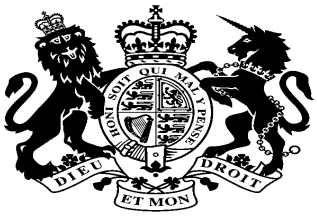

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21064/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 5th June 2019	**On 14 June 2019**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OT
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr Shahnawaz Khan, instructed by Malik & Malik Solicitors

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any

member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Introduction

1. The respondent is 24 years old, having been born in April 1995. He was born in the UK but is a citizen of Zambia. His mother held no valid immigration status here when he was born, although she had been living here since 1989. The respondent's mother could not cope with the demands of looking after him in his very early years. She arranged for him to move to Zambia in 1998 to live with her mother, his grandmother. He was able to live in Zambia with his grandmother only until late May 2000, when she sadly died at the age of just 43. The claimant was only 5 years old at that time. He then lived with his father in South Africa until 2004, when (aged 9) he returned to the UK to live with his mother (as he has done ever since, apart from time spent in prison between January and November 2017 and then in immigration detention until April 2018).

2. When the respondent came back to the UK in 2004, his mother was a failed asylum seeker. However, in August 2008 she was granted indefinite leave to remain, as was he, in an exceptional grant of leave outside the immigration rules. His father died in South Africa in 2014.

3. Between March 2009 and November 2016, the respondent committed various criminal offences, collecting 7 convictions for 15 offences, the most serious being a conviction in November 2016 for possession of Class A drugs with intent to supply in January 2019 (when he was 20). He was sentenced in January 2017 to a total of 19 months, comprising 18 months for the November 2016 convictions themselves plus 1 month (consecutive) by way of partial activation of a suspended sentence imposed in September 2015 for possession of a knife or bladed article in public.

4. An initial deportation decision in May 2017, certified under s.94B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') was reconsidered following the Supreme Court decision in Kiarie & Byndloss [2017] UKSC 42, so that in August 2017 the respondent was granted an in-country right of appeal. He did not appeal, but in March 2018 further submissions were made to the appellant Secretary of State on the respondent's behalf. They have rightly been treated as an application to revoke deportation and led to the decision challenged in these proceedings, an undated decision by the Home Office for the appellant, served on the respondent on 6 October 2018, refusing the respondent leave to remain on any basis and refusing to revoke his deportation order.

5. The respondent's appeal against that decision was allowed by First-tier Tribunal Judge Hodgkinson in a determination promulgated on 17 January 2019, and the appellant Secretary of State now appeals against that decision. For the reasons set

out in the Upper Tribunal Panel decision at Annex A of this decision it was found that the First-tier Tribunal had erred in law and the decision was set aside.

6. The matter came before me to remake the appeal. The appellant and his mother attended the Upper Tribunal and gave oral evidence in support of their statements. At the end of the hearing I reserved my determination.

Evidence & Submissions – Remaking

7. The respondent's evidence is, in summary, as follows. He explains his criminal record by saying that he was running away from his mother's illness HIV as he was ashamed of it and had a lot of time alone when she was unwell, and because he wanted money, latterly to give to the mother of his child, as he had no income from working as a musician at that time and was hanging about with a bad crowd and wanting to fit in and not be seen as an outsider. He has not had any further convictions or trouble with the criminal justice system since he left prison/detention in April 2018.

8. He is the father of two British citizen children, and has had a close relationship with them, and has co-parenting the children with his ex-partner after a complex process due to her being a former looked after child by Social Services although currently his ex-partner is insisting he obtains a court order for contact and he is in a process of mediation and re-establishing contact with his children which ceased due to her actions in April 2019. He has concerns about the mental health of his children's mother. He lived with his ex-partner for a few months prior to going to prison but no longer wants a relationship with her.

9. He also does not want to leave the UK because of the relationship he has with his mum, as they have lived together for almost all of the 15 years he has been in the UK and because he is concerned about her vulnerable state of health, and also because of his relationship with his step-sister whose dad lives in Nigeria. He is concerned that if anything were to happen to his mum his step-sister, C, who was born in June 2016, would have to go into care. Her father lives in Nigeria and visits approximately once a year for a few weeks.

