Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00093/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated:**
On 11 December 2020	**On 6 January 2021**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

GEORGE YEBOAH
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 20 March 2020 to deport him to Ghana, of which he is a citizen. The appellant came to the United Kingdom as a young adult, aged 18 and has permanent residence pursuant to the Immigration (European Economic Area) Regulations 2016, acquired as the EEA dependant family member of his father.

Background

2. The appellant was born in Ghana on 7 January 1990 and is now 30 years old. He grew up in Ghana, completed his education there, and left Ghana in September 2008, with his father and twin sister, arriving in the United Kingdom on 22 September 2009. While in Ghana he was a student and did not take up employment.

3. On 18 February 2010, the appellant applied for a residence card as his father's EEA dependant, which was issued on 14 August 2010, valid until 14 August 2015. On 16 August 2015, he applied for permanent residence as his father's extended family member, which was issued on 17 February 2016.

4. On 16 October 2014, the appellant's daughter was born. Her mother has had very little contact with the child from birth, and disappeared altogether in 2017. The appellant and his twin sister have fulfilled the parental roles: the appellant had sole custody of his daughter, who is six years old now.

5. By family agreement, his sister gave up work to look after the appellant's daughter and her own children. In practice, it is his sister who has brought up the appellant's daughter, undertaking the day to day care of the child, while the appellant worked to support them. When arrested, the appellant was living in Telford but his daughter was living with his sister, her husband, and their children in Stoke-on-Trent. The sister says in her witness statement that 'we have been happy to be able to bring [the appellant's daughter] into our family'.

6. Since the appellant's arrest, there has been a special guardianship order made in favour of the appellant's sister and her husband, and it is they, not the appellant, who have custody of his daughter. The child lives with them and her cousins and it is expected that she will remain with them for the rest of her childhood. The appellant has had no direct contact with his daughter her while in prison and will not be permitted to live in his sister's house, or any house with young children in it, when he is released.

7. On 11 March 2019, the appellant was convicted at Shrewsbury Crown Court of sexual activity with a female child under 16 years, including vaginal penetration. The child in question was 13 years old and is described in the January 2020 OASys report as a family friend, attending the same church, the Church of Grace, in Telford. The rape occurred when the child asked the appellant to see her safely home. It was his only offence, but was a serious one and a breach of trust.

8. On 1 April 2019, a judge at Shrewsbury Crown Court sentenced the appellant to 38 months' imprisonment. He is required to sign on the Sex Offenders Register for life and is prohibited from working with children, also for life. The sentencing judge said this:

> "…At the time of this offence you were 27. Why you decided to engage in sexual activity with a 13-year-old child only you will know. One of the aspects of this type of offending, that sometimes gets

> missed out, is that even if there is a genuine relationship, as opposed to simply sexual desire, one rarely goes from a kiss straight into sexual intercourse which is what you did; it was with a 13-year-old child and somebody you knew was 13.
>
> To your credit, you accept all of that; you understand that you were the adult, and therefore you really should have known that what you were doing was wrong. This was very wrong; a 13-year-old child. The offence is plainly a category 1 offence. It is plainly culpability A. There is, as I have already mentioned, the age disparity; there is clearly an element of breach of trust, you were somebody that she knew and trusted, as is evidenced by the fact that she asked you if you would help her get home. I accept, of course, that as a result of this your daughter has suffered, you have suffered because of the change in your ability to look after her imposed by the Children Services. …"

9. In response to a liability to deport letter dated 18 April 2019, the appellant relied on his EEA permanent residence, his sole custody of his daughter, and stated that his life would be in serious danger if he returned to Ghana. However, on 15 August 2019 the appellant had signed a disclaimer expressing a wish to return to Accra, Ghana, and on 2 September 2019, he applied for the Facilitated Return Scheme. On 30 September 2019, the respondent told the appellant that he was ineligible for the FRS. The appellant subsequently withdrew his disclaimer.

10. The appellant has now reached the licence phase of the custodial sentence, and bail in principle was granted on 30 October 2020, subject to suitable Schedule 10 accommodation being found. There was another bail hearing in November 2020. The appellant moved to immigration detention on 1 December 2020 and remains in detention. He hopes for supervised access to his daughter when he returns to the community.

