IAC-AH-LEM/KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00686/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 16 November 2015	**On 28 January 2016**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

KN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Khan, instructed by Halliday Reeves Law Firm
For the Respondent: Mr D Diwncyz, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, KN, was born in 1973 and is a male citizen of Zimbabwe. He was convicted on 11 July 2007 at Leeds Crown Court of taking a motor vehicle without consent and received a sentence of sixteen months imprisonment. On 31 March 2014, the respondent refused to revoke a deportation order which had been made in respect of the appellant. An order had been made under Section 5(1) of the Immigration Act 1971 ("conducive grounds"). The appellant appealed to the First-tier Tribunal (Judge Pickup) which, in a determination promulgated on 1 August 2014 dismissed the appeal. The appellant appealed to the Upper Tribunal. By a

decision promulgated on 1 May 2015, I determined the First-tier Tribunal had erred in law and I set aside its decision. My reasons for doing so were as follows:

"1. The appellant, KN, was born in 1973 and is a citizen of Zimbabwe. He has appealed against a decision of the respondent to refuse to revoke a deportation order dated 15 October 2008. The respondent's decision was dated 31 March 2014. The First-tier Tribunal (Judge Pickup) in a determination promulgated on 1 August 2014 dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Paragraph [7] of the grounds of appeal reads as follows:

> "At paragraph 7 of his determination, the FtTJ makes a fundamental mistake of fact when he states that the appellant was subject to the automatic deportation provisions because the appellant's offence and conviction and sentence predates the coming into force of the automatic deportation provisions under Section 32 of the UK Borders Act 2007. 1 August 2008 was when the automatic deportation proceedings came into force and the appellant's conviction and sentence took place in July and September 2007. It is respectfully submitted that this mistake of fact clearly influenced the FtTJ's consideration of whether the appellant's subsequent deportation order should be revoked – see paragraph 12 of his determination."

3. At paragraph 12 of the determination, the judge wrote:

> "Paragraph 396 provides that where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with Section 32 of the 2007 Act, which applies to this appellant."

4. Mr Diwncyz, for the Secretary of State, indicated that he could not support the First-tier Tribunal determination in the light of this error. He accepted that the error may have influenced the manner in which the judge carried out his analysis of the evidence and applied the relevant provision. I therefore set aside the determination. The Upper Tribunal will remake the decision following resumed hearing.

DECISION

5. The determination of the First-tier Tribunal which promulgated on 1 August 2014 is set aside. The Upper Tribunal will remake the decision following a resumed hearing ..."

2. The resumed hearing took place at Bradford on 16 November 2015 when Ms Khan appeared for the appellant and Mr Diwncyz, a Senior Home Office Presenting Officer, appeared for the respondent. The burden of proof in the appeal is on the appellant and the standard of proof (in this appeal under the Immigration Rules and Article 8 ECHR) is the balance of probabilities.

3. I heard oral evidence from the appellant and also his partner (GB). The representatives made submissions and I reserved my decision.

4. There are three children of the relationship of the appellant and GB. The eldest child has lived in the United Kingdom since the age of 4 and is a naturalised British citizen who is now aged 15 years. The remaining children are aged 10 years, 6 years respectively are British citizens; GB is a British citizen by naturalisation; she was born in Zimbabwe. Although I set aside Judge Pickup's decision, I find, as he did, that the appellant has a genuine and subsisting relationship with all three children [40]. Mr Diwncyz, for the respondent, did not seek to dissuade me from such a finding. It was also the case that two of the children have been living in the United Kingdom for at least seven years. The appellant himself has been resident in the United Kingdom for nearly fourteen years. Furthermore, the appellant is the primary carer of the children. I accept that to be the position; Mr Diwncyz did not seek to persuade me otherwise. Indeed, I found the evidence of the appellant and GB as regards the circumstances of their children and their own family living arrangements to be true and accurate.

5. This is a case where it is necessary to apply the provisions of Section 117C(5) of the Immigration Act 2014 (Section 19 of the Nationality, Immigration and Asylum Act 2002 – as amended):

> '**117C Article 8: additional considerations in cases involving foreign criminals**
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.'

6. The appellant does not fall into the more serious category of offender (i.e. those sentenced to at least four years' imprisonment) covered by subsection (6). The focus of the Tribunal is, therefore, upon whether the effect of the appellant's deportation on the partner (GB) or the children would be unduly harsh. Ms Khan did not seek to persuade me that the "unduly harsh" test could be satisfied by separation of GB from the appellant. The appellant's adult partner, GB, was born in Zimbabwe and there was no reason to suppose that she would not be able to reintegrate into the society of that country with the appellant upon return.

7. As regards the effect upon the children, however, I find that the effect would be unduly harsh. There was evidence from a social worker as well as from the appellant and GB which gave details of the depth and strength of the relationship between the three children (all of whom are significantly British citizens) and the appellant. It is of great significance that the appellant acts as the children's primary carer at the present time. Assistance as to the proper interpretation of "unduly harsh" is provided in the presidential decision *MK (Section 55 – Tribunal options) Sierra Leone* [2015] UKUT 00223 (IAC) in particular at [46]:

> "The determination of the two questions which we have posed in [44](d) above requires an evaluative assessment on the part of the Tribunal. This is to be contrasted with a fact finding exercise. By way of self-direction, we are

> mindful that "*unduly harsh*" does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "*unduly*" raises an already elevated standard still higher. Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less than cruel."

8. Mr Diwncyz did not seek to argue that the children travel to Zimbabwe to settle there with the appellant. The focus, instead, in this case was upon the potential undue harshness which would occur if the children remained living in the United Kingdom and the appellant was separated from them by deportation to Zimbabwe. The comments of the Tribunal in *MK* at [47] are helpful:

> "The final question is whether it would be unduly harsh for either child to remain in the United Kingdom without the Appellant. This is a different question from that considered in [46] above. We have identified a range of facts and considerations bearing on this issue. Once again, an evaluative judgment on the part of the Tribunal is required. In performing this exercise we view everything in the round. The Appellant plays an important role in the lives of both children concerned particularly that of his step son. He is the provider of stability, security, emotional support and financial support to both children. We have rehearsed above the various benefits and advantages which he brings to the lives of both children, coupled with his personal attributes and merits. We remind ourselves of section 55 of the 2009 Act. We acknowledge the distinction between harsh and unduly harsh. We remind ourselves again of the potency of the main public interest in play, emphasised most recently by the Court of Appeal in SSHD v MA (Somalia) [2015] EWCA Civ 1192. The outcome of our careful reflections in this difficult and borderline case and in an exercise bereft of bright luminous lines is as follows. