Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18503/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 July 2013	**On 28 August 2013**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

A K Z
(ANONYMITY ORDER MADE)

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Claimant: no appearance
For the Respondent: Ms Holmes. Presenting officer

DETERMINATION AND REASONS

1 For the sake of clarity, the appellant before the First-tier Tribunal is referred to in this determination as the claimant. For clarity also, the Secretary of State who is the appellant here, but was the respondent below, is referred to in this determination as the respondent.

2 The respondent appeals with permission against the decision of the First-tier Tribunal promulgated on 3 December 2012 allowing the claimant's appeal against the respondent's decision made on 17 August 2012 to refuse to revoke a deportation order against him.

3 I make an anonymity order protecting the identity of the claimant's children and prohibiting the publication of any details permitting their identification.

4 The claimant is a citizen of the Democratic Republic of Congo ("DRC") who arrived in the United Kingdom on 12 September 1994 to join family here. On 25 August 1999 he was granted indefinite leave to remain as the dependant of his mother. His case is that he has two children: a son born in 2004 who lives with his mother, and a daughter born in 2012 who lives with him and his partner. His partner is also a citizen of the DRC settled here; their child is a British Citizen.

5 On 12 August 2008, the claimant was convicted of handling stolen goods and conspiracy to defraud. He was sentenced to 18 months' imprisonment. A deportation order was signed against him on 24 December 2008. Appeals against that decision, including a hearing before the Upper Tribunal in 2010 (DA/00005/2009) were unsuccessful, and his appeal rights became exhausted on 12 August 2010. He was not removed as, according to the respondent, he had no Travel Document. In October and November 2011, further representations were made to the respondent on the basis that, amongst other things, the claimant's mother had now died, leaving him in her absence as the pivot of the family in the United Kingdom; that he was now in regular contact with his son.

6 The respondent refused to revoke the deportation order, considering that the requirements of paragraph 399(a) were not met, as his son's mother (his ex-partner) could look after the child. She considered also that while it would be in the interest of the son to have regular contact with his father, this could be continued by modern means of communication [28] and that the child's best interests were outweighed by the public interest in deporting the claimant.

7 The respondent was not satisfied that the requirements of paragraph 399(b) were met, as she was not satisfied that the claimant was in a subsisting relationship; nor was she satisfied that the claimant met the requirements of paragraph 399A either, given that he had not spent over 20 years here and there were insufficient reasons to depart from the immigration rules.

8 The appeal against the respondent's decision came before the First-tier Tribunal on 1 November 2013, the panel consisting of First-tier Tribunal Judge Abebrese and Mr J Eames. They found:

(i) that the evidence the claimant and his partner gave about their relationship was credible [15] and can be relied upon;

(ii) that the claimant and his partner are in a relationship and have a child; and, that there would be a significant effect on all three of them were the claimant to be deported [15];
(iii) that the claimant has in the nearly 20 years he has spent here developed a substantial private life in addition to his family life[15];
(iv) that the claimant's presence in the United Kingdom no longer presents a threat or a danger to the public, and that he will desist from any further criminal activities [15];
(v) that while the Upper Tribunal had in 2010 not been satisfied that the claimant had contact with his son, they were satisfied that he now does so, given the letter from his mother and the evidence of the claimant and his partner [15], notwithstanding the respondent's withdrawal of the concession that family life existed between the claimant and his son [16];
(vi) that it would not be in the interests of the son for the claimant to be deported [15];
(vii) that "the public interest in deportation is outweighed by the evidence against the claimant's deportation in respect of his private had family life [16];
(viii) that the appeal fell to be allowed under the immigration rules and under article 8 of the Human Rights Convention [19];

9 The respondent sought permission to appeal on the grounds that the First-tier Tribunal had erred in law:

(i) By failing to give adequate reasons for concluding in the absence of corroborative documentation that the claimant and his partner were in a relationship [1]; had failed to address the outcome of a previous adjournment to obtain a social work report which had resulted in a report concerning only the claimant's teenage sister;
(ii) By failing to give adequate reasons for going behind the finding of the Upper Tribunal made in 2010 that the claimant's relationship with his son was not sufficient to make deportation disproportionate; and, that that conclusion and the finding that the claimant and his partner were credible, were based on an incomplete assessment of the evidence [4];
(iii) By failing to take into account when assessing proportionality, public policy as set out in the article 8 sections of the immigration rules [5,6];

10 On 21 December 2012, First-tier Tribunal Judge Mailer granted permission on all grounds. There is no reply to the grant of permission.

