Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01860/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 2 November 2015	**On 24 November 2015**

Before

Upper Tribunal Judge Jordan

Between

The Secretary of State for the Home Department

Appellant

and

Karim Sohna

Respondent

Representation:
For the Appellant: Ms A. Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. Mr Sohna is a citizen of Gambia who was born on 3 March 1969. The Secretary of State has appealed against the decision of First-tier Tribunal Judge Seelhoff promulgated on 9 December 2014 allowing Mr Sohna's appeal under the Immigration Rules. For the sake of continuity I shall refer to Mr Sohna as the appellant as he was in the First-tier Tribunal.

2. The appellant came to the United Kingdom on 24 January 2001 as a spouse and was granted indefinite leave to remain on 16 July 2002.

3. According to the decision letter, in a pattern of offending that commenced in 2003 and continued for the next decade, the appellant acquired 11 convictions for 17 offences. When last sentenced, the appellant asked for two further matters both concerning an incident on 24 July 2013 to be taken into account. The appellant was sentenced to 12 months imprisonment.

4. The pattern of offending covered a spectrum of offences: disorderly behaviour; threatening words; assault; battery; being drunk and disorderly. His conduct also caused him to be banned from driving and thereafter other offences occurred of driving whilst disqualified. However, the last of these offences was an assault occasioning grievous bodily harm. The Judge, when sentencing him on 4 April 2014, said:

> 'You had 9 convictions for 15 offences between 2003 and 2013, you are now 45, and, when sober, you are, as Mr Clare has rightly emphasised on your behalf, a hard-working man with positive qualities. However, you do have an unhealthy attitude to violence when you feel it would suit you, and you have a number of previous convictions for threatening behaviour and also assault, often in the context of drink. For example, in August 2012, battery, an assault on St Vedast Street, Norwich. This index, of course, 6 April 2013 and then threatening behaviour to the same victim on 31 May 2013.
> The pre-sentence report by Lisa Nixon, dated 2 April [2014], sets out very fully and thoroughly your background and personal circumstances. I don't repeat those but she does indicate during interview you demonstrated attitudes which condone the use of violence, you are prepared to arm yourself with weapons if you feel threatened, and who still regard yourself as unjustly convicted of the index offence. I must, nevertheless, honour the verdict of the jury.
> This offence does deserve immediate custody, in my judgment. Having regard to the guidelines, this was a nasty incident, a jaw fracture to this mature gentlemen of mature years, going about his lawful business on Prince of Wales Road late at night, was one that, in my judgment, can properly be regarded as coming within Category 2 once one factors in your previous convictions.
> In addition, I do not regard the recommendation within the pre-sentence report for supervision related work as appropriate, not because it is not realistically advanced, but because I don't think you would actually keep to it given your current attitude."

5. The First-tier Tribunal Judge described the victim as a 62 year-old gentleman who was the owner of the bar where the appellant was said to have run up significant credit. The punch delivered by the appellant broke his jaw.

6. On the basis of this conviction and the appellant's past offending it is not surprising that the respondent initiated proceedings to deport him. In doing so, she sought information from the appellant as to his circumstances in the United Kingdom. He set out, in response, that he was married to his second wife, S, a British national by whom he has had two sons: J was born on 13 January 2006 and is now 9 years old and T who was born on 8 October 2010, now 5. The appellant also claimed to be in a relationship with another British citizen, Ms K P, by whom he has had a daughter, A, born on 22 January 2012, aged 2.

7. The evidence before the First-tier Tribunal was that Norwich Social Services would have serious concerns about his returning to the home of J and T given the risk of domestic violence; the quality of contact was poor.

8. This effectively determined any realistic prospect of a claim that the two boys would suffer a violation of their rights were the appellant to be removed.

9. A has visited her father whilst in prison on a number of occasions (albeit when she must have been a 1-year old) but he is not named on the birth certificate and had moved out of the home in 2012 shortly after A's birth. In the pre-sentence report of 2 April 2014, the appellant stated he was living with a friend and had no permanent or stable address. He did not say he was living with Ms K P. Ms K P informed Norwich Children's Services in July 2014 that the appellant did not reside in the family home but visited approximately twice a week, sleeping on the sofa. This contradicted a later letter that the couple had been living as a family for over 2 ½ years. A bail application lodged on 22 September 2014 proposed a place of residence other than with Ms K P.

