Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17785/2016**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 6th September 2017	**On 4th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDWIN NJIRI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mrs Pettersen, Home Office Presenting Officer
For the Respondent: Mr Williams of Andrew Williams Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Ruth made following a hearing at Bradford on 15th February 2017.

Background

2. The claimant is a citizen of Zimbabwe born on 27th April 1981. He came to the UK with leave on 11th June 2002, which was subsequently extended until January 2003. He submitted unsuccessful applications for leave as a student in late 2003 and, after a three year delay, was refused in 2007.

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He then applied for leave on family and private life grounds with his wife and children in 2008.

3. They were granted refugee status on 18th May 2009 and the claimant was granted discretionary leave for six years on 18th January 2010. His wife and children were granted indefinite leave to remain as refugees on 29th August 2014. Two of the children have subsequently become British citizens.

4. On 15th October 2015 the claimant was convicted for wounding and inflicting grievous bodily harm and sentenced to one year and nine months' imprisonment. The Secretary of State signed a deportation order on 13th July 2016, and it was this decision which was the subject of the appeal before the Immigration Judge.

5. The Secretary of State accepted that it would be unduly harsh for the children and their mother to live in Zimbabwe and that the claimant's deportation might result in permanent separation from his wife and children.

The Immigration Judge's Decision

6. The judge set out the facts and the applicable law.

7. He recorded that there was no dispute that there was a genuine and subsisting parental relationship between the claimant and his children, two of whom were British citizens and therefore satisfied the requirements of paragraph 399(a)(i). The third child could not do so because he was not British and was born in the UK in 2014. So far as his wife was concerned, the claimant cannot satisfy the requirements of paragraph 399(b)(i) of the Immigration Rules, because at no point since his arrival in the UK has he ever had indefinite leave to remain and at the time of the formation of his relationship with his wife, in 2004, his leave was limited and precarious. Finally, he noted that the claimant could not satisfy the requirements of paragraph 399A of the Immigration Rules and the only way in which he could succeed, putting aside the question of very compelling circumstances under paragraph 398 would be by establishing undue harshness in relation to the two British citizen children.

8. The judge considered all of the evidence in relation to the children, and what their best interests would be. He recorded that the claimant had a close and loving relationship with them and that they depended on him to a significant extent. However, the best interests of the children were not a trump card and had to be placed in the overall context of an assessment of all factors when considering the proportionality of deportation.

9. The judge concluded that the risk of reoffending was probably low to medium at most, and reminded himself that even a low risk of reoffending and many years living in the UK with children would not necessarily mean that deportation would be a disproportionate response where criminality was involved.

10. At paragraph 99 he wrote:

> "99. Looking at the matter in the round and considering the question of undue harshness, I take the view that this is a case where the consequences for the appellant's partner and Zimbabwean child would not have been excessively bleak, harsh or severe if some form of genuine family life could have been carried on.
>
> 100. If, for example, in addition to contact over Skype, the telephone and through correspondence, there could have been visits to the appellant in Zimbabwe, then although that would have been far indeed from an ideal situation, I would have concluded it would not have been unduly harsh."

11. However, this case was quite different because there would be a permanent separation of the claimant from his family members as a result of them being recognised as refugees. There was no possibility of visits and of maintaining genuine family life in that way. The difficulty did not arise in relation to the British citizen children, because there was no bar on them travelling to Zimbabwe to visit their father, but the remaining child has derivative refugee status in line with his mother and cannot travel.

12. The judge concluded:

> "107. In relation to the wife and Section 117C (5) of the 2002 Act, I conclude deportation would be unduly harsh since it would effectively bring an end to family life. It will also, therefore, be disproportionate.
>
> 108. In relation to the Zimbabwean child, who does not satisfy the requirements of the undue harshness rules or of section 117C (5) since he is not a qualified child, I nevertheless conclude the decision would be disproportionate.
>
> 109. The beset interests of this child are to have a stable family environment with both of his parents. The consequences of the deportation of the father in this particular, perhaps unusual, case would be no physical contact with his father for many years. In the light of the level of criminality, the circumstances of the offending described by the sentencing judge and the limited risk of reoffending, I conclude the public interest does not justify this level of interference with family life."

13. On that basis the judge allowed the appeal.

The Grounds of Application

14. The Secretary of State sought permission to appeal on the grounds that the judge had misdirected himself in law in failing to correctly identify the circumstances that would amount to unduly harsh circumstances which would outweigh the significant public interest in his deportation. The judge had found that the family split itself amounted to unduly harsh

circumstances without anything more. The Secretary of State relied on the Court of Appeal decision in NA Pakistan v SSHD [2016] EWCA Civ 662 and AJ Zimbabwe [2016] EWCA Civ 1012.

15. The judge had failed to identify undue harsh consequences on the spouse other than separation and the emotional upset caused by that split. He was bound by the requirements of Section 117C of the 2002 Act; if the circumstances do not meet those requirements he should not find that deportation would be disproportionate. As the deportation would not result in an unduly harsh outcome in relation to the children it could not be deemed disproportionate to the public interest requiring his deportation.

16. Permission to appeal was granted by Designated Judge Woodcraft on 25th May 2017 for the reasons stated in the grounds.

