IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00471/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 August 2015	**On 7 September 2015**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR ALKALI MELLA BEDOR BANGURA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Mackenzie, Counsel instructed by Bindmans LLP
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. This is a rehearing of the appellant's appeal against the decision of the respondent dated 5 March 2014 to make a deportation order under Section 32(5) of the Immigration Act 1971. The respondent's decision to deport was based on the appellant's conviction on 10 August 2012 at Exeter Crown Court of possessing a controlled drug with intent to supply, thereby receiving a three year custodial sentence with a consecutive twelve month sentence for possession of an offensive weapon, totalling four years.

2. The appellant's appeal was allowed by a First-tier Tribunal on 16 July 2015. On 18 June 2015 the Upper Tribunal, consisting of Upper Tribunal Judges Eshun and Blum, held that the First-tier Tribunal erred in law such that its decision could not stand. The errors identified by the Upper Tribunal were that the First-tier Tribunal failed to refer to the Rules as then in place, erred in considering the case on the basis of Article 8 outside the Rules and failed to explain its conclusions. The errors of law were set out in the Upper Tribunal's decision at paragraphs 13 to 15.

3. The appellant is a citizen of Sierra Leone born on 10 December 1986.

4. The First-tier Tribunal made the following findings of fact which have not been challenged by the respondent. The appellant entered the UK on 16 December 2003 with indefinite leave to remain as a family member of his mother, Adama Conteh, who was granted asylum on 3 April 2002. He was convicted of various public order, theft, criminal damage and common assault offences between 2006 and 2011, the sentences included two short custodial terms. On 10 August 2012 he was convicted at Exeter Crown Court of possessing a controlled drug with intent to supply and received a three year custodial sentence with a consecutive twelve month sentence for possession of an offensive weapon; making four years in all.

5. The appellant was born in Freetown in 1986. His mother left the family when he was very young. He went to live with his grandmother and when she died he returned to live with his father. His father died in 1994 and the appellant went to live with an aunt. He became friends with a neighbouring teenager, Arthur Babatunde Fania. Arthur was suspected to be gay. The appellant suffered abuse from his family and in 1996 Arthur persuaded him to run away. He travelled to Maboka but the town was overrun by the Revolutionary United Front (RUF). The appellant and Arthur were recruited as child soldiers.

6. The appellant was made to take drugs and to kill a man. There followed a significant period of time when the appellant was with the RUF and carried out significant acts of brutality, killing and raping civilians. In 1997 he spent time as an assistant to Ibrahim Koroma of the Armed Forces Revolutionary Council. He travelled to Guinea to try to find his mother and then back to Sierra Leone to rejoin the RUF. He was assaulted by his family again for his relationship with Arthur and then fled to Guinea and Senegal and was eventually reunited with his mother in Gambia. His mother came to the UK to claim asylum in 2001 and the appellant went back to Sierra Leone to live with an aunt. He came to the UK in 2003.

7. In 2005 the appellant met Annisha Evans and they started a relationship. She was 16 and was from an unsettled background. She became pregnant and the couple had two children, in 2005 and 2009. The respondent has accepted that there is a genuine and subsisting parental relationship between the appellant and the children and that it is not reasonable for the children to leave the UK. The respondent also accepted that the

appellant is in a genuine and subsisting relationship with Annisha Evans, a citizen of Jamaica, who was granted indefinite leave to remain in the UK.

8. The FtT considered the report by Peter Horrocks, an independent social worker, dated 27 May 2014. The report concluded that the appellant has been traumatised and severely emotionally damaged by the horrors he witnessed and took part in as a child in Sierra Leone. He took a cocktail of drugs to cocoon himself from the realities of his life and this has continued into his early adulthood. His emotional needs were not met as a child. There has been domestic violence in the relationship with Annisha but the couple appeared to be maturing and are committed to each other and the children. They both grew up without fathers and do not want their daughters to experience the same thing.

