IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002318
First-tier Tribunal No:
HU/04782/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 April 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

EKIM CAN BALABAN
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E. Nicholson, instructed by London Solicitors
For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

Heard at Field House on 14 February 2023

DECISION AND REASONS

1. Neither the First-tier Tribunal nor the Upper Tribunal that made an earlier decision in this case made an order for anonymity. Although the case involves the consideration of the welfare of young children, we do not consider it necessary to make an order at this stage because the children were not named in the earlier Upper Tribunal decision, and it is not necessary to consider their position in any detail in this decision.

2. The appellant entered the UK illegally on 26 November 2009 and claimed asylum a few days later. The application was refused and a subsequent appeal was dismissed. He remained in the UK in the knowledge that he had no leave to remain and was treated as an absconder.

3. The appellant did not come to the attention of the authorities again until 10 March 2015 when he applied for leave to remain based on his family life in the UK. He was granted leave to remain until 29 November 2017 and then further

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leave to remain until 02 January 2021. The appellant started a family and was able to regularise his immigration status. He and his now estranged British wife have three young children.

4. On 25 September 2018 the appellant was convicted of driving a motor vehicle with excess alcohol. He was ordered to pay financial penalties and was disqualified from driving for 14 months. The conviction was not sufficiently serious to cause the Secretary of State to consider deportation proceedings. The evidence shows that the index offences that formed the basis of the subsequent deportation decision arose from his behaviour during the breakdown of his marriage.

5. The Home Office bundle does not appear to contain a copy of a printout from the Police National Computer (PNC), which would confirm the category of the convictions and the sentences with more accuracy. Because he was sentenced in the Magistrates' Court there are no judicial sentencing remarks. The respondent's summaries of the convictions and sentences change from one document to another and appear to be inaccurate. The information contained in the subsequent OASys assessment dated 13 July 2021 is likely to be more accurate because the probation officer would have access to official information relating to the appellant's convictions.

6. The evidence contained in the OASys assessment records that the appellant was convicted of common assault on 22 September 2020. The victim was his wife. The report notes that the appellant was sentenced to six months imprisonment suspended for 18 months accompanied by an exclusion requirement. The OASys records that the appellant's wife and their children were moved to a 'safe' address by the police. On 28 September 2020 the appellant was given a police warning for breaching the exclusion requirement. The OASys records that the appellant went to the address and was banging on the door trying to gain entry.

7. It was only after a second conviction on 06 March 2021, for making threats to his wife and her family by telephone, that the respondent was prompted to take action in relation to deportation. The appellant was convicted of 'send letter/communication/article conveying a threatening message' and sentenced to 26 weeks imprisonment. The OASys report states that on the same date the previous sentence was activated due to the breaches of the earlier orders. The report states that the appellant was 'sentenced to a total of 52 weeks in custody for both offences'.

8. This might explain why in some of the decision letters the respondent mistakenly thought that the appellant had been sentenced to 12 months imprisonment and treated him as a 'foreign criminal' who was subject to automatic deportation.

9. The initial notice of decision to make a deportation order dated 24 March 2021 notified the appellant of the respondent's decision to make an automatic deportation order under section 32(5) of the UK Borders Act 2007 ('UKBA 2007'). The error was recognised when a fresh notice of decision to make a deportation order was issued on 05 October 2021. The later decision accepted that the appellant did not meet the criteria for automatic deportation because he was given two sentences of 26 weeks to be served consecutively. Nevertheless, the respondent deemed that his deportation was still conducive to the public good with reference to section 3(5)(a) of the Immigration Act 1971 ('IA 1971'). It is

unclear from the evidence before the Upper Tribunal whether a deportation order was signed pursuant to section 32(5) UKBA 2007 in the intervening period between the two notices of decision. No copy of a signed deportation order appears to be contained in the evidence before the Upper Tribunal.

10. Having received further submissions from the appellant's representatives, a decision to refuse a human rights claim was made on 21 October 2021. Despite the recent correction in the notice dated 05 October 2021, the decision to refuse the human rights claim repeated the earlier error. It stated that the appellant had been convicted of an offence for which he had been sentenced to a period of imprisonment of at least 12 months and considered the case on that basis. The appellant appealed the decision.

11. First-tier Tribunal Judge Buckwell allowed the appeal in a decision sent on 31 March 2022. The respondent applied for permission to appeal to the Upper Tribunal. In a decision sent on 21 November 2022, Upper Tribunal Judge Lindsley concluded that the First-tier Tribunal decision involved the making of an error on a point of law. Judge Lindsley found that sufficient reasons were given for the judge's finding that the appellant was not a 'persistent offender' for the purpose of the definition of a 'foreign criminal' contained in section 117D(2)(c)(iii) of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002'), but had failed to give adequate reasons for his finding that the offences did not cause 'serious harm' for the purpose of section 117D(2)(c)(ii). She preserved the first finding but set aside the rest of the decision for want of adequate reasoning relating to other aspects of the relevant legal framework.

