Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **DA 01001-13**

THE IMMIGRATION ACTS

At **Field House** Decision signed: **07.05.2014**
on **26.03.2014 & 02.05.2014** sent out: **12.05.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Jacques Mbila MBAKI

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Isaac Maka* (counsel instructed by Traymans)
For the respondent: Mr Tom Wilding (on 26 March); Mr Glyn Saunders (on 2 May)

DETERMINATION & REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Philip Conrath and a lay member), sitting at Kingston Crown Court on 24 October 2013, to allow a deportation appeal by a citizen of the DRC, born 2 August 1962. The appellant arrived in this country in 1991 and claimed asylum: no decision was made on this till 1998, but meanwhile he had met and married a Zambian citizen with limited leave to remain in this country, who gave birth to their son in 1996; so in 1998 he was refused asylum, but they were all given exceptional leave, and eventually indefinite leave to remain on 25 February 2003.

CASE HISTORY

2. That decision might have caused surprise nowadays, because the appellant had already served a number of sentences of imprisonment for motoring offences, and was to serve more: leaving aside those convictions which did not result in imprisonment, his record was as follows (total sentences only shown):

28 January	1997	driving a motor vehicle with excess alcohol	2 months
21 June	2000	driving whilst disqualified/failing to provide specimen	5 months
12 July	2004	driving whilst disqualified/failing to surrender	6 months

There followed occasions in 2006, 2008 and 2010 when he appeared before courts for offences of dishonesty, for which he received community orders and a conditional discharge. Then on 16 August 2011 the appellant received a 3 months' suspended sentence for fraud.

3. Presumably unknown to the court which suspended that sentence, the appellant had already been involved in a conspiracy to defraud: the dates for that offence were charged as between 11 August 2009 and 11 August 2011. On 31 July 2012 he pled guilty to that charge, and on 7 August he was sentenced to 16 months' imprisonment, with part of the suspended sentence put into effect concurrently. This led to the automatic deportation order of 8 May 2013, now under appeal.

4. At the date of the first-tier hearing, *MF (Nigeria)* [2013] EWCA Civ 1192 had been out for over a fortnight; but neither Mr Maka, nor the presenting officer (not Mr Wilding) were sufficiently *au fait* with developments in their field to bring it to the notice of the panel, as was both their professional duty. The result was that the panel embarked on an open-ended assessment of the proportionality of the appellant's removal, under article 8 of the Human Rights Convention, which they should never have done without first expressly finding that there were circumstances in the case so 'exceptional' or 'compelling' as to justify that. A valiant attempt by Mr Maka to argue that the facts set out at paragraph 32 of the first-tier decision could only be seen in that light was doomed to failure: whatever sympathy they excited for the appellant or his children would have to be set against his increasingly poor criminal record.

5. That is a judgment which in my view needed to be reached by way of re-making the decision on a fresh hearing, which took place on 2 May. The first-tier panel should never have been expected to hear an appeal against a deportation decision without being provided with the sentencing judge's remarks, and in accordance with my directions one was put before me.

DECISION RE-MADE

6. Sentencing judge's remarks This is the gist of what the judge said to the appellant, who had pled guilty to conspiracy to defraud, involving benefits. He pointed out the ease of access to the benefit system, designed as it was for people who might not have much English. In this case, people had got hold of genuine cheques, altered the values on them, and cashed them in with false ID. One of those caught cashing cheques

was the appellant; but a search of his property revealed the typewriter that had been used to alter them, and a set of false identity documents: "In other words, it was a complete fraudster's kit". The judge however accepted that the appellant was not at the top of the enterprise, and had allowed others to use his premises, using him to "take the rap" for them. However, he described it as "… a very serious planned offence and … one that you have committed before in extremely similar and parallel circumstances".

7. This can only have referred to the suspended sentence the appellant had received the previous year. The judge noted his very early guilty plea on this occasion, and, inaccurately in view of his driving record, that this was his "first committed sentence" [meaning, to prison there and then]. Since he had done all the unpaid work and kept the curfew ordered with his suspended sentence, the judge put that into effect with a reduced term of one month, concurrent with the sentence for the conspiracy, for which he took a starting-point of two years, reduced to 16 months for the appellant's plea.

8. Risk for criminals returned to the DRC? Mr Maka referred in his updated skeleton argument to a first instance decision by Phillips J, for which he did not give the full citation, but it is *P (DRC)* [2013] EWHC 3879 (Admin). However, both sides agreed that this point had never been taken by the appellant before the present hearing, and would have to form the subject of separate representations by him to the Home Office, if the need arose later. It was clearly in the public interest that I should deal with the issues already before me, for which purpose there had already been over a month's adjournment, following the March hearing, especially as the Home Office were challenging the decision in *P (DRC)* before the Court of Appeal.

9. National Offender Management Service [NOMS]/ OASys reports There was a very recent NOMS report before me, dated 23 April. The writer (Sandra Maragh) notes that she supervised the appellant from his release on licence on 28 April 2013 till that expired last 6 December. She goes on to say that the appellant

> … complied fully with his Licence conditions by attending all pre-arranged appointments, addressing his offending behaviour and not committing any further offences.
>
> He was also successful in getting and sustaining employment with [named firm] and I was informed by an employment partnership that [he] was a valued employer [*sic*].
>
> To my knowledge since his licence expiry date [the appellant] continues to live a life free from crime.

While that last remark can only mean that the writer has no reason to believe otherwise, the endorsement is not without value. The OASys report of 27 December 2012 had given no indication of any significant continuing risk of the appellant's committing any further offences. He is now working for a different firm.

FAMILY HISTORY

10. The appellant was born in the Congo in 1962, and in 1983 begat a son called Corence, who is with him in this country, and who has mental health problems. In 1991 the appellant came here as an asylum-seeker, and the same year Everine Chansa arrived from Zambia, she says as an au pair. They got married on 26 January 1996, and must have met

some time before, as on 16 August that year they had their son, whom I shall call J1; but I shall call all the grown-ups involved in this case, apart from the appellant, by their Christian names.

11. Around 2002 the appellant and Everine split up, perhaps unknown to those who gave them all exceptional leave to remain in 2003; but the appellant has always kept in touch with J1. In about 2004 Everine was diagnosed as HIV+, and sadly J1 has since had the same diagnosis. So far his condition is symptom-free; but hers has led to TB. Meanwhile in 2005 the appellant met Clarisse: they had their daughter J2 on 4 December 2006, and married in 2008, but are now living apart. Clarisse too has indefinite leave to remain, and so both J1 and J2 are British citizens, who whatever happens are likely to stay in this country. Though J2's school confirms that the appellant has picked up and dropped off J2 since she started in nursery in 2010, he cannot do that now that he is working again, so in term-time sees her when she comes to stay at week-ends. However the potentially exceptional feature of this case lies in the responsibility the appellant has for J1, now and in the future, in view of Everine's state of health and prospects; and also for Corence.

12. <u>Corence</u> Since Mr Saunders did not challenge any of the evidence given by or for the appellant on any point, I can deal with it relatively shortly. Corence had lived with him from 2001 when he came to this country with his mother, who died soon after, till 2008 – 09, when he moved out on his own, eventually to Birmingham. He never showed any signs of mental health problems till June 2011, when he was taken into hospital after an incident at a bus-stop, and stayed there till December that year, when the appellant took him back to live with him.

13. Corence stayed with the appellant till he went to prison on 7 August 2012. Though the appellant was working full-time then, Corence took his medication at night, and so the appellant was able to supervise that. During the day the appellant's lodger Geoff (clearly a fellow-countryman, as his other name is Ndongala) kept an eye on Corence, and when the appellant went to prison, Geoff went on looking after him. However, when Geoff moved out, Corence couldn't cope on his own, as was clear to the appellant when he rang him from prison in April 2013.

14. The appellant told Corence to ring Jackie Clark, his care co-ordinator at Barnet, Enfield and Haringey Mental Health NHS trust. Ms Clark arranged for Corence's re-admission to hospital in April last year; but confirms in a letter of 11 June 2013 that he was back living with the appellant again. She says that, owing to his] mental health condition [*she does not specify this, but it is paranoid schizophrenia*] he needs looking after at home and would struggle to live alone, partly to keep him on his medication, and partly because he simply can't look after himself.

15. The appellant is able to provide this care, and Ms Clark supports that being allowed to happen. I heard and saw Corence give brief oral evidence, in which he said there was no-one else to support him if his father wasn't there, and he couldn't see a future for himself, or how he could carry on, if he were returned to the DRC. Corence was lucid enough to answer simple questions, but clearly somewhat withdrawn.

16. J1 and Everine also gave oral evidence before me. J1 (born 16 August 1996, so now nearly 18) had been a very promising boy footballer, and had had a trial for Arsenal. However, in 2011 he had been attacked and stabbed in his lower buttock, near the sciatic nerve: though this was a bad shock for him, he might have recovered from the physical injury, but in 2012 he had broken his ankle badly while playing football. The result was that any thought of a professional career was over for him; but he is still very keen on the game, which he plays at the college where he started a course in sport and exercise science last September.

17. J1 said things were always hard for him at home, as his mother was always ill: there are some medical details for her, which show that, besides being treated for her HIV+ and TB, she has been under investigation for gastric problems. His own HIV+ diagnosis had come as a complete shock to him: he said he was lost for words, and didn't know what to say, or how to react.

18. Everine described her own condition: she said her doctors were worried about her, as her weight had gone down from 55 kg to 45 – she certainly looked distinctly ethereal when she gave evidence – and she in turn was worried about who would be there for J1 if she were to die, and the appellant to go back to the DRC. So far as her HIV+ condition was concerned, she was on anti-retrovirals, with antibiotics for her TB, which made her dizzy and sleepy during the day. Three weeks ago she had been in hospital for three days with her gastric problems; every fortnight she had to have a blood test. She no longer had the strength to stand up and cook, so was reduced to using the microwave. Not surprisingly, she was also on anti-depressants.

