IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40679/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st July 2015	**On 19th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR MQAMLANDABA MTHETHWA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Symes (Counsel)
For the Respondent: Mr P Duffy (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant's appeal against a decision to remove him from the United Kingdom was dismissed by a First-tier Tribunal Judge, in a decision promulgated on 27th January 2015. That decision was set aside, as containing errors of law, on 28th May 2015 and directions were given to the parties on the same date regarding the remaking of the decision in the Upper Tribunal.

2. The documentary evidence before me consisted of the Secretary of State's bundle, which was before the First-tier Tribunal, and a file minute made by

an officer with "Operational Barrier Casework", in late March 2013, regarding the Secretary of State's assessment of the appellant's circumstances at that time. Also before me was a bundle prepared by the appellant's solicitors for the First-tier Tribunal hearing. Mr Symes handed up a skeleton argument and I was provided with copies of the judgments in Sunassee [2015] EWHC 1604 (Admin) and SS (Congo) and Others [2015] EWCA Civ 387 and the Secretary of State's guidance to caseworkers on applications for limited leave to remain as a parent and whether it would be unreasonable to expect non-British citizen children to leave the United Kingdom.

3. The Secretary of State's removal decision was made on 10th October 2014. In an earlier letter dated 29th September that year, she gave reasons for the decision and for refusing an application for indefinite leave to remain made by the appellant as long ago as 24th June 2005. There was a brief apology for the delay of almost nine years. The application was refused under paragraph 322(1C) of the Immigration Rules ("the rules") in the light of a conviction (not properly identified in the letter) and the fact that a period of seven years had not yet passed since the end of the sentence imposed upon the appellant. His immigration history was taken into account. He arrived in the United Kingdom from Zimbabwe in March 1999 and was given six months' leave to remain. He was given further leave until September 2001 but an application made shortly before expiry was refused. An asylum claim made in 2003 also failed.

4. The Secretary of State applied the rules to the appellant's application for indefinite leave, in the light of his private and family life ties here. He had two children, aged 3 and 11 at the time, present in the United Kingdom for their entire lives. The appellant lived apart from the children, who lived with their mother, but visited them twice a month, attended parents' evenings and took them out for recreational activities. The Secretary of State concluded that he was not their primary carer. Neither of the children was a British citizen although both were born in the United Kingdom. The elder was approaching 12 years of age and as she had established herself here, the Secretary of State concluded that requiring her to leave the United Kingdom would not be reasonable. In any event she had limited leave to remain, as did her sister and her mother. They had no remaining family ties in Zimbabwe. Neither child had visited the country.

5. Overall, the Secretary of State concluded that there were no exceptional circumstances in the appellant's case, meriting a grant of leave to remain outside the rules. Although he had spent fifteen years in the United Kingdom, as at the date of the letter, he was present here unlawfully for much of that time.

6. Reference was made to the appellant's convictions and cautions, spanning the years 2001 to 2014. Although no details appear in the letter, the Secretary of State concluded that his character, conduct and associations told against him in the assessment of his application.

7. In a witness statement the appellant made on 4th July 2014, he referred to a conviction for assault in 2001, which he disclosed in an asylum application in 2003. He was sentenced to a period of imprisonment of six months. More recently, on 1st January 2014, he was convicted of motoring offences while driving his sister's vehicle. She was indisposed at the time. The appellant claimed that he felt unable to decline her request for help. He was arrested by the police on the way back from collecting his sister's daughter. He was convicted for failing to provide a sample and fined. In a more recent statement made on 9th January 2015, the appellant described his relationship with Nomagugu Mpofu, the mother of his children. Their first daughter Zibongeni was born on 5th November 2002. The appellant continued to reside with his uncle in Forest Hill whilst his partner stayed in Northampton. They continued to be close although their relationship came to an end. It was rekindled in November 2009 and they then married in April 2011, according to Zimbabwean traditional custom. The birth of their second daughter Wakhile followed on 10th August 2011. The appellant and his partner then lived together from October of that year until the end of February 2012, after which they applied for NASS accommodation so that they could continue to live together as a family. Although they wished to live together, this proved not to be possible and they were housed apart. Notwithstanding that setback, the appellant continued to visit his family regularly in Southampton and they spent Christmas together in Forest Hill in 2011 and then again in 2012, this time with a cousin in Gravesend. In 2013. They spent Christmas together in Southampton in 2013 and in Leeds in 2014. For some of his visits, the appellant stayed for a week or more and when able to, he helped his partner with household chores at her accommodation in Southampton. The appellant stated that, as at January 2015, he had been present in the United Kingdom for nearly sixteen years and had not returned to Zimbabwe at all in that time. He had no ties there. His father passed away in September 2006. The appellant's stepmother and his half-brother remained in Zimbabwe but there were no close bonds between them. The appellant had been close to his uncle here, Godfrey, who passed away in February 2010 and was still close to Godfrey's children. He continued to live at Godfrey's house as part of a close-knit family.