10. He wants to remain in the UK and get work in the music business. He did do some work for Six Figure Music Studio in the UK for one year as an assistant sound engineer, having done an after-school programme, after he left college. He believes he is integrated in the UK because of his length of residence and family connections. He currently spends time going to the gym and meeting friends there and playing basketball, looking after his children when their mother permits this, caring for his little sister whilst his mum is at work between 3pm and 7pm, and researching the possibility of setting up a music or clothing business using the internet. He is not permitted to work, study or go out in the evening.

11. He does not believe he would be able to obtain work in Zambia as he has no real skills or work experience and has never really had to manage his own accommodation and budget even in the UK, and he fears that his criminal record

would be held against him. He only has three GCSE passes: E in English, D in art and D in media with an additional ungraded work skills qualification. He went to college after school to study IT but dropped out after six months. He has no knowledge as to how things work in Zambia and no contacts. He fears that he might be exploited as people would recognise that he was from the UK and think he had access to money. He also says he could not return to live in Zambia because he has no family connection with that country and does not speak the local languages. The fact that he was sent to South Africa to be with his father when his grandmother died shows that there is truly no one there for him to turn to for help. He has not been to Zambia since he left when he was three years old. His father died in South Africa in 2014, and was buried in Malawi by his relatives. He did not attend the funeral.

12. The respondent's mother, CN, gave evidence which in summary is as follows. She has no relatives in Zambia: one brother lives in Wales, one in Russia and she has a step-sister whom she has never met in South Africa, and her parents are dead. She was not sure if her brothers had contacts in Zambia as mostly she tried to avoid African contacts as they asked her for money she could not afford to give them. Her brothers have helped her financially with things like the legal fees for the respondent's case. She did not believe that they could constantly support him in Zambia however.

13. When she went back to Zambia in 2010 to visit her mother's grave and sort out her new passport she found that she had no one there as a lot of her mum's friends had died of HIV, strokes and cancer. She felt lost and as if she no longer had that heritage. The friend she stayed with on that trip has since married a Chinese man and moved to South Africa. She saw that the country had problems with alcoholism and with thieves, as a friend who travelled there had her passport and money stolen. She does not believe that the respondent could live in Zambia as it would be a foreign country of which he has no knowledge, and he would be vulnerable to criminal elements who wanted to exploit him due to his accent indicating he had access to funds as he would be identified as a western foreigner. He has no money to set up a business or rent a place to live in Zambia. She fears that he might die there.

14. She did travel to a village in Malawi called Mzuzu to bury her son's father in 2014: she had collected the body from South Africa and taken it back there. Her only contact with her son's father's family was to be contacted for money. She could not help the respondent with money if he went back as she was only taking home £1500 a month from her job at St Mungo's as a cook and is struggling to pay her rent, council tax and bills and nursery money for her daughter C. C's father does not pay anything towards her upkeep. He lives in Nigeria where he has another family. He last visited C a year and a half ago. She would be very stressed by worrying about how the respondent would cope in Zambia. She would not be able to live in Zambia due to her HIV status which means she is more susceptible to diseases such as malaria and she could not afford to visit him there due to her low income.

15. The respondent has lived with his mother since returning to the UK continuously except a period of about a year when he was supposed to be going to college. She had driven him out of her house as she could see that things were going wrong but he would not listen to her and the police would not help. She believed that he lived with his girlfriend during that time. She knew he was talented at music, but did not think that he had worked for money although she was aware he had gone to the studio a lot.

16. It was very traumatic when the respondent was sent to prison for her as at that time he was her only child, but he has returned a changed man who wants to spend time at home and help her out around the house and with his step-sister, C, whom he picks up from nursery everyday, and is listed as her next of kin so he can deal with things like medical appointments.

17. Mr Melvin for the appellant submits that there are no very significant obstacles to integration if the respondent is returned to Zambia, as he will have friends of family or friends of friends in that country who can assist him to settle, particularly as his mother visited Zambia in 2010 and knows other who have visited, and because he is in good health. English is the official language of Zambia, the respondent has GCSEs and worked in a music studio at one point. Zambia is a stable country politically, has good economic growth and does not have problems with war or internal conflict. The respondent had failed to do any research to show that he could not work as a sound engineer or in clothing retail in Zambia. He has not shown he could not have a reasonable private life there. Mr Melvin also submits that the respondent is not integrated into the UK despite his long residence due to his criminal history. The appeal should be dismissed.

