Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01048/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 November 2014	**On 27 February 2015**

Before

THE HONOURABLE LORD BURNS
UPPER TRIBUNAL JUDGE A JORDAN

Between

ASIM PARRIS

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Chirico of Counsel: Birnberg Pierce and Partners
For the Respondent: Mr Shilliday, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the respondent's decision of 24 May 2013 to make a deportation order in terms of section 32(5) of the UK Borders Act 2007. The appellant appealed to the First tier tribunal (the Tribunal) on human rights grounds. After a hearing on 18 October 2013 and 19 June 2014 the appeal was refused.

2. The appellant was born on 11 November 1987 and is a citizen of Trinidad and Tobago. Although there is no record, it appears that he entered the UK in 1999 to join his mother. He was granted indefinite leave to remain on 5 April 2000. Since 2008 he has accrued a substantial criminal record and has served a number of custodial sentences. He has 11 convictions for 16 offences between March 2005 and March 2011. In particular, in October 2010 he was convicted of battery and criminal damage in which the victim was his ex-partner. This was committed in the presence of his baby daughter, born on 22 July 2007 (see page 54 of the appellant's bundle). In May 2008 he was convicted of possession of a class A drug with intent to supply and sentenced to 18 months imprisonment. In October 2009 he was convicted of common assault (while on licence from the previous sentence) and sentenced to 26 weeks. In March 2011 he was convicted of wounding with intent to intent to do grievous bodily harm and was sentenced to 6 years imprisonment. Interweaved in that history is the making of deportation orders and appeals against those orders. An appeal against a deportation order, originally made in December 2008, was allowed in May 2011 after protracted procedure but, in the light of the conviction of March 2011, he was notified again of his liability to deportation in July 2011. The order itself was made in May 2013.

3. The respondent considered that the appellant constituted a serious future risk of harm to the public. He was liable to deportation and that the public interest required it. The position under Article 8 of the Convention was examined and it was concluded that the decision to deport was proportionate and did not contravene his rights thereunder.

The Hearings of 18 October 2013 and 19 June 2014

4. Hearings before the Tribunal took place on 18 October 2013 and 19 June 2014. Written and oral evidence was given by the appellant and others at the first hearing. His ex-partner provided a statement and gave evidence. The appellant had only lived with his ex-partner and daughter from her birth in July 2007 until January 2008. Although the relationship had ended, the appellant maintained contact with his daughter. While serving his latest period of imprisonment, he had seen her regularly at the prison when she was brought there by the appellant's mother. He had been released on 10 October 2013 and had continued to see her at his mother's house and would continue to do so each week. His ex-partner, who gave her address in writing so that the appellant would not become aware of it, nevertheless supported the appellant's appeal because she knew that her daughter would "be devastated if she could not see him again".

5. Due to the delay between the hearings, a supplementary statement by the appellant (which bears the date 19 June 2014) was provided and a further OASys report was prepared. The statement narrated that contact had stopped about 4 weeks before by the mother but he was hopeful that the matter could be resolved without legal proceedings.

However, the situation had moved on by the time of the second hearing and he gave further oral evidence which is set out in paragraphs 5 and 6 of the grounds in support of the application for permission to appeal to the Upper Tribunal dated 13 July 2014.

6. In examination-in-chief he was referred to paras 11 to 14 of the statement 19 June and asked whether there had been any change in position. He replied that since the statement had been drafted he had had contact with his daughter and things were going fine. This had happened the previous day. It had been arranged through contact between his mother and the mother of his child. He had had no contact with the child's mother. In cross-examination and in response to questions from the Tribunal, the appellant said he did not know why contact had stopped. He explained that his daughter had come to him the previous day, she was at his home with his mother, and would return to her mother on the coming Saturday or Sunday.

