Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02523/2013

THE IMMIGRATION ACTS

Heard at Bradford Upper Tribunal	**Determination Promulgated**
On 5 June 2014	**On 5 August 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

F M M
(ANONYMITY DIRECTION MAINTAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Khan, instructed by Parker Rhodes Hickmotts, Solicitors
For the Respondent: Ms Johnstone, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, FMM is a citizen of Zambia. He appealed against an order made for his deportation dated 2 December 2013 on Article 8 ECHR grounds. His appeal was dismissed by First-tier Tribunal (Judge Kelly; Mr

Getlevog) in a determination promulgated on 3 March 2014. The appellant now appeals, with permission, to the Upper Tribunal.

2. Permission was granted by Upper Tribunal Judge Peter Lane in the following terms:

> Despite the terms of [20] of the determination, it is arguable that the First-tier Tribunal has not given adequate attention to the reports of Jayne Foster (probation officer) and Charlotte Barclay (social worker); particularly the latter, was of the opinion that it is "*highly likely to be harmful and destructive to [the son's] development if there is another major change in his life and his father is deported*."

3. The Tribunal did not deal directly with those items of evidence referred to in the grant of permission although at [20], it wrote:

> We are bound to be selective in our references to the evidence when explaining the reasons for our decision. However, we wish to emphasise that we considered all the evidence in the round when reaching our conclusions.

4. The Tribunal went on at [21] to find the appellant was not a witness of truth. The appellant had been charged, in August 2011, with wounding with intent to cause grievously bodily harm and possessing an offensive weapon in a public place. He pleaded guilty to the offences on 16 November 2011 and was sentenced to a term of four years' imprisonment. The child, who is the focus of these proceedings, we shall refer to as K. K was born in 2010. The Tribunal found that the appellant had given a false account of his relationship with K's mother. The appellant claimed that he had had a brief sexual encounter with her when it was clear from other evidence emanating from the appellant that he had had an enduring relationship with the mother. The Tribunal found the appellant was "prepared to paint a wholly false picture of the relationship with [the mother of K] in an attempt to persuade the respondent from ordering his deportation". The Tribunal went on to find that the appellant had also painted a "false picture [concerning] the state of his relationship with his son" [23]. At [24] the Tribunal wrote:

> The appellant claimed at the hearing that whilst he travelled to Huddersfield on a daily basis between Monday and Friday of each week, he was nevertheless always back in Sheffield in time to pick up his son from nursery at 3 o' clock in the afternoon. Ms M, on the other hand, told us that it was she who habitually picked up K from nursery, and that this was due to the fact that the appellant did not normally get home from university until around 6 or 7 o'clock in the evening. After Mr Brown informed her of the appellant's testimony in relation to this issue (something that he did by way of supposed re-examination) Ms M slightly modified her evidence to say that it "may be" he came back earlier on Mondays and Wednesdays. However, in view of the manner in which that particular aspect of her testimony was adduced, we have attached little weight to it. Nevertheless, we consider that for the most part Ms M was a truthful witness. By contrast, we find that the appellant was being untruthful by deliberately exaggerating the role that he currently plays in his son's day-to-day care.

5. Likewise, the Tribunal made adverse findings in respect of the credibility of the appellant's account of his involvement in his son's day-to-day life:

> There was also a fairly major discrepancy between the appellant and Ms M concerning her shift-pattern as a nurse. The appellant stated that his mother worked three day-shifts a week. His mother, on the other hand, stated that she worked on two night-shifts a week. This was an important matter because her shift-pattern must necessarily dictate the times when Ms M will be unable to cater K's immediate needs and thus is required to make alternative arrangements to meet them. We have no reason to suppose that Ms M did not give a truthful and accurate account of her own shift-pattern. On the other hand, whilst he may genuinely have believed what he had to say about the matter, it remains a matter of concern that the appellant should have been so ignorant of the true position, and this in our view speaks volumes about the extent to which he is genuinely involved in the provision of his son's day-to-day care.

6. At [28], the Tribunal considered the appellant's funding and the likelihood that he poses a risk of harm to others;

> In the above circumstances, we are unable to treat the appellant's plea of 'guilty' as a sincere expression of remorse. Whilst it is true that the appellant did express some regret at the hearing (as indeed he had in his witness statement) for the fact that he had inflicted injury upon his victim, this did not come close to accepting full responsibility for his criminal behaviour. This in turn makes it impossible for us to accept his claim that he has addressed the root cause of his offending. Although the appellant accepts that he committed the offence whilst in drink – a fact that is in any event apparent from the judge's sentencing remarks – his account of the circumstances of the offence does not in our view admit to the possibility that drink was the only or even the principle cause of him committing the offence in question. On the contrary, he insists that he was merely defending his mother's property against the actions of an aggressive drunk; something that he would presumably have wished to do whatever had been his state of sobriety at the time. As the appellant continues to deny deliberately stabbing his victim with the intention of causing him to suffer grievous bodily harm, it is difficult to see how he can at the same time claim that he behaved in a manner that was out of character due to drink. To the extent that he has since moderated his drinking habits, we are therefore satisfied that this is because he has been given to believe that it will serve him well in seeking to resist his deportation rather because he truly appreciates the reasons that lie behind his need to change his ways. For these reasons, we are not persuaded by the view of Ms Jayne Foster that (i) the appellant now only represents a medium risk of causing serious harm to others, or (ii) it is unlikely that he will repeat his previous behaviour (i.e. wounding with intent to cause grievous bodily harm) for so long as his current circumstances remain unchanged [see her letter of the 23rd January 2014 at page 116 of the appellant's bundle of documents]. On the contrary, we are satisfied that unless or until the appellant is able fully and sincerely to acknowledge responsibility for his criminal behaviour, he will continue to pose a significant risk of causing serious harm to members of the public.

