Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01697/2013

THE IMMIGRATION ACTS

Heard at Manchester Crown Court	**Determination Promulgated**
On 31 January 2014	**On 18 February 2014**
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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

KENNETH NJAO MUTHONI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A N McVea, Compass Immigration Law Limited
For the Respondent: Miss Johnson, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Kenneth Njau Muthoni, was born on 8 September 1987 and is a citizen of Kenya. The appellant had appealed against a decision of the respondent not to

revoke a deportation order dated 9 August 2013. The First-tier Tribunal (Judge Chambers and Mrs S E Singer, non-legal member) in a determination promulgated on 5 November 2013 dismissed the appeal. The appellant now appeals to the Upper Tribunal.

2. There are three grounds of appeal. The first is headed, "error of evidence: family life and criminality." The appellant asserts that at [11] the Tribunal cited evidence of the appellant and his partner "fighting" and refers to the partner, Hayley Sambrook, "on one such occasion [calling] the police." The appellant asserts that there was evidence only of one instance of physical violence by the appellant towards Miss Sambrook. The only evidence of additional domestic violence appears in a letter written by the mother of Hayley Sambrook (Dianne Sambrook) to which the Tribunal gave no weight.

3. I find that this appeal ground has no merit. At [11], in describing the evidence which it received of the relationship between Miss Sambrook and the appellant, the Tribunal recorded that, "the appellant describes how [the appellant] and Hayley began to 'fight.'" That is evidence which is taken directly from the witness statement of the appellant himself. It is true that at [41] the Tribunal did not give weight to the letter of Dianne Sambrook (because it was "unsupported by any oral evidence") but I do not see how that interferes with the Tribunal's recording of evidence which the appellant himself has provided.

4. At [12] of the determination, the Tribunal noted that the appellant claimed "he became a dealer in cannabis." The grounds assert that the appellant had been convicted of possession of cannabis with intent to supply.

5. I find that this ground of appeal is without merit. At [2], the Tribunal accurately recorded that "on 27 December 2010 [the appellant] was convicted of possession of a class D drug with intent to supply and for breaching a suspended sentence for assaulting his present partner. He was sentenced to imprisonment." At [12], the statement regarding the appellant being a "dealer in cannabis" comes under the heading "evidence of the appellant." The statement does not, therefore, appear to be a factual finding of the Tribunal but rather a record of the appellant's own evidence. Mr McVea, who also appeared for the appellant before the First-tier Tribunal, told me that he did not recall the appellant having claimed in oral evidence that he had become a dealer in cannabis and the written Record of Proceedings is inconclusive. However, I have no reason to believe that the judge recorded the evidence which he heard inaccurately. An individual who has been convicted of possession of cannabis with intent to supply might well describe himself as a dealer in cannabis. In any event, I note under the heading "findings" that, in considering the Article 8 ECHR appeal, the Tribunal had proper regard to the "seriousness of the appellant's offending." [60] I am not persuaded that, whether the Tribunal considered the appellant a dealer in cannabis or an individual convicted of possession with intent to supply, this would have made a material difference to its assessment of the seriousness of the offending. Indeed, at [60], the Tribunal, was particularly concerned with the failure of the appellant to heed previous warnings of the

consequences of continued criminal behaviour. That observation was valid in any event.

6. The grounds complain that the Tribunal failed to have adequate regard to a report from an independent social work consultant, Mr Graham Nolan. At [44], the Tribunal noted that,

> the point is made in the report by the independent consultant in social work that children are better off having strong relationships with both parents and government policy encourages strong relationships with both parents. We agree with that as a general statement about what is desirable.

7. Mr McVea complained that the Tribunal had failed to give sufficient reasons for departing from the social worker's recommendation that the children would be better off with both the appellant and Miss Sambrook. I do not agree. It is not for the judge to give detailed reasons for departing from a recommendation which the Tribunal itself acknowledged was axiomatic. It was for the Tribunal to make findings and determine the appeal based on all the evidence, including that of the social work consultant. There was no suggestion that the Tribunal ignored the report's recommendations. Indeed, at [44], the Tribunal did explain why it intended to make a decision which appeared to go against the (self-evident) principle that children are better off being brought up by both of their parents. The submission that the Tribunal has ignored or dealt inadequately with the expert evidence is simply not made out.