Adjourned Hearing on 24 June 2013

11 This matter first came before me on 24 June 2013. On that occasion, there was no appearance by the claimant and it was only after enquiries had been made of his representatives, Fletcher Dervish & Co, seeking an explanation for non-attendance that a representative from that firm, Mr Diavewa, arrived at court at 12.50 p.m. Mr Diavewa explained that his firm had sent a brief to 12 Old Square Chambers as Mr Klear of those Chambers had represented the claimant before the First-tier. He said

that the brief had been returned, apparently without explanation. As he did not have a file he was unable to provide me with any attendance note or other correspondence indicating that Counsel had been instructed. He said that the claimant was aware that he should have been at court and he had been surprised to learn that he did not attend. He said he attempted to contact him by telephone but that this appeared to have been turned off.

12 In the circumstances, I gave oral directions, later confirmed in writing, requiring the claimant's solicitors to provide a full, written explanation for what had happened and, an explanation from Mr Klear's clerk for the brief being returned. A new date for hearing, 23 July 2013, was fixed in Mr Diavewa's presence. I explained that if the matter were to proceed to remaking the decision it would proceed on 23 July 2013, and that therefore the claimant's representatives should ensure that the witnesses attend.

13 Subsequent to that on 28 June 2013 Mr Djemal Dervish, Principal of Fletcher Dervish and Company wrote to the Upper Tribunal. It is explained that they had received the notice of hearing for 24 June 2013, had explained this to Counsel and had briefed him to attend but that unfortunately they inserted the date of hearing in their diary system as 25 June and briefed Counsel on that, incorrect basis and that although the notice of hearing giving the correct date, 24 June 2013, was amongst Counsel's papers, the error was not noticed and Counsel was not available for 25 June. Chambers then returned the papers on 21 June 2013 at which point alternative Counsel had been briefed to attend on 25 June 2013. I note that the letter from Mr Dervish dated 28 June 2013 is headed

> "Re Appeal Number IA/18503/2012 Appellant A K Z **next hearing 23/07/2013** [emphasis added]."

Hearing on 23 July 2013

14 When the matter came before me at 10 a.m. on 23 July 2013 there was no appearance either from the claimant or from his representatives. I had enquiries made of the claimant's representatives and at 11.59 they sent a fax stating

> "We find ourselves very unfortunately in a very similar position to what happened on the last occasion. The only difference on this occasion is that we have been without fresh instructions since the last hearing and we were proposing to notify the court that we may not have been able to attend. Unfortunately, we have not informed the court and we again sincerely apologise. We will make one last endeavour to contact our client within the next 14 days to determine whether or not we will continue to be acting.
>
> However it is we feel pertinent that although today's hearing was given to us orally at the last hearing, we were never sent a hearing notice, which would have triggered an entry in our hearing diary. It would seem that having written the letter to the court on 27 June 2013 a copy was sent to the Counsel's clerk at 12 Old Square, who we understand were also required at the last hearing to given an explanation, the file was put away."

The letter indicates that the brief has since been returned. Despite the reference to seeking further instructions from their client, there has been no further communication from him or his representatives.

15 While it may well be that the hearing notice was not received by Fletcher Dervish & Co that does not absolve them from failing to attend the hearing as they acknowledge that they were given oral notice of the hearing and it is to say the least remarkable that although their letter to the court of 28 June 2013 (see paragraph 14 above) clearly shows that they were aware of the hearing on 23 July 2013, this fact was not recorded in any diary.

16 In all the circumstances of this case, I am not satisfied that this is a sufficient explanation for the claimant's failure to attend court or for his representatives to fail to attend. I am not satisfied that it would be on the facts of this case, given that the solicitors accept they were notified of the hearing date, that sufficient reason has been given as to why this appeal should now be adjourned. I therefore proceeded with the appeal.

Does the determination of the First-tier Tribunal involve the making of an error of law?

17 I am satisfied that it does for the reasons set out below. Ms Holmes submitted that the First-tier Tribunal had erred in their analysis of the evidence in failing to take into account the findings by the previous Tribunal as upheld by Upper Tribunal Judge Nichols in her determination promulgated on 26 July 2010. She submitted further that they had failed to engage with the respondent's submissions that there was little or no evidence that the claimant has a relationship with his son and that was of particular concern in the context of the previous concerns about lack of documentation in particular in relation to the elder child as well as the conflict between him and his former partner as to how much contact he had.

18 Ms Holmes submitted that in addition, whilst considering doubts should have been raised in the First-tier Tribunal's mind from the very late registration of the birth of the elder child and the lack of any documentary evidence to show that the claimant and his claimed new partner were in a relationship. Ms Holmes submitted also that the First-tier Tribunal's consideration of the public interest against which any family and private life needs to be balanced was wholly unreasoned.

19 In their determination the First-tier Tribunal say this [15]:

> "The Tribunal notes the facts and evidence previous application in that the appellant does have a second child as stated above and that he is in a relationship with his present partner who gave evidence on his behalf in these proceedings. The Tribunal take the view that the evidence in respect of this relationship is credible and that the evidence that was given by the claimant and his partner can be relied upon to substantiate the relationship that they have together. They have a child and the Tribunal took the view that their relationship is cemented by the presence of [that child] and that it would indeed

be an impact on all concerned presently and in the future if the claimant were to be deported from the United Kingdom."

20 What is remarkable about this passage is that it indicates the First-tier Tribunal believed that the claimant's most recent application, to have the deportation order against him revoked, which was the subject of a refusal on 17 August 2012, had been based on his relationship with his current partner (whom I refer to as Ms B) and the existence of her child.

21 It is evident from the refusal letter that that was not the basis on which the claimant sought to have the deportation order revoked but rather his relationship with his older child. There is no indication that it was submitted to the respondent prior to the service of the appeal bundle that he was in a relationship with his claimed current partner which is said to have endured for some two to three years. Whilst I accept that the younger child was not yet born, it is unclear why the fact that the mother was pregnant was not raised with the respondent.

22 As the First-tier Tribunal notes, [15] they had Judge Nichols' determination yet despite the significant concerns recorded in there about the relationship between the claimant and his former partner and child, they do not adequately explain why they now accept that they are now satisfied that the situation had changed considerably since that determination, given the discrepancies in evidence referred to in Judge Nichols' determination.

23 I consider that the First-tier Tribunal has given insufficient reasons for concluding that, in the absence of any documentary evidence, and given the concerns raised about the claimant's credibility in a previous determination, the claimant and his claimed partner were in a relationship and had been for some two to three years and that they had a child, in the absence even of a birth certificate. Whilst credibility was a matter for the First-tier Tribunal, given that what is concerned here is the serious matter of the welfare of two children, it was incumbent on them for them to give a proper reasoned approach to the evidence and to explain adequately to the respondent why they rejected her submissions first that the claimant had a continuing relationship with his older child and second that he was in a relationship with Ms B and that they had had a child together. I consider that this failure to give adequate reasons for findings of fact is a material error of law given that these findings of fact underpin First-tier Tribunal's finding that it would be disproportionate to deport the claimant to DRC. Further, in what is a highly fact-sensitive issue, it cannot be said that the First-tier Tribunal would not, had they given thought to the defects in the evidence and the submissions of the respondent, have come to another decision nor, that they could not have done so reasonably.

24 The claimant had been convicted on a guilty plea of conspiracy to defraud and handling stolen goods. It is clear from the sentencing remarks that he had pleaded guilty to possession of a false identification document. He was also sentenced for breaching earlier community orders imposed on 10 April 2007 for a conspiracy to defraud.

25 The First-tier Tribunal were aware that the claimant faced deportation under the automatic provisions set out in the UK Borders Act and could not have been aware that as a result his deportation was deemed conducive to the public good.

26 As is noted in SS (Nigeria) [2013] EWCA Civ 550, there is a strong public interest in deporting foreign criminals. Whilst that decision had not been handed down at the time the First-tier Tribunal reached their decision, the learning on this issue establishes that significant weight has to be attached to the public interest in deporting such persons.

27 The First-tier Tribunal said only this in relation to the public interest:

> "The Tribunal took the view on balance that there is evidence of family life before us and that the public interest of the public in this instance in respect of deportation were outweighed by the evidence against the [claimant]'s deportation in respect of his private and family life."

28 This is inadequate. It discloses no basis on which the respondent could know why the strong public interest in favour of deportation in this case was outweighed; there is no proper analysis. For these reasons, I am satisfied that the determination of the First-tier Tribunal did involve the making of an error of law and I set it aside.

29 The respondent has not challenged the finding in respect of the claimant no longer presenting a threat or danger to the public or that he will desist from further criminal activities in this country and accordingly, that must stand.

