Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **OA/13279/2013**

THE IMMIGRATION ACTS

At **Field House** Decision signed: **02.11.2014**
on **30.07.2014 & 27.10.2014** sent out on: **04.11.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Travor MUGARISANWA

appellant

and

Secretary of State for the Home Department

respondent

Representation: (on 30 July)
For the appellant: Mr F Habtemariam ((working under the supervision of Cambridge Law Centre)
For the respondent: Miss J Isherwood

(on 27 October)
The sponsor appeared in person; Mr S Kandola for the respondent

DETERMINATION & REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Janice Woolley and a lay member), sitting at Richmond on 25 April, to allow an appeal against refusal to revoke a deportation order by a citizen of Zimbabwe, born 16 June 1975. Permission was given mainly on a ground relating to the primacy of the Rules, with which I shall deal first; but it was extended to the other grounds, which I shall go on to.

ERROR OF LAW?

2. History

	2002	enters as visitor – overstays till 2008
	2007	meets Melody (originally from Zimbabwe, but now a British citizen)
	2008	tries to re-enter on false Portuguese passport – 8 months' imprisonment, with recommendation for deportation – claims asylum – appeal dismissed – order signed
	2009	further representations – treated as application for revocation – refused – voluntary departure – appeal withdrawn
01.12.	2009	Melody gives birth to their daughter R in UK
	2010	marries Melody in Zimbabwe
01.08	2011	B born to Melody in UK
	2011	application for visit visa – refused – appeal dismissed
21.02.	2012	application for revocation
04.06.	2013	revocation refused

3. Rules/law

The Home Office grounds argued that the panel should have applied *MF (Nigeria)* [2013] EWCA Civ 1192, effectively requiring exceptional circumstances if they were to depart from the terms of the current Rules. They made no attempt to suggest the precise basis under the Rules on which such circumstances would be required. Miss Isherwood suggested that the relevant version in a deportation case is the 'new Rules'. The reason for that lay in the following paragraph

> A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 9 July 2012 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

4. Since the panel described this (at paragraph 32) as "essentially a case under article 8", I assumed that this provision applied to the present case, and approached it on the basis of the 'new Rules' throughout. The case was not covered by *Edgehill & another* [2014] EWCA Civ 402, where neither of the individual cases dealt with involved deportation.

5. However, the panel do not seem to have been referred by either side to A362, and they dealt at paragraph 31 (oddly cross-headed 'Findings') with paragraph 398 on its own terms.

> Paragraph 398 [of those Rules] does not apply in this case. The decision to make the deportation order was made under s. 3 (6) of the Immigration Act 1971 on the basis that the sentencing judge had made an order for deportation. The respondent did not include s. 3 (5) in his [*sic*] reasons as he was entitled to do had he so chosen.

6. This slightly gnomic utterance is quite clear when set out with reference to the legislation. Sections 3 (5) and (6) of the Immigration Act 1971 refer respectively to deportation on 'conducive grounds', and to deportation on a court's recommendation. What follows is paragraph 398 under the 'new Rules'

> Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
> (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
> (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

7. Clearly neither (a) nor (b) applies in the present case; and neither does (c), for the reason given by the panel. Deportation on a judicial recommendation is not covered by paragraph 398 at all, and, where that is the only basis for the order, then paragraph 398 does not require exceptional circumstances for it to be successfully challenged, even under the 'new Rules'. So far, there was nothing wrong with the panel's decision.

8. However, the decision under appeal had been made by reference to paragraphs 390 and 391, which specifically relate to revocation cases: the general relevant considerations are laid out in both old and new Rules as follows:

> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
> (i) the grounds on which the order was made;
> (ii) any representations made in support of revocation;
> (iii) the interests of the community, including the maintenance of an effective immigration control;
> (iv) the interests of the applicant, including any compassionate circumstances.

9. The relevant considerations in a criminal case are now these: paragraph 391A begins "In other cases …", clearly meaning, in context, cases other than criminal ones.

> 391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:

> (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order, or
>
> (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,
>
> Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

10. The same considerations were set out at paragraph 391 in the 'old Rules': the first category of offence was differently described, but in a form which made no significant difference in the present case. The reason for that was that the relevant period was defined with reference to the Rehabilitation of Offenders Act 1974, and under s. 5 of that Act, the period for a sentence of imprisonment of less than 30 months is in any case ten years. It followed that the proper course in this appellant's case would have been continuation of the deportation order against him, subject only to the terms of the proviso, beginning "Unless …".

11. While paragraph 391 in the 'old Rules' was differently laid out, it is clear that the terms of the proviso applied to both categories of offender (short and long sentence prisoners, or former prisoners). It simply allowed for revocation where refusal "… would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees". The question is whether the addition of the words "…or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors" just added another category of those who could avoid the normal consequence of their convictions; or whether it was intended to govern the whole proviso by requiring Convention grounds, as well as others, to be exceptional or compelling.