7. It is important to note from [28] that the Tribunal gave detailed reasons for not accepting the conclusions of Jayne Foster that the appellant only represents a medium risk of causing harm to others. It was clearly open to the Tribunal to disagree with the conclusions of Ms Foster provided they gave adequate reasons for doing so. I find they have given adequate reasons.

8. Of significance in this appeal are the reports of social worker, Charlotte Barclay. The first report is a risk assessment in respect of the appellant dated 15 August 2013. The second report dated 3 February 2014 deals in greater detail with K where the appellant's relationship with K and the likely impact upon the child of the appellant's deportation. Put simply, the appellant submits the Tribunal has given adequate reasons for reaching conclusions which differ from those of Ms Barclay. Her primary conclusion in her second report is that quoted in the grant of permission. In addition to that conclusion, Ms Barclay noted that K had "significant attachment difficulties ... due to the experiences he had as a young child in his mother's care". She noted that K is currently being assessed by a child psychotherapist. It was felt that the appellant would provide a positive male role model for K during his childhood. Ms Barclay observed:

> K has developed a close relationship with [the appellant] since he has been living with him; I have observed positive interaction between K and [the appellant] and K is very settled in his father's care. K is a difficult child to care for at times and [the appellant] has managed this well, he is able to support with K's bedtime routine and morning routine. K, who has had problems with eating meals since he moved to live with his grandmother, will eat meals with his father.

9. As I have noted above the Tribunal made the clear finding that the appellant had deliberately exaggerated the role that he plays in his son's day-to-day care. The Tribunal made the further following findings at [34]:

> There is no question of K emigrating to Zambia in order to be with his father. He is a British citizen and thus entitled to all the health-care, educational, and other benefits attaching thereto. We acknowledge that K's long-term interests might be better served by him having daily contact with his father. However, we feel that this is capable of being over-stated. The appellant currently studies full-time at university and has a significant period of commuting at the beginning and end of each day. Following graduation he will no doubt seek full-time employment (for what other purpose is he currently pursuing a course of higher education?). We are therefore satisfied that, whatever the future may hold for the appellant, the responsibility for meeting K's emotional, physical, and educational needs will, as now, very largely fall to be discharged by the appellant's mother throughout the period of his minority. We do not therefore regard the appellant's presence in the United Kingdom as critical to K's long-term welfare.

10. The assertion made in the grounds of appeal [20] (the grounds to First-tier Tribunal) ids that the Tribunal had sought to "minimise the appellant's role as both the father and his role [with] the social services [in the] scheme for K's future care". I disagree. The Tribunal had the advantage of

hearing oral evidence and considering that evidence together the documents. It was the Tribunal's task to establish a factual matrix upon which to apply the relevant law. The Tribunal came to different conclusions regarding the appellant's role in K's day-to-day care from those used by Ms Barclay to base her own conclusions. The passage from Ms Barclay's second report, which I have quoted above, appears to minimise the role played in K's care by his primary current carer, his grandmother. It is clear, however, from the Tribunal's findings of fact (especially [34]) that the appellant is not actually present in the family home for significant periods of the day and that it is the grandmother who provides much of the care. I acknowledge that it may have been helpful if the Tribunal had engaged directly with the contents of Ms Barclay's report but I can see no reason to reject the Tribunal's assertion [20] that it had considered all the evidence in reaching its conclusion.

11. In addition, the grounds seem to confuse the different roles played in the proceedings by Ms Barclay, as an expert witness, and the First-tier Tribunal, whose task was to make primary findings of fact and to apply the relevant law. I have no doubt at all that Ms Barclay genuinely believed that K would benefit from having the presence of his father in the home on a day-to-day basis. That much was acknowledged by the Tribunal at [34]. It was not, however, any part of Ms Barclay's role to consider that need in the wider context of the appellant's offending and the public interest concerned with his removal by way of deportation; that was the task of the Tribunal. Ms Barclay's report must be considered in the context of the standard or specification by reference to which she has assessed K's welfare. It is clear from Ms Barclay's report that she has approached the assessment of K's welfare by reference to the criterion governing applications under the Children Act 1989 which, as she notes in her report, "highlights that the child's welfare should be the paramount consideration". The Tribunal, on the other hand, is obliged to consider the best interests of K as a primary consideration (see Section 55 of the Borders, Citizenship and Immigration Act 2009 and *ZH (Tanzania) 2011 UKSC 4*). The "paramount" principle of the Children Act trumps all other considerations; the best interests of the child, as protected by Section 55, may be outweighed by other factors which the Tribunal found to exist in this instance and which included a "strong public interest that exists in deporting [the appellant]." [38].

12. I am aware that it is not my job to fill in the gaps which may exist in the First-tier Tribunal's determination by supplying the detailed consideration of Ms Barclay's report with which, it is true to say, the Tribunal did not directly engage. However, I find that the Tribunal has not perpetrated an error of law of a kind which requires the determination to be set aside. Ultimately, Ms Barclay's conclusion that it was "highly likely that K's welfare will be significantly affected" should the appellant be deported was based (i) on the understanding that K's welfare was of paramount importance, a basis of assessment which differed from that ("best interests") properly adopted by the Tribunal; and (ii) on her acceptance of evidence that indicated that A had a greater day-to-day involvement in

K's life than the Tribunal, having the advantage of considering all the evidence, found as a fact. With those observations in mind, I find that the Tribunal's own analysis was both cogent and supported by the evidence and I am not satisfied, as the grounds assert, that the Tribunal has ignored important and relevant evidence. I am satisfied that this appeal should be dismissed.

DECISION

13. This appeal is dismissed.

Direction Regarding Anonymity – Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

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 their 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.

Signed Date 20 July 2014

Upper Tribunal Judge Clive Lane