18. Mr Khan submits that the sentencing judge had commented that the respondent was young and talented when passing sentence. The respondent has been positively impacted by prison and has returned a changed man who instead of being the difficult person whom his mother chased out of the house is now wanted and allowed to live there and trusted with the care of his three year old sister, and is taking responsibility for his own children when possible. It should be found that he is rehabilitated. He would have very significant obstacles to integration in Zambia because he has only lived there for two years; he has no knowledge of that country; he was born in the UK and has lived here most of his life having his friends and education here as well as his children and his plans for future work; although there is a past growing economy there is also widespread poverty. It is a different type of country from the UK with widespread corruption and a lack of the rule of law, making it culturally and politically very different. The level of obstacles to integration mean that the appeal should be allowed.

Conclusions – Remaking

19. The conclusion that the respondent's case does not fall within paragraph 399 or 399A of the Immigration Rules was preserved by the Panel from the First-tier Tribunal decision. These findings were made because the respondent does not

have a subsisting relationship with his partner; because it was found that it would not be unduly harsh for his two children to remain here whilst he is deported; and because he has not lived in the UK lawfully for most of his life as his stay in the UK was only regularised in 2008 when he was 13 years old. The only consideration before me is whether there are very compelling circumstances over and above those described in paragraphs 399 and 399A which outweigh the public interest in the appellant's deportation. Very compelling circumstances requires something more than mere hardship, difficulty or inconvenience. The determination of the appeal and consideration of very compelling circumstances is done best with a balance sheet exercise.

20. I find that the appellant and his mother are both credible witnesses. They both gave direct answers to the questions put to them, and explained themselves in detail. There were no discrepancies between their accounts, although it was clear that they explained the situation from their own perspectives. They were consistent with their written statements and with each other.

21. Against the respondent is that there is a very strong public interest in the deportation of the respondent as a foreign criminal, to maintain public confidence in the immigration system in deporting foreign criminals and to deter others from committing such acts. He has been a persistent offender, who has been convicted on 7 occasions of 15 offences between 2009 and 2016 (theft, shoplifting, possession of drugs with intent to supply, driving without a licence and without insurance and obstructing a constable and possessing of a knife in a public place). His index offence is a serious one: possession of class A and class B drugs with intent to supply and failing to comply with the community requirements of a previous sentence for which he was sentenced to 19 months in prison. The sentencing judge found that he had a significant role in selling on the drugs and that the appellant had a previous conviction for possession with intent to supply class A drugs but that he was in the lowest category because the joint weight of the drugs was less than 5 grams. The sentencing judge found that the mitigating factors were the respondent's age, his guilty plea, the fact that he had not been to prison before and his belief that he had promising future ahead of him.

22. In addition, it is not in the respondent's favour that he has never been financially independent in the UK. He speaks English, the official language used in Zambia, and so would have language skills which would assist with integration. It has been found not to be unduly harsh to his children if he were deported to Zambia and they remained in the UK with their mother, and he has no partner in the UK.

23. In favour of the respondent is the low risk of reoffending and harm I find he poses to the public. The probation evidence is that he poses a medium risk of serious harm to the public however I find that he is now rehabilitated, as he has had no further convictions since 2016, and has been in the community for a year without any issues. I found his mother's evidence of the salutary effect of prison on him very striking. She had so little sympathy with him when he was involved with criminal elements and crime that she required him to leave her home, physically

driving him out when trying to enlist the help of the police to address his behaviour had failed. She was clearly amazed and delighted that prison had turned him around, and he has lived with her since his released and he now cares for her three year old daughter enabling her to work. The appellant also gave evidence I found credible of his commitment to not getting into further trouble as a result of his realisation of the effect of his incarceration on all his family members and their need for his positive input in their lives. In these circumstances I find that his deportation is not needed for the protection of the public against further crime, but I note that this does not significantly diminish the public interest in his deportation for the reasons set out above.

