



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00224/2019

THE IMMIGRATION ACTS

Heard at Bradford by Teams
On the 17 November 2021

Decision & Reasons Promulgated
On the 25 November 2021

Before

Upper Tribunal Judge Lane and
Deputy Upper Tribunal Judge Saffer

Between

PW-O (Nigeria)
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Chaudhry of Counsel

For the Respondent: Mr Kotas a Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant is a Nigerian citizen born on 16 May 1982. He entered the United Kingdom on 29 June 2004, applied for asylum claiming to be Liberian, lost his appeal, and became appeal rights exhausted on 15 November 2005. He remained for over 2 years before being granted a residence card following his marriage to a Dutch national. He acquired a permanent right of residence on 13 April 2013 having resided here for 10 years as the spouse of a qualified EEA national.
2. On 21 September 2017 he was convicted of 4 counts of assaulting/ill-treating/abandoning a child/young person likely to cause unnecessary suffering/injury, and

assaulting a person thereby occasioning actual bodily harm. He was jailed for 4 years. The victim was his son "O". The offences spanned 2 years.

3. The Respondent made a decision to deport the Appellant on 11 April 2019. Judge Mensah dismissed the appeal against that decision following a hearing on 17 October 2019.

4. Permission to appeal was granted by Judge Keane on 30 December 2019 who stated,
"the grounds disclosed arguable errors of law but for which the outcome of the appeal might have been different. In particular, the judge arguably failed to determine whether the respondent discharged the burden of proof intrinsic to Regulation 27 (3) namely that there were serious grounds of public policy or public security. Nowhere in the judge's decision did the judge assess the risk posed by the appellant. The judge arguably failed to accord weight to an OASys assessment which assessed the appellant's likely reoffending as being low. All the grounds are arguable."

Ground 1 and 2

5. These can be taken together as in order to assess whether the serious grounds of public policy or public security was met, the offending behaviour has to be assessed.

6. Regarding Ground 1, the application states at §3 that,

"the Judge has failed to apply the correct test in relation to the Appellant's deportation...nowhere does the Judge finds that there were serious grounds of public policy or public security..."

... The conduct must be sufficiently serious ... Nowhere does the Judge explain what is meant by sufficiently serious. The Judge has therefore failed to apply the elevated threshold set out at Reg 27(3)."

7. Regarding Ground 2, the application states that,

"4. The Judge has failed to determine and has given inadequate reasons in assessing the risk posed by the Appellant..."

5. The Judge places great weight upon the Appellant's previous unsuccessful asylum claim. The Judge fails to explain how the unsuccessful asylum claim made in 2004 and concluded in 2005, was relevant to any of the fundamental interests of society given that the Appellant had lawfully resided in the UK since 2007 and acquired permanent residence in 2013... these matters are irrelevant to the question of the risk posed presently by the Appellant ... The Judge is required to explain how the previous asylum claim related the risk posed by the Appellant arising from his conviction for child cruelty but failed to do so.

6. The Appellant's particular criminal offence was against his own children. It was necessary to look at the risk posed by the Appellant within that context. The Judge

fails to do that. The OASys report identifies 2 children at risk of serious harm from the Appellant... It is the Appellant's children who are considered to be at risk from him... The risk is highest if the Appellant were to be in the community alone with the children... The risk had to be considered taking into account the fact that the Appellant's children were taken into care. It is not in dispute that any future contact with his children will be very closely supervised by the relevant local authority. This would plainly reduce the risk to the Appellant's children... Hence the future risk to the Appellant's own children from the Appellant was remote. None of these matters are taken into account...

7. ... The OASys assessment took into account the Appellant's failure at that stage to acknowledge his guilt... They take account of both static and dynamic factors...

8. The Judge errs in finding at §22 that the fact that the Appellant has been a model prisoner was a neutral factor. The Appellant's conduct since his conviction and imprisonment is plainly a relevant factor to consider. Positive conduct must indicate a reduction in risk adverse conduct reflects an increase in or ongoing risk.