12. *MF (Nigeria)* was of course a deportation case, though MF, unlike this appellant, does seem to have come within paragraph 398 of the 'new Rules'. This was the context for what the Court of Appeal said here:

> 43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".
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> 44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence.

13. In this case the general rule for a person deported on a judicial recommendation, or otherwise, following a sentence of less than four years' imprisonment, is that the order should continue. That is subject to the proviso: under the terms of that, continuation of the order may be contrary to the Refugee Convention, or to article 3 of the Human Rights Convention. In either of those cases, there will be no further argument, and it must be revoked.

14. The question in this case, however, as probably in most revocation cases, is whether continuation of the deportation order would be contrary to article 8 of the Human Rights Convention. Here it is clear that the whole of part 13 'Deportation', in which paragraphs 390 – 400 appear, together with paragraph 276ADE and appendix FM, referred to specifically in 400, are to be considered as a 'complete code', for the reasons given in *MF (Nigeria)*. On a common sense basis, it might equally be considered absurd if a deportation order could be made on one basis, but was then liable to revocation on another.

15. It follows that what the panel were required to do under paragraphs 390 – 391 was to assess the proportionality of the appellant's continued exclusion in terms of whether, taking account of what the Court of Appeal described as the 'Strasbourg jurisprudence', there were exceptional or compelling reasons why the deportation order against him should be revoked. They did not consider this, mainly because they correctly saw paragraph 398 as not including this requirement in the present case; but, however understandable in terms of the argument presented to them, it was in my view a material error of law.

16. I briefly considered the rest of the Home Office grounds, before deciding what should happen to the case now. The first pair, dealing with the Rules and article 8, were numbered a) and b); so are the rest, but it is this second series that I deal with now. [*Simple consecutive numbering of paragraphs has for some time been the accepted judicial style, and should be adopted by all Tribunal-users, please*].

17. The second a) begins by disputing that the situation is 'materially alerted' [*sic*] since the order was made. This as it happens refers to what is now paragraph 391A of the Rules, which in my view does not apply in a criminal case; but it couldn't be called arguable on its own terms. Following the appellant's voluntary departure in 2009, he and Melody have married and had two daughters, besides the lapse of time in itself.

18. The other point taken against the panel at a) was that the negative factors they noted at paragraph 44 should have been given more weight. There is nothing in this: the panel rightly noted them and clearly took account of them. b) refers to the appellant's "flagrant disregard for immigration control"; but this, including overstaying and illegally working here till 2008, was exactly what the panel took

into account at paragraph 44. The other points they made there, that the offence for which the appellant went to prison was his first, and that there was nothing to show he had misused the Portuguese passport, other than in trying to return to this country, were correct on the facts before them.

19. The remaining point, at c), is as follows:

> … the panel's findings at s. 46 are fundamentally flawed as they seek to diminish the severity of the appellant's offence. The panel do not engage with the material facts of the decision made by the Sentencing Judge, which, was in essence, that the appellant's presence in the UK was undesirable and a recommendation was therefore made …

20. What the sentencing judge actually said to the appellant was this "I understand some of the pressures that must have fallen on your shoulders as you found [yourself] on the wrong side of the line from the current political climate in your home country". As the panel noted, the judge took account of that, and the appellant's lack of previous convictions and immediate plea of guilty. Of course the appellant had no right to be in this country at the time, and the length of his sentence did not bring in automatic deportation; so the judge made a recommendation.

21. In my view, there was nothing in any of the Home Office's complaints about the panel's decision on the merits of the case. Whether those added up to such 'exceptional' or 'compelling' features in the case as the Rules now required (in the light of any continuing obligation of Melody's to serve as an Army dental nurse) may or may not be another question. I saw no reason not to decide this for myself, at a further hearing; but in view of the panel's comprehensive findings of fact, I saw no need for further formal oral evidence.

RE-HEARING

22. **Evidence** At the re-hearing Melody appeared to represent the appellant, which she was well able to do. She explained that she had joined the Army as a dental nurse in 2008, and been posted to Germany: the appellant had been able to join her there for up to six months at a time, and help with the children when they were born in 2009 and 2011. However, when she had been due for a posting to Afghanistan, she had had to refuse it, though she wanted to go, as there would have been no way of looking after the children while she was there.

23. Finally in March 2013 Melody was posted back to this country, where the appellant was unable to follow her, and she became even more depressed, a state which had set in after R was born in 2009. That had led to her going to Zimbabwe to marry him there, with a view to his being able to join her here; but the application and appeal process had taken so long that her depression got

worse. She was still keen to carry out her duties, but had had to work limited hours, by agreement with the military authorities; however she had been unable to join her unit on an exercise in Canada. Finally in November 2013 she had been given a medical discharge.

24. Since then Melody had been at home with the children: since 2012 she has been a British citizen, so she would have no problems getting employment from that point of view; but she seems to have become too depressed at one point to work, and in September 2014 had to declare herself bankrupt. Now she is at college, doing a foundation course for a humanities or social science degree, for which the Army will pay under the terms of her discharge, so long as she claims her entitlement within two years.