24. I also find that the respondent is integrated into the UK, and this is a positive factor in his favour. I find this because he was born here and has lived here since he was nine years old and completed the majority of his schooling in this country. He has a genuine and subsisting parental relationship with his two children, who are British citizens and therefore qualifying children and that it is in their best interests that he remains in their lives, albeit that his involvement has been limited in scope and at the current time he is in the process of having to negotiate contact through mediation and possibly the family court. He also has very close family relationships with his mother and three year old step-sister. He has lived with his mum for the past 15 years since arriving in the UK bar a period of months when he was with his girlfriend prior to going to prison and of course excluding his time in prison and Immigration detention. Although his presence is not needed for assisting his mother with her medical issues, as her HIV is stable and controlled by medication and she is able to work, I find that her serious medical condition makes his presence a great comfort given she is the single parent of a very young child whose father plays no significant role in her life whatsoever. He cares for his three year old sister, C, alone for three hours every week day, and is the only regular male figure in her life as her father has not visited her for a year and a half and lives with his family in Nigeria. Whilst the respondent's criminal behaviour will have led to a period when he would not have been seen as integrated I find that this is in the past and he is now rehabilitated and living a law abiding existence attending the gym and seeing friends to play sport, looking after his sister and when he can his own children, and trying to make plans for the time when he is permitted to work again.

25. The respondent has only spent two years living in Zambia between the ages of 2 and 5 years. He has no knowledge of that country, and I accept his mother's evidence that when she returned there to visit her mother's grave even her mother's friends had passed away and she found no connection remained. Her evidence on this point was poignant as she clearly had not anticipated that she had lost this part of her heritage when she went back there. Her friend who lost her passport and money clearly was also in a similar position, as she had to help her out rather than that friend turn to friends in Zambia for support. Her experience of Zambia is that it is a foreign country full of "alcoholics, street boys or thieves". The evidence before me is that the respondent's father came to Malawi, and that they would not assist with his integration in Zambia. I find that

it is most unlikely that friends of friends will be persuaded to assist him integrate in that country. His mother could not send him money to help him: at present he contributes to the household income by babysitting his younger sister while his mother works, and without him his mother will struggle even more to make ends meet for her and his sister. I find it most unlikely that his UK and Russia based uncles would be able to provide financial support on a regular and continuing basis given that they already helping their sister.

26. Whilst the respondent speaks the official language he has no knowledge of any local languages and I find that he would stand out as a foreigner, who would be a magnet for those who might try to exploit believing he had connection to westerners with money rather than those who would help him to establish himself. I find that whilst the appellant is young and healthy he has no worthwhile qualifications and few works skills to utilise when trying to integrate himself in Zambia. He has done a small amount of work for a music studio in the UK over a period of approximately a year some years ago. In the BBC country profile, which Mr Melvin provided to the Upper Tribunal, it is noted that the population of the country is growing at one of fastest rates in the world and whilst there has been rapid economic growth and massive Chinese investment this has failed to improve the lives of most Zambians with two thirds still living in poverty. The CIA document, also supplied by Mr Melvin, updated in May 2019 notes that almost a quarter of those aged 15 to 24 are unemployed in Zambia and that high unemployment is a significant problem. In the CIA document, and the report from US State Department provided by the respondent, I could see no mention of any music industry in Zambia, the economy being based largely on copper production. I find that it is unlikely that the respondent would be able to find work at all for a significant period of months during which time he would be destitute, and even after that he would only be likely to find work which meant that he lived in significant poverty in Zambia. I find that he would have very significant obstacles to integration in Zambia.

27. My next question is whether the respondent has shown that there are very compelling circumstances over and above the exceptions to deportation, meaning something more than mere hardship, difficulty or inconvenience. I find that this test is reached for the following reasons. I have found that he is rehabilitated and integrated in the UK and would have very significant obstacles to integration if returned to Zambia; he has genuine parental relationships with his own two British citizen children and it is in their best interests for him to continue these relationships; he has been providing significant care for his three year old step-sister as the only male figure in her day to day life over the past year and has a close relationship with his mother with whom he has lived for the overwhelming majority of his time in the UK and who has a serious underlying medical condition; he was born in the UK and has lived here for most of his life and had indefinite leave to remain when he was convicted of his index offence and is intending to live a lawful, peaceful and constructive existence if permitted to remain.