12. The appeal was listed for a resumed hearing before the Upper Tribunal to remake the decision, with a direction for any up-to-date evidence to be filed and served at least 10 days before the hearing. The appellant's updated bundle was sent the day before the hearing, in breach of the Upper Tribunal's direction. The bundle contained an interim Child Arrangements Order made by the Family Court on 01 February 2023 and a copy of a welfare report prepared by a social worker in relation to the family proceedings. The order makes clear that permission was granted to disclose all court orders and the section 7 (Children Act 1989) report to the Upper Tribunal.

13. Because of the late service of this evidence, Ms Everett was unable to take instructions to confirm whether the appeal should be formally conceded. However, she indicated that in light of the up to date evidence from the Family Court, which made tentative interim arrangements for supervised contact between the appellant and his children, and the decision in *CF (family proceedings and deportation) South Africa* [2022] UKUT 00336 (IAC), she recognised the force of the Article 8 argument and accepted that the Upper Tribunal might find that there could only be one outcome to the appeal. She did not propose to make detailed submissions.

14. After an informal discussion with Ms Everett and Mr Nicholson about the best way to proceed there was a level of agreement that the appeal could be disposed of without the need for the appellant to give evidence or for the parties to make formal submissions.

Decision and reasons

15. In light of the discussion that took place at the hearing, and the indication from the Secretary of State's representative, is not necessary to conduct a detailed

analysis of the evidence before the Upper Tribunal nor to make extensive findings in relation to the applicable legal framework. However, we will make brief findings relating to the evidence and summarise why the appeal is allowed.

16. The evidence contained in the OASys assessment and the section 7 report attached to the Family Court order paints a concerning picture about the appellant's behaviour prior to and during the break down of his marriage. The OASys assessment describes the appellant's lack of insight into his behaviour and his tendency to blame the victim rather than taking responsibility for his actions. It also describes his use as alcohol as a potential risk factor. The evidence given in the appellant's witness statements are consistent with the observations made in the OASys assessment. The appellant seeks to minimise the seriousness of the assault on his wife to a single incident and blames her for provoking him. He omits to mention any other problems or the past involvement of social services with the family.

17. The OASys assessment concluded that there was a link between the appellant's use of alcohol and his offending behaviour. The probation records indicated that the family were known to Haringey Children's Services. The evidence indicated an emerging pattern of abusive behaviour by the appellant within intimate relationships and concluded that there was a risk of the children suffering serious psychological or physical harm as a result of being 'caught in the cross-fire'. The report notes that the family had been referred to MARAC, a multi-agency procedure to provide protection in high risk cases involving domestic abuse. The assessing officer also spoke to a previous Offender Manager who spoke of the challenges of managing the appellant's behaviour in the community because 'he was not always honest with her and at times she felt manipulated by him.'

18. Other evidence shows that a restraining order was made following the appellant's breach of the original exclusion order and his further conviction for threatening behaviour.

19. The picture painted in the OASys assessment is also reflected in the section 7 report prepared for the Family Court. The information provided by the appellant and his sister sought to minimise the difficulties arising from his behaviour. The summary of his discussion with the social worker indicates that, in contrast to other evidence, he denied hurting his wife. He made allegations about her behaviour that he believed might put the children at risk without any acknowledgment of the impact that his own behaviour might have had on them. He claimed that he did not drink on a regular basis.

20. In contrast, the section 7 report indicates that his wife was still highly concerned about her whereabouts becoming known given his past attempts to find her and the threats made to her family. She was concerned that he only wanted to establish contact with the children to avoid deportation. The conversations that the social worker had with the two older children indicated that, at the moment, they are fearful of seeing their father because of his aggressive behaviour. The oldest child seemed adamant that she did not want to see him. The middle child also said that she did not want to see her father but reluctantly engaged in a conversation about what arrangements might make her feel safer if the court decided that she should.

21. In light of this evidence, the Family Court decided that the welfare of the children justified making an interim Contact Arrangements Order pending a final contested hearing on 31 May 2023. The recitals contain a series of

understandings including (i) that the appellant had agreed not to denigrate the children's mother in front of them; (ii) that he will not consume alcohol in the 24 hours before each contact visit; and (iii) that he will fully engage in meaningful and regular contact with the children.

22. The Family Court ordered the appellant to use his best endeavours to undertake a Triple P parenting course and a Building Better Relationships course. It also ordered that there should be supervised contact between the appellant and the children at a contact centre commencing from 11 March 2023. The contact will be tentative at first for an initial period of one hour every fortnight at the weekend for a period of three months. This would amount to six supervised contact sessions at the appellant's expense.

23. The appellant has not seen the children since he went to prison. It is clear from this evidence that the Family Court considered that, despite their reluctance, it was in the children's best interests to take initial steps towards rebuilding a relationship with their father. The process will be supervised and will be reviewed at the final hearing in the Family Court.

24. Given that there was some level of agreement between the parties, a summary of how the essential elements of the relevant legal framework are engaged is sufficient for the purpose of this decision.

