. He also treated the fact that the appellant had been issued with a residence card by the Irish authorities as being determinative of his situation engaging regulation 9: see [10] and [10.1]. The judge found that the appellant's present risk profile was not such that there were serious grounds of public policy or security justifying his continued exclusion. Even on the lowest threshold, which omits the "serious" limb of the test, the appellant's continued exclusion could not be justified, he found: see [10.7] to [10.11].

13. As for Article 8 ECHR, the judge found that there was no evidence the appellant enjoyed family life with any persons in the UK: [11.5]. However, he found that there were compelling circumstances justifying the deportation order being revoked on other grounds. They included the appellant's history of mental health problems and the family life the appellant enjoyed with the sponsor. It was irrelevant, said the judge, that the appellant and the sponsor could continue family life together in Ireland, as the Secretary of State had contended in her decision. The appellant's wife is a British citizen and her main home was in the UK. The fact she had lived in Ireland for two years previously did not mean that she would want to live there permanently, or that she would choose to do so. The appellant had not been removed by the Secretary of State, thereby considerably weakening the claimed public interest in his continued exclusion. The requirements of Article 8 ECHR were such that the deportation order should be revoked. The judge allowed the appeal.

*Grounds of appeal*

14. The Secretary of State advances four grounds of appeal with the permission of First-tier Tribunal Judge Parkes:

    a. Ground 1 contends that the judge erred in relation to the significance of the appellant's EU residence card issued by the Irish authorities for the purposes of regulation 9 of the 2016 Regulations. Merely holding a card does not automatically confer a right of residence upon its bearer.

b. Ground 2 contends that the judge failed properly to engage with the requirements of regulation 9 in any event, as the appellant and his wife were in Nigeria, rather than Ireland. The appellant's wife had not returned directly to the UK, as required by regulation 9.

c. Ground 3 is that the judge erred by concluding that the mere revocation of a deportation order confers upon the individual concerned a right to enter the country.

d. Ground 4 challenges the judge's assessment of the proportionality of the appellant's continued exclusion for the purposes of Article 8(2) of the ECHR.

The appellant served a rule 24 notice, to which I shall return.

*Submissions*

15. Expanding upon the grounds of appeal, Ms Everett submitted that the judge appeared to view the appellant's Irish residence card as though it were a grant of domestic leave to remain, and so misunderstood its significance. In relation to the proportionality assessment, the judge impermissibly discounted the weight that attached to the continued exclusion of foreign criminals, and erroneously purported to diminish the public interest in his exclusion by reference to the length of time for which the appellant had remained in the UK following the order being made. It was not necessary for the appellant and the sponsor to be in the UK to enjoy family life together, yet the judge failed to ascribe significance to that factor.

16. Mr Ogunbiyi relied upon his rule 24 notice; the appellant and sponsor had only temporarily been visiting Nigeria. They have returned to their home in Ireland, to which they have returned. As for whether the sponsor was exercising Treaty rights, the Secretary of State had not challenged the judge's additional findings that the sponsor had been economically active in Ireland, which were dispositive of this point. The appellant enjoyed an EU law right to be admitted to the UK, without having to demonstrate an additional basis for his admission under the Immigration Rules. The Secretary of State's criticism of the judge's Article 8 analysis is no more than a disagreement with the judge's legitimate exercise of discretion.

17. Mr Ogunbiyi also sought to rely on new evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 which in the form of correspondence dated 12 October 2021 from the Irish Department of Justice, EU Treaty Rights Section, to the appellant. I turn to this application below.

*Legal framework*

18. The Immigration (European Economic Area) Regulations 2016 implemented the United Kingdom's obligations under the EU Treaties and Directive 2004/38/EC ("the Directive") in respect of the free movement of Union citizens and their family members within the territories of the Member States. Regulation 9 of the Regulations makes provision for certain family members of British citizens to enjoy a right to reside in the United Kingdom. That is an exception to the normal rule that the Directive and the Regulations do not apply to an EU citizen in their own Member State. It provides, where relevant:

"**9.— Family members and extended family members of British citizens**

(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member ("F") of a British citizen ("BC") as though the BC were an EEA national.