Deportation order

11. In a letter of 10 March 2020, the respondent gave her reasons for making a deportation order. She considered that the appellant represented a significant threat to the safety and security of the public and that any further offence would be similar, or more serious. Deportation was justified on public policy grounds, with reference to Regulation 23(6)(b) of the EEA Regulations 2016.

12. The respondent considered the appellant's Regulation 27(5)(a) dangerousness and whether it was proportionate to remove him. The appellant had lived in Ghana until he was 18 and was young enough to adapt to the changes on return. He could approach the Ghanaian authorities should he experience hardship on return. There was no evidence of his having undertaken any rehabilitative work while in prison. His family in the United Kingdom had been unable to prevent the original offence and, as he was not allowed to reside with them, it was not likely that they could provide support to aid any rehabilitation in the United Kingdom.

13. The appellant's international protection claim was not accepted. He had a mother in Ghana. His fear of his victim's family if he were to be returned to Ghana, said to be dangerous people, was contradicted by the appellant's willingness in August 2019 to return to Ghana and rejoin his mother there. On 12 December 2019, he had told the immigration staff that his only reason for staying in the United Kingdom was to be near his daughter and his sister's family.

The OASys reports

14. The respondent's bundle includes an OASys report prepared on 31 January 2020, while the appellant's bundle includes an updated version dated 30 June 2020.

15. The reports both note that appellant completed his education in Ghana, before coming to the United Kingdom with his sister and their father, all of them hoping to find work here. Following his sister's marriage in 2010, the appellant, her husband, and his sister moved into accommodation in Stoke-on-Trent, while their father remained in Telford. His father has since relocated to the Netherlands. His mother, who is in Ghana, is in poor health. She has not had much to do with the appellant or his sister, as their father was implacably opposed to contact between his children and their mother.

16. While in the United Kingdom, the appellant has worked in factories and in shops. He did not manage to save, and had no financial resources, nor did he wish to ask his family for money while in prison. He survived in prison financially on what he earned from working in the waste management function there.

17. The appellant told the probation officer that he was not good at any sports and liked to 'hang around at home'. The probation officer was not clear how much alcohol the appellant had consumed before the offence, nor how predatory he was. He had never misused drugs, but his alcohol use was a worry. Further work needed to be done to understand how much he consumes. He was calm and polite but he had difficulty recognising problems and his awareness of consequences needed further work.

18. The appellant was reluctant to discuss his offending behaviour, saying only that he was drunk and that the rape 'just happened'. He was prepared to admit his responsibility, but not to discuss it further. The appellant said to the probation officer that he would be 'SO angry' if the same thing happened to his daughter. He refused to acknowledge that such offences do not 'just happen'. Further work was considered to be needed, when the appellant was eventually released.

19. The OASys report considered that the appellant presented a high risk of serious harm to females under the age of 16 and that if the appellant lived in a house in which there are young girls around, 'his risk will escalate'. Both the January 2020 and June 2020 OASys reports identify him as a

continuing high risk to children, although a low risk in the community generally. A high risk is defined thus:

> "**High risk of serious harm –** there are identifiable indicators of risk of serious harm. The potential event could happen at any time and the impact would be serious. …
>
> Where an individual is assessed as being at **medium, high or very high** risk of serious harm, this MUST be following through with a risk management plan. …"

20. The 30 June 2020 OASys report says that the appellant's daughter is likely to spend the rest of her childhood with her aunt and her uncle, who are now her guardians. There were no current Child Protection /Looked After Child meetings but there had been in the past. The Probation Service would not agree to the appellant living with his sister when released, or in a house with young people (even his nephews and nieces) as this would raise the risk of serious sexual harm, linked to the appellant's offending behaviour. They would stipulate that he could not do so, and that he could have supervised contact only with his young daughter.

