**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA 00600 2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 20 November 2013** | **On 24 December 2013** |
| | ..... |

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**G M**
**(Anonymity Order Made)**

Respondent

**Representation:**
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mrs Y Gwashawanhu, Solicitor from Bake & Co Solicitors

## DETERMINATION AND REASONS

1. On my own motion I make an order under rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of the respondent's name or any other matter likely to lead members of the public to identify the respondent or his children. This is because one of his children has been the subject of proceedings in the Family Court and identifying her is probably contrary to the requirements of Section 97 (2) of the Children Act 1989. Failure to follow this order may be punished as a contempt of court.

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal to allow (on human rights grounds) an appeal by the respondent (hereinafter "the claimant") against a decision of the respondent that he was liable for automatic deportation under Section 32(5) of the UK Borders Act 2007 because he did not come within one of the exceptions set out in Section 33 of that Act.

3. It is necessary to begin by looking carefully at the First-tier Tribunal's determination.

4. The claimant was born in 1979 and so is now about 34 years old. He arrived in the United Kingdom in 2002 when he was about 23 years old. He claimed asylum but the application was refused. He was given temporary admission which lasted until 2008.

5. In November 2004 he was conditionally discharged for six months after being convicted of drunk and disorderly behaviour.

6. After he arrived in the United Kingdom he started a relationship with one J T and went through a customary marriage ceremony with her. Children were born of the relationship in 2004 and 2007 and in 2009 the claimant, J T, and the children were given indefinite leave to remain in the United Kingdom. The children became British citizens in December 2011.

7. The claimant was not faithful to J T. In 2008, whilst living with J T, he commenced a relationship with another woman and although the relationship ended in early 2009 that woman gave birth to another daughter of the claimant in 2009. The claimant wanted contact with the daughter of the alternative relationship.

8. On the autumn of 2011 the appellant visited the home where she lived with his daughter and another daughter and a man unconnected with the previous relationships. He had been drinking and arrived at about 5 o'clock in the morning having announced his intention of so doing. He entered the house by breaking a glass pane in the door and then he struck the woman on her face and body leaving marks and bruises. After leaving the house he again tried to contact the woman to discuss contact with his child and then began to threaten her so that she was frightened for her safety unless he was detained.

9. He was convicted of various offences, the most serious being an assault occasioning actual bodily harm to which he pleaded guilty and he was sentenced to a total of twenty months' imprisonment. The judge commented adversely on the claimant having targeted a vulnerable victim and carried out a premeditated offence. The offence was made still worse by his having broken into the victim's home in the early hours of the morning and assaulted in the presence of her 12 year old daughter. The pre-sentence report observed that he denied responsibility for his actions and attempted to minimise his role although that has to be contrasted with the guilty plea. He is also subject to a restraining order.

10. On 9 March 2012 he was served with a notice of liability to deportation.

11. He claimed that he could not live safely in the country of which he is a national because of his involvement with an opposition party there. Additionally he said that he regretted his violent behaviour. He also pointed out that he had been in regular employment and wanted to care for, and support his children.

12. The Secretary of State considered the case under the Immigration Rules and particularly paragraph 399 and 399A of HC 395. She found that the

claimant had a genuine and subsisting parental relationship with his three children who were under the age of 18 and who lived in the United Kingdom and that the children were British citizens and that one of them had lived continuously in the United Kingdom for at least seven years preceding the date of the immigration decision. She further found that it would not be reasonable to expect the three children to leave the United Kingdom. However, she was not satisfied that the appellant's circumstances satisfied the requirements of paragraph 399(b)(ii) of HC 395 as she was not persuaded there were insurmountable obstacles to family life with that partner continuing outside the United Kingdom and in any event the claimant had not had valid leave continuously for at least fifteen years preceding the date of the immigration decision.

13. Nevertheless the Secretary of State was satisfied that it was not reasonable to expect the children to leave the United Kingdom and therefore not reasonable to expect the partner to leave the United Kingdom.

14. It must follow that the Secretary of State accepted that her decision would destroy a nuclear family. Nevertheless the respondent then decided that this was not a case where there were exceptional circumstances that meant the public interest in deportation would be outweighed by other factors.

15. The claimant gave oral evidence and explained that a male child had also been born to the relationship between him and J T. He said that he was contrite about his behaviour and had learnt for his experience in prison.

16. Additionally he said that the victim of the assault had applied to amend the restraining order so that he could see his daughter. The application was refused in the way it was sought but the order varied so he could see his daughter through the intervention of a solicitor. He had rekindled his relationship with J T and described it as a "strong marital relationship" although of course they are not actually married. He had employment with two cleaning companies and his partner was in full-time higher education.

17. He was supported by J T who said, amongst other things, that his attitude had changed completely since his release from prison and the change was for the better. She could not contemplate raising the children on her own.

18. In cross-examination she explained how the claimant had misbehaved when he drank too much.

19. She said that when the claimant had been in custody she was supported by her aunt. She particularly focused on paragraph 399(b) which applied where there was "no other family member who was able to care for the child in the UK". She said that the social services had provided a report showing that since the claimant's release from prison his presence in the family home had been a stabilising factor so that the family were no longer of interest.

20. Additionally she had suggested that removing him was a disproportionate interference with the private and family life of the claimant because of the effect it would have on his relationship with his partner, his children

including his son, who could not reasonably be expected to join them in Zimbabwe. She also submitted that the claimant had been rehabilitated.

21. The First-tier Tribunal was not easily impressed. It said that it had "very considerable reservations as to whether the [claimant's] attitude towards his offending has genuinely changed." It was however more impressed with the evidence of J T about his improved behaviour subsequent to his release. Nevertheless it was not persuaded that it had been given a complete picture about the claimant's attitude to drink.

