



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/01648/2013

**THE IMMIGRATION ACTS**

Heard at Nottingham Magistrates' Court  
On 24 February 2014

Determination Promulgated  
On 28 March 2014

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

D OA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J Holt instructed by Fadiga & Co  
For the Respondent: Mr J Singh, Home Office Presenting Officer

**DETERMINATION AND REASONS**

**Introduction**

1. The appellant who is a national of Ghana born in 1970 appeals with permission the determination of First-tier Tribunal Judge Hollingworth and Mrs J Holt (the Tribunal) who, for reasons given in a determination by Judge Hollingworth dated 5

November 2013, dismissed the appeal against the decision dated 1 August 2013 refusing to revoke a deportation order dated 15 July 2011.

2. The deportation order had been made pursuant to s.32(5) of the UK Borders Act 2007 on the basis of the appellant being a foreign criminal as defined by s.32(1) of that Act. It followed his conviction on 15 December 2010 of sixteen counts of possession of false identity documents with intent, the possession of apparatus for making false identity documents with intent, making or supplying articles for use in frauds for which he was sentenced to four years' imprisonment on 22 December 2010.
3. An appeal against the deportation order was dismissed by a judge of the First-tier Tribunal in a determination dated 21 December 2011. Following the grant of permission to appeal, error of law was found pursuant to rule 34 of the Upper Tribunal (Procedure) Rules. The decision was re-made by UTJ Hanson in the Upper Tribunal who for reasons given in a determination dated 29 May 2012 dismissed the appeal. The Court of Appeal refused permission to appeal (and an extension of time to do so) on 26 January 2012. The respondent set removal directions on 25 February 2013 which were cancelled following application for judicial review.
4. On 23 April 2013 the appellant made an application for revocation of the deportation order. The respondent gave reasons why she would not do so in a letter dated 1 August 2013. The grounds of appeal to the Tribunal against the decision refusing to revoke the deportation order relied on Articles 3 and 8 of the Human Rights Convention although it was only the latter which was particularised.
5. The Tribunal heard evidence from the appellant, his wife, the appellant's sister, his cousin and an additional witness whose relationship to the appellant is not identified in the determination. In addition the Tribunal had before them an independent social worker's report by Ms Justice dated April 2013 and an independent risk assessment and risk management plan by Ms Marshall dated 22 and 23 November 2012. There were also reports by Ms Peacock who had counselled the appellant's son and Ms Bove, an integrative psychotherapist to whom the appellant's daughter had been referred. None of these reports had been before UTJ Hanson in the earlier proceedings.
6. In essence the Tribunal dismissed the appeal on the basis that the evidence provided subsequent to UTJ Hanson's determination outweighed the factors in favour of the respondent and that the rights of the appellant's wife and two children did not outweigh the public interest in his deportation.
7. The Tribunal made a direction regarding anonymity. I continue that order. No report of these proceedings shall directly or indirectly identify the appellant or any member of his family as children are involved. The appellant is to be referred to as in the title to this determination, his wife as Mrs A and the children as H and D. They are twins born 27 December 2001. Mrs A is an Australian national born 1995. The children are British citizens. Mrs A has retained her Australian citizenship.

8. Unfortunately the tribunal file had not been sent to Nottingham Magistrates' Court but nevertheless with the assistance of the parties, it was possible to proceed based on a core bundle which had been provided in advance together with copies of the reports detailed above. In the absence of any response to the directions by UTJ Southern sent with the grant of permission to appeal, the parties were content for me to re-make the decision based on the evidence before the Tribunal taking account in addition of the witness statements and the further submissions. I reserved my decision.

### **Grant of Permission to Appeal**

9. Permission to appeal was granted on a renewed application to the Upper Tribunal. Three grounds were relied on. The first is a failure by the Tribunal to give reasons or any adequate reasons for finding on material matters, in particular the effect upon the children. It is argued that no determination was reached as to the best interests of either child and yet their Article 8 rights were deemed to be insufficient to outweigh the public interest.
10. The second ground argues perverse or irrational findings arising out of conflation of the reports by Ms Marshall and Ms Justice. This ground was amended by Mr Holt withdrawing an assertion of perversity or irrationality but instead he argued inadequate reasons were given by the Tribunal for its conclusion on the reports applying the same reason to both yet they had been for different purposes, one being an impact and one being a risk report.
11. The third ground argues a failure by the Tribunal to refer to s.55 of the Borders, Citizenship and Immigration Act 2009 with regard to the best interests of the children.
12. In granting permission to appeal Upper Tribunal Judge Grubb considered it arguable that the Tribunal had erred by failing to make findings in relation to the best interests of the children, that its reasons were arguably inadequate, that the public interests outweighed the rights of the children and their mother and it seemed that the Tribunal may have carried over the inadequacies in one expert report for giving little weight to another report.

