IAC-AH-DN-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02238/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 December 2015	**On 1 February 2016**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

MR MUCHAI WAINAINA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Fripp of Counsel instructed by Liberty & Co Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, born on 29 June 1989, is a citizen of Kenya. He appeals with permission against the determination of the First-tier Tribunal (FtT) (Judge Sanderson, Mr F Jamieson JP) against a decision of the respondent dated 18 February 2013 to make a deportation order under s.32(5) of the UK Borders Act 2007 on the basis that he was a foreign criminal.

2. The immediate basis for this decision was the appellant's conviction on 3 September 2007 at Winchester Crown Court for possessing a Class A drug (crack cocaine) with intent to supply, for which he was sentenced to three

years' detention in a young offenders' institution. Previously he had a caution in May 2004 for aggravated vehicle taking, and six months' sentence (conditionally discharged) for possession of cannabis. Subsequently he was cautioned in June 2010 for possession of cannabis and convicted in March 2010 of driving a motor vehicle with excess alcohol, using a vehicle whilst uninsured and driving a motor vehicle without a licence, for which he was fined and his licence endorsed and he was disqualified from driving for twelve months. On 15 November 2012 he was convicted of an offence of attempted robbery and sentenced to a period of twelve months' imprisonment suspended for two years and he was made the subject of a supervision order. He was also convicted on the same occasion of failing to surrender to custody at an appointed time, for which he was sentenced to three months' imprisonment. On 18 September 2013 he was convicted of destroying or damaging property, battery and failing to surrender to custody at an appropriate time. He was sentenced to a fine and a period of twelve weeks' imprisonment.

3. Before the FtT the appellant relied on Article 8 ECHR, citing the fact that he had been in the UK since June 1995, only a few days short of his 6th birthday, his family life ties with his parents and sister who are British citizens and his relationship with his partner, Ms Victoria Taylor and their child T, born in May 2013, both of whom are British citizens, the couple having lived together since February 2011. At the date of the hearing before the FtT the couple were expecting a second child. In his oral evidence the appellant said he had lost touch completely with his country of birth and would be unable to cope without the support of close family in Kenya. He said he was employed with ABR Energy Household Energy Solutions. He said he regretted his criminal conduct but was now a changed man. He had completed a number of programmes whilst in custody.

4. The FtT also heard evidence from his partner who confirmed that they had met in April 2010 and were in a serious relationship and planned to marry in the near future. She said she had never been to Kenya, did not speak the language and would find it extremely difficult to communicate with people there. She could not relocate there; all her ties were with family and friends and community in the UK. She needed the appellant to be involved in her children's lives. If her partner were to be deported she would go with him; otherwise the children would not have a father.

5. The appellant's mother, Ms Agnes Muhoro, also gave evidence. She said she had sustained a neck injury in October 2004 which resulted in her being permanently disabled. She believed her disability may have unsettled the appellant. Her son, the appellant, had been living with her until 2010. In 2009 he had helped her with household chores. Most of the time he was living with her he was out. In evidence she gave concerning her relationship with the appellant and others she said that to her knowledge the appellant had never communicated with any family members in Kenya directly or indirectly except one uncle he had spoken to briefly in 1999. She had four brothers in Kenya and her 67 year old

mother. She herself had been back to Kenya twice since her arrival in the UK in 1993 – once in February 2009 and once in June/July 2012. She said the appellant speaks a little Swahili.

6. The FtT next heard from the appellant's sister, Wambui Munchal. Like her mother, his sister thought the appellant had expressed considerable remorse for his crimes. Finally the FtT heard from the appellant's partner's mother. She said that the appellant had matured and become more responsible since he became a father.

7. The FtT first considered whether the appellant met the requirements of paragraph 399(a) of the Immigration Rules. It accepted he was in a genuine and subsisting parental relationship with his son T, but did not consider it had been shown that it would be unduly harsh for T to live in Kenya or for T to live in the UK without the appellant. It took into account the factors that had been raised as identifying the child's best interests in remaining in the UK. At [62] the panel stated:

> "62. In assessing the child's best interest we have regard to s55 of the Borders, Citizenship and Immigration Act 2009 and ZH (Tanzania) v SSHD [2011] 2 AC 166. We are obliged to treat the best interests of the child as a primary consideration. We note that while British citizenship is a trump card, it is of particular importance in the assessment of the child's best interests that the child will lose the advantages of growing up and being educated in their own country, culture and language if required to move abroad. It is submitted on the appellant's behalf that deprivation of the benefits of British citizenship including educationally and culturally; removal from the nuclear family; lack of evidence that the child's father/parents would have somewhere to live or an income; providing for a new baby in a state of homelessness; the lack of financial support and lack of contact with relatives in Kenya over a period of 19 years, bar one conversation 15 years ago; the unreasonableness of requiring a mother of a British citizen to relocate outside the EU; the mortality rate for under 5's in Kenya and the considerable health risks to street homeless children cumulatively render it unduly harsh for Tristan to move to Kenya."