8. The children's mother, the appellant's partner Ms Nomagugu Mpofu, made a statement on 7th January 2015. She described herself as traditionally married to the appellant. She is a Zimbabwean national and the mother of their two children. The appellant continued to visit at least twice a month and played an active role in the family. They work hard to ensure that the best interests of their daughters come first. Ms Mpofu described the appellant as a loving father and stated that the family would be devastated if he were forced to return to Zimbabwe.

9. The evidence also included a report prepared by Dr Rozmin Halari, a consultant clinical psychologist, in early January 2014. She was instructed to assess the family relationships and concluded that the appellant played a positive and significant role in the children's lives and that the children expressed their relationship with their father positively. She found that

the appellant's removal would have a significant detrimental impact on each child's psychological, social, emotional and educational development.

The Hearing

10. The appellant gave evidence and adopted his two witness statements. He was asked why he did not have more photographs showing him with his children. Copies of those he had appeared in his bundle. The appellant said that there was sometimes no opportunity to take photographs when he was with the children and he sometimes felt odd asking strangers to take photographs.

11. In cross-examination, the appellant said that it was still the case that he visited the children at their mother's home every other weekend and on special occasions. He would spend time with his partner on these occasions, although when she was tired he would leave her and take the children. At birthdays they spent time together. He and his partner had lived apart since 2012 or 2013 when she moved to Southampton. That created problems. She and the children now had discretionary leave and they were no longer in NASS accommodation. Mr Duffy asked whether there was anything to stop the appellant moving in with them now. He replied that the finances were difficult. He had no capacity to provide for his partner and he did not wish to be dependent upon her. He had to travel back and forth to see them and sometimes she helped him with travel costs. She was a community nurse working full-time, in the field of learning disabilities. They had a childminder close to the house and the elder of the two children started secondary school in September 2014. If the appellant moved in full-time or permanently, they would not need a childminder but within their culture, he should be the one who provided for the family. There was some discomfort. He had reservations about moving in on this basis and so did his partner. It was awkward for him to be dependent upon her.

12. The appellant said that at present, he and his wife were not a couple and their relationship was currently "not on". However, they had a strong mutual understanding about bringing up their children as best they could. The appellant currently lived with his cousin and his aunt. His cousin had two sisters, one here and one in Australia. The appellant had members of his family in the United Kingdom from his aunt's side. There were two cousins, the aunt and extended family members. Also present was a relative the appellant referring to as his brother. The actual relationship was as cousins as this person was his father's brother's son. The appellant said that his father had passed away and his stepmother remained in Zimbabwe, as did a stepbrother and a stepsister. He had no cousins or extended family members that he knew there.

13. When he lived in Zimbabwe, the appellant was an apprentice in motor mechanics. In the United Kingdom he worked in information systems and studied for part of a nursing course but did not finish it. He was able to do some care work at the time. He had taken no work as a motor mechanic.

14. There was no re-examination.

15. The appellant's cousin, Ndabezinhle Mtetwa, gave evidence and adopted the witness statement he made on 6th January 2014. Mr Mtetwa has lived in the United Kingdom for ten years and is employed by a housing association in Manchester. In his statement, Mr Mtetwa set out his knowledge of the appellant's involvement in the upbringing of his children. The appellant went to stay with his partner when they stayed in Northampton and after that in Southampton. He helped with the search for schools, babysitters and fully supported his children. The couple attended parents' evenings at schools. He would babysit for the younger child, particularly when a childminder was not available. There was no cross-examination. Mr Langalibalelle Mthethwa then gave evidence and adopted the witness statement which appeared in the appellant's bundle at page 99. He is the appellant's late father's brother's son. He was born in the United Kingdom and has lived here all his life. The appellant regarded Mr Langalibalelle Mthethwa's father, Godfrey, as he would a father. He described the appellant as a responsible parent and as a role model. Mr Langalibalelle Mthethwa's sisters look to the appellant for guidance and he played a strong role in arranging a family wedding in September 2014. There was no cross-examination.

16. In submissions, Mr Duffy relied upon the Secretary of State's decision letter, dated 29th September 2014. Both paragraph 317 of the old rules and the new rules, in relation to the partner or parent route to settlement, were considered. The requirements of the partner route were not satisfied. The parent route led to an assessment of whether leave should be given as a matter of discretion because the appellant could not meet the suitability requirements, not least because of his past convictions. The private life requirements were also not met.