9. Peter Horrocks also stated that the appellant was a major figure in the lives of his daughters since birth and was their primary carer until he went to prison because Annisha was at college and university. There was a significant impact upon the children when the appellant went to prison. Mellisha suffered from speech difficulties and Leah reverted to soiling and wetting herself. The children have continued to have contact with the appellant and were excited at the prospect of his return home. If the appellant were to be permanently separated from his children then this would in all likelihood have a major impact upon their wellbeing and development. Annisha could suffer a deterioration of her mental health difficulties which could undermine the functioning of the family unit. The FtT accepted all these conclusions.

10. I had a bundle of documents at the hearing before me. They included a statement from the appellant and Annisha Evans. There were also statements from his mother, Adama Conteh, a sister Bomposseh Bangura, sister Amiratu Conteh and brother Alpha Conteh. There were letters from Mellisha and Massia Bangura, the appellant's niece. There were letters relating to Adama Conteh's health and a psychological assessment of the appellant, Leah and Mellisha by Dr Ball dated 15 August 2015. There were also school reports on Mellisha Bangura and Leah Bangura.

11. The appellant and Annisha Evans gave evidence briefly. There was no challenge to their evidence.

12. The appellant relied on his witness statement. He confirmed that he was released on bail on 26 August 2014. He was bailed to his mother's address. He sees his children every day, sometimes from 6am on weekdays and from 8 to 10am at weekends, and spends the whole day with them. He picks them up from school, takes them swimming and to the cinema and to visit family members. They went out together yesterday because it was Mellisha's 8th birthday. His plan is to live together with his family and get a job. Annisha is pregnant with their third child who is due on 2 November.

13. The appellant said that when he was on remand and in prison, his mother helped when she could. His sister went once in a while to help Annisha and the girls. If he were to be deported his family would still continue to support them but that support would be limited because his sister has three children, his younger brother is mentally ill and his other sister and mother are not well.

14. He said that Annisha has family in the UK. Her two sisters came from Jamaica in June 2012 to live in the UK. Annisha does not get on with her sisters and her mother. She has very limited contact with her family members. It was very difficult for her when he was in prison.

15. The appellant said he made a mistake, got punished for it and Annisha stood by him. His absence has affected the children.

16. Annisha said in evidence that she was expecting their third child in November. She is a support worker at a care agency. She works sixteen hours a week. She said that the children will be devastated should the appellant be deported from the UK. They were very angry, emotional and depressed when he was in prison and would revert to this state should the appellant be deported.

17. She said that when the appellant was in prison she got a little help from his family but not emotionally. The behaviour of their daughters got out of control. Mellisha did not want to talk and Leah wanted their father all the time. Mellisha started school when the appellant was in prison. She had no help in taking her to school and fetching her from school. She had to take Leah with her each time.

18. She said that once in a while she sees her siblings and her mother. 16 July was the first time she had seen her mother in a year. Her mother did not even know that the appellant was in prison. She heard it from someone else.

Submissions

19. Mr Mackenzie submitted that the correct approach following **Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 415 (IAC)**, is to consider the substantive requirements of the Rules first and then address the legislation as part of the assessment of Article 8 under the heading of *"very compelling circumstances"* in paragraph 398 of the Rules. Both stages are carried out within the Rules, the difference being that the assessment of *"very compelling circumstances"* is not limited to the effect on the children and partner, but involves a holistic assessment of the facts, viewing the balancing exercise through the lens of the Rules, and taking account of the significant public interest in the deportation of serious offenders.

20. Mr Mackenzie relied on the meaning of *"unduly harsh"* as was explained in **MK Sierra Leone [2015] UKUT 00223 (IAC)** at paragraph 46, where the President said:

> "'Unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

21. Mr Mackenzie also relied on **MAB (para 399; "unduly harsh") USA [2015] UKUT 435 (IAC)** where the Tribunal rejected the submission of the SSHD that *"unduly harsh"* implied a need to factor in the public interest, and held that neither **MK Sierra Leone** nor **BM and Others (returnees – criminal and non-criminal) (CG) [2015] UKUT 293 (IAC)** was authority for the proposition that it did. At paragraph 72 the Tribunal said that:

> "'unduly' requires that the impact upon the individual concerned be 'inordinately' harsh. By that we mean that the impact would be 'unusually large' or 'excessive'. We do not intend that to be a definition but rather a 'gloss' to assist decision makers applying para 399, indeed, s.117C(5). [The assessment] is necessarily fact-sensitive but is focused upon the impact on the individual (whether child or partner) concerned."