8. The panel concluded that properly considered the appellant had not established that the child T's best interests required the appellant to remain in the UK because the child T was only 16 months old and the appellant's partner had clearly stated in cross-examination that if he were removed to Kenya she would go with him with the children. In this way in the best interests of the child to remain with both his parents could be fully respected. Further, the panel found that it could not accept the appellant's evidence or that of his witnesses that he would not have somewhere to live in Kenya: "He has, we find, deliberately underplayed the extent of his contact with family members in Kenya in order to strengthen his case for remaining in the UK." Nor did the panel accept that the partner's mother would stop providing financial support to the couple. The panel's conclusion was that the family would not be homeless in Kenya and neither T nor the expected second child would be left in a vulnerable position. In light of these findings the panel decided that the

question of whether it would be unduly harsh for T to remain in the UK without the appellant did not arise.

9. The panel then considered whether the appellant could satisfy the requirements of paragraph 339A. It was prepared to accept that the appellant was socially and culturally integrated into the UK but concluded that he had not shown there would be very significant obstacles to the appellant's integration back into Kenyan society. In this regard the panel reiterated the earlier finding that it did not accept the appellant lacked contact with family in Kenya and noted that the grandmother's accommodation had been seen as suitable enough for his mother and sister when they had visited. It considered that because the appellant had been brought up by his mother who is fully aware of Kenyan culture she would have imparted family experiences to him.

10. The panel also considered whether the appellant could show very compelling circumstances over and above those set out in paragraphs 339 and 399A. It accepted that the appellant enjoys family life with his partner and child but concluded that taking into account factors for and against, both of which were rehearsed earlier in the determination, the appellant had not shown the existence of such circumstances. In relation to his criminal conduct, it accepted that his conviction for being in possession of Class A drugs with intent to supply was more than seven years ago, but noted that his record showed he had not "learned the lesson about drugs" even after a period of detention and that he had a history of repeated offences including one of attempted robbery:

> "Even though it was claimed that the appellant had changed after he had been released from detention and following the birth of his child that is not borne out by his behaviour since he committed further offences for which he was convicted on 18 September 2013."

11. The panel referred to displays of anger as a theme running through the appellant's criminal history. It noted that the OASys assessment assessed the appellant as "posing a low risk of reoffending. It considered this "surprising ..." because his history of offences marked him out as a person who committed offences on a yearly basis". It concluded:

> "We do not accept the opinions set out in the OASys Assessment that the appellant only poses a low risk of reoffending. He does not appear to have learned his lesson."

It concluded that there was a clear public interest in his deportation.

Grounds of Appeal

13. The grounds of appeal contended that the panel had failed to appreciate the appellant's Article 8 rights in full; had erred in finding that it would not be unduly harsh for his son T to live in Kenya, notwithstanding the mortality rate for under 5's; had erred in concluding that the appellant had deliberately underplayed the extent of his contact with family members in Kenya; had erred in concluding that it would be the "choice" of the

appellant and his partner as to whether she would relocate with him to Kenya, (since she would in reality be "forced out" of the UK under the guise of immigration control); had erred in finding his mother would have imparted Kenyan culture to him; and had erred in finding that his grandmother's accommodation in Kenya would be sufficient for him and his wife and children. In relation to the OASys Report it was noted that the assessment that the appellant would be at low risk of reoffending had not been disputed by the Crown Court judge.

14. To the written grounds, Mr Fripp, with my permission added the further ground that in assessing the appellant's circumstances, especially in relation to the best interests of the child, the judge had erred in focusing on the likely situation of the appellant immediately upon return rather than in the longer term encompassing the education facilities the children would have to encounter when they went to schools which were nowhere near the quality of UK schools. He submitted that the panel had also underplayed the extent of the appellant's integration into UK society, a country in which he had lived since aged 5.

My Assessment

15. I do not propose to deal with grounds in the order they have been enumerated, but their principal content will be covered.

16. As a prelude to what follows, I would observe that several of the grounds amount to more disagreements with the panel's findings of fact. In the absence of any identification of perversity, it is difficult to see how these grounds can succeed - as Mr Fripp's submissions for the most part acknowledged. The panel had written statements from the appellant, his partner, his mother and his partner's mother and heard oral evidence from each of them which was tested in cross-examination. It was entirely within the range of reasonable responses for the panel to reach a number of findings adverse to the appellant in particular (i) that he had underplayed the extent of his connections with family members in Kenya; (ii) that his mother would have imparted knowledge of Kenyan culture experiences to him; and (iii) that that it was likely his partner's mother would continue to support the couple in Kenya as she had done in the UK.