[…]

(2) The conditions are that—

(a) BC—

(i) is residing in an EEA State as a worker, self-employed person, self-sufficient person or a student, or so resided immediately before returning to the United Kingdom; or

(ii) has acquired the right of permanent residence in an EEA State;

(b) F or EFM and BC resided together in the EEA State;

(c) F or EFM and BC's residence in the EEA State was genuine;

(d) either—

(i) F was a family member of BC during all or part of their joint residence in the EEA State;

(ii) F was an EFM of BC during all or part of their joint residence in the EEA State, during which time F was lawfully resident in the EEA State; or

(iii) EFM was an EFM of BC during all or part of their joint residence in the EEA State, during which time EFM was lawfully resident in the EEA State;

(e) genuine family life was created or strengthened during F or EFM and BC's joint residence in the EEA State; and

(f) the conditions in sub-paragraphs (a), (b) and (c) have been met concurrently."

"EFM" means "extended family member": see regulation 9(1A).

19. Article 1 ECHR provides:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

20. Article 8 ECHR provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

*Discussion*

21. I pause first to address the application under rule 15(2A) to rely on the Department of Justice's letter to the appellant dated 12 October 2021. It post-dates the judge's decision, but does no more than confirm that, pursuant to enquiries raised by the Minister for Justice in light of unspecified concerns the Minister appears to have had (the details of which have not been provided, which itself gives rise to a number of questions), the Department considered the appellant to continue to enjoy a right to reside in Ireland. His entitlement to do so was conditional upon the sponsor residing in accordance with Union law in the country. In my judgment, the letter takes matters no further. It appears to be based on representations made by the appellant which pre-dated his departure for Nigeria. The letter concludes stating "please note that the onus is on you to advise this office of any change in circumstances (e.g. change of residence, change in activities of EU citizen, or change in relationship to EU citizen) and to submit new supporting documentation as appropriate." It is not clear whether the appellant and sponsor provided any update to the Minister in light of their residence in Nigeria from November 2020 until at least 29 July 2021, as required by the terms of the letter. Taken at its highest, the letter simply reflects the legal position relating to the residence of EU family members under EU free movement law, as applied by the Withdrawal Agreement. Such residence is, as the letter states, conditional upon the sponsoring EU citizen continuing to reside in accordance "the Regulations". That this letter was issued by the Department of Justice is neutral as to whether the appellant or the sponsor enjoyed a right to reside under EU law or the Withdrawal Agreement at the time it was sent, especially given, on the appellant's own case, he was not even in Ireland at the time. I decline to admit the letter for the purposes of determining whether the decision of the judge involved the making of an error of law.

*Grounds 1 to 3: regulation 9 incapable of being engaged on the facts before the judge*

22. Turning to the substance of the Secretary of State's grounds of appeal, the judge correctly identified that a primary issue for resolution was whether the appellant's case fell to be considered by reference to the 2016 Regulations at all. Whether the appellant enjoyed the ability to proceed through the gateway of regulation 9 of the regulations depended not on his economic status, but that of the sponsor, under regulation 9(2)(a)(i), as the judge appeared to recognise.

23. Ground 1 is correct to contend that the judge erred in relation to the significance of the appellant's Irish residence card. Documentation issued by an EU Member State to an EU citizen or the family member of an EU citizen is declarative of an underlying right to reside, and does not have a constitutive character (see *Secretary of State for Work and Pensions v Dias* (Case C-325/09) [2011] ECR I-6387; [2012] All ER (EC) 199, at [48]–[49]). As such, the mere fact that the appellant had been issued with a residence card by the Irish authorities was incapable of establishing the presence of the underlying right to reside on his part, or determining what the sponsor's EU residence status was at the relevant times, which was an issue to be assessed by reference to the evidence going to

those issues. For that reason, the judge fell into error at [10.2] by finding that the issue of such a residence card to the appellant was "determinative" of the issue. By definition, it was incapable of being determinative.