First-tier Tribunal decision

21. The First-tier Judge dismissed the appellant's appeal, setting out the nature of the offence and that it was a first, but very serious offence. The appellant had not offended while on bail pending trial, but had maintained his innocence, not pleading guilty until the hearing. The judge noted at [13], when assessing the future risk, that:

> "13. … Those that have assessed him closely clearly do regard the appellant as being a high risk to children, that he requires MAPPA supervision in addition to that of the Probation Service, he is not permitted direct contact with his daughter, is not allowed to work with children and is to register with the police. With those matters in mind, I am satisfied that the appellant presents a sufficiently serious and present threat such that there are serious grounds of public policy and security that justify the appellant's deportation."

22. The appellant had come to the United Kingdom as an adult and was not a 'home grown criminal'. International protection was not relied upon and there was a functioning police force in Ghana, should the appellant have difficulty with his victim's family on return. There was insufficient evidence to establish that any such risk could not be met by internal relocation, as Ghana has a population of over 31 million: it is a large country.

23. In relation to the appellant's daughter, the judge found that the appellant, with his sister, had always been the main carer for the child, and that she was the subject of a care order, and lived with the appellant's sister and her family. The appellant did not have direct contact and was not even permitted to speak to the child on the phone. Such indirect contact could

be maintained from Ghana. The respondent accepted that it would be unduly harsh for the child to go and live with her father in Ghana.

24. The Care Order arrangement for the child to live with her aunt, her uncle, and their two little boys aged 6 years, and 10 months old respectively, would continue whether or not the appellant was removed.

25. From [22]–[25] the First-tier Judge summarised his reasons for concluding that the deportation order was 'not inconsistent with her [s55] best interests' and not disproportionate. Direct contact was not, he considered, an option for some considerable time and 'it would be possible to maintain indirect contact with effort on his part and assistance and support from his sister and her partner' when the appellant was in Ghana.

26. The judge concluded:

> "Taking all of the above into account, I find that the appellant's deportation is justified as the evidence shows that he presents a sufficiently serious threat within the United Kingdom to meet the threshold for the deportation of an individual with permanent residence. It is a proportionate response in the circumstances and is not contrary to his daughter's best interests. I find that the appellant is not in need of international protection and can relocate within Ghana, in those circumstances there is no need to make an assessment under section 72 of the 2002 Act."

27. The appellant appealed to the Upper Tribunal.

Permission to appeal

28. Permission to appeal was granted by Resident Judge Campbell, who considered that the First-tier Judge had arguably erred in failing to make an adequate Regulation 27(5) dangerousness finding, and in the application of *HA (Iraq) v Secretary of State for the Home Department (Rev 1)* [2020] EWCA Civ 1176 with respect to the section 55 best interests of his daughter.

Rule 24 Reply

29. The respondent filed a Rule 24 Reply, arguing that the decision was adequately reasoned, given the assessment that the appellant remained a high risk to children and was not even permitted direct contact with his daughter.

30. That is the basis on which this appeal came before the Upper Tribunal.

Submissions

31. For the appellant, Mr Burrett acknowledged that the evidence showed that even if the appellant were granted supervised access to his daughter, he was likely to see her at most 6 times a year. There would be lifelong restrictions on his being with children on his own, but it was a single

offence which had occurred in February 2017, and been reported to the police in March 2017. He was arrested on 3 March 2017 and bailed not to live at his sister's family home, which had endured until the trial in 2019. He had committed no further offences during that time.

32. Not all children would be at risk from the appellant, Mr Burrett submitted, since the OASys report said the risk was to known children. The appellant had not been convicted of the offence of rape, but of the lesser offence of sexual activity with a minor, with penetration. Mr Burrett said the appellant accepted that his actions had been seriously wrong.

33. Mr Burrett contended, without evidence, that statistics showed that sex offenders when released committed 50% fewer offences than those of other offenders. That had been argued before the First-tier Judge. The judge in making his decision had no regard to the management which would take place on release.

34. As regards the section 55 issue, Mr Burrett asserted that the appellant currently had contact three times a week with his daughter, albeit not direct contact. The child did not see her mother and was living with her aunt. He relied on *HA (Iraq),* and argued that the obligations placed on the 'decision maker' at [154] of that decision included the judge. Mr Burrett asked me to find a material error of law and allow the appeal.