10. When dealing with the risk posed to the community by the appellant's conduct, Ms Lisa Nixon stated:

> "Mr Sohna acknowledges that he was under the influence of alcohol in both offences, but failed to recognise the disinhibiting effects of alcohol on his behaviour. Mr Sohna has committed violent offences both whilst under the influence of alcohol and while sober; however the current offences mark an escalation in seriousness in offence type. Therefore, it is my assessment that alcohol is not a necessary factor in the commission of violence by Mr Sohna, but when present escalates the seriousness of his behaviour. Throughout the course of the interview, Mr Sohna acknowledged that at times he consumed large quantities of alcohol (binge drinking) and started to question whether this might be a problem for him.
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> During interview, Mr Sohna demonstrated attitudes which condone the use of violence as a means of resolving conflict; telling me that his preferred method is 'mano a mano'… was keen to explain to me how the victim [in 2012] deserved the assault… continued denial [in relation to GBH]…his attitudes contribute to the risk of serious harm."

11. All this resulted in an evaluation of a medium risk of serious harm.

12. It is important to note structure of the decision making process adopted by the respondent in the decision letter of 3 October 2014 because it represented the approach then required.

13. First, this is a deportation under s. 32 (5) of the UK Borders Act 2007. The Secretary of State is required to make a deportation order in respect of a foreign national who has been convicted of an offence and sentenced to a term of imprisonment of at least 12 months unless removal would result in a violation of the human rights of the appellant or members of his family. This is not a discretionary element providing either the decision maker within the Home Office or the Judge on appeal with power to dispense with the requirement if, for example, the claimant only just comes within its provisions. Parliament itself has determined that 12 months is the point at which removal must take place unless the statutory exception comes into play.

14. Second, the respondent went on to consider the appellant's immigration history. Although the appellant's arrival in the United Kingdom on 16 February 2001 was lawful as it was based upon the applicant's marriage to a British citizen, the marriage was dissolved in June 2004. Family life based on a relationship with the appellant's former wife was never a viable claim.

15. The respondent's refusal letter went on to consider the appellant's offending and his attitude towards it including his claim to have been wrongly convicted.

16. Although the decision letter spends a significant amount of time dealing with the relationship with the children of the appellant's second marriage, given the concern expressed by Norwich Children's Services as a result of the allegations of domestic violence and abuse and their professional opinion that the children would not suffer undue stress were the appellant to be deported, the appellant had no viable claim to remain on the basis of the relationships he had formed with his second wife and children.

17. The respondent naturally focused upon the appellant's relationship with Ms K P (about which Norwich Children's Services had received contradictory information) and the effect upon A, then aged two. The Secretary of State concluded that she was not satisfied the appellant was in a genuine and subsisting relationship with Ms K P. This led to the respondent's rejection of the claim that the appellant enjoyed a genuine and subsisting parental relationship with A. On the basis of these findings, the respondent concluded it would not be unduly harsh for Ms K P and her daughter to remain in the United Kingdom even though the appellant was to be deported. Inevitably, notwithstanding the period of time spent by the appellant in the United Kingdom, the pattern of offending which had commenced in 2003 belied any assertion by the appellant that he was socially and culturally integrated into the United Kingdom. Since he had frequently returned to Ghana, he had plainly maintained contact with family and friends, thereby establishing a continued familiarity with the country enabling him to re-establish his private life if returned there.

18. Importantly, the Secretary of State went on to consider, as she was required to do, whether there were very compelling circumstances such that the appellant should not be deported. However, as there was a significant public interest in removing him on the basis of the pattern of criminal offending, there were no such circumstances which might outweigh the public interest in deportation.

19. However, I am satisfied that it was open to the First-tier Tribunal Judge on appeal to re-examine the evidence about the appellant's relationship with Ms K P and A.