24. I reject Mr Ogunbiyi's submission that the error was immaterial in light of the judge's unchallenged findings of fact at [10.1] that the sponsor had exercised Treaty rights by reference to her economic activities in Ireland between May 2018 and October 2020. Those findings are not dispositive of this issue. That is because the sponsor was not in Ireland at the time of the hearing, which was the relevant date for the purposes of the judge's assessment. The appellant and sponsor had not lived in Ireland for over eight months by the time the judge heard the case. Although the judge appeared to accept that the appellant and sponsor were in Nigeria only temporarily, he did not make any findings about their prospective return to the country in order to resume exercising the very free movement rights that, on the judge's findings, engaged regulation 9. Moreover, on the judge's eventual findings, the appellant and sponsor would return directly to the United Kingdom, having left Ireland altogether. The judge failed to address whether the appellant and sponsor were only temporarily absent from Ireland (and, if so, how an absence of this length impacted the continuity of their residence), or whether they had left the country, and the territory of the EU, altogether.

25. Regulation 9(2)(a)(i) features a temporal requirement, which is that the British citizen sponsor "*is residing*" in the host Member State in one of the capacities listed, or had so resided "*immediately before returning* to the United Kingdom". Both formulations impose a requirement for there to be contemporaneous satisfaction of the relevant criterion. By contrast, the judge's findings on this issue, at their highest, established the *prior* exercise of Treaty rights by the sponsor in Ireland, but not the required present exercise of such rights. In light of the length of the appellant and sponsor's time away from Ireland living in Nigeria, their visit to the country cannot be categorised as *de minimis*. It simply could not be said that the sponsor met the "is residing" limb of paragraph (i): she had left the country, and the EU, a considerable period before the hearing before the judge. It is nothing to the point, as stated in the rule 24 notice, that the sponsor and appellant have now returned to Ireland (putting to one side the fact that there are no details of when they are said to have returned); the issue is whether, at the time of the appeal before the judge, the criteria in regulation 9(2)(a)(i) applied, not whether, on the facts as they have evolved in time, the sponsor now purports to meet the requirements of that paragraph.

26. That leaves the "*or so resided immediately before returning to the United Kingdom*" limb of regulation 9(2)(a)(i). The fundamental difficulty for the appellant with this criterion is that she had not returned to the United Kingdom. She was in Nigeria. Immediately before moving to Nigeria she may well have "so resided", but that is immaterial, since she has left the territory of the EU.

27. For these reasons, the evidence before the judge was incapable of meriting the finding that the criteria in regulation 9(2)(a)(i) were met.

28. It is necessary to consider whether the regulation 9(2)(a)(ii) criterion had been met, namely that the British citizen sponsor "has acquired the right of permanent residence in an EEA State". There was no evidence before the judge to merit a finding that the *sponsor* had acquired permanent residence in Ireland, and he did not make an express finding that she had acquired the right. The judge did, however, find that the appellant enjoyed the right of permanent residence in

Ireland. That finding was flawed, as was the judge's analysis consequential upon it. The basis for the judge's finding on this issue, at [8.7], was that the appellant had been issued with a *residence card*. Putting to one side the fact that residence documentation issued under the Directive is declaratory and not constitutive, the document adduced by the appellant was not, and did not purport to be, a permanent residence card; it was simply a residence card. Nothing in the documentation issued to the appellant by the Irish Department of Justice purported to recognise his entitlement to the right of permanent residence, which is a right enjoyed only in accordance with the framework established by Article 16 and 17 of the Directive , the detail of which is not relevant here, other than to observe that the appellant had not accrued continuous lawful residence under the Directive, or the Withdrawal Agreement, for any of the periods necessary to accrue the right of permanent residence. In any event, even if the appellant did hold the right of permanent residence in Ireland, he held that right in relation to *Ireland*, not all other Member States.

29. Drawing this analysis together, regulation 9 of the 2016 Regulations was incapable of being engaged on the facts of this case because the appellant and the sponsor were residing in Nigeria, and had been for at least eight months by the time of the hearing before the judge. The relevant date of assessment was the date of the hearing. The sponsor's past residence in Ireland lacked the necessary temporal connection with her prospective return to the UK in order to engage regulation 9, in view of the length of her absence, and the fact she had not returned to the UK immediately after exercising Treaty Rights in Ireland. It follows that the judge's remaining findings in relation to the 2016 Regulations were otiose and I need not consider them further; the appeal succeeds on Ground 3. The judge was wrong to allow the appeal under the 2016 Regulations and to the extent he did so, that was an error of law, and the decision must be set aside.