25. As for the children, R had started school this September: when Melody had been to a Parent Teacher Association about her, the teaching staff had expressed the opinion that she was missing her father. As for B, she spoke to him on the phone; but she was too young to miss him in the same way as R. Melody said it would change her life if the appellant were allowed back in: previously, when she was in the Army, she was supporting him; but now he is staying in Zimbabwe with his parents, helped by remittances from his brother and sister in this country.

26. **Law** Mr Kandola referred me to *R. v Benabbas* ([2005] EWCA Crim 2113, though he was unable to provide me with the citation). As that suggests, this was a criminal appeal against the sentencing judge's recommendation for deportation: it is enough to cite this, from the final paragraph:

> … the judge was right therefore to say that the appellant's use of a forged passport undermined the good order of society and constituted the appellant a threat. In *Nazar* terms, his continued presence would be a detriment to this country.

27. The deportation order against this appellant was signed on 18 December 2008: it follows from paragraph 391 (see **9**) that its continuation would be the proper course, till the same day in 2018, unless there were such 'exceptional' or 'compelling' features in the case as to make that contrary to article 8 of the Human Rights Convention. Since this is not an EEA case, I am not limited to considering the appellant's personal conduct, nor forbidden to consider general deterrence or economic ends, but have to take into account all those questions, as set out in such well-known authorities as *N (Kenya)* [2004] EWCA Civ 1094 and *OH (Serbia)* [2008] EWCA Civ 694.

28. **Conclusions** It is now nearly 6½ years since this appellant was sent to prison for eight months for trying to get back into this country on a false passport. While it would be wrong to minimize the significance of that, particularly in the light of what was said in *Benabbas*, I also need to remember what the judge said in sentencing him (set out at **20**): for good reason, the

sentencing judge's views must form the main basis for my own, so far as the facts of the offence are concerned, as explained in *Masih* (deportation - public interest - basic principles) Pakistan [2012] UKUT 46 (IAC).

29. The deportation order was signed six months later, so that this appellant would normally have to wait another four years before he could expect to have it revoked. However, during the six which have nearly passed since it was signed, he has not only made a voluntary departure and withdrawn his original appeal against it, but begotten two children, now nearly five, and three, who are either British citizens already, or entitled to be registered as such at once in line with their mother, who went out to Zimbabwe in order to be married to him.

30. While Melody would have been well aware of the difficulties facing the appellant in any attempt to return to this country, both when she conceived R and when she was married to him, and following that conceived B, she too has had serious difficulties, as a result of her determination to be loyal to him. She clearly enjoyed her Army service, which, as with any other member of the armed forces, involved important work in the national interest, and in her case could and should have continued, as a letter in the Home Office bundle shows, till 2020.

31. Although Melody was able to have the appellant with her in Army housing in Germany, as another letter confirms, she was unable to join her unit on posting to Afghanistan, or even on exercise in Canada, since there was no way for her to see that the children were looked after without his being there. It is not surprising that she should have left the service at the end of 2013, following which she has had serious money troubles.

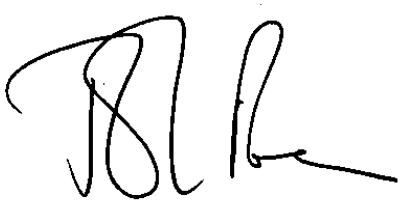
32. While the terms of Melody's discharge provided for payment for her to follow a course leading to a degree, she needs to take that up effectively by the start of the 2015 – 16 academic year: no doubt that too would be hard for her without anyone to help with looking after the children. While B is really too young for her consciously to miss her father very much, R clearly does, to the extent that her teachers have noticed it. It would clearly be in both their best interests for him to be allowed to return and join them to live as a family together.

33. Of course, while that must be a primary consideration in deciding this case, it cannot be a paramount one, and certainly not one which could decide the result on its own. However, giving full weight to the strong public interest in deterring others from subverting the immigration system by using false documents, I have also to recognize that this appellant followed the course which others in his position should, but rarely do, and withdrew his appeal against deportation and returned of his own accord to his country of origin. There he has spent the last five years: I am not so much concerned with such difficulties as he has had there, which are the result of his own actions, as with the effect on his wife and

children. I should remember here that in 2011 he was refused a visa to visit them here, and his appeal against that dismissed.

34. The military authorities clearly did their best to look after this divided family, and will, as the result of Melody's service give her the chance to get a degree; but meanwhile she is left to cope on her own, and has faced serious difficulties in doing so. The ten-year restriction on revocation applies to all those sentenced to terms of imprisonment between the very shortest and four years: while the Home Office are of course entitled to have a fixed policy on that, and to have it set out in the Rules approved by Parliament, the rigidity that causes may in some exceptional cases result in a decision which is not proportional, given the time which has already gone by since the original order, to the public interest involved. For the reasons I have given, I am satisfied that this case is one of them, and it follows that the appellant's appeal will be allowed.

Home Office appeal allowed: decision re-made
Appellant's appeal against refusal of revocation allowed



(a judge of the Upper Tribunal)
03.11.2014