The Tribunal's Determination

7. The Tribunal considered the appellant's criminal history and the terms of the OASys reports (the last of which assessed him to be of medium risk in the community to "known adult", children and to the public). It also observed that such risk may increase due to relationship stressors, such as relationship difficulties which included problems with contact with his child. Previous violent offending had occurred with his ex-partner when the child was present and the nature of the risk he posed was that he might commit offences "causing physical or psychological harm when frustrated, angry or unable to articulate his emotions" (paragraph 42). The Tribunal accepted that contact with his daughter was of benefit to both father and child (paragraph 64) and that "in normal circumstances" a young child whose parents live apart should have regular face to face contact with the father. It bore in mind the appellant's past behaviour of violence to the mother in the presence of the child, that he had lived in family with the child for a short period and thereafter most of the contact had been in prison or detention (paragraph 66). He had been in the UK for 20 years. The Tribunal found that deportation would interfere with his right to family and private life. Article 8 was engaged. Against that, the appellant had committed serious crimes (paragraph 71). He had no employment record of note (paragraph 72). The mother had "until recently" supported ongoing contact. While in most cases it was in the interests of the child to have contact with both birth parents, it found that there were well founded concerns about the appellant's past offending behaviour and the risk of his re-offending was not insignificant (paragraph 73). It concluded that the best interests of the child, while an important feature of this case, did not tilt the balance of its assessment of proportionality in his favour (paragraph 80).

The submissions on the first ground of appeal

8. The first ground of appeal contends that the Tribunal left out of account the oral evidence given at the continued hearing of 19 June 2014. Mr Chirico submitted that this was a material error in respect that the Tribunal had failed to deal and consider the evidence set out above and had thus proceeded on a mistaken factual basis, namely that all contact with the appellant's daughter had stopped (see paragraphs 22, 41, 46, 50 and 73 of the determination). As such there was a legal error leading to unfairness and, separately, a relevant consideration had not been taken into account. The omission was significant in respect of the consideration of the best interests of the child and to the nature and extent of the interference with the appellant's right to respect for family life which his deportation would involve.

9. Further, no rational proportionality exercise could properly be done in circumstances where the Tribunal has not accurately appreciated the nature of the contact between the appellant and his daughter. Mr Chirico referred us to **Zoumbas v Secretary of State for the Home Department [2013] 1WLR 3690** at paragraph 10 where Lord Hodge delivering the judgment of the court set out the legal principles applicable in a case of this sort as follows:

> "(1) The best interests of a child are an integral part of the proportionality assessment under Article 8 of the Convention.
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> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration.
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> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

10. Mr Shilliday argued that any error of fact upon which the Tribunal proceeded was not material. Given the fact that contact had occurred in the past and that the child had stayed with the appellant's mother overnight, the Tribunal must have contemplated that the situation might change and contact be resumed.

Decision on the first ground

11. We do not consider that the Tribunal materially erred in their treatment of the evidence of contact between the appellant and his daughter. It is, in our view, plain from a reading of the determination as a whole that the Tribunal did not proceed upon the basis that contact with the child had permanently ceased. The judge accepted at paragraph 64 that the contact had been of benefit both to father and child and that he continued to want to have such contact. It is also accepted at paragraph 65 that the child herself wished to maintain contact. That evidence came from the mother herself. At paragraph 73 it is acknowledged that "some continuing face to face contact with the child may be in the best interests of both child and father" and at paragraph 76 it is pointed out that, on deportation, no face to face contact would be possible. These passages indicate to us that continuing contact was assumed in the assessment of the nature and quality of the appellant's family life in the UK. In any event, as set out below, the Tribunal's assessment of the child's best interests proceeded on the assumption that contact would continue and, in such circumstances, the risk of re-offending was "not insignificant" (see paragraph 73). Although there is no express reference to the oral evidence given at the hearing on 19 June 2014, it is stated at paragraph 6 that what is set out below is a summary of the evidence given, a full note of which is contained in the Record of Proceedings. The evidence is set out there. There is no basis for the contention that this evidence was ignored. We therefore reject the first ground of appeal.