19. Everine confirmed that the appellant had acquired his bad motoring record while they were together, but she regarded him as a changed man. She had pointed out his duty to be there for J1: he had always supported her with money, and she was here to support him, though she was supposed to be on bed-rest. As for J2, it was more a question now of his looking after her, rather than the other way round: the appellant came round once a week to see him, but clearly her main concern was the future, uncertain at best for her.

20. Dr Hannah Caller DCH gave oral evidence too. She had been responsible for J1 as part of the pædiatric team at the hospital where he was looked after from 2010, when he was diagnosed as HIV+, till he was transferred to the care of the adult sexual health team more recently. Dr Caller had seen him every two or three months till then, though more often following the stabbing and his ankle injury. J1 was coping with doing more of the shopping and housework at home; but there was serious anxiety about his future, since his mother's condition was not stable in the long term; but she would be less worried if the appellant were to stay in this country.

21. Submissions Mr Saunders referred to the need for exceptional circumstances, already dealt with, and to *SS (Nigeria)* [2013] EWCA Civ 550, with which I shall deal in my conclusions: he did not address me further. Mr Maka accepted the need for deterrence, but stressed the potential effect of the appellant's removal on J2 and Everine.

CONCLUSIONS

22. Some of the judgment in *SS (Nigeria)* has now to be read in the light of what has since been said in *MF (Nigeria)*. In *SS (Nigeria)*, the Court of Appeal had already referred specifically to deportation cases at 46; what was said there is repeated, with added emphasis, at 55:

> … while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed.

23. That is reinforced by the requirement of exceptional circumstances, or 'compelling reasons' (I see no relevant difference between the two expressions) made clear in *MF (Nigeria)*. In this case the appellant was sentenced to 16 months' imprisonment in 2012 for his part in a series of benefit frauds which had been going on between 2009 and 2011, spanning the date on which he had been given a suspended sentence for a similar offence. Not surprisingly, the sentencing judge described that as a very serious planned offence, and gave reasons for that view; but clearly he had some sympathy for the appellant, in view of his very early guilty plea, and full compliance with the other conditions of his suspended sentence, and reduced the sentence passed, so far as he was able to do so.

24. It is quite clear from the recent NOMS report that the appellant has given just as full co-operation to those supervising him this time: he is no fool, and must see that his ability to stay here and look after Corence, and, rather less closely, J1, demands nothing less. There is still a strong public interest in removing him, if only as an example to others who might be tempted by the easy money to be made through this kind of offence; and that is why only exceptional circumstances should be allowed to prevent that. The appellant may not have been guilty of violence, or any other offence against the person; but the public interest is clear.

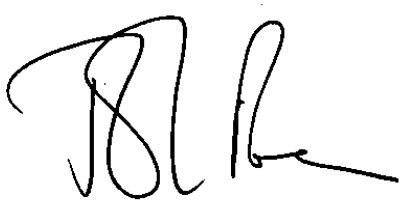
25. Though the appellant sees J2 when he can, and her best interests no doubt are against, not for his removal, there is clearly nothing in her case which could be called exceptional. However, in my view it is otherwise with Corence, and with J1 and Everine. Corence needs daily care, in making sure he takes his medication, and generally looks after himself. Although Geoff was able to look after Corence for a while when the appellant first went to prison, it is quite clear from what happened when Geoff left that, if the appellant were not there for him, the only long-term future would be in some institution. There he would no doubt get all the medication and physical care he needed, but would have no familiar face to keep him from becoming thoroughly institutionalized, probably for the rest of his life.

26. So far as J1 is concerned, the situation is rather different. He can look after himself, and increasingly must look after his mother too, so far as day-to-day things are concerned. However, he is clearly still 'shell-shocked' from his HIV+ diagnosis, though that dates back to 2010, when he was only 14. There is no medical prognosis for his mother before

me; but from what she said, without challenge from Mr Saunders, about her loss of weight and problems resulting from her HIV+-related TB, she must be justified in regarding her own future as uncertain. Both she and the appellant were clearly genuinely worried about J1's prospects, if he were left alone in this country without either of them; and, with the shock he has had already with his own diagnosis, not to mention the injuries which have prevented his going on with football as a career, he is by no means an average near-18 year old; nor can Corence be treated as a normal grown-up person.

27. In this very unusual case, I regard J1's continuing need to have the moral support of at least one parent, and Corence's for the appellant's practical and moral support, taken together, as amounting to an exceptional reason for not letting the appellant's future take the normal course of deportation, following the serious offence he has committed. I reach this conclusion with some reservations, given the fact that he had a previous conviction for the same kind of thing; but in the end that is my view, and it must follow that deportation in this case would not be proportionate to the legitimate purposes of prevention of crime, or of immigration control

Home Office appeal against first-tier decision allowed: decision re-made
Appellant's appeal against deportation allowed



(a judge of the Upper Tribunal