17. The appellant could not meet the requirements of the rules for the reasons given by the Secretary of State in the letter. The appeal might turn on his relationship with the children. The Secretary of State accepted that he played an active role although he did not live with them. If he were removed, they could maintain some form of contact with him. The failure on the appellant's part to meet the requirements of the rules strongly showed that the removal decision was a proportionate response and that the Secretary of State was justified in making the decision she had. The appellant might apply to return for visits or as a parent with rights of contact. Removal would not necessarily entail permanent severance but even if it were to do so, the decision was made in accordance with the rules and was a proportionate response.

18. Mr Symes said that, dealing with the parent route first of all, the convictions were referred to in the decision letter, in the part of it dealing with the old rules. The decision was made in late September 2014, after the "window" explained in Singh and Khalid. What was required was an assessment under the new rules contained in Appendix FM with the initial focus on the suitability requirements. S-LTR.1.5 and 1.6 were the relevant

candidates but the conviction for assault in 2001 was spent. The only recent offences mentioned in the witness statement made in January 2015 were the motoring offences.

19. Nonetheless, Mr Symes accepted that the suitability requirements were not met. This was so in relation to the parent route, in the light of the convictions relied upon and the appellant's acceptance of what appeared in the Home Office minute, prepared in relation to the grant of leave to his partner, which was handed up (on the first page of that document).

20. The next step concerned the appellant's circumstances outside the rules, in the light of the family life ties established. In this context, guidance given by the Administrative Court in Sunassee and by the Court of Appeal in SS (Congo) and Others fell to be applied. There was no substantial challenge to the evidence in this regard and it was clear from the decision letter that the Secretary of State accepted that it would not be reasonable for the children to move to Zimbabwe and that the appellant played a role in their lives. The appellant also relied on the report prepared by the clinical psychologist in January 2014 and the letter from his daughters which appeared at page 16 of the bundle, albeit that this was prepared at an earlier stage, in October 2011. The report from the clinical psychologist strongly supported the appellant's case, as paragraphs 62, 64, 65 and 67 particularly showed. There was sufficient material before the Tribunal, not challenged by the Secretary of State, that family life between the appellant and his children subsisted and was strong. There were also family life ties between the appellant and the witnesses, his close relatives. Removal to Zimbabwe would interfere with these relationships and the prospects of maintaining them by means of visits to the United Kingdom were very poor. The children's best interests were required to be assessed, the Secretary of State paying this aspect attention in the decision letter. They had both been present here all their lives, the elder of the two for over fourteen years. That built a strong case that it would be unreasonable to expect them to move abroad. The daughters had discretionary leave.

21. The appellant had also been present here for many years, without going to ground and had been in contact with the Secretary of State. He had private life ties which deserved respect.

22. Mr Symes said that there were reasons to move from the rules, to make an assessment outside them, as the rules did not fully cater for the appellant's circumstances. Because of his offending behaviour, albeit that the serious offence led to a conviction which was now spent and the recent offences were minor, the suitability requirements caused the application to fail under both the partner and parent routes. As a result, an assessment was required outside the rules, although that the offending behaviour and the failure to meet the requirements of the rules still had to be taken into account. The only non-spent offence was the recent motoring offence, as explained by the appellant in his January 2015

witness statement. He did not pose any present risk and the Secretary of State had not suggested at any stage that she might deport the appellant.

Findings and Conclusions

23. In this appeal, the burden lies with the appellant to prove the facts and matters he relies upon and the standard of proof is that of a balance of probabilities.

24. This is a very unusual case for several reasons. First, there is the extraordinary period of delay, of some nine years, between the application made by the appellant for leave in the light of his family ties, at a time when his firstborn was very young, and the date of decision in the autumn of 2014. In all those years, his daughter has, of course, grown up and is now at secondary school and a second daughter has been born to the appellant and his partner. Secondly, the scheme of the new rules is such that the appellant has been found not to meet the suitability requirements in S-LTR, which apply to both parent and partner route. Mr Symes accepted that this was so in the light of the appellant's convictions and offending behaviour. However, the Secretary of State appears to have accepted that although the appellant has relatively minor recent convictions for motoring offences, committed very early in 2014, the only serious conviction he has is now spent. He was convicted of an assault in 2001 and served a term of imprisonment of some six or seven months (the evidence was not clear). The consequence of failing to meet the suitability requirements of the rules is that the appellant has no access to the expression of the Secretary of State's policy in EX.1, which provides an exception to certain eligibility requirements for leave to remain as a partner or parent. EX.1 is not an exception to the suitability requirements. A failure to meet the suitability requirements means that the assessment under the rules comes to a halt and any consideration of discretionary leave or the proportionality of an adverse decision has to take place outside them. EX.1 requires weight is to be given to a genuine and subsisting parental relationship with a child who is under the age of 18 years and who is in the UK and has (if not a British citizen) lived in the United Kingdom continuously for at least the seven years immediately preceding the date of application. Of course, as the date of application was long ago in 2005, and as the appellant's daughter was about 3 years old at the time, he could not derive any benefit from EX.1. The Secretary of State has, however, accepted in her decision letter that it would not be reasonable for either child to leave the United Kingdom. That is hardly surprising in view of the years the children have spent here, particularly the elder.

25. In the appellant's case, therefore, relatively minor motoring offences committed recently and a spent conviction have combined to show that he cannot meet the suitability requirements of the rules, in circumstances where, largely by reason of the Secretary of State's extraordinary delay, one of his two children has grown up in this country, having been born here, and has spent far more years here than required to attract weight

under the rules, in EX.1, which exception the appellant cannot in any event avail himself of because of the requirement that the seven years the child must have lived here immediately precede the date of application.

26. The evidence, largely unchallenged by the Secretary of State, shows that the appellant does play a substantial role in his children's lives and that he still has substantial contact with his partner, albeit that their relationship is "not on", as described in the evidence. I accept Mr Symes' submission that the report from the clinical psychologist supports the appellant's case in this regard. There are also other relationships the appellant enjoys here, with close relatives, including the two witnesses, although these have less weight in the assessment.

27. The first critical question is whether the rules, as applied by the Secretary of State, fully cater for the appellant's circumstances and, if not, whether an assessment outside the rules is required. What is plain from the evidence is that there are substantial family life ties between the appellant and his children which have been established over a period of many years, both before and largely after the application for leave to remain. Do the rules fully cater for these relationships? In the particular circumstances of the appellant's case, I conclude that they do not. The offending behaviour which causes him to fail to meet the suitability requirements consists of a spent offence and relatively minor motoring offences and there is no evidence at all to suggest that the appellant is a present threat or likely to reoffend. Important guidance appears in the judgment of the Court of Appeal in SS (Congo), for example in paragraph 44 where there is the following:

> "If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the rules … then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8."

28. Insofar as there is a threshold to be surmounted before an assessment outside the rules is required, the test is sometimes expressed as a requirement to show compelling circumstances not sufficiently considered under the rules.

29. In the present appeal, the only substantial barrier in relation to the rules identified by the Secretary of State in the decision letter, (save in relation to the private life rules and EX.1) is the failure to meet the suitability requirements. Even accepting that the spent offence is serious and even if, taken in combination with the motoring offences, it were capable of showing that the appellant is a persistent offender, in preventing success under the rules altogether at this point, no sufficient account is taken of the parental relationship the appellant in fact enjoys with his children. The significance of the suitability requirements must be carried forward into

any assessment outside the rules but, viewed sensibly, the offending behaviour recorded by the Secretary of State is a relatively modest factor. There is nothing to show any present threat or propensity to reoffend.

30. Nor can the delay of nine years be simply overlooked, although it is not a determinative factor. It was in the years of delay that the family ties strengthened. In March 2013, one of the Secretary of State's officers considered the appellant's partner's case, accepting that substantial private life ties would have been established in the years spent in the United Kingdom, similar to the period of time the appellant has spent here. The Secretary of State was clearly aware of the appellant's own circumstances at that time and the conclusion that it would not be reasonable to expect the children to relocate to Zimbabwe also appears in the file minute. The significant level of integration into the United Kingdom of the older child is expressly mentioned and the best interests of the two children are described as a weighty consideration in the appellant's partner's case. I find that they are a weighty consideration in the appellant's case too.

31. Applying the approach in SS (Congo), succinctly summarised in Sunassee, I conclude that there are compelling circumstances not sufficiently recognised under the rules, in the particular circumstances of this case, which show that an assessment outside the rules is required. The rules in this context do not amount to a complete code. The factors not fully reflected in the rules, relevant to the proportionality assessment, include the substantial family life the appellant has with his children in particular, and also with his close relatives here. The relationship with his children is not fully catered for in the rules because he cannot meet the suitability requirements. Failure in this respect is a relevant factor, but, nonetheless, a factor of relatively modest weight. This is because the spent offence and the motoring convictions fall short of showing that it is undesirable to allow the appellant to remain in the United Kingdom or that he has caused serious harm and has shown a particular disregard for the law, even though their impact is to cause his application to fail.

32. Of course, the Secretary of State went on in her decision letter to consider whether there were exceptional circumstances in the case but the assessment of the children's best interests proceeded on the basis that the appellant merely saw the children twice a month, informally and the respondent did not have the benefit of all the evidence which was before the Tribunal, including the report from the clinical psychologist. Although the Secretary of State took into account contact between the appellant and his children, the decision letter does not reveal that weight has been given to the fact of the relationship between the appellant and his children over many years. For example, in considering whether it would be unreasonable to expect the children to leave, the fact that the elder child has put down roots in her (then) nearly twelve years in the United Kingdom is noted, but without any apparent regard to the very substantial contact she has had with her father in all of those years. Some doubt about the extent of the appellant's involvement appears in the letter, for

example at the bottom of page 4, due to the absence of "any corroborating documentation". Again, the evidence before the Tribunal, largely unchallenged, does show strong family life ties.

33. Turning to the statutory factors contained in section 117A – D of the 2002 Act required to be taken into account when the Tribunal considers the public interest question, meaning whether an interference with a person's right to respect for private and family life is justified, the first point to be made is that I find that the evidence does show that the appellant's removal would substantially interfere with the family relationships he relies upon. Even accepting the possibility of visits from Zimbabwe, or perhaps visits to Zimbabwe by the children and their mother, the possibility of maintaining contact by electronic means, including Skype or other video link, could not remotely reproduce the current intensity of the relationships, as the two children enter their critical teenage years. This is not a case where the appellant has had regular contact with his children only for a limited period. His involvement has been regular throughout their entire lives. Although the appellant has convictions, this is not a deportation appeal and the strength of the public interest in removal is not enhanced by serious criminality showing that the appellant is a present risk or that there is a need to deter others.

34. The maintenance of effective immigration controls is in the public interest and weight is to be given to the appellant's failure to meet the suitability requirements of the rules, although there is no need to repeat what I have said about this aspect already. The appellant speaks English but he is not financially independent. He is not permitted to work. He has no "qualifying partner", as the mother of his children is not settled in the United Kingdom, although she has limited leave given on a discretionary basis. Little weight should be given to his private life as it was established while he was present here unlawfully. On the other hand, the private life aspect is relatively minor. There is no evidence showing that important or enduring private life ties were established while the appellant had temporary leave, between March 1999 and September 2001 but even if there were, his status was precarious and so those ties should be given little weight. On the other hand, section 117B(6) provides that the public interest does not require a person's removal, where he or she is not liable to deportation, where he or she has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. For these purposes, "qualifying child" means a person who is under the age of 18 and who has lived in the United Kingdom for a continuous period of seven years or more. The appellant's elder child is, therefore, a qualifying child and the Secretary of State has herself concluded that it would not be reasonable to expect her, or her sibling, to leave the United Kingdom. The evidence shows that the appellant has a genuine and subsisting parental relationship with both children. This particular statutory factor is one which clearly strengthens the appellant's case and weakens, even if it does not reduce it altogether, the public interest in his removal.

35. Bringing the threads of analysis together, I conclude in summary as follows. The appellant has accepted, through Mr Symes, that the suitability requirements of the rules were not met in relation to either the partner or the parent route. Nonetheless, the rules do not fully cater for his circumstances as there are no means whereby weight can properly be given to the family life ties in the light of that failure. Although the Secretary of State herself went outside the rules to consider exceptional circumstances, she did not have the benefit of the evidence before the Tribunal. Following the guidance given in SS (Congo) and Others, in the particular circumstances of this case an assessment outside the rules is required, for the reasons set out above. Having made that assessment, and having taken into account both the adverse factors shown by the appellant's failure to meet the suitability requirements and the statutory factors which appear in section 117B of the 2002 Act, I conclude that the appellant's removal would amount to a disproportionate response. It would lead to an unjustified interference with the relationships he enjoys with his two children, who have discretionary leave to remain and who have lived here for their entire lives and in relation to whom the Secretary of State has accepted that it would not be reasonable for them to leave the United Kingdom. His removal in consequence of the decision under appeal would so disrupt the family life ties as not to be justified under Article 8(2).

36. The appeal is allowed.

NOTICE OF DECISION

The decision of the First-tier Tribunal having been set aside, it is remade as follows: appeal allowed.

ANONYMITY

There has been no application for anonymity and I make no direction on this occasion.

Signed Date

Deputy Upper Tribunal Judge R C Campbell

TO THE RESPONDENT
FEE AWARD

As no fee has been paid, no fee award may be made.

Signed Date

Deputy Upper Tribunal Judge R C Campbell