Submissions of the second ground of appeal

12. The second ground contends that the Tribunal erred in considering the best interests of the child since there is no clear assessment of where the best interests of the child lay. Paragraph 66 of the determination could be read as a conclusion that it would not be in the best interests of the child to have regular face to fact contact with the appellant. On the other hand, in paragraph 73 the Tribunal state that some continuing face to face contact with her "may be in the best interests of both child and the father". There were contradictory findings on the best interests of the child. In the absence of a concluded view as to where the best interests lay, no proper proportionality assessment could be made. There was no consideration of the child's views and the tribunal erred in finding that family life could be maintained by means of telephone or

email. Further, it failed to have regard to the fact that Article 8 rights included the right to develop relationships in the future.

13. Mr Shilliday accepted that it was not entirely clear what findings had been made in respect of the best interests of the child. If, on the one hand, the Tribunal felt that the best interests lay in not having contact that in itself could not be categorised as an irrational decision, having regard to the history of violence by the appellant. That history had included assaults on the mother in the child's presence and therefore constituted, at least, emotional harm suffered by the child at the hands of her father. The risk assessment had found that the appellant was at medium risk in the community to known adults, children and the public. If, on the other hand, the conclusion was that it was in the best interests for contact to continue it is clear from paragraph 80 that the Tribunal consider that those interests did not outweigh the public interest in his deportation.

The decision on the second ground

14. It was not submitted before us that the Tribunal had in any way failed to regard the best interests of the child as a primary consideration. Rather, it was submitted that it had failed to reach a conclusion on where those interests lay and had omitted to give consideration to all the material components of his family life in their assessment of the proportionality of the deportation of the appellant. The Tribunal was faced in this case with conflicting evidence as to where the best interests of the appellant's daughter lay. There was evidence that the appellant had assaulted the mother in the past in the child's presence. While that incident occurred when the child was very young, the Tribunal required to consider the risk that continued contact between the appellant and his child posed. It found that the past behaviour of the appellant "highlighted a risk of physical and/or mental harm to the child". That was a legitimate approach having regard to the assessment of risk from the OASys reports. On the other hand, the tribunal accepted that "in normal circumstances" it was in the best interests of children to have face to fact contact with the parent who did not have day to day care of her. However the tribunal noted that the circumstances were not normal because of the risk it had highlighted. Accordingly this case was one where the evaluation of the best interests of the child did not point unequivocally in one direction or the other. In those circumstances, we cannot conclude that the absence of an explicit finding of precisely where those interests lay renders the tribunal's determination erroneous in law. The Tribunal's approach was wholly justified on the evidence before it and meant, in effect, that it was not possible to accord the interests of the child a determinative weight in the assessment of the proportionality of deportation.

15. Having regard to the fact that it was not possible to reach an unequivocal view, it was then wholly legitimate for the Tribunal to proceed to examine the factors that it did in order to assess the

proportionality of deportation. We do not accept that the Tribunal fell into error in the ways which Mr Chirico maintained. It plainly had very firmly in mind that the child's views were as recorded at paragraphs 65 and 66 and that it had regard thereto. The observations at paragraph 76 about other means of communication with the child cannot properly be read as a conclusion that such contact was any substitute for family life or its future development. It is merely a factor to which the Tribunal points as mitigating the effects of deportation. It was apposite in this case since, while in prison, he had required to have recourse to those types of communication with his daughter.

16. The Tribunal was bound in the proportionality assessment to have proper regard not only to the equivocal nature of where the child's best interests lay but to the relevant and material considerations on the other side of the scale. Those are succinctly set out at paragraphs 77 to 80. It cannot be said that the conclusion it reached was based on any material error. We therefore must dismiss this appeal.

DECISION

The Tribunal made no error on a point of law and the original determination of the appeal will stand._

Signed Date **23 December 2014**

Lord Burns