25. The appellant was convicted of offences for which he received periods of imprisonment of less than 12 months. The case does not engage the provisions relating to automatic deportation. Because of the error relating to the understanding of his sentence in the decision dated 21 October 2021, the Secretary of State did not consider whether the offences caused 'serious harm' for the purpose of section 117D(2)(c)(ii) NIAA 2022. Nevertheless, we are satisfied that the evidence shows that the offences did cause serious harm. Upper Tribunal Judge Lindsley pointed out the relevant evidence contained in the OASys assessment at [18] of her decision. The officer who prepared the OASys assessment made clear that domestic abuse causes serious harm to children who witness it. Despite the relatively low level of the sentence, the fact that the family was referred to MARAC, demonstrates the concerns arising from a history of domestic abuse and the potential risk that aggressive behaviour might escalate into a very serious situation. In this case the appellant was convicted of a second offence in which he threatened to kill.

26. In the end, whether the appellant technically falls within the definition of a 'foreign criminal' under section 117D NIAA 2002 or not, it does not make much difference to the assessment because the respondent still has power to deport a person on the ground that it is conducive to the public good under the IA 1971 even if a person is not deemed to be a 'foreign criminal'. Given that the statutory scheme under Part 5A is intended provide a framework for the assessment of Article 8 of the European Convention on Human Rights, the overall evaluation of the relevant factors in a particular case is likely to be the same whether the exercise is conducted within the rubric of section 117C(6) or under Article 8 more generally.

27. After an initially poor immigration history, the appellant was granted leave to remain and was on a route to settlement with his wife and children at the date when he committed the offences. He jeopardised his position in the UK by his own behaviour.

28. Significant weight will usually be given to the public interest in deporting foreign criminals. The more serious the offence the greater the public interest in deportation will be. The offences caused serious harm to the appellant's wife and children and members of his wife's family. Although the potential for further serious harm is reflected in the family being referred to MARAC, the sentences that the appellant received were at the lower end of the scale and were not serious enough to engage the automatic deportation provisions.

29. The appellant does not have a long series of convictions. The OASys assessment suggests that he does not have pro-criminal attitudes. However, his continued use of alcohol and the emerging pattern of domestic abuse were deemed to be risk factors for future offending. The appellant's use of alcohol is linked to all the convictions, including the earlier conviction for driving over the limit. Although the OASys indicated some acknowledgment by the appellant of the need to address his use of alcohol, he was also described as being manipulative towards an earlier Offender Manager. The more recent evidence contained in the section 7 report indicates that the appellant is still drinking. It is possible, like in relation to other matters, that the appellant could be seeking to minimise the amount that he is drinking. The Family Court considered it to be of sufficient concern to seek an undertaking from the appellant that he would not drink in the 24 hours before a contact visit with the children. If the appellant is serious about rebuilding his relationship with his children, who are said to be fearful of him because of his past behaviour when drunk, he may need to take serious steps to address this issue. If necessary, he should seek support.

30. Although the appellant has not had contact with his children for around two years, the evidence indicates that he lived in the family home with them before the breakdown of the marriage leading to the index offences. He has not been able to see them for some time because of his own actions, which led to the family being taken to a safe house. His breach of the orders meant that the suspended sentence was activated. Thereafter he was in prison or in immigration detention. This explains the length of time that it has taken to obtain advice and to make an application to the Family Court for contact.

31. The nature of the current situation means that it is not possible for the appellant to produce evidence to show what the impact of his deportation would have on his children. There is insufficient evidence at this stage to conclude that his deportation would be 'unduly harsh' on his children for the purpose of section 117C(5) NIAA 2022.

32. A case with ongoing family proceedings involves a discreet area of assessment. Deference is given to the Family Court's expertise in assessing the best interests of the children. The decision in *CJ (South Africa)* built on earlier decisions of the Upper Tribunal in relation to this issue. The Upper Tribunal concluded that where a tribunal finds that Article 8 is likely to be engaged, the fact that there are ongoing family proceedings is likely to merit a finding that there are 'very compelling circumstances' that outweigh the public interest in deportation.

33. The evidence indicates that the appellant was an involved father before the family breakdown. We are satisfied that his attempt to re-establish contact with his children is a matter that engages his right to family life under Article 8. There is evidence to show that family proceedings are now in motion. For this reason, we are satisfied that, at the date of the hearing, there are 'very compelling circumstances' that outweigh the public interest in deportation for the purpose of section 117C(6) NIAA 2002.

34. The effect of this decision is to find that the appellant's removal is premature at this stage. As a result of this decision, it is likely that the appellant will be given a period of limited leave to remain. The length of the period of leave to remain is a matter for the respondent. No doubt the respondent will recognise that rebuilding relationships of this kind might take time and is likely to be dependent on the outcome of the final hearing in the family proceedings.

35. The interim order made by the Family Court is so recent that, at this early stage, it is not known whether the appellant will be able to establish a positive and meaningful parental relationship with his children in the next few months or years. It is very much up to him. To do so, it is likely that he will need to gain more insight into his behaviour than he has thus far.

36. For the reasons given above, we conclude that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998.

Notice of Decision

The appeal is ALLOWED on human rights grounds

M. Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber
20 February 2023