Remaking the Decision

30 It is not disputed that the claimant arrived in the United Kingdom in 1994 or that he was granted leave to remain; or, that he was granted indefinite leave to remain in August 1999 in line with his mother. The claimant has been present in the United Kingdom since the age of 9 and has been here for now very nearly twenty years. That is a significant factor in his favour. It appears from the social work report in respect of his sister that he has played an important part in her life but there is no witness statement from her nor is there any evidence before me from the claimant about his relationship with her. In any event, it is clear from the social work report that he has other siblings here but again there is no evidence from them about their relationship.

31 In considering the claimant's claim that he has a relationship with Ms B, I have not had the benefit of hearing evidence from her or the claimant. Beyond her witness statement there is no documentary evidence of where she lives nor, beyond the evidence of her and the claimant is there any evidence that they lived together as it is unsupported by other evidence. Similarly, it is only their evidence that he is the father of her child.

32 I considered that the fact that the existence of this relationship is not mentioned in submissions made to the respondent prior to the appeal is significant. There is no mention in the social work report that the claimant is any long-term relationship.

33 I do not consider that, in the absence of more detailed testimony and documentary evidence such as photographs of them together, that the situation of contact between the claimant and his son has changed since the decision of Upper Tribunal Judge Nichols. Judge Nichols found that there was no birth certificate and whilst I accept that this was later amended to show that he is the father, it does not follow from this that there has been any real, substantial and lasting change in the relationship.

34 Whilst I note that it is said that the claimant has a close relationship with his sister, who is a minor, and that she is recorded as saying she could not cope with life without her brother, she also has other family on whom to depend including other brothers and an aunt but equally I note they do not live together and the level of financial support for her said to come from the claimant is not supported by documentary evidence nor is it clear where the claimant receives these funds from. Further, it is difficult to attach much weight to what is recorded as being the younger sister's words but there is no witness statement from her nor has she attended to give evidence and to be subjected to cross-examination, if relevant. I therefore attach less weight to this evidence. Whilst it is not apparently in doubt that their mother has died, and it would be remarkable if she had not been strongly affected by this, it is also remarkable that she has provided no evidence in support of her brother's case.

35 I accept that the claimant would be returning to DRC, a country which he left some twenty years ago and about which he may know little. While there is in the claimant's bundle a report on DRC at pages 54 to 75, this report is concerned with the state of the media and it is unclear why this is of any relevance to the claimant's situation on return. The additional material in the bundle said to form part of the same report includes a generic statement on international protection covering a number of countries and is of little or no relevance to DRC. Whilst there is a letter (page 83) from a Congolese support group this has no particular relevance to the claimant.

36 Taking all of these matters into account, I am not satisfied, given the very limited evidence before me, that the claimant is in a relationship with Ms B or that he is the father of her child. I am not satisfied either that he has a family relationship with her.

37 Whilst I accept that the claimant's sister may have an emotional attachment to him they do not cohabit and I am not satisfied, in the absence of clear testimony from her and him that there continues to exist between them a family life although I accept that this may have existed in the past when they were younger. His removal may have an impact on her but only in the sense of her private life and whilst it may be in her interests, as a minor, for him to be here, and although she has only limited contact with her birth father, she has other relatives in this country including an aunt and brothers on whom she relies also.

38 I accept, given the findings of the previous court that the claimant has a son in this country but I am not satisfied that they have regular contact and the family life, which I accept must exist, is now very attenuated and of limited content. There is limit evidence of the effect there would be on the child. I consider that therefore, the

claimant's removal to DRC would have a minimal impact on the family life that exists between him and his son.

39 Following Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC) and MF (Article 8 – new rules) Nigeria [2012] UKUT 00393(IAC), I deal first with the position under the Immigration Rules. I consider that by operation of paragraph 390A of the immigration rules, the appellant may be able to succeed if he meets the requirements of paragraph 399 or 399A. I find that the does not, given that he has not established that he has a subsisting parental relationship with his son, or the claimed younger child, or that he has a genuine and subsisting relationship with Ms B. Further, he is over 25 and has not lived in this country for 20 years, discounting his periods of imprisonment.