Submissions

17. Mrs Pettersen relied on her grounds and submitted that the fact that one child could not visit his father, could not elevate the facts of this appeal into a sustainable finding that the deportation decision would be disproportionate. In effect the judge had relied solely on the upset which would be caused by the separation which was a consequence of the claimant’s offending behaviour.

18. Mr Williams defended the determination.

Findings and conclusions

19. The relevant law considered by the judge and applied by him in allowing the claimant’s appeal is set out at paragraph 117C of the Nationality, Immigration and Asylum Act 2002.

20. It reads as follows:

> “Article 8: additional considerations in cases involving foreign criminals:
>
> (i) The deportation of foreign criminals is in the public interest.
>
> (ii) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (iii) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C’s deportation unless Exception 1 or Exception 2 applies.
>
> (iv) Exception 1 applies where—
>
> (a) C has been lawfully resident in the UK for most of C’s life,
>
> (b) C is socially and culturally integrated in the UK, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(v) 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."

21. The underlying facts in this case are not in dispute. It was not argued by the Secretary of State that family life in any form could continue on the assumption that there could be visits by the spouse or the youngest child to Zimbabwe since both have refugee status here.

22. The two British citizen children would not be barred from seeing their father and the judge therefore concluded that the undue harshness requirements within the Immigration Rules in relation to those two children were not satisfied.

23. Neither were they satisfied in relation to the Zimbabwean child because he was not a qualified child.

24. The appeal was allowed in relation to the wife under the Exception set out in Section 117C(v) of the 2002 Act because it would bring an end to family life altogether. Having made that finding, although the children could not bring themselves within the requirements of Exception 2, the judge allowed the appeal outside the Rules.

25. The grounds argue that the judge failed to identify anything other than separation from his spouse which would amount to unduly harsh circumstances.

26. The Secretary of State relies on the decision in NA citing paragraphs 33 and 34 which state:

"33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

34. The best interests of children certainly carry great weight, as identified by Lord Kerr in HH v Deputy Prosecutor of the Italian Republic [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is as a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals.

As Rafferty LJ observed in SSHD v CT (Vietnam) [2016] EWCA Civ 488 at [38]:

> "Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation."

27. The Secretary of State also relies on paragraph 31 of AJ (Zimbabwe) [2016] EWCA Civ 1012 which states:

> "31. I am not satisfied that the FTT did give the appropriate weight to the public interest in deportation, notwithstanding its reference to the principles enunciated in MF (Nigeria). The later reference to the 'significant weight' to be given to the relevant public interest suggests that the full rigour of the test was not appreciated. Even if I am wrong about that, in my judgment the FTT did not apply the Article 8 proportionality assessment in accordance with the principles laid down in the authorities. It was not open to the FTT to find that the separation of the children from the father/step-father was a compelling reason to allow the respondent to remain. Far from being an exceptional circumstance, this is an everyday situation as the authorities I have set out demonstrate. They show that the separating parent and child cannot, without more, be a good reason to outweigh the very powerful public interest in deportation. No doubt the FTT was right to say that these children would unfortunately suffer from the separation but for reasons I have already explained, if the concept of exceptional circumstances can apply in such a case, it would undermine the application of the Immigration Rules."

28. The cases cited in the grounds do not deal with the circumstances of this claimant. Indeed two of the appellants in NA Pakistan had committed offences which bring them outside paragraph 117C(v) since they had committed offences which had resulted in sentences of a period of more than four years. In order to succeed they would therefore have to show very compelling circumstances over and above those described in Exceptions 1 and 2. The Secretary of State did not succeed in relation to the remaining claimants in that case. So far as AJ is concerned, in a postscript to the judgment, the Court of Appeal said in terms that although they found if very difficult to see how the Article 8 position of the deportees could possibly be improved under the new Rules they made it plain that they did not in terms address that question nor consider, if there were to be a fresh reconsideration now whether any of the specific impressions might apply to the deportees given the further passage of time.

29. I conclude that the judge in this case was entitled to decide that the claimant's spouse could bring herself within Exception 117C(v). The children are unable to do so, the older ones because there would be no bar

upon them visiting their father in Zimbabwe, and the youngest because he is not a qualifying child. However, the judge was right to look at the family holistically.

30. It is quite wrong to say that the judge based his decision upon the mere separation of the claimant from his family. The judge was at pains to emphasise that the consequences for the claimant's partner would not have been unduly harsh if some form of genuine family life could have continued. If there could have been visits to the claimant in Zimbabwe, he would have concluded that the decision would not have been unduly harsh. He distinguished this case because the deportation of the claimant would bring to an end any real relationship at all because the only way it could continue would be by remote communication.

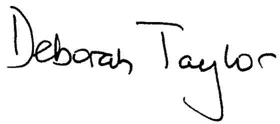
31. Accordingly, it was open to the judge to place weight upon the fact that there could be no possibility of visits to Zimbabwe in concluding that the effect on this particular family would be unduly harsh.

Notice of Decision

32. The judge did not err in law. The decision stands. The Secretary of State's appeal is dismissed.

No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Taylor Date 4 October 2017