Decision:

1. The decision of the First-tier Tribunal involved an error on a point of law.

2. The Panel set aside that decision.

3. I remake the appeal allowing the appeal on Article 8 ECHR grounds.

This decision is subject to an anonymity direction. That is in the interests of protecting the identity of the respondent's children and the confidentiality of his mother's medical issues, given the public availability of this Decision and the future Decision upon the re-making, notwithstanding that there was no anonymity order in the First-tier Tribunal.

Signed: *Fiona Lindsley*

Dated: 11th June 2019

Annex A: Error of Law Decision

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Introduction

1. The respondent has just turned 24, having been born on 1 April 1995. He was born in the UK but is a citizen of Zambia. His mother held no valid immigration status here when he was born, although she had been living here since 1989.

2. For reasons that do not matter to this decision, the respondent's mother could not cope with the demands of looking after him in his very early years. She arranged for him to move to Zambia in 1998 to live with her mother, his grandmother. He was able to live in Zambia with his grandmother only until, in late May 2000, she sadly died at the age of just 43. The claimant was only 5. He then lived with his father in South Africa until 2004, when (aged 9) he returned to the UK to live with his mother (as he has ever since, apart from time spent in prison between January and November 2017 and then in immigration detention until April 2018).

3. When the respondent came back to the UK in 2004, his mother was a failed asylum seeker. However, in August 2008 she was granted indefinite leave to remain, as was he, in an exceptional grant of leave outside the immigration rules.

4. Between March 2009 and November 2016, the respondent committed various criminal offences, collecting 7 convictions for 15 offences, the most serious being convictions in November 2016 for possession of Class A drugs with intent to supply in January 2019 (when he was 20). He was sentenced in January 2017 to a total of 19 months, comprising 18 months for the November 2016 convictions themselves plus 1 month (consecutive) by way of partial activation of a suspended sentence imposed in September 2015 for possession of a knife or bladed article in public.

5. An initial deportation decision in May 2017, certified under s.94B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') was reconsidered following the Supreme Court decision in *Kiarie & Byndloss* [2017] UKSC 42, so that in August 2017 the respondent was granted an in-country right of appeal. He did not appeal, but in March 2018 further submissions were made to the appellant Secretary of State on the respondent's behalf. They have rightly been treated as an

application to revoke deportation and led to the decision challenged in these proceedings, an undated decision by the Home Office for the appellant, served on the respondent on 6 October 2018, refusing the respondent leave to remain on any basis and refusing to revoke his deportation order.

6. The respondent's appeal against that decision was allowed by First-tier Tribunal Judge Hodgkinson in a determination promulgated on 17 January 2019, and the appellant Secretary of State now appeals against that decision, with permission granted by First-tier Tribunal Judge Parkes on 6 February 2019. Permission was granted on the basis that it was arguable the First-tier Judge had erred in law in concluding that there were obstacles in the way of the respondent relocating to Zambia amounting to 'very compelling circumstances' such that deporting him would be disproportionate, thereby infringing his Article 8 rights.

7. The matter came before us to determine whether the First-tier Tribunal had erred in law.

Context – 'very compelling circumstances'

8. When the respondent was sentenced to 19 months imprisonment in January 2017, he became a 'foreign criminal' as defined by s.32(1) of the UK Borders Act 2007, so that:

    i. by s.32(4) his deportation is to be regarded as conducive to the public good for the purposes of s.3(5)(a) of the Immigration Act 1971, unless (so far as material to this case) his removal would infringe his Article 8 rights; and

    ii. by s.32(5) the appellant Secretary of State was bound to make a deportation order in respect of him, unless (so far as material to this case) the appellant thought that his removal would infringe his Article 8 rights.

9. Part 13 of the Immigration Rules therefore provided the framework by reference to which the respondent's case fell to be considered. More particularly, in his case:-

    i. paragraph 398(b) applied, and therefore the Secretary of State was bound to consider whether paragraph 399 or 399A applied and, if neither did, to assess the claim that Article 8 would be infringed by deportation on the basis that "*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*";

    ii. to similar effect, by paragraph 390A, the Secretary of State was bound to adopt the approach that if neither of paragraphs 399 and 399A applied, "*it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors*".