20. At the hearing before the First-tier Tribunal, Ms K P gave evidence such that the Judge was entitled to find she was committed to the appellant and that they were in a relationship which she considered to be genuine and durable. However, the Judge did not ignore the appellant's admissions that he "*sleeps around*" and that "*Ms K P was something of a second choice as he had been attempting to reconcile with his*

wife even after he had had A with Ms K P". He concluded that the relationship between the appellant and Ms K P was not nearly as strong as that of a marriage and that the appellant had failed to prove a genuine and subsisting relationship with a partner. He also accepted that the relationship was formed at a time when the appellant had indefinite leave to remain and that it would be unduly harsh for Ms K P to live in Gambia.

21. Inevitably, the success of any Article 8 claim turned upon the Judge's finding in relation to A. He noted that, in the course of the hearing, A, not yet 3, ran to him spontaneously and then sat on his lap. Whilst a degree of caution should be exercised when assessing these glimpses of a relationship, the Judge accepted Ms K P told a social worker that A had a good relationship with her father whom she would see about twice a week when the appellant stayed overnight, sleeping on the sofa. He concluded that there was

> "…nothing in the evidence that would give me reason to question the assertion that there is a genuine and subsist in relationship between the appellant and A."

22. This conclusion which was properly open to the Judge having heard from the appellant and Ms K P and reading the material from the social worker. This marks a distinction between the approach adopted by the Secretary of State in the refusal letter and the Judge at the hearing.

23. On the basis of this material, the Judge went on to consider whether this relationship determined the appeal in favour of the appellant. In doing so the Judge made reference to *MC (deportation - public interest - basic principles)* Pakistan [2012] UKUT00046 (IAC) having previously referred to paragraphs 398 and 399 of the Immigration Rules and mentioned ss. 117B and 117C of the Nationality, Immigration and Asylum Act, 2002, as amended. In paragraph 75 of the determination the Judge turned to s. 117C, noting that the appellant's sentence was "*as short as it could be yet still engage mandatory deportation*". This comment on its face neglects to mention the fact that this was not a lone offence for which a sentence of 12 months imprisonment was imposed but the culmination of serial offending which had been committed over the past 10 years. It is true that the Secretary of State did not refer to the conducive grounds found in paragraph 398(c) of the Immigration Rules but she did not need to because the 12-month threshold was met. The Judge considered whether it would be unduly harsh for the child to be expected to remain in the United Kingdom without a father. He concluded that this provision "*may*" be engaged.

24. In paragraph 76 he went on to consider the prospect of A having a significant relationship with her father, should he be deported. He reached two conclusions. The first was that she was not yet of an age when electronic means of communication could provide a substitute for time spent with her father. Bearing in mind her age of 2, that was self-evident. Secondly, he concluded there was no credible evidence to support a finding that he had not been a good father. In paragraph 78 he stated that the exceptions built into the Immigration Rules and

into the 2002 Act permitted the public interest in deportation to be outweighed in the case of a genuine relationship with a British citizen.

25. He then determined that the appeal turned on the rights of a British citizen who was not at fault and with whom the appellant had a genuine and loving relationship and concluded it would be and usually harsh to expect A to live without him given the offence was at the "*bottom end of the scale*" envisaged in paragraph 399 (b) of the Rules. Once again, by concentrating on the last offence only, the Judge overlooked the cumulative effect of past offending and the impact this must have on the appellant's attitude to offending and the risk to the public.

26. In the course of argument I was referred to *SSHD v MKO (section 117 - unduly harsh)* Nigeria [2015] UKUT 00543 (IAC) in which the Upper Tribunal noted that it was necessary to take into account the appellant's criminal conduct in deciding whether it was unduly harsh for a separation to occur between an appellant and his daughter. In doing so, the Upper Tribunal considered the earlier decision in *MAB (paragraph 399; "unduly harsh")* USA [2015] UKUT 00435 (IAC) in which a different division of the Upper Tribunal considered that the evaluation of unduly harsh focused solely upon an evaluation of the impact upon the child. For the reasons given by the Upper Tribunal in *KMO*, I have no hesitation in concluding that a proportionality exercise cannot properly operate where the decision maker is precluded from relying upon material considerations. The level of criminal offending is clearly material in deciding whether it is unduly harsh to separate a child from his parent and its omission inevitably skews the proportionality balance. Were the consideration to be directed exclusively towards the child, the public interest in removing those who commit criminal offences would be emasculated to the extent that no distinction could be made between a minor offender and a serious offender.

