Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00718/2013

THE IMMIGRATION ACTS

Heard at : Victoria Law Courts	**Determination Promulgated**
On : 31st July 2013	**On: 13 August 2013**

Before

Upper Tribunal Judge McKee

Between

A.A.M.Z.I.
(anonymity direction continued)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Michael Rudd, instructed by Ravi Sethi Solicitors
For the Respondent: Mr Neville Smart of the Specialist Appeals Team

DETERMINATION AND REASONS

1. Mr I., who is 31 years old and hails from the Sudan, has been living in the United Kingdom for the past twelve years. He applied for asylum here in August 2001, claiming to be a member of the persecuted Massaleit tribe in Darfur. His claim was rejected, and an appeal to the Immigration Appellate Authority was dismissed by an adjudicator in October 2002. In January 2003, however, Mr I married a Hungarian

national, and in September 2004 he applied through solicitors for a residence document under the EEA Regulations 2000. In November 2005 a residence card was indeed issued, valid for five years, but by then the marriage had broken down. The Hungarian lady had gone back to Hungary in March 2005, taking the child of the marriage with her. She obtained a decree of divorce in October 2006, but arrangements are in place for Mr I to have contact with his son in Hungary. In August 2007 the residence document was revoked, and an appeal to the Asylum and Immigration Tribunal against revocation was dismissed in October 2007. By then Mr I had celebrated an Islamic marriage with a British citizen ('Mrs S') in Omdurman, a union subsequently made official by a civil marriage at a register office in Southampton. Mrs S has three children from her previous marriage, and had borne a child ('Z') to Mr I by the time he applied in August 2009 for indefinite leave to remain as a spouse, using form SET(M). Although he had not even limited leave at that time, Mr I was granted settlement, and another child of the marriage ('Y') was born in 2010.

2. In August 2012, however, an incident occurred at the family home which resulted in Mr I being sentenced to 15 months in prison, rendering him liable to 'automatic' deportation under section 32 of the UK Borders Act 2007. A deportation order was duly signed on 22nd March 2013, and on 21st May 2013 an appeal to the First-tier Tribunal came before a panel comprising Judge Whiting and Mrs Lydia Schmitt, JP. They dismissed the appeal, but permission to appeal to the Upper Tribunal was granted by Judge Mailer, and so the matter has come before me. My task of deciding whether the panel made a material error of law has been greatly assisted by Mr Rudd, who vigorously advanced the appellant's case, and by Mr Smart, who ably fielded the criticisms made of the First-tier determination. So able were the submissions of both representatives, and so extensive was the documentary evidence, that I needed time to consider my decision – quite a considerable time, as it has turned out. But I think I can now give the reasons for my decision without being over-long.

3. The grounds of appeal, on the strength of which leave was granted, focus on paragraph 26 of the First-tier determination, contending that the panel misunderstood the sentencing remarks of Mr Recorder Burgess. At no point, it is said, do those sentencing remarks "*suggest that during the trial the Appellant sought to blame his son's injuries upon his younger son*." That does not accord with the judge saying "*I do not accept for a moment the evidence that you gave to the jury that at any point you genuinely believed Y might have been responsible for causing the injury*."

4. The panel are then said to have mistakenly believed that the appellant's daughter gave live evidence at the trial. She had recorded an interview, which was played before the jury, but there was no question that the appellant made his stepdaughter give evidence at the trial, as the panel are said to have thought. That, in my view, misrepresents the position. The panel certainly thought that the girl's evidence was given by video link. That was a natural inference to draw from the sentencing remarks, since the judge describes Miss A demonstrating an overarm throw, and comments upon her demeanour. But the panel did not say that the appellant made his stepdaughter give evidence at the trial. What they said was that by pleading not guilty, and giving evidence to the effect that Y was responsible for the injury, the appellant had made it necessary for Miss A, who had witnessed the assault, to give

evidence as to what she had seen. It seems to me that the panel were right about that.