10. The First-tier Tribunal Judge correctly considered the case on the basis that the respondent did not fall within either paragraph 399 or paragraph 399A. There is no challenge or basis for challenge to that. As regards paragraph 399(b), the

respondent had no subsisting relationship with a UK partner. As regards paragraph 399(a), the Judge concluded that the respondent did have a genuine and subsisting (if, as he held, somewhat limited) parental relationship with his two young children here, but it would not be unduly harsh for the children to remain in the UK without the respondent if he were deported. As regards paragraph 399A, the respondent had not been lawfully resident in the UK for most of his life, because his mother's immigration status only became regularised, and his with it, in 2008, by when the respondent was 13 years old, so paragraph 399A(a) was not satisfied.

11. Had the respondent's mother obtained her, and his, leave to remain in 2004 when he came back to the UK from South Africa, paragraph 399A(a) would have been satisfied. In that case, paragraph 399A would have given rise to the further questions whether the respondent was "*socially and culturally integrated in the UK*" (paragraph 399A(b)) and whether there would be "*very significant obstacles to his integration into [Zambia]*" (paragraph 399A(c)). As it is, the respondent's social and cultural integration in the UK, likewise any obstacle there may be to his becoming integrated in Zambia, are relevant, but they (and any other relevant factors present) must be assessed in accordance with paragraphs 390A and 398 of the Immigration Rules, summarised above.

12. In the present case, the First-tier Tribunal Judge correctly directed himself that 'very compelling circumstances' were required, meaning there was "*a very high threshold*" that required there to be "*circumstances which have a powerful, irresistible, and convincing effect*"; and that only "*exceptionally*" will that very high threshold be met. The basis of the Secretary of State's appeal, however, is that the First-tier Judge's conclusion that the threshold was indeed met is irrational, in light of the Judge's other findings.

Submissions – Error of Law

13. The Secretary of State thus contends that it was irrational for the First-tier Tribunal Judge to find very compelling circumstances rendering it disproportionate to deport the respondent. Very compelling circumstances requires more than mere hardship, mere difficulty, mere hurdles or mere inconvenience, see *Treebhawon and Others (NIAA 2002 Part 5A – compelling circumstances test)* [2017] UKUT 13. The respondent has an English education and several GCSEs, English is an official language in Zambia and there are no medical issues that might prevent him obtaining employment in Zambia. In short, it is said, the First-tier Tribunal Judge has rested upon nothing more than the fact that the respondent has no connection to Zambia apart from his nationality, for an apparent finding that he could not realistically establish a life for himself there and then for the ultimate conclusion that there were 'very compelling circumstances'.

14. Further, it is said for the Secretary of State that insufficient weight was given to the public interest in deporting a foreign criminal (as part of which it is contended

that the First-tier Tribunal wrongly had regard to a view that the respondent's sentence for the Class A drugs offences was not a long one).

15. As a result, it is said, the decision is not in accordance with *Hesham Ali* [2016] UKSC 60 and we should say that there were no very compelling circumstances justifying departure from the normal rule that deportation is proportionate, given that the respondent did not satisfy paragraph 399 or 399A of the Immigration Rules.

16. It was also said to have been irrational to find, as the First-tier Tribunal Judge did, that the respondent had a genuine and subsisting relationship with his children, because improper weight was placed upon a letter from their mother, although she did not give evidence at the First-tier Tribunal hearing, and inadequate weight was placed upon information obtained from social services as to the nature and extent of the respondent's contact with the children. Mr Melvin who presented the case for the appellant before us realistically accepted that this was something of a side-issue or makeweight. As we shall identify below, the relevant finding is in fact a careful, and rather limited, finding that demonstrates a fair and balanced evaluation of the evidence bearing upon it.