22. Mr Wilding informed me that the respondent has appealed head note 1 of **MAB** to the Court of Appeal on a point of law. Head note 1 states as follows:

> "The phrase 'unduly harsh' in para 399 of the Rules (and s.117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned."

23. Mr Wilding submitted that because the Court of Appeal have said since **SS (Nigeria)** in respect of the sliding scale, that unduly harsh has to engage with some sort of public interest, that is why the respondent disagrees with head note 1 in **MAB**. In any event he relied on head notes 2 and 3 which arise from the Tribunal's findings at paragraph 72.

Findings

24. The appellant is claiming that his deportation would be contrary to his human rights under Article 8 of the ECHR following his conviction of an offence for which he was sentenced to a period of imprisonment of three years. Consequently I find that paragraph 398(b) applies. Paragraph 398 states:

> 'The Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very

compelling circumstances over and above those described in paragraphs 399 and 399A'

Paragraph 399 states:

"399. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British citizen; or

(ii) the child has lived in the UK continuously for at least the seven years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported"

25. The respondent has accepted that the appellant was in a genuine and subsisting relationship with Mellisha and Leah, who are under the age of 18. The respondent also considered that it would be unreasonable to expect Mellisha and Leah to leave the United Kingdom.

26. The respondent has also accepted that the appellant is in a genuine and subsisting relationship with Annisha Evans, who is settled in the United Kingdom.

27. The issue therefore that I have to decide under the Immigration Rules is whether it would be unduly harsh for the children and Annisha Evans to remain in the UK without the appellant.

28. I also have to consider the appellant's appeal under Section 117 of the Nationality, Immigration and Asylum Act 2002. Although this section involves the consideration of the public interest when assessing the appellant's appeal under Article 8, I bear in mind that the Upper Tribunal in **MAB** has ruled that "the phrase "unduly harsh" in paragraph 399 of the Rules and (and s.117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the

circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned."

29. Section 117C identifies additional considerations in cases involving foreign criminals. It states:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal who has not been sentenced to a period of imprisonment of four years or more, the public interest requires his deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where –
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh."

30. Again, under this Section the issue that I have to decide is whether the effect of the appellant's deportation on Annisha and Mellisha and Leah would be unduly harsh. I find that the "unduly harsh" test is the same in both the Immigration Rules and section 117C(5) of the 2002 Act.

31. I rely on the definition of the phrase "unduly harsh" in **MAB.**

32. I find that the strength in the appellant's case stems in part from his own background and the strength of his relationship with Annisha Evans and their two daughters Mellisha and Leah. It is therefore appropriate to recite the conclusions and recommendations made by Peter Horrocks, the independent social worker, whose report was accepted by the First-tier Tribunal.

> "5.1 Mr Bangura is a man who has been traumatised and severely emotionally damaged by the horrors he witnessed and took a cocktail of drugs in order to cocoon himself from the realities of his life and this continued into his early adulthood and resulted in his current prison sentence. As a child Mr Bangura only had very short periods of time in his early childhood years, when he had any form of stable and loving family home environment. The reality is that his emotional needs were not met as a child, which is fundamental in order to develop any enduring and stable adult relationship. However in Ms Evans he found a woman, who saw in him special qualities and fell in love with him, she remained committed to him even when his actions undermined their family life together and the well-being of their children.

5.2 Against the odds Mr Bangura discovered something in life which he could value and which made life worthwhile living. The couple's relationship was not always optimal and there has been domestic violence. Ms Evans had not enjoyed an optimal life as a child and has an equally difficult relationship with her own mother, just like Mr Bangura. Both Mr Bangura and Ms Evans grew up without their fathers, which has united them in wanting their own daughters not to have to experience the same deprivation. Both Ms Evans and Mr Bangura appear to be maturing and recognise that if they wish to achieve the best outcomes for themselves and their children, then there is a long way to go and things have to change. As a couple they are committed to each other and their children.