27. I am satisfied that the First-tier Tribunal Judge misunderstood and misapplied the provisions which relate, on the one hand, to the limitations upon the Secretary of State's power to deport a non-national with no substantive right to remain in the United Kingdom who has committed a series of offences of escalating gravity, one of which statute has determined should trigger his deportation and, on the other hand, the presence of his British child. It goes without saying that, in normal circumstances, children should not be separated from their parents with whom they are engaged in a normal and loving relationship. However, were this to be the sole consideration, the presence of a British or settled child within the United Kingdom would prevent the deportation of foreign criminals. The scheme of the legislation simply does not produce this result. It is not achieved by classifying as 'unduly harsh', the normal consequences of deportation where there is a relevant minor child. In each case, the deportation of the father will result in a significant diminution in his relationship with that child. However, that is what deportation does, as Sedley LJ said in Lee v SSHD [2011] EWCA Civ 348:

> The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does.

> Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an Immigration Judge.

28. The separation of a child from his father is undoubtedly harsh but this does not prevent a court from imposing a period of imprisonment, sometimes a long period of imprisonment. The issue, however, is not whether the effect is harsh upon the child but whether it is *unduly* harsh. The word '*unduly*' implies that something is done which is out of proportion with what is reasonable, justified or fair in the circumstances of the case. It has echoes of the proportionality test which is the bed-rock of the Article 8 assessment.

29. It is not unduly harsh to separate a child from his father if the father's conduct merits deportation unless there is something in the circumstances which identify something more that distinguishes the case from the normal effect of deportation. This distinction was identified both in *MKO* and in *MAB* as identified and confirmed in paragraph 26 of *MKO*.

30. The decision cannot be based just upon the fact that the index offence was only just serious enough to trigger deportation because that would have the effect of undermining the mandatory nature of s. 32 when the threshold has been reached. In any event, in the circumstances of this case, it disregards the significant effect of the totality of 11 convictions and 17 offences.

31. The distinguishing features identified by the Judge were two-fold. First, the effectiveness of modern means of communication was undermined in the case of a 2-year old by what he described as poor infrastructure in a country like Gambia. Whatever material there was before the Judge to reach the conclusion that Gambia's telecommunications network is ineffective (and it is not set out in the determination), this is not a distinguishing mark. The Tribunal does not claim that communication between a parent and child is the same if the two are separated by Continents as it is when they share a household. It will always be a poor substitute in a case where the pair currently enjoys a normal and loving parental relationship in a home they share. Furthermore, there is no warrant in such cases for a distinction being made by looking at the capability of the infrastructure in the country to which the appellant will be returned. It is inconceivable that a different result will flow between an appellant who establishes access to wireless internet access with 6G technology and a person who has to rely upon a landline.

32. Second, he relied on the fact that there was no credible evidence that the appellant had not been a good father. Were the evidence to establish the appellant was a bad father, that would undoubtedly be a material factor in assessing the strength of the Article 8 claim but it should be taken as uncontroversial that the father is a good father unless there is evidence to the contrary. As it is a factor likely to be common to almost all such cases, there was no basis for a finding that the effect in the specific circumstances of the appellant's case was unduly harsh, where the circumstances were not at all unusual and merited no distinction being made.

33. Neither of these reasons establishes anything that is unusual in a deportation appeal. Neither renders the consequences of the decision unduly harsh.

34. Reliance upon these factors as elevating the case to one which fulfils the requirement of being unduly harsh amounts to an error on a point of law. In essence it marginalises the role played by the public interest in removal cases where removal has an inevitable effect upon the life of a child, provided there is a relationship between the child and his parent.