9. The Judge errs in law in failing to make any finding of the risk of reoffending posed by the Appellant. The Judge accepted 'the concept of general prevention did not justify deportation' at §15 and purported to focus on this issue of present threat (§16). The case of Nazli C-340/97, which set out principles in the deportation of EU nationals and their family members, states "that expulsion is precluded " 'without the personal conduct of the person concerned giving reason to consider that he will commit other serious offences prejudicial to the requirements of public policy in the host member state '.

10. The Judge makes no finding in relation to this critical issue."

8. Mrs Choudhury added that the public are not at risk from his behaviour as the OASys assessed that there was a low risk being only 12%, and that is in the context of his own children. The immigration history was not really relevant when looking at seriousness.
9. Mr Kotas asserted that at §15 the Judge conducted a full assessment and in referring to the sentencing remarks, looked at the Appellant's offending. Credibility was in issue. The Judge was entitled to take into account that the Appellant had fabricated an asylum claim. He presents a high risk of harm to his children. He denies culpability. The fact there are preventative measures shows there is a genuine present and serious risk to his children. Therefore a segment of society is at risk.

The Judge's decision

10. At §7 Judge Mensah summarised the offending behaviour,

"The child was subject to various forms of cruelty, which I need at this stage to describe as cruel and torturous. The offences are described in sufficient detail in the Judge's sentencing remarks to give the reader an understanding of the level of

harm caused to 'O' and includes reference to medical evidence and photographs being "utterly compelling" and "distressing", and which show marks and scars on 'O's body mainly, plainly from being whipped. The three doctors involved confirmed the 30 different marks were 'non-accidental' and some of the marks indicated some of the injuries would have been "open and bleeding" A victim personal statement of 'O's was read to the court and is harrowing and refers to urinating and defecating in his room because he was not allowed to use the toilet as punishment, being deprived of food and as well as being physically assaulted he was made to squat and remain in stress positions with little sleep. The Judge said the abuse was witnessed by another child of the family, whom I shall refer to as 'V', and who is a few years older than 'O'. The Judge said "I have no doubt that your abuse of [O] will have a profound effect on your daughters emotionally too. Indeed, it already has because all three were removed from your wife's care following your arrest." The Judge did not believe the mother of the children knew nothing about the abuse and noted all three children have been placed in separate foster homes; which has added to their trauma and distress."

11. At §9 Judge Mensah identified the relevant test from within the Immigration (European Economic Area) Regulations 2016,

"Decisions taken on grounds of public policy, public security and public health
27. – (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 right of permanent residence under regulation 15 except on serious grounds of public policy and 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 a right of permanent residence under regulation 15 and who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

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

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
- (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;
- (f) The decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

12. At §15 Judge Mensah stated,

"Given the seriousness of this offence there is absolutely no doubt in my mind the Respondent has shown the offence is one what has the potential to meet the test for deportation. The personal conduct of the Appellant over a two year period against a child affects multiple fundamental interests of society. I identify those as where the conduct of that person is likely to cause, or has in fact caused, public offence, protecting the rights and freedoms of others, protecting the public, acting in the best interests of a child, and protecting shared values. It is also based exclusively on the Appellant's conduct and the conduct that has been considered and decided by a criminal court to a higher standard of proof. I recognise the concept of general prevention does not justify deportation."

13. At §17 Judge Mensah stated,

"... I have considered the Appellant's past conduct. He is someone who has in the past been willing to lie to the UK authorities for his own personal gain. He pursued a false asylum claim as a Liberian national when he is a Nigerian national."

14. At §19 Judge Mensah stated,

"...the failure of the Appellant to acknowledge at the hearing that he had presented a false asylum claim shows he is still a completely unreliable witness and not a witness of truth. His answers seek to evade taking any responsibility for what he has done and in my view show him to be a manipulative character."