5. As for the 'not guilty' plea, it is the grounds that got it wrong. They say that this plea concerned only the question of intent. The appellant is said to have accepted that he caused the injuries to his son, but not that he intended to cause them. But as Mr Smart points out from the Trial Record Sheet, the appellant was arraigned on two counts, but only convicted of one. That conviction was of unlawful wounding under section 20 of the Offences against the Person Act 1861. One can safely assume that the other count was of wounding with intent to cause grievous bodily harm, under section 18 of the same Act. The two charges are often laid in tandem, and the accused can obviously plead not guilty to the greater, but guilty to the lesser, charge. What the appellant did here, however, was plead not guilty to the lesser charge of unlawful wounding. That is the only inference which can be drawn from the following remarks of the judge :

> "That failure [to own up to your own wrongdoing] was reflected in your decision to choose to have a trial in this case. I make it plain I do not punish you for that decision, it was your right, but you have deprived yourself thereby of what would have been significant mitigation in the form of a plea of guilty. In my judgment, the jury convicted you, quite unsurprisingly, on the basis of strong evidence. The idea that this was an accident is one that I find wholly unpersuasive. I think you knew full well what you had done. I think you knew full well that it was a criminal act and I think that you sought to minimise that fact to conceal that fact initially and justify your actions by telling untruthful evidence to the jury."

6. Plainly, the appellant pleaded not guilty to unlawful wounding, and tried to persuade the jury that what happened was an accident. The principal basis of the challenge to the panel's determination in the grounds of appeal, namely the panel's understanding of the sentencing remarks, turns out to be mistaken. The grounds go on to make another wholly unfounded criticism when they say that there was no basis for the Tribunal to hold at paragraph 31 of their determination that there was an unhealthy environment for the children in the family home "*in consequence of the appellant's exhibited anger and violence*." The panel had just given examples of such behaviour, taken from the Child Protection Conference held on 17th January 2013, so there obviously was a basis for the panel's view.

7. The last paragraph f the grounds also misrepresents the true position. The panel are said to have given no reasons for rejecting the view of Mrs S that it is in the best interests of the children to have their father in their lives ~ especially when, at paragraph 33, the panel have found Mrs S to be "*a truthful witness of commendable frankness*." But when one actually looks to see what Mrs S was being frank about, one reads this at paragraph 30 :

> "In the appellant's absence whilst in custody Mrs [S] obtained Prohibited Steps and Residence Orders to prevent the appellant removing the children from their schools of jurisdiction and returning to the matrimonial home upon release for the protection of the children. She recorded during the foregoing meeting that she would maybe consider a future relationship with the applicant at some stage in the future conditionally if the appellant was willing to work on his anger, substance misuse and parenting work, but could not make that decision without counselling, as *she has issues herself*. If the appellant wanted his family back, he would need to do a considerable amount of work for that *to be vaguely possible*. In respect of the appellant's relationship with the children she would not shut the door to him but he

> would need to change a lifelong belief of how the children are brought up and would need to change everything. The view of the Child Protection Advisor present at that meeting recorded that it would be hard to change the appellant in regard to such matters. Mrs [S] stated that all the children missed the appellant who came into their lives in 2005, although she was considering obtaining an 'exclusion zone' to prevent the appellant contacting the family upon his release from custody."

8. The grounds of appeal end by observing that the views of the children, as recorded in the Social Services Report (presumably this refers to the Child Protection Conference on 17th January 2013), "*all confirm that they miss their father and would like to be re-united with him again*." But that is not what the children said. The appellant's three step-children attended the conference, but only Miss A said anything about Mr I, and that was that she was "*trying to separate herself emotionally*" rather than wishing to be re-united with him. It was Mrs S, not the children themselves, who said that the children miss their father.

9. It turns out that the grounds accompanying the application for leave to appeal have absolutely no merit. The panel have clearly devoted a great deal of attention to the best interests of the children, and rightly set great store by the report of the Child Protection Conference, whose primary objective was "*to examine the best interests of the children resident in the UK*." Paragraphs 28 to 32 of the determination are taken up with his conference, which gave a recent and professional assessment of the matters most relevant to the panel's own assessment of Article 8 family life and the best interests of the children, in determining the appeal against deportation.