### **Did the Tribunal err in law?**

13. In his submissions, Mr Holt accepted the degree of overlap between the grounds and, in respect of the first, argued that despite the length of the determination, an answer could not be found why the Tribunal considered the rights of the parties affected were outweighed by the public interest. He considered there had been an over reliance on the earlier determination of UTJ Hanson although did not advance this as a separate ground. He nevertheless accepted that the criticisms made by the Tribunal of the evidence of Ms Bove and Ms Peacock were valid. The assessment of the best interests by the Tribunal had been in the negative having regard to the Tribunal's observation that UTJ Hanson had found that it was not in the best interests for the children to be removed from the United Kingdom.

14. With regard to the conclusion by the Tribunal that the evidence provided subsequent to the determination of UTJ Hanson outweighed the factors in favour of the respondent, the answer could either have been the Tribunal considered that the best interests lay in the parents being together in the United Kingdom but nevertheless the seriousness of the offence required the appellant to be removed. It might also be that the Tribunal had in mind that the appellant should not be with the children.
15. As to the second ground, this lay in the Tribunal having the same criticism of both reports by Marshall and Justice. Mr Holt distinguished those reports with reference to Marshall being the risk assessment and that by Justice analysing the relationships but nevertheless the Tribunal had applied criticism to the Justice report at [87] in these terms:

“At page 22 of her report the author states that she thinks that the appellant can now demonstrate to his children that he has changed and to set them an example by not offending again. We do not accept that assertion. The author of the report has failed to particularise, as we have stated above, that the appellant has actually accepted as to the nature and extent of his offending.”
16. As to the third ground, in the light of the Justice report containing the opinion that the effect on the family would be devastating, unless the Tribunal had reached a conclusion otherwise, the obligations under s.55 had not been met.
17. By way of response, Mr Singh argued that the determination was sustainable and if there was an error to be found it was not material as the Tribunal had carried out what it had been asked to do. The Tribunal was not obliged to give its reasons based on all the evidence that it had heard but instead on the central issues which it had done with reference to the Marshall and Justice reports. He accepted with reference to the devastating impact analysis by Justice, the Tribunal had not rejected that evidence; it was an important factor which the Tribunal did not seem to have grappled with. I observe at this point that despite this acknowledgement, Mr Singh did not withdraw his opposition to the appeal.
18. By way of reply Mr Holt argued with regard to the content of the Justice report it was arguable that it had probably dismissed the report but its reasoning was inadequate and it was difficult to understand why it had done so particularly with reference to paragraphs [96] and [97].
19. As to submissions in the event that I found error of law and proceeded to re-make the decision, Mr Holt relied on the Marshall and Justice reports with the best evidence coming from the latter as to its description of the family unit. The effect would be one of devastation and it can only be in the best interests of the children not to suffer such devastation. With reference to paragraph 44 of *SS (Nigeria)* there was a need to look at the risk of harm from the offences committed. Mr Holt contended that the risk was low having regard to the type of harm which was not of a type that should outweigh the best interests. He acknowledged that none of the exceptions to paragraph 398 of the Immigration Rules applied and so therefore the

test was whether in exceptional circumstances the public interest would be outweighed by other factors.

20. For his part, Mr Singh argued that the best interests of the children were for the appellant to be removed based on his previous conduct.
21. The Tribunal's determination has in parts a discursive style but in my view it is broadly coherent and understandable. The determination needs to be read as a whole. The determination begins with the evidence given at the hearing by the witnesses described above and thereafter with a detailed account of the submissions from the Presenting Officer and Mr Holt.
22. At paragraph 41 the Tribunal directed itself that the starting point was the determination of UTJ Hanson and referred to developments since then which are set out in the account of submissions between [21] and [40]. There is no suggestion that the Tribunal was wrong to take this approach. Thereafter the Tribunal set out what it understood to be conclusions of UTJ Hanson and here again there is no challenge to the accuracy of that exercise in [42] to [63] of its determination.
23. At [65] the Tribunal turned to the new evidence beginning with that by Marshall and concluded that they found it "... of profound concern that the appellant still fails to recognise the significance or nature of his conduct". This led them to conclude that the author Ms Marshall had not provided a sufficient analysis of the significance of the extent of the disparity referred to in relation to the risk assessments and that the findings of UTJ Hanson in this respect had not been undermined.
24. Once again, there is no challenge to this.
25. At [72] the Tribunal begins with its analysis of the report by Ms Justice, a core aspect of Mr Holt's challenge. The contents of the report are set out over thirteen paragraphs in some detail including the wishes of the children and their sentiments about the appellant's circumstances. The Tribunal noted that in summary:
 

"...the author refers to the children presenting to her as being normal, intelligent and well brought up and that they had been deeply affected by their father's actions which resulted in his imprisonment. They clearly love their father and wished to be a complete family again."
26. One of Mr Holt's arguments is that the report had been criticised for a purpose for which it had not been written. I do not consider this to have any foundation as one of the questions put to Miss Justice ([7]) was: "Please also comment on the reference to the OASys Report regarding our client's likelihood of re-offending?" This was in the context of an invitation to comment on a statement made by UTJ Hanson that it could not be said the appellant was providing a good role model for his children and that it could be argued the children did not deserve to be in such a household. It was therefore open to the Tribunal to comment on this aspect.