15. At §20 Judge Mensah stated,

"That situation is compounded by the fact he failed to plead guilty to the offences and maintain his innocence throughout the criminal proceedings. He was convicted after a full jury trial! As if the above matters are not damaging enough,

in his witness statement prepared for the deportation proceedings the Appellant spends a rather large part of his statement giving reasons why he say child "V" is an unreliable witness. I note he refers to child "V" making "her allegations against me" (para 85). It is clear, even now, when the Appellant has been convicted of causing his children such trauma and harm at his own hands, he seeks to blame others. This is echoed in the family court documents. Effectively, he is willing to blame child "V" instead of accepting responsibility. At the hearing he was asked why he was blaming child "V" and he replied "she caused too much trouble. Since I came here I have never had police come to my house." This is not evidence of a man who has learnt any lessons from prison, other than the selfish affect it has had on him. I consider this evidence indicative of someone who does not put the interests of his children before his own. He is a selfish manipulator."

16. At §22 Judge Mensah stated,

"In the Pre-sentence report the Appellant maintains his innocence and is determined as having a "12%" risk of reoffending in the next two years; which is said to be low. The author of the report says this was largely based upon the Appellant having no previous convictions. The author of the report then goes on to say "Although [A] has no contact with his eldest children. I feel he presents a high risk of serious harm to children should he have unsupervised contact in the future." The OASys report confirms the Appellant is a High Risk when alone with children in the Community but a low risk in all other categories. The fact the Appellant has been a model prisoner is of limited value as it is not a matter for which I consider any credit should be given. It is a standard one would expect as a neutral factor."

17. At §23 Judge Mensah stated,

"I find on the evidence the Respondent has clearly shown the Appellant is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent."

Discussion

18. It is clear that the Judge summarised the Appellant's offending behaviour at §7, and identified the relevant test at §9. We are satisfied that she applied the test at §15 and §23, and agree with Mr Kotas that the fact there are preventative measures shows there is a genuine present and serious risk to his children who are a segment of society. The Judge plainly considered both the pre-sentence report and OASys report in relation to criminality and risk. The fact that the identified risk of reoffending over the next 2 years is 12%, does not mean that there is no risk or that the risk is not insignificant and is plainly sufficiently serious to justify the lack of contact.
19. Contrary to that which has been asserted in the grounds, the finding in relation to Reg 27(5)(c) applied to consideration of Reg 27(3) as it is one of the factors the Judge

must consider. It is not only applicable to Reg 27(4). Indeed that was agreed at the hearing and referred to at §14(c) of the Judge's decision.

20. We agree that the analysis of his immigration history is relevant to the assessment of the risk posed to the children even given the distance in time since the bogus asylum claim, and the fact it was many years before the appalling behaviour that led to his conviction. That is because the Judge has to consider the Appellant's personal conduct within Reg 27 (5)(c). On the facts she was entitled to find "He is someone who has in the past been willing to lie to the UK authorities for his own personal gain", and undermines the belated acceptance of responsibility for his behaviour as set out by the Judge in §20 of her decision.
21. We are not therefore satisfied that in relation to Ground 1 or 2 the Judge made a material error of law.

Ground 3 and 4

22. These can be taken together as they both relate to the best interest assessment of the children within the proportionality balancing exercise.
23. Regarding Ground 3 and 4, the application states at §11 that,

"the Judge made a material mistake of fact in relation to the decision of the family court. At §24 the Judge states

'I am satisfied it is in the children's best interests they have no direct contact with their father. This is what the family court has decided and this is the current position.'

12. This is factually incorrect. In the same paragraph the Judge refers to the final judgement in the family proceedings, when the Appellant was in prison and so there is no likely direct contact. The Family Court judgement is cited as stating:

'any direct contact would only take place once there has been a further consideration and assessment of the children's emotional welfare in regard to any contact with their father.'

13. Nowhere does the Judge cite any statement from the Family Court that either there should be no direct contact, or that it was in the children's best interests and that they have no direct contact with their father. This amounts to a material mistake of fact. It renders the Judge's assessment of the best interests of the children concerning direct contact with the Appellant legally flawed.