35. This is highlighted by the circumstances of the present appeal. It was unnecessary, according to the Judge, for the father and the child to be living together. It was sufficient if the father is no longer part of the child's household as long as he is in a genuine and subsisting relationship with his child. Nor did it matter that the mother and father were separated. It was sufficient if the father had contact with his child to the extent of seeing her twice a week. Inevitably, the weight attached by the Judge to the interest in maintaining the appellant's relationship with his daughter A (as the Judge found it to be) overrode any public interest in his removal. The public interest in removing a foreign criminal is, in part, assessed by reference to the risk he poses to the community. This was not a case of a single offence which resulted in a term of imprisonment of 12 months. Rather it was a history of criminal offending. Although the Judge recorded in his determination that there was a 57% chance of reoffending in the next two years which he described as "*a very significant factor to which I attach considerable weight*", the Judge then permitted the presence of British child to outweigh it with only the slightest of reasons to justify it.

36. The Upper Tribunal must always caution itself against finding that there is an error of law in circumstances where, in truth, the real criticism of the First-tier Tribunal is a difference of view over the outcome. The Upper Tribunal must always uphold the First-tier Tribunal Judge, even in the case of such a disagreement, if the First-tier Tribunal was properly entitled to reach the conclusion that it did. I am, however, satisfied that in the instant appeal, the Judge was in error in his finding that A's relationship with her father and his relationship with her were capable of outweighing the public interest in deportation on the strength of the reasons provided by the Judge. I set the decision of the First-tier Tribunal aside.

37. In re-making the decision, it is unnecessary to me to rehearse the provisions of ss. 117B and C of the 2002 Act as inserted by the Immigration Act 2014. The new Part 5 of the 2002 Act as it applies to the Tribunal requires me to have regard to both the considerations listed in s. 117B and, in the case of this appellant as a foreign criminal, to the considerations listed in s. 117C. Inevitably, whilst the deportation of a foreign criminal is in the public interest, the more serious the offence, the greater the public interest in deportation. In the case of a foreign criminal who has been sentenced to a period of imprisonment of 12 months or more and who has a genuine and subsisting parental relationship with a British child, consideration

has to be given to whether the effect of his deportation on the child would be unduly harsh.

38. Whilst the scheme of ss. 117 A-D is directed towards the Tribunal having particular regard to a number of statutory considerations, whether an individual falls within the categories of persons so defined is not determinative. The Immigration Rules provide a code which, since 28 July 2014, replicates the provisions of s. 117C in the case of a person who has a genuine and subsisting parental relationship with a British child. The 'unduly harsh' test is replicated both in relation to the question of whether the child might live in the country to which the appellant is to be deported as well as in assessing whether the child should remain in the United Kingdom without the person to be deported.

39. If it is *not* unduly harsh it will only be if there are very compelling circumstances over and above those already considered that those factors will outweigh the pressure in favour of deportation. This is a hurdle no-one has suggested could be met in this appeal.

40. For the reasons I have given, I am satisfied that it is not unduly harsh for the appellant to be separated from A. In reaching this conclusion, I do not seek to diminish the effect such a separation will inevitably cause to her. The Judge's findings of fact were clear; the appellant was not living with A's mother but he spent two occasions a week in A's presence staying overnight at her home in order to do so. The appellant has a genuine and subsisting relationship with his daughter in the context of the restraints imposed by this regime. The factors identified by the Judge as establishing that deportation would be unduly harsh are not tenable. Neither the fact that other means of communication are no substitute for face-to-face contact nor the fact that father and daughter enjoy a relationship with each other is sufficient to establish that the effect of deportation would be unduly harsh. Absent these reasons, no other reason has been advanced which might affect the balance in favour of the appellant remaining in the United Kingdom.

DECISION

1. The Judge made an error on a point of law and I set aside the decision of the First-tier Tribunal.
2. I re-make the decision in the following terms:
    a. the Secretary of State's appeal to the Upper Tribunal is allowed;
    b. the appeal of Mr Sohna to the Tribunal against the decision of the Secretary of State to make a deportation order against him is dismissed on all the grounds advanced.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
18 November 2015