5.3 Mr Bangura has been a major figure in the lives of his daughters since birth and he played the role of their primary carer until he was sent to prison, whilst their mother was at college and university. There was a significant impact of both Mellisha and Leah as a result of their separation from their father when he was sent to prison. Mellisha suffered from speech difficulties and Leah reverted to soiling and wetting herself. The children have continued to have regular contact with their father since he has been in prison and are excited about the thought that he will soon return home. If Mr Bangura was deported and permanently separated from his children, this would in all likelihood have a major impact on their well-being and development. In addition Ms Evans could suffer a deterioration of her mental health difficulties, which could undermine the functioning of the family unit. A further concern would be in respect of Mr Bangura and the impact on him of the loss of the only things in his life worth living for, he could attempt to self-harm or return to using drugs."

33. Mr Horrocks also said in his report that the knowledge of the permanent absence of their father from their lives would have a traumatic effect on both Mellisha and Leah and would in all likelihood lead to a recurrence of the difficulties they experienced when their father was first sent to prison. His view echoes the evidence of Annisha Evans'. She was of the view that the absence of the appellant would lead to the emotional distress suffered by the children when their father was in prison. Mr Horrocks went on to say that the combination of the dual effect of the appellant's absence and the impact of this on their mother's mental health difficulties could have a long-term destabilising effect on all aspects of the girls' development, in particular their emotional/behavioural and educational development extending longer term into their adolescence and adult lives.

34. In the light of this report I accept Mr Mackenzie's submission that causing serious developmental difficulties and mental illness to three young British children and their mother, would be plainly unduly harsh, in the sense of being very severe, or excessive.

35. Mr Mackenzie also relied on a report by Dr David Ball, a clinical psychologist, dated 15 August 2015. His assessment of the impact on Mellisha and Leah caused by the appellant being in prison until August 2014 was that the children were too young and immature to fully understand the situation. Leah experienced incontinence and Mellisha had

speech and language difficulties. Mellisha has made considerable improvement in this area since her father's release and for Leah it is an issue that is still ongoing. They were confused, distracted and emotionally distraught during this period.

36. Dr Ball went on to say that children as young as Mellisha and Leah were unable at the time to intellectually articulate their emotional discord. As the development of Mellisha's speech issues coincide with her father's absence and the improvement of this condition with his return, it is safe to conclude that there may be a high risk of this condition, or other similar developmental or behavioural cluster of problems occurring if the appellant is deported.

37. Dr Ball added that the appellant is a man who is functioning exceptionally well under extreme conditions. His sole perspective is the safety and nurturance of his family above himself. He is insightful about his past errors and committed to a new lifestyle which is family-focused. He said that the children are happy, stable, psychologically nurtured and emotionally well-balanced, who are integrating and progressing in all significant areas of their lives. If their father is removed from the country it is with a high degree of certainly and clinical acumen that he concludes that all, maybe more, significant aspects of their lives will be negatively affected. It can be accurately predicted that these girls may experience severe emotional discord; they may develop behavioural problems as a result of unresolved anger, such as oppositional defiance or a conduct disorder in later years. Symptoms of grief and loss may develop as exhibited by loss of sleep, loss of concentration and an impaired ability to function in school, thus affecting their educational development. They may also experience traits and features associated with trauma, such as diminished interest in normal functioning, nightmares, flashbacks, withdrawing, irrational fears, depressive symptoms or anxiety.

38. I note from Annisha Evans' evidence that she did not receive emotional support from the appellant's family or from her family. I find that the emotional support which she lacked could not in any event have been provided by any of the family members. That emotional support can only come from the appellant. The children suffered badly and I find that they would continue to suffer badly were the appellant to be deported. I find that the conclusions of Dr. Ball and Mr. Horrocks reach the high threshold of "unduly harsh" as defined in **MAB.**

39. I conclude on the evidence that it would be unduly harsh on Annisha Evans and the two children Mellisha and Leah for the appellant to be deported. The appellant therefore satisfies the Immigration Rules and Section 117C(5) of the 2002 Act.

Notice of Decision

The appellant's appeal is allowed.

Signed Date

Upper Tribunal Judge Eshun