40 In turning to the issue of Article 8, I bear in mind the questions set out by Lord Bingham at paragraph 17 of the opinions in **Razgar**. I bear in mind also the decisions in **Üner v The Netherlands** (2007) 45 EHRR 14 ("**Üner**") and **Maslov** [2009] INLR 47 which, with other cases, were summarised in **Masih (deportation – public interest – basic principles) Pakistan** [2012] UKUT 00046(IAC) at paragraph 11:

> 11. In our view those basic principles, on the public interest side of the balancing exercise, are as follows; we have set out the authorities on which they are based in foot-notes, to make it clear that there is no need for further reference to them by panels:
>
> (a) In a case of automatic deportation[1], full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place[2];
> (b) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them[3];
> (c) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge[4];
> (d) The appeal has to be dealt with on the basis of the situation at the date of the hearing;
> (e) Full account should also be taken of any developments since sentence was passed, for example the result of any disciplinary adjudications in prison or detention, or any OASys or licence report;
> (f) In considering the relevant facts on 'private and family life' under article 8 of the European Convention on Human Rights, "for a settled migrant[5] who has lawfully spent all or the major part of his or her childhood and youth in [this] country, very serious reasons are required to justify expulsion"[6];
> (g) Such serious reasons are needed "all the more so where the person concerned committed the relevant offences as a juvenile" [7]; but "very serious violent offences can justify expulsion even if they were committed by a minor"[8]. Other very serious offending may also have this consequence.

41 I accept that the burden is on the Secretary of State to demonstrate that her actions are proportionate, but the balancing exercise can only be undertaken once facts are established. As a general principle, it is for the person asserting the fact to prove it.

42 The welfare of the children is a paramount concern, but in this case, I have little or no credible evidence as to the links the claimant has with his so; and, as noted above I am not satisfied that the claimant is the father of Ms B's child, or that he is in a family relationship with either of them. I am not satisfied that the claimant has anything but a very tenuous link with his son or that he has any regular contact with him. In the absence of evidence as to the child's wishes, or reliable evidence as to his current circumstances, or any reliable evidence other as to the impact on him of the claimant's removal, I am not satisfied that that would cause any substantial detrimental effect on the child. While it may be in his best interests for his father to remain here, and I bear in mind he may well wish to re-establish links with his father, these factors must still be weighed.

43 In this case there is no evidence of any adjudications in prison or detention, nor of any re-offending. These are matters in the claimant's favour. It is also very much in his favour that he as spent by far the greater part of his life here, but equally he has a history of offending and there is in fact little change in his situation since his deportation was found by Judge Nichols to be proportionate other than the fact that he is older and has spent more time here.

44 That said, I remind myself that the claimant has spent a substantial part of his life in this country, where his siblings live, and was partially educated and , to a great extent, formed here. He has been here for nearly 20 years, and these are weighty matters in his favour. He has not, however, put his case forward to any substantial degree, and has failed to attend before Tribunals on more than one occasion.

45 I turn now to the factors which weigh against the appellant. There is here, a history of offending which goes back a number of years, including breaches of community sentences imposed against him. This shows a degree of contempt for the legal process and the further offending after those sentences were imposed is a factor weighing against him albeit that he is now of low risk of re-offending.

46 I note that in OH (Serbia) v SSHD [2008] EWCA Civ 694 Wilson LJ summarised the relevant principles as follows at paragraph 15:

(a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.

(b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.

(c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.

(d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case. Speaking for myself, I would not however describe the tribunal's duty in this regard as being higher than 'to weigh' this feature."

47 I consider also that factors (b) and (c) identified in OH (Serbia) are of considerable importance here, not least because of the seriousness of the most recent offences, and the effect on the public as a whole. I consider that the seriousness of the offences and the need to mark society's revulsion at serious crimes weigh significantly against the claimant, all the more so given the fact that, as was noted in SS (Nigeria) Parliament has indicated that significant weight is to be attached to the public interest in deporting those to whom section 32 of the UK Borders Act 2007 applies.

48 I accept that deporting the claimant to DRC will have a significant impact on the claimant and in particular on the private life he has created here, severing the ties he has made with this country, and with his siblings. I accept also that it will in effect sever the relationship (such that it is) with his son. Nonetheless, given the tenuousness of his family life, I consider that it is a proportionate interference with the claimant's right to respect for his private and family life to deport him, given the significant weight to be attached to the public interest in showing that foreign criminals, particularly those who have continued to offend, and given that his deportation is, as is deemed by law, conducive to the public good.

49 For all these reasons, I find that the claimant has failed to satisfy me that he meets the requirements of the Immigration Rules such that his deportation order should be revoked or that the respondent's decision not to do so amounts to a disproportionate interference with his right to respect for his private and family life. I therefore dismiss the appeal on all grounds.

SUMMARY OF CONCLUSIONS

1 The determination of the First-tier Tribunal did involve the making of an error of law. I set it aside

2 I re-make the determination by dismissing it on all grounds.

Signed Date: 27 August 2013

Upper Tribunal Judge Rintoul