10. The January conference might have been fairly recent, Mr Rudd now contended, but it was not recent enough. The panel sat in May, and needed more up-to-date information if they were to make a fair assessment of what Article 8 required, as at the date of the hearing. They had an opportunity to obtain that information when the Presenting Officer, Mr Hammonds, sought an adjournment the day before the hearing. He had just received the Appellant's Bundle, containing the report of the Child Protection Conference, and wanted to know what the current situation was regarding Child Socal Services and the appellant's children. He therefore telephoned Southampton Social Services, who confirmed that they were willing to produce a report "*detailing their position regarding the potential deportation of the Appellant owing to the risk posed to the children*." But they could not produce that report in time for the hearing the next day. The report would give the reasons why Social Services considered the appellant to pose a risk to the children, and what their concerns were over his parenting skills. The conference report, thought Mr Hammonds, told us what their concerns were, but not the reasons for those concerns. Without those reasons it would not, in his view, be possible to give proper consideration to the section 55 duty.

11. Mr Rudd had now identified a much stronger ground than any in the application for leave to appeal. Unfortunately for him, the panel record at paragraph 7 of their determination that on the day of the hearing, when Mr Hammonds renewed his request for an adjournment (it had already been refused on paper the previous day), his application "*was resisted upon instructions by the appellant's representative*." So the appellant himself was unwilling to let the panel be informed of the reasons for the concerns about him entertained by Southampton Social Services. The panel then looked at the exchange of e-mails between Mr Hammonds and a social worker in

Southampton the previous day (the latter having given his permission for the e-mails to be disclosed). The social worker said that his Senior Practitioner and line manager "*would be happy to put something in writing detailing that Southampton Children Services would not oppose the deportation of Mr [I] due to the risks he presents to the children*." But any report, the social worker clarifies, "*would just be a short expansion of what is below*", namely that "*Southampton Children's Services do have significant concerns surrounding Mr [I]'s parenting capacity and therefore would not contest his deportation*."

12. Given the above information, the panel cannot be said to have erred in law by proceeding with the appeal. The views of Southampton Social Services clearly had not changed between January and May, and the appellant himself had expressed unwillingness for the hearing to be adjourned in order for Social Services to provide fuller reasons for their adverse view of him.

13. Mr Rudd points to a failure by the respondent to provide all the documents listed in 'Specific Directions' by the Resident Judge at Newport, prior to the first-instance hearing. These included "*any relevant Pre-Sentence Report*." The panel really ought to have had that, said Mr Rudd, in order to make a full assessment of the case. They ought also to have had a post-sentence NOMS or OASys report, giving a prognosis of any risk still posed by the appellant. Mr Smart explained that the Border Agency (now, I think, Enforcement Command) can request such documents, but cannot compel their production. True it is that the risk score in an OASys report (low, medium or high) usually features in a deportation appeal, but it is not essential to have it, and without it the Tribunal must simply go ahead and come to a decision on all the other evidence. For examples of that, see *MK (Gambia)* [2010] UKUT 281 9IAC) and *BK (Ghana)* [2010] UKUT 328 (IAC).

14. The upshot of all this is that the First-tier Tribunal made no error of law. They took a long view of the appellant's conduct, noting that his initial entry to the United Kingdom was achieved on the strength of a bogus asylum claim. He claimed to be a member of the persecuted Massaleit tribe in Darfur, when all the time he had been born and brought up in Omdurman. He was content to be issued with a five-year residence card as the husband of an EEA national, after the EEA national had left the United Kingdom and his marriage to her had broken down. The panel were entitled to take the view that these matters did not reflect well on the appellant's character. They were entitled also to have regard for the view, shared by Mrs S and the social workers at the January conference, that it would be difficult for the appellant to change his ways, and would take a very long time, if it happened at all. There was nothing perverse or irrational in the conclusion reached by the panel.

DECISION

The appeal is dismissed.

The anonymity direction made by the First-tier Tribunal is continued.

Richard McKee
Judge of the Upper Tribunal

10th August 2013