17. In relation to (i), the grounds propound the argument that the panel had no evidential basis for its conclusion. That argument overlooks that the panel properly took as its starting point that the burden of proof was on the appellant ([46]) and that having considered the evidence put forward by the appellant and witnesses it was not satisfied they had given a true picture. Part of that body of evidence was the fact that the appellant's family in the UK and extended family members in Kenya had kept up contact in more ways than one. It was a reasonable inference from that body of evidence that the appellant's connections were more significant than was being suggested.

18. As regards (ii) and (iii), a similar point can be made. The evidence of family connections, coupled with the fact that the appellant had lived with his mother until 2010 and spoke a little Swahili, was a sufficient and evident basis for the panel's finding on this matter. It was a reasonable inference from the finding that the partner's mother had given the couple financial support in the UK that she would continue to do so if they relocated to Kenya.

19. In respect of the panel's finding of fact, the only matter on which it might be said it had gone beyond the evidence was in the apparent finding as regards accommodation at [68] that the appellant and his wife and children could live in his grandmother's house even though it was described by the appellant's mother as comprising one room and one bedroom ([33]). However, read in the context of the assessment as a whole it is clear that the Tribunal considered it was reasonable to expect that the appellant would be able to obtain support from "family members" in Kenya and that he and his wife would also have some financial support from his partner's mother. In that broader context, the panel's findings considering accommodation are free of legal error.

20. Another main theme of the grounds concerns the panel's assessment that it would not be unduly harsh for the appellant's partner and son to live in Kenya. Here also, I consider the grounds fail to identify any legal error on the part of the panel. In light of the partner's evidence in cross-examination, it was open to the panel to conclude that in the event that he is deported, his partner would choose to go with him in order to maintain the unity of the family. It was clearly not her evidence that if the appellant were returned to Kenya, she and the children would remain in the UK. However much this choice would be one constrained by a premise his partner did not accept (that he would be deported), it was a real choice. Once the panel had reached a conclusion about the likely residence of the partner and children, it was entirely correct, and in line with established case law principles, for it to conclude that the principal answer to the question regarding the best interests of the child was to say that those lay with the child(ren) remaining with his (their) parents ([63]). I see no force in the contention that the panel should have regarded the evidence relating to the mortality rate in Kenya for under 5's and the health risks to homeless street children, as any sort of comparator of relevance to the appellant's case, when, on the panel's findings there would be family support both from family members in Kenya and the UK.

21. As already noted, I gave Mr Fripp permission to extend the ground so as to argue that the panel had wrongly confined its assessment to the situation the appellant and his family would face immediately upon relocation to Kenya. Mr Jarvis is right to say that no Tribunal can be expected to look as far into the future as ten years (a period Mr Fripp said was salient because of Immigration Rules on re-entry). However, it can be expected to consider what is reasonably foreseeable. But that it seems to me is precisely what this panel did. Indeed it is implicit in its entire analysis that

it was considering whether he could overcome obstacles to his reintegration into Kenyan society in the longer-term; see [66]-[68].

22. The grounds submit that the panel erred in failing to agree with the findings of the OASys Report which described the appellant as at low risk of reoffending. It was clearly open to the panel, however, to reach different findings as regards the risk of reoffending as long as it sufficiently explained why: see **Vasconcelos (risk – rehabilitation) Portugal [2013] UKUT 378**. The panel in this case made it sufficiently clear that it differed from that assessment because on the evidence before it in September 2015, he had not "learned his lesson" ([72]). I note that the Crown Court sentencing judge who had this OASys Report before him made his sentencing remarks in September 2007 and that since then the appellant had offended several times, most recently in September 2013.

23. The panel's conclusions that the appellant could not succeed under paragraphs 399 or 399A were free of legal error.

24. Mr Fripp was realistic enough to accept that if the appellant could not succeed under paragraphs 399 or 399A he could not succeed under the provision in paragraph 398 which requires an applicant to show very compelling circumstances over and above those identified in paragraphs 399 and 399A. I would point out that the appellant could not derive any additional assistance from ss117B-D of the Nationality, Immigration and Asylum Act 2002 because he could not bring himself within s117C(4) or (5). He could not do so for the same reasons as he could not bring himself within the Immigration Rules. Further, there was one significant s117B consideration – s117B(4) – that meant that in the Appellant's case little weight could be attached to his relationship with his partner, namely that he knew when they began their relationship that he was under active threat of deportation; indeed on his own account he told her as much. The First-tier Tribunal does not appear to have taken this point against the appellant but if it had it would only have added to the weight of factors demonstrative of a strong public interest in his deportation.

25. In light of the above considerations I am entirely satisfied that the First-tier Tribunal dealt with the appellant's Article 8 rights in full and reached entirely sustainable conclusions.

26. For the above reasons:

    The First-tier Tribunal did not err in law.

    Its decision to dismiss the appellant's appeal must stand.

No anonymity direction is made.

Signed Date

Dr H H Storey
Judge of the Upper Tribunal