14. Further the Judge takes no account of the most up-to-date evidence from the social worker involved in the Appellant's children's care... Which states that any application by the Appellant direct contact would have to be 'robustly assessed'. The social worker does not state that any such application would be opposed.

15. This error is compounded by the Judge's failure to adequately consider the Appellant's family life. This is dealt with summarily at §27. There is no consideration of the indirect contact that the Appellant has had with his children while in prison... There is no consideration of the fact that neither the Family Court, nor social services, have ruled out direct contact with his children. Hence there can have been no finding that such direct contact would not be in the children's best interests. There is no account taken of the fact that the Appellant's convictions relate only to one child. The allegations relate only to the eldest two children. The Appellant has four children. There is no suggestion that he has mistreated the youngest two children. None of the children will be adopted and will all remain in long term foster care. The youngest is just 6 years old. There is no account taken of the health problems of the youngest child including Noonan syndrome, autoimmune hepatitis, and autism ... The Judge fails to acknowledge that if the Appellant remains in the UK..., he would have the opportunity to rebuild his relationship with some or all of his children. A deportation would end all realistic prospect of ... ever having direct contact with his children, for at least as long as they remain children. None of this is taken into account..."

24. Mrs Choudhury submitted that there is no direct contact. There needs to be a proper assessment. There has been no proportionality assessment regarding the youngest child.
25. Mr Kotas submitted that all the children had been removed from his care. It is not in their best interest to have direct contact. The grounds of appeal just disagree with the best interest assessment. It is very difficult to see how the outcome of the hearing could have been different.

The Judge's decision

26. At §24 Judge Mensah stated,

"The Appellant may wish to see his children again but there is no credible evidence it is in their best interests to see him or that he will in fact be able to see them in the future. The reality is the family court has already determined their best interests by removing the children from the care of both parents and placing them in long term care arrangements. The evidence from Social services is clear "with regard to future contact, I refer to the final judgement which states that "any direct contact would only take place once there has been a further consideration and assessment of the children's emotional welfare in regard to any contact with their father." (Page 143 Appellant bundle). I am not willing to speculate about the future but at present I am satisfied it is in the children's best interests they have no direct contact with their father. This is what the family court has decided and this is the current position."

27. The Judge stated at §27,

"The Appellant... has destroyed his family life through his own conduct ..."

Discussion

28. The Judge was entitled to find that it was in the children's best interests that there would be no direct contact with the Appellant given his appalling offending behaviour towards one child "O" and blaming of another child "V". As at the date of the First-tier Tribunal hearing, that finding was legally sound whether or not the Family Court had directed that there be no direct contact or that contact may only commence following a further assessment. At the date of the hearing, there was no direct contact nor has any further assessment process been initiated by the Family Court. The argument that "there is no suggestion that he has mistreated the youngest two children" entirely misses the point that due to the risk of harm they have been placed in care. The argument that the "social worker does not state that any such application" for contact "would be opposed" entirely misses the point that an application cannot be considered until it is received however hopeless the application may seem.
29. The grounds overlook the clear indication in the care plan that the children will not return to the Appellant. The grounds are entirely speculative as to what further contact the children may or may not have with the Appellant. The grounds are advanced on the assumption that, if the children wished to visit the appellant in Nigeria, attempts would be made by social services to prevent them from doing so. Moreover, there is no evidence that the health of the youngest child has not been adequately and appropriately managed in the prolonged absence of the Appellant from the child's life. Contrary to what is asserted in the grounds, the findings upon which the Judge based her determination of the appeal were patently open to her on the evidence. Consequently, we find that the grounds amount to nothing more than a disagreement with the Judge's findings, including those as regards the best interests of the children.
30. We are not therefore satisfied that in relation to Ground 3 or 4 the Judge made a material error of law.

Decision

31. There was no material error of law in the decision.

Laurence Saffer

Deputy Upper Tribunal Judge Saffer
24 November 2021

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or Court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to Contempt of Court proceedings.

Laurence Saffer

Deputy Upper Tribunal Judge Saffer
24 November 2021