Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02123/2013

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice	**Determination Promulgated**
On 18 August 2014	**On 5 September 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

RN
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not represented
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of France, originally from Cameroon, born on 25 June 1962. He arrived in the UK in 1995 from Cameroon. He made a claim for asylum in 1996 which was refused and his appeal against that decision was dismissed.

2. Taking the further narrative from the decision of the First-tier Tribunal, the appellant married in April 1998 to a French national although they later divorced. He married again in February 2006 to MF, in Cameroon.

3. These proceedings arise out of a decision made by the respondent to make a deportation order under the deportation provisions of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

4. That decision was made following the appellant's conviction for offences of assault occasioning actual bodily harm and cruelty to a person under the age of 16 years, for which he was sentenced on 16 May 2012 to a term of imprisonment of three years in total. His wife MF was also convicted of an offence of child cruelty for which she received a sentence of nine months' imprisonment suspended for two years, the suspended sentence being subject to certain conditions. She was also required to undertake 100 hours of unpaid community work.

5. The appellant appealed against the decision to make a deportation order and his appeal came before a panel of the First-tier Tribunal on 14 April 2014, consisting of First-tier Tribunal Judge N. Paul and Mrs E. Morton, a non-legal member. The First-tier Tribunal dismissed the appellant's appeal.

6. Permission to appeal was granted by an Upper Tribunal Judge ("UTJ"). Summarising the grant of permission, the UTJ stated that the panel's assessment is arguably entirely focused on past events. Although there was reference in the determination to a NOMS assessment, it was said to be arguable that the panel did not consider the future risk of reoffending and harm.

7. In order to put my judgment into context, it is necessary to set out the circumstances of the offences of which the appellant was convicted. Those circumstances are best seen from the sentencing remarks of His Honour Judge Saggerson. HHJ Saggerson stated that the assault occasioning actual bodily harm consisted of "a series of injuries that resulted from an incident on 28 October 2011 in which you attacked your ten year old daughter with the sharp point of a car key and you did so on her scalp, and causing at least four wounds…"

8. The judge concluded that this was not a momentary loss of self control because there were two separate incidents, one inside the house and one on the balcony, both of which in parts of the episode involved his using his car key to "skewer" the head of his daughter. The judge went on to state that to make matters worse, the assault and the injuries came at the very end of a period of about eleven months in which the appellant had manifestly not only failed to look after his daughter properly, but it was a period during which he had assaulted her on previous occasions, that being the subject matter of the child cruelty charge. The injuries did not require hospital or medical attention, however.

9. Judge Saggerson went on to state that the upshot of the appellant's behaviour culminating on 28 October, is that the child DN, having been deliberately taken by the appellant from Cameroon and brought to London for a better life, had now lost all contact with her family including all of her siblings or half-siblings. He described that as having a potentially drastic impact on the child. The judge concluded that the offences were "of high culpability that involves a high degree of harm". He rejected the submission that the 28 October episode represented a momentary loss of temper. He also rejected the submission that his behaviour to DN arose in circumstances where he was doing his "heroic best" to struggle with four very young children. He gave reasons for rejecting that submission. Giving further detail of the offences, he stated that the child cruelty charge covered a series of assaults over an appreciable period of time, being some eleven months.

10. Judge Saggerson concluded that it was impossible to say on how many occasions assaults occurred but it was clear that there were a number of them and they were not isolated events. He stated that those occasions involved beating DN with a sandal over all different parts of her body and tying her hands together with a belt so that she could be beaten with the sandal. It also involved beating her with a belt. Those assaults involved relatively modest injuries, consisting of bruising and lacerations.

11. The judge went on to state that the appellant made DN at the age of 9 and 10 years old, adopt "stress punishment positions" where she was required over extended periods of time to stand in uncomfortable positions, sometimes in the freezing cold, because the appellant thought he was exercising discipline over her.

12. Returning for a moment to the appellant's family circumstances, he disclosed in response to the Secretary of State's request for details of his family that he had two children by two previous wives and mothers with whom he has no contact, and four children with his current wife, MF. Save that in respect of the oldest child, DN, she is not his birth child, as established by DNA tests.

13. Again, putting into context my judgment and the decision of the First-tier Tribunal, it is necessary to refer to the proceedings that took place in the Family Division of the High Court before Mrs Justice Theis, whereby the local authority sought care orders for all four children, together with placement orders. The hearing before Theis J. took place over a period of five days. Her judgment goes into considerable detail about the family circumstances and the evidence that she heard. The judgment is dated 24 May 2013. At [70] it is stated that DN would be at considerable risk of harm without someone to make decisions about her future care. It is stated that she did not want to return to the care of her mother and father. At [71] Theis J. stated as follows:

> "In my judgment they have both acted in a cruel way to her. I am satisfied they both could have done more in providing information about her true

> origins. They have shown no empathy at all with the circumstances she now finds herself in, through no fault of her own. It is more likely than not the father knows the truth about her background and circumstances. For reasons which are unclear he has deliberately chosen not to give any relevant information to assist locate her birth family. He makes no detailed reference to this in his written statements and was unconvincingly vague in his oral evidence."

14. At [73] she stated that it was not too late for the appellant and the child's mother to provide information which in her judgment they had been withholding, to assist on the issue of her age which the judge concluded was so fundamental to her welfare.

15. At [76] of her judgment she referred to the evidential foundation for the failure to protect in the past having clearly been established "and the consequent risk in the future is strong and compelling" for reasons which were then described in the succeeding paragraphs. At [76(4)] she concluded that it was more likely than not that this was a house controlled by the father (the appellant) through frequent threats and fear and, on occasions, physical assaults of both the mother and the children. That assessment, she concluded, was supported by the father's evidence, that is the appellant. She went on to state as follows at [76(5)]:

> "Up until his most recent written statement and oral evidence he has denied any harm to these children. The limited admissions in his evidence, in my judgment, minimise the reality of what went on in the family home and his conduct to the mother and children. He, in my judgment, has not been truthful and has shown a chilling disregard for the welfare of all the children. He has failed to offer any credible explanation to assist in establishing a credible account of DN's background, when he is the only one who holds the key to providing that information. That was graphically illustrated when he was unwilling to provide any information about the photograph produced during the hearing. His account that he did not know who it was other than a vague account of it being a relation he could not name was wholly unconvincing. His limited admissions about his behaviour to the mother and children came across as inherently unreliable."

16. In its determination the First-tier Tribunal referred to the sentencing remarks, gave a detailed summary of the respondent's reasons for deportation and referred on several occasions to the judgment of Theis J. In the determination under the heading "Conclusions & Reasons" the panel stated that it had regard to the complex history of the appellant as set out in the judgment of Theis J. In general terms the panel referred to the circumstances of the offences and concluded that "the SSHD's analysis of the facts of this case does cross the 'imperative' threshold."

My assessment

17. Before me were a number of documents submitted by the appellant. These included manuscript letters written to the Upper Tribunal asserting his Article 8 right to family and private life, also asserting that he is not at risk of reoffending or at risk of harm. A separate bundle of documents

submitted by the appellant to the Upper Tribunal consists of 17 items as described in the manuscript index. These included copies of correspondence between the appellant and the offender manager, employment or tax records, correspondence from prison in relation to requests to see his children and monthly progress reports from prison.

18. At the hearing before me, after I had explained to the appellant the purpose of the proceedings in the Upper Tribunal, and having asked him what matters he wanted to draw to my attention, he said that he did not understand why he was still in prison. He referred to the OASys Report which he said showed a low risk to the public. He said that if he was released he would follow a course which would show him how to be more aware of looking after his children. At the moment he has no children under his care, which I took to be a reference to the issue of the risk of reoffending.

19. Ms Isherwood relied on the 'rule 24' response, arguing that there was no error of law in the decision of the First-tier Tribunal. She referred to the OASys Report, which she said indicated that the appellant did not accept his guilt or that he had trafficked DN to the UK. I was referred to the determination of the First-tier Tribunal and to the references in it to the decision of Theis J.

20. Although it was accepted on behalf of the respondent that the First-tier Tribunal's reasons were brief, it was submitted that they were legally sustainable. The decision of Theis J. referred to the best interests of the children.

21. In reply, the appellant said that his sentence had been served on 16 October 2013 although it was not until 18 October 2013 that a decision was made to issue him with a deportation order. He had been in prison for one and a half years and there had been enough opportunity to assess his case. The UKBA, he said, had to explain why he has not been released.

22. In relation to the issues raised on behalf of the respondent, he said that he had written numerous letters showing how remorseful he was and that was why he did not appeal against his conviction. DN came to the UK legally, being a French citizen. In prison there were no courses available to him.

23. It does not appear to be in dispute, and was found by the First-tier Tribunal, that the appellant was entitled to the highest level of protection against removal under the EEA Regulations, namely that he could only be removed on imperative grounds of public security. This results from the Tribunal having found that he had resided in the UK for a continuous period of at least ten years prior to the relevant decision.

24. Regulation 21 of the EEA Regulations, so far as relevant, states as follows:

> **"21.— Decisions taken on public policy, public security and public health grounds**

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

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

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

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

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

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

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

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

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

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

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

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin…”

25. Of most significance for the purposes of the appeal before me is the question of the appellant's personal conduct being required to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. That was essentially the basis on which permission to appeal was granted. That is to say, the First-tier Tribunal’s

treatment of that issue. It is true to say that under the subheading "Conclusions & Reasons" there is no reference by the First-tier Tribunal to the question of risk of reoffending. However, the panel at [9] referred to the decision of Theis J. and stated that their decision

> "must be read in close conjunction with the very detailed findings of fact made by the High Court Judge in the Family Division in dealing with the background of the family, and in particular the appellant's and his wife's credibility and general parenting skills and experience".

26. At [17] the panel quoted from the decision of Theis J. at [76(4) and (5)], to which I have referred at [15] above.

27. At [20] of its determination the First-tier Tribunal stated that it was of particular importance, so far as the panel was concerned, to take into account [40] of the Secretary of State's decision letter. At its own [20] the panel referred to the decision letter as stating that the appellant had contravened immigration laws by bringing DN to the UK illegally. It referred to the lack of any remorse regarding her treatment, which showed that the appellant was capable of appalling treatment and disregard for her welfare. The panel went on to state that the Secretary of State considered that "it is necessary to prevent him re-offending in the UK and that he be deported from the UK to preserve the safety and security of those who are resident in the UK."

28. At [29] the panel stated that it was satisfied "adding to the analysis of [the respondent] that the appellant in this case merits deportation on the basis that it satisfies the test of 'imperative'." In other words, it is apparent that the panel concluded that it was in agreement with the Secretary of State's reasons for deportation, thus including the conclusion by the Secretary of State that the appellant's removal was necessary to prevent him reoffending in the UK.

29. At the start of [29] the panel stated that it was satisfied that the respondent's analysis of the facts "does cross the 'imperative' threshold". It is evident from the panel's decision that it agreed with the reasons given by the Secretary of State for the decision to removal the appellant.

30. In the National Offender Management Service ("NOMS") report it states at page 4 that the level of risk of serious harm (taken from the OASys Report) was high. The details of who was at risk are identified as children who are under his care. It is to be noted on page 5 of the NOMS report that it was understood that there was no abuse directed towards his own children and that once he was released the appellant would be trying to regain custody of those children. Of course, it is to be remembered that Theis J. decided that his children were to be the subject of care orders. At page 6 of the NOMS report it states that the likelihood of reconviction is low.

31. Whilst it is true that the First-tier Tribunal did not expressly, in its reasons, state that it had made an assessment of the risk of the appellant reoffending, I am satisfied that when read as a whole the determination

does reveal that the First-tier Tribunal concluded that the appellant does represent a risk of reoffending. This is evident from its reference to the detailed judgment of Theis J. and by its agreement with the Secretary of State's reasons for making the deportation order. Again, at [20] it expressly stated that of particular importance was the Secretary of State's decision letter at [40]. That paragraph referred to the conclusion or assessment by the Secretary of State that the appellant did represent a risk of reoffending.

32. Whilst the appellant does not presently have children in his care, not least because he is detained, it is evident that he has in the past had close contact with children. He has two children by two previous wives or mothers, albeit that he has no contact with them. He has four children with his current wife, who, as I have indicated, was also convicted of an offence of child cruelty. The appellant has expressed a clear intention to try to re-establish contact with his children. Whether in relation to those children or others with whom he may become associated, there is evidence from which the First-tier Tribunal was entitled to conclude that he represented a risk of reoffending which constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

33. No doubt the First-tier Tribunal's reasons could have been more clearly articulated in this distinct respect. However, I am not satisfied that there is any error of law in its decision in that regard, or indeed in any other.

34. Although the appellant sought to rely on, amongst other things, the OASys report, dated 8 April 2014, which does not appear to have been before the First-tier Tribunal, that report in fact in my judgement reinforces the decision of the First-tier Tribunal. It refers repeatedly to the appellant's refusal to admit the offences. It is correct that manuscript letters from the appellant express remorse, although the OASys Report makes it clear that at that time certainly he did not accept his guilt. Indeed, at page 19 the report states that:

> "In my opinion this shows that there are deficits in his thinking and behaviour which can only begin to be addressed when he is willing to admit his guilt. Until this time I have concerns and believe that the likelihood of further assaults on any child he comes into contact if he feels the need to administer punishment (sic). I have therefore linked this area to risk of serious harm and also to offending behaviour."

35. The other documentation put before me by the appellant at the hearing does not establish any error of law on the part of the First-tier Tribunal. In passing, it is worth noting that the issue that appeared to concern the appellant first and foremost at the hearing before me was why he was being detained, rather than an explanation of why it could be said that he was not at risk of reoffending and why the First-tier Tribunal was wrong in its conclusions.

36. So far as Article 8 of the ECHR is concerned, although this is also referred to in the grounds of appeal to the Upper Tribunal, the decision of the First-tier Tribunal to dismiss the appeal under the EEA Regulations is such that an appeal under Article 8 of the ECHR in terms of family or private life could not have succeeded, it being subsumed within the decision under the EEA Regulations.

37. In conclusion, I am not satisfied that the decision of the First-tier Tribunal did involve the making of an error on a point of law. The decision of the First-tier Tribunal to dismiss the appeal therefore stands.

Anonymity Order

Given that these proceedings involve children, I make an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Consequently, this determination identifies the appellant's child and the adults associated with her, including the appellant, by initials only in order to preserve the anonymity of that child.

Signed Date

Upper Tribunal Judge Kopieczek 3/09/14