17. The respondent's skeleton argument was provided very late, but we did not prevent Mr Khan from advancing the submissions outlined in it. He emphasised the guidance in *Hesham Ali*, above, at [26], derived from Strasbourg jurisprudence, as to the range of factors that may legitimately be considered, when assessing either the weight finally to be given, in judging an individual case, to the public interest in deporting foreign criminals or the weight to be afforded to countervailing factors. He contended that the First-tier Tribunal Judge gave a proper and balanced assessment to all of the relevant factors present in this particular case, and he relied on the fact that having properly directed himself as to the test (see paragraph 12 above), the Judge said in terms that he had taken into account all of the factors he had considered, in combination. It could not be said that his ultimate conclusion, namely that this case "*<u>just</u> reaches the relevant threshold of very compelling circumstances*" (original emphasis) was a conclusion no reasonable judge could reach.

Conclusions – Error of Law

18. We do not accept the submission that the First-tier Tribunal Judge failed to give proper weight to the public interest in deporting foreign criminals. At [59], he reminded himself that it was a "*strong public interest*"; at [60] he set out a very full extract of the sentencing remarks; at [61]-[66] he considered such evidence as he had concerning the respondent's conduct in custody and since his release; it is evident that he regarded those as lessening but only marginally the weight of the public interest in deportation, but at [67] he expressly reminded himself that it remained a "*strong interest*" and a "*very strong and material factor*".

19. Mr Melvin criticised reliance by the Judge on a comment by the sentencing judge that the sentence imposed was the lowest sentence that judge considered she

could give in the circumstances. We agree the Judge should not have placed any material weight upon that comment – *any* custodial sentence must be for the shortest period commensurate with the seriousness of the offending, as assessed by the sentencing judge. But we do not read the First-tier Judge as doing more than noting, correctly, that the particular sentence in this case, considered with the sentencing remarks, said something as to the seriousness of the respondent's particular offending, in the scale of seriousness of Class A drugs offences.

20. The real question, therefore, is whether the First-tier Judge's conclusion that there were countervailing factors that so outweighed the strong public interest in deporting the respondent as a foreign criminal as to provide a 'very compelling' case. As to that, we agree with Mr Khan, in general, that the First-tier Tribunal Judge carefully considered the factors that had been suggested to him as bearing upon that issue, and that in doing so he made rational and balanced assessments of the evidence available to him. The difficulty, however, is that, likewise in general, the Judge's respective conclusions as to those factors do not point, let alone compellingly so, to a finding that, exceptionally in this case, deportation would be disproportionate. Thus:-

    i. At [35]-[46], the Judge considered the evidence as to the respondent's parental relationship with his children. The careful, and rather limited, finding (as we described it in paragraph 16 above) was that the respondent had some contact with his children, and wished as a loving father to continue that involvement, that the best interests of the children would be to have him in their lives and that, overall, the respondent had "*a genuine and subsisting parental relationship with his two children, albeit that it is somewhat limited in scope at the present time*".

    ii. At [47]-[53], the Judge looked at the matter from the children's perspective and reached an unassailable conclusion that "*it would not be unduly harsh for the children to remain in the UK, were the [respondent] to be deported to Zambia*".

    iii. At [58], the Judge found that the evidence did not show that the respondent had an established family life with his mother and young stepsister.

    iv. At [69], the Judge rejected on the evidence a claim that had been advanced by the respondent that his presence in his mother's household was required because of her medical issues.

    v. At [70]-[71], the Judge accepted on the evidence that the respondent had been a persistent offender, found that he had never been financially independent, and as a result "*[his] level of integration into UK society to date has been limited, bearing in mind his offending history, which can only be described as materially antisocial*".

21. Against that backdrop – a rather unpromising backdrop for the respondent – the critical reasoning of the First-tier Tribunal Judge, therefore, is at [72], which we should quote in full:

i. "*It is acknowledged by the [appellant] that the [respondent] has spent a considerable amount of his time away from Zambia. In fact, I would put it higher than this. The [respondent] was born in the UK in 1995, went to live in Zambia with his maternal grandmother in 1998, when he was about 3 years old. He then left Zambia in 2000, when he was about 5 years old. He has not returned to Zambia since then and has only spent 2 of his 23 years of life to date in his country of nationality, Zambia. The [appellant's] position is that his removal to Zambia may present certain challenges to him and that his standard of living in Zambia is likely to be less than it is in the UK but that it is possible for the [respondent] to establish a life for himself there. Such contention is clearly relevant to the question of "very significant obstacles" and "very compelling circumstances". I find that the [respondent's] ability, or otherwise, to establish a life for himself in Zambia is, in fact, the central issue in that regard. I state this, bearing in mind that I have already indicated that I conclude that it would not be unduly harsh to expect the appellant's children to remain in the UK without him.*" (our emphasis)