*Ground 4*

*Continued exclusion not unlawful under section 6 of the Human Rights Act 1998*

30. I reject Mr Ogunbiyi's submission that the Secretary of State's challenge to the judge's Article 8 analysis is solely a disagreement of weight. I accept that there are disagreements of weight embedded within this ground, and that trial judges are entitled to appropriate deference in the exercise of their discretion. However, I consider that at [11.9] the judge expressly excluded from his consideration a factor that was plainly relevant to his analysis, namely the proportionality of expecting the appellant and the sponsor to continue family life together in Ireland. The judge said:

> "The focus of my mind is whether the [deportation order] remains justified in light of very compelling circumstances and not whether there is an alternative country to Nigeria where the appellant may be admitted."

31. With respect to the judge, whether the couple could return to live in Ireland, rather than remain in Nigeria or be readmitted to the UK, was a paradigm question for his consideration, and there was no basis for excluding it from consideration, as the judge did. At [11.7], the judge had touched on whether he should include the possibility of the couple living in Ireland in his analysis, and, without engaging with any analysis of their past or prospective circumstances in the country, said that the fact the sponsor had lived in Ireland previously "does not mean that she can live in Ireland permanently or would ever choose to do so.

The reasoning therefore that the appellant would simply stay with his life in Ireland does [*sic*] is not reasonable." Any Article 8 proportionality assessment is highly fact-specific. The paradigm question which lies at the heart of many such assessments in the immigration context is, if the individual concerned is removed, not admitted, or otherwise excluded, what are the realistic alternatives to family life continuing or being formed elsewhere? There is no basis in law to restrict the parameters of that assessment by peremptorily deciding that that the appellant's country of residence for the two and a half hears to November 2020 would form no part of that analysis. The proportionality of the couple's continued existence in Ireland should have been at the heart of the judge's consideration of the proportionality of the appellant's continued exclusion from the UK. That is not to say that the judge would have been bound to find that it would have been proportionate for the couple to return to Ireland, but it was a relevant factor that he expressly declined to consider. It follows that the judge's Article 8 analysis was flawed on account of its failure to consider a material factor, and the decision falls to be set aside on this basis also.

32. There is a more fundamental reason why the judge's Article 8 analysis was flawed, which I raised with the parties at the hearing. It was flawed on account of its failure to engage with the territorial scope of the United Kingdom's obligations under the ECHR. Pursuant to Article 1 ECHR, the obligations of the High Contracting Parties to the Convention are territorial; the obligation is to secure the rights and freedoms guaranteed by the Convention "to everyone within their jurisdiction". At the time of both the application to the Secretary of State and the judge's decision, the appellant and sponsor were in Ireland and Nigeria respectively, neither of which are territories which engage the United Kingdom's obligations under the ECHR. The appellant has not 'cross-appealed' the judge's finding at [11.5] that he does not enjoy family life with any persons in the UK (as to the process for a successful appellant before the First-tier Tribunal to cross-appeal unfavourable findings, see *Secretary of State for the Home Department v Devani* [2020] EWCA Civ 612 at [31]). On the judge's findings, there was no territorial link between the appellant's family life and the UK's obligations under the ECHR.

33. In *Secretary of State for the Home Department v Abbas* [2017] EWCA Civ 1393, Burnett LJ (as he then was) said at [17], with emphasis added:

> "The underlying basis on which the family life aspect of article 8 falls within the jurisdiction of the ECHR in an immigration case, even though the person seeking entry is not in an ECHR state, was explained in *Khan v United Kingdom* (2014) 58 EHRR SE15. It concerned a Pakistani national whose leave to remain in the United Kingdom was cancelled on national security grounds whilst he was in Pakistan. He argued that he was at risk of treatment contrary to article 3 ECHR if he remained in Pakistan and was not allowed to return to the United Kingdom:
>
> > 'There is support in the Court's case law for the proposition that the Contracting State's obligation under art.8 may, in certain circumstances, require family members to be reunified with their relatives living in the Contracting State. **However, that positive obligation rests, in large part, on the fact that one of the family members/applicants is already in the**

> **Contracting State and being prevented from enjoying his or her family life with their relative because that relative has been denied entry to the Contracting State**…'"

The quote from *Khan v United Kingdom* was at paragraph 27.