22. The Tribunal was satisfied that J T was able to care for the children and so the claimant's circumstances were not assisted by paragraph 399(b) of HC 395. It concluded that the application could not succeed under the Rules.

23. In conducting the balancing exercise the Tribunal found the best interests of the children were to be with both parents and that it would be unreasonable to expect the older children to go to the claimant's home country. The best interests of the children lay in living in the United Kingdom with their parents. In the final paragraph the Tribunal said that it had:

> "given significant weight to the public interest and doubts remain as to whether the [claimant] has genuinely changed. However, overall, and having regard to the prevention of disorder and crime, we find that the interference with the family life of the [claimant], [JT] and the three children of the family arising from the deportation of the [claimant] is sufficiently serious as to amount to a breach of the [claimant's] protected right to family life and the protected right of his family members to the enjoyment of family life under Article 8 of the European Convention on Human Rights."

24. Given the Tribunal's findings it may have been better to have allowed the appeal with reference to paragraph 398 of HC 395 because there were exceptional circumstances so that the public interest in deportation is outweighed by other factors but the Tribunal clearly allowed the appeal because it was satisfied that the effect of deportation on removal would be disproportionate to the public interest in removing the claimant.

25. The Secretary of State's grounds of appeal to the Upper Tribunal essentially make three points. They complain that the First-tier Tribunal wrongly followed **MF (Nigeria) [2012] UKUT 00393 (IAC)**. They complains that the Tribunal should not have regarded the Rules as a starting point before conducting a jurisprudentially-based Article 8 assessment but should have asked itself in the exceptional circumstances to allow the appeal under the Rules if the appeal would not otherwise be allowed under the Rules and the complain that insufficient regard was given to the public interest. They also complain generally that the reasoning is inadequate.

26. There is also a complaint there was no finding about the risk of re-offending.

27. Mrs Gwashawanhu produced a skeleton argument.

28. She submitted it was perfectly plain that the First-tier Tribunal was satisfied that the claimant had changed his ways. Although unimpressed with the claimant's evidence they were more impressed with J T's evidence about the claimant's change of attitude after his release from prison. The Tribunal had not produced figures alleging a percentage risk of re-offending but there was clear evidence before the Tribunal which the Tribunal had clearly accepted that the claimant was a changed man and there was no basis to criticise them for ignoring the risk of re-offending.

29. She drew attention to the decision **MF (Nigeria) v SSHD [2013] EWCA Civ 1192 CA**. Paragraph 45 in particular makes it plain that a proportionality test applied properly outside the new Rules or within the new Rules should not make a difference to the outcome.

30. She submitted that the determination was framed in the lines of the old jurisprudence and that may not have been the best approach to a case made after the rules had been amended but it was not inherently wrong in law because it had produced a sustainable and understandable result.

31. Ms Everett contended that there was no proper consideration of the public interest.

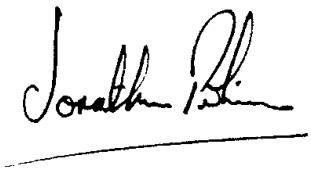
32. I find this somewhat vexing criticism although I accept that is encouraged by jurisprudence and I am not in any way criticising Ms Everett for raising it. It was quite plain to the Tribunal that it was dealing with a case of automatic deportation so there was a statutory presumption in favour of deportation. The whole reason that there was an appeal is that in the ordinary course of events the claimant ought to be deported but he was seeking to persuade the Tribunal that he should be deported. I do not accept that the determination would have been substantially improved if there had been a paragraph where the Tribunal expressly reminded itself that the person subject to statutory deportation should normally be deported. It is quite plain that the Tribunal was aware that it was dealing with a man who in a fit of drink-induced nasty temper invaded the privacy of a person's home and used violence, and that this misconduct amounted to a serious offence which was reflected in the sentence imposed by the court. The Tribunal did say in the last paragraph of the Determination that it had given "significant weight to the public interest". There is no basis for saying that it had lost sight of that in its deliberations. Although it would have been better to have said a little more I am quite unpersuaded that the First-tier Tribunal erred in law.

33. It is clear from paragraph 24 of the Determination that the Tribunal had doubts about the claimant having changed his behaviour but noted to his credit that he had kept out of trouble since being released from custody in 2012 and that he had abided by restraining orders imposed by the Crown Court. Whilst this might not seem much, given that the claimant knew that he would be subject to intense scrutiny, the offence giving rise to the deportation order was committed whilst the claimant was jealous and intoxicated. Jealous, intoxicated people tend not to behave properly and so even a few months of good behaviour is significant support to the contention that the clamant had changed. Further, although the public

interest in deporting an offender includes expressing society's disapproval of immigrant law breakers, and so deporting reformed characters is legitimate, the fact that the claimant's victim supported his application to see more of their child was known to the Tribunal and suggested a degree of trust or reconciliation that must have diminished the interest in removing him.

34. In deciding if the First-tier Tribunal erred in law there are three key questions. Does a fair minder reader know what the Tribunal did? Does that reader know why it did it? Were the reasons permissible in law? When all is said and done it is quite plain why the Tribunal allowed the appeal because it was persuaded that breaking up a family of three children and leaving them without a father as well as diminishing his role in the life of another daughter was too great an interference with the private and family life of the people concerned. That is a permissible and intelligible decision and I do not interfere with it.

35. I find no material error on the part of the First-tier Tribunal and I dismiss the Secretary of State's appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 20 December 2013