22. Thus, as the Judge reasoned, his preceding findings (summarised in paragraph 20 above) rendered it critical to say whether the respondent could establish a life for himself in Zambia. If so, on the Judge's reasoning, there was no 'very compelling' case. If not, then on the Judge's reasoning, it became at least possible for that threshold to be crossed, although whether in fact it was crossed would require a final balancing evaluation of the nature and severity of the obstacles held to exist to the making of a new life in Zambia.

23. That reasoning, however, does not itself contain any finding at all on what the Judge has thus described as the "*central issue*". Nor, as Mr Melvin emphasised in his oral argument, does the Judge grapple with that issue in any detail. When finally stating his overall conclusion, at [75], the Judge repeats that "*the key question [is] whether the [respondent] can realistically establish a life for himself in Zambia*", adding "*to which country he is in reality a stranger and where, I find, he has nobody at all to turn to. I reiterate that it is a country where he has only ever spent 2 years and that that was between the ages of about 3 and 5.*" This must, we think, be intended by the Judge to express a finding that, realistically, the respondent cannot establish a life for himself in Zambia. But in our judgment it displays no proper basis for that finding. Rather, it appears to treat it as a necessary consequence of the fact that the respondent is a stranger to Zambia, and so would start out upon any new life as a stranger there. Whether in fact that renders it unrealistic to say that the respondent could establish himself in Zambia and whether, if so, that makes a very compelling case against deportation sufficient to outweigh the strong public interest engaged by the respondent's offending here, are questions that arise upon, not questions that are answered by, the basic facts of the respondent's life story cited by the Judge.

24. We therefore concluded that the First-tier Tribunal's decision is wrong in law. It must be set aside, in material part, and re-made in the Upper Tribunal.

25. In circumstances where, in truth, the key factual consideration (as the First-tier Tribunal Judge saw it, anyway) has not been addressed in proper detail at all, and

it became apparent that at least the appellant, and it may well be also the respondent, may wish to adduce additional evidence on the respondent's ability (or inability) to make a new life in Zambia, we further concluded that it was not realistic or fair to seek to re-make the decision at this hearing.

Decision:

26. The decision of the First-tier Tribunal allowing the appeal on the basis that there were 'very compelling circumstances' rendering deportation disproportionate so as to infringe the respondent's Article 8 rights involved an error on a point of law.

27. We therefore set aside that decision. To be clear, we do not set aside, but affirm, the conclusion that the respondent's case does not fall within paragraph 399 or 399A of the Immigration Rules and, in particular, we do not set aside, but affirm, the conclusions that each of paragraph 399(a)(i)(b), paragraph 399(b) and paragraph 399A(a) does not apply.

28. We adjourn the re-making of the decision on the respondent's original appeal to the First-tier Tribunal against the October 2018 decision letter, with the following directions, namely that:

    a. The adjourned hearing shall be listed, time estimate 2 hours, for the first available date not before 7 May 2019.

    b. The appellant and respondent shall file and serve any updating or other supplementary evidence upon which they wish to rely (which in the case of the appellant shall include a copy of the US State Department country report on Zambia) no later than 10 days prior to the re-listed hearing date.

29. Of our own motion, we have anonymised this Decision and made an anonymity direction in relation to these proceedings. That is in the interests of protecting the identity of the respondent's children and the confidentiality of his mother's medical issues, given the public availability of this Decision and the future Decision upon the re-making, notwithstanding that there was no anonymity order in the First-tier Tribunal. If either party wishes anonymity to be reconsidered, that can be raised at the adjourned hearing.

Signed: *Andrew Baker* Date: 9 April 2019

The Hon. Mr Justice Andrew Baker