8. The grounds also complain that the judge inaccurately recorded that, after the appellant had been released from prison on the last occasion, he had returned to live with his mother rather than Miss Sambrook. At [45], the Tribunal describes this as a "telling aspect" of the evidence. The appellant says that he did, in fact, return to live with Miss Sambrook.

9. There is rather more force in this submission but I do not consider that any error is sufficiently serious to justify the setting aside of the determination. Although the Tribunal did describe that part of the evidence as "a telling aspect" there is certainly no suggestion that it was in any way determinative of the outcome of the appeal or tipped the balance against the appellant. The Tribunal's observations were made in the context of the discussion of a relationship in which domestic violence has occurred and in which Miss Sambrook is accurately recorded as having been "furious" with the appellant following his last conviction and the fact that their family life was jeopardised as a consequence. I am satisfied that, had the Tribunal been aware that the appellant had returned to live with Miss Sambrook rather than his mother, then the outcome of the assessment, based quite properly on an accurate consideration of all the remainder of the evidence, would have been exactly the same. In the absence of other factual inaccuracies and errors of law, the Tribunal's mistake certainly does not justify, as Mr McVea submitted it should, a reconsideration *de novo* of the entirety of the evidence.

10. The same is true for what is said at [7] of the grounds of appeal. It is disputed in the grounds that the appellant and Miss Sambrook were estranged for six months as stated in the determination at [43]. It is asserted also that the Tribunal failed to take proper account of the Integrated Domestic Abuse Programme in which the appellant was ordered to participate as part of his sentence for causing actual bodily harm to Miss Sambrook. I am absolutely clear that (a) the panel had a clear and accurate view of the nature of the relationship between the appellant and Miss Sambrook and the difficulties which they had encountered and; (b) that there was no suggestion that the Tribunal has wittingly or unwittingly distorted the evidence in a manner prejudicial to the appellant.

11. At [9], it is asserted that the appellant's offence (attracting a criminal sentence of 54 weeks) was of a "relatively minor nature." In support of that assertion, the grounds quote the sentencing remarks of His Honour Judge Teague QC who, sentencing the appellant, stated, "[the appellant's offence] cannot be said to be a case of utmost gravity although it comes close to it." It would seem that Judge Teague's comments hardly support the appellant's contention. An offence coming close to "utmost gravity" cannot, in my judgment, properly be described as "relatively minor." The fact that the sentence only "narrowly triggered" the automatic deportation provisions does not detract from the seriousness of the offence and the public interest represented by the appellant's deportation, both factors of which the First-tier Tribunal was well aware.

12. The third ground of appeal complains that the First-tier Tribunal failed to make any finding in respect of the refusal of the appellant's application for a variation of his leave to remain. As the grounds record,

> The appellant held lawful discretionary leave to remain on 5 September 2012 when he applied for variation. The deportation order made by the respondent on 9 August 2013 also served as a refusal to vary leave, carrying a distinct right of appeal.

The relevant provision of the Immigration Rules is paragraph 276ADE(v).

13. The Tribunal made it clear at paragraph [49] that "the appellant does not succeed under the Immigration Rules." Further, as I pointed out to Mr McVea, the appellant's appeal to the First-tier Tribunal (form IAFT-1) makes no reference whatsoever to the respondent's decision in respect of the appellant's application to vary his leave to remain; the notice of appeal is concerned entirely with the deportation order. The First-tier Tribunal is only obliged to consider those grounds of appeal which are put before it. On the face of the form IAFT-1, the appellant had not appealed against the respondent's decision to refuse his application.

14. In conclusion, I am satisfied that the Tribunal reached a conclusion which was open to it on the evidence by way of an application of the relevant jurisprudence (see, in particular, **MF (Nigeria) [2013] EWCA Civ 1192**). Any minor errors which the Tribunal may have made as regards the particulars of the appellant's evidence had no effect on the overall outcome of the appeal and for that reason, insofar as any

errors do exist, I exercise my discretion to refrain from setting aside the determination.

DECISION

15. The determination of the First-tier Tribunal promulgated on 5 November 2013 shall stand. This appeal is dismissed.

Signed Date 11 February 2014

Upper Tribunal Judge Clive Lane