34. Burnett LJ then specifically addressed the jurisdictional basis upon which Article 8 claims involving family life where one party is outside the territory of the United Kingdom are justiciable in a human rights appeal:

> "24. The consistent approach of the Strasbourg Court to the question whether someone is within the jurisdiction of a Contracting State for the purpose of article 1 is to emphasise that it is primarily territorial. However, in exceptional circumstances acts producing effects outside the territory of a Contracting State may constitute an exercise of jurisdiction: see *Al-Skeini v United Kingdom* (55721/07) (2011) 53 EHRR 18 at paragraph 131. None of the exceptions thereafter identified by the Strasbourg Court has any bearing on the facts of this case.
>
> 25. **In article 8 cases involving family life, even though the spouse or child seeking entry to the territory of a Contracting Party will be outside that territory, members of the family whose rights are affected are undoubtedly within it. That provides the jurisdictional peg…** No other argument to suggest that the respondent and his family were within the jurisdiction of the United Kingdom when making the application for entry clearance could prosper in the face of the decisions of the Grand Chamber of the Strasbourg Court in *Bankovic v Belgium (Admissibility) (52207/99)* (2007) 44 EHRR SE5 and *Al Skeini*." (Emphasis added)

35. To adopt the terminology of Burnett LJ, the "jurisdictional peg" upon which a putative breach of the ECHR may be hung in an Article 8 family life case is the presence of one party in the territory of the UK, provided "family life" exists between an applicant and that person. In these proceedings, neither the appellant nor the sponsor are in the territory of the United Kingdom, and the judge's family life findings relate to their relationship alone. The refusal of the appellant's human rights claim is incapable of amounting to an interference with the Article 8 rights of any person within the United Kingdom, on the findings of the judge. It is nothing to the point, as submitted by Mr Ogunbiyi, that the sponsor's home is in the UK, and that she has a right to return to it. At the time of the judge's decision, she had not returned to the UK. If she chooses to do so in the future, she or the appellant may well be able to point to a "jurisdictional peg" upon which to hang a putative human rights claim. But at the time of the judge's decision, both she and the appellant were outside the jurisdiction.

36. The refusal of the appellant's human rights claim was therefore not unlawful under section 6 of the Human Rights Act 1998, with the effect that there was no lawful basis for the judge properly to conclude that the refusal of the appellant's human rights claim would be unlawful under section 6 of the Human Rights Act 1998.

37. In conclusion, the judge's analysis of the 2016 Regulations and Article 8 involved the making of an error of law. I set his decision aside. It will be necessary to remake the decision in this tribunal, adopting the findings of fact reached by the judge insofar as they represented the position at the date of the hearing before him, and to the extent they have not been impugned by this decision.

38. In light of the fact, as stated in the rule 24 notice, the appellant and sponsor are now said to have resumed living in Ireland, it will be necessary to address at the resumed hearing the extent to which the Withdrawal Agreement confers upon the appellant a continued ability, if any, to succeed under regulation 9 of the 2016 Regulations (or any other relevant provision), by reference to those Regulations, any applicable transitional provisions under domestic law, and the Withdrawal Agreement itself. The assessment at the resumed hearing will be by reference to the circumstances of the appellant and the sponsor at the date of the resumed hearing. It will also be necessary to consider whether there have been any changes to their circumstances such that the territorial jurisdiction of the UK under the ECHR is now engaged, and if it is, to reconsider the proportionality of the appellant's continued exclusion afresh.

39. The parties are reminded that if any witness seeks to give evidence from outside the United Kingdom of Great Britain and Northern Ireland, it will be necessary to comply with the guidance given in *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 (IAC).

40. The appeal will be remade in this tribunal.

41. Further directions and a notice of hearing will follow.

**Notice of Decision**

The appeal is allowed.

The decision of Judge Stedman involved the making of an error of law and is set aside.

The appeal will be remade in this tribunal, with further directions to follow.

I do not make an anonymity direction.

Signed Stephen H Smith Date 19 May 2022

Upper Tribunal Judge Stephen Smith