35. For the respondent, Mr Lindsay relied on his Rule 24 reply. The grounds of appeal did not seriously challenge the finding that there was a lack of evidence that the daughter was not suffering unduly in the appellant's absence. The judge's decision was careful and fair, and he was in command of the facts, including the inaccurate reference to 'rape' in the OASys report. The judge had made a properly considered forward looking assessment which was amply justified on the facts, including proper consideration of proportionality, the breach of trust involved in the offence, and the unduly harsh exception. The findings were sound and the First-tier Tribunal's decision should be upheld.

Analysis

36. I remind myself of the narrow circumstances in which as an appellate Tribunal, the Upper Tribunal may interfere with findings of fact made by the First-tier Judge: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 and *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982. The challenge in this appeal is to the adequacy of the findings of fact about the appellant's future dangerousness, and the best interests of his daughter.

37. Dealing first with the dangerousness question, Regulation 27(3) of the 2015 Regulations requires the respondent to demonstrate 'serious grounds of public policy and public security' and the decision must be proportionate, based exclusively on the appellant's personal conduct.

38. Section 27(5)(c) requires that such conduct 'must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent'. In this case, the OASys report, the care order, and the proposed circumstances of release indicated that the appellant was considered to represent such a threat on an ongoing basis, and for life.

39. Despite Mr Burrett's eloquent submissions about the percentage of sex offenders who reoffend, and the risk being to known children, a risk of forced sexual penetration of a child under 16, which is considered to exist for life, is more than sufficient to support the appellant's EEA deportation. The First-tier Judge did not err in finding the appellant's removal to be proportionate, on the facts of this appeal and he gave proper, intelligible and adequate reasons for so finding.

40. I consider next the best interests of the child, applying the guidance in *HA (Iraq),* which was not available to the First-tier Judge when he decided this appeal. At [153]-[155], Lord Justice Peter Jackson, concurring with the leading judgment by Lord Justice Underhill, summarised the section 55 test:

> "153. The practical effect of Section 55 has been summarised in *Zoumbas*. I draw particular attention to the final parts of Lord Hodge's summary, reproduced for convenience:
>
> > "(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
> >
> > (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
> >
> > (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."
>
> 154. To these I would respectfully add that the Section 55 duty falls on the decision-maker. A child will not usually be in a position to urge his or her point of view and the decision-maker cannot treat the child as if he or she had some burden of proof.
>
> 155. The assessment that has to be carried out is therefore one that is adequately informed and specific to the individual child as a person distinct from the offending parent. It requires the decision-maker, as part of the overall assessment, to look at matters from the child's point of view – in the case of Exception 2, the question explicitly concerns undue harshness *to the child*."

41. At [157]-[159], Peter Jackson LJ emphasised the individual assessment which must be made, and the proper approach to emotional harm, concluding that:

> "159. ... Provided the decision-maker faces up to the reality of the child's situation and gives it primary consideration, the public interest in deportation may prevail, but it will not do to minimise the emotional impact on the child of the severing of ties by reference to the doubtful prospect of maintaining relationships over many years by indirect means only, or by reciting the fact that this is what deportation does."

42. In this case, that was precisely what the First-tier Judge did. The evidence, properly understood, is that since the appellant found himself as sole carer for his baby daughter, a family arrangement was swiftly reached whereby his twin sister gave up work to care for her and for her own little boy, who was roughly the same age as the appellant's daughter. Another child has since come along in that household. For all practical purposes, the appellant's sister is the only mother his daughter has ever known, and she has lived as a part of the sister's family throughout. The appellant has not always lived in the family, particularly since his arrest and bail in 2017. He has not been home at all since he was convicted in 2019.

43. On the evidence, the judge was fully entitled to consider that the evidence was that the appellant's removal to Ghana would make little, if any difference, to his daughter's situation or her emotional life. She is pleased to get letters from him, but she is in reality a member of his sister's family and the care order which is in place, along with an emergency guardianship order, contemplates that she will complete her childhood as a member of that family. The First-tier Judge made no error of law or fact in so finding.

DECISION

44. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed Judith AJC Gleeson Date: 16 December 2020

Upper Tribunal Judge Gleeson