27. Faithful to the report, the Tribunal observed that the author had considered that both children would be devastated if the appellant were to be deported and explained this in more detail.
28. The only real criticism of Ms Justice's report by the Tribunal relates to its understanding that Ms Justice believed the appellant can now demonstrate to his children that he has changed and set them an example by not offending again. This was specifically in response to the question Ms Justice was asked.
29. Thereafter the Tribunal examined Ms Justice's disagreement with the conclusion of UTJ Hanson that the children would be better off without their father setting out the reasons why she came to that view. Criticism is made of the absence of a sufficient explanation by Ms Justice for the need for counselling having regard to the then lengthy period of the appellant's absence from the family. This counselling had begun recently and was on a weekly basis. I consider that this was a valid criticism open to the Tribunal bearing in mind the length of time the appellant had already been in custody. It was also open to the Tribunal to observe that Ms Justice had not explored the nexus between the consequences of separation to date set against the level of contact maintained with the consequences as the result of deportation.
30. It may be that this aspect of the Tribunal's criticism at [96] and [97] might have been better expressed, but it is clear that the Tribunal was questioning the adequacies of the assessment of matters to date and what was likely to be the case in the future. Examination of the report shows that of the questions Ms Justice had been asked, none specifically enquired what would be the effect on the children were the appellant to be deported. Her view that both children would be devastated if their father were to be deported arises in the context of the first enquiry which relates to the interaction, attachment and bonding between the parents of each of the children. By way of explanation of that analysis, Ms Justice believed the son would be at risk of performing poorly at school and that the daughter would want to hide her feeling of hurt and would feel an increased sense of responsibility. The Tribunal was correct to note the qualification to the report that Ms Justice had not carried out an in-depth assessment of the family due to time constraints in the context of its concerns over the adequacy of the reasons for the conclusions reached.
31. Otherwise the Tribunal concerned itself with its conclusions on the evidence of the appellant and his wife and that of the witnesses Peacock and Bove referred to above. There is no criticism of any of that. The Tribunal also took account of the courses undertaken and certificates obtained by the appellant as well as a medical report from a Mr Selim, a locum consultant neurologist identifying a small volume low grade prostrate disease.
32. After correctly directing itself in accordance with the principles in *R (Razgar) v SSHD* UKHL [2004] INLR 349 and *Huang* [2007] UKHL 11, the Tribunal proceeded with its proportionality exercise. It referred to the weight to be attached to the reports of Marshall and Justice being limited for the reasons previously given. The Tribunal acknowledged the further light shed on the effect of deportation on Mrs A and the

children by the reports and went on to confirm that the analysis by the Upper Tribunal Judge had been “confirmed by that work”. At this point I note that UTJ Hanson accepted at [84] of his determination that: “ ... removal of the appellant from the UK will have the effect of splitting the family and I accept that this will cause a great deal of heartache within the immediate family....”.

33. I am therefore satisfied that despite what is alleged in the grounds of application, the Tribunal gave adequate reasons for finding that despite the new evidence, it did not come to a different decision from that of UTJ Hanson. Its conclusion was a permissible one based on a correct understanding of the law with none of the evidence being overlooked.
34. The best interests of the children were clearly at the heart of this appeal indicated by the way in which the Tribunal analysed the evidence. Ultimately, the reasons challenge is no more than a disagreement with the Tribunal’s conclusions. Although it is asserted that no determination was reached as to the children’s best interests, in fact, the Tribunal found that those interests lay as found by UTJ Hanson despite the new evidence.
35. As to the second ground which Mr Holt sensibly diluted from an assertion of perversity or irrational findings to inadequate reasoning, it is not arguable that the Tribunal failed to understand the difference between the two reports. Its criticism of Ms Justice’s report was warranted having regard to the reference which she had made to re-offending.
36. The third ground echoes the first. I am satisfied that although Ms Justice identified the impact of removal on the children as devastating, this is not well-analysed in her report on a clinical basis. That is not to say that the Tribunal was not aware of the serious impact removal would have nor can it be said that it was not aware that it was charged with determining whether the new evidence required a re-assessment of the best interests of the children. I am not persuaded it failed in that exercise.
37. Ultimately the appeal failed because of the greater pull of the public interest considerations due to the serious offending by the appellant as reflected in his sentence. I am satisfied that the Tribunal came to a permissible conclusion on proportionality without legal error.
38. This appeal is dismissed.

Signed



Date 27 March 2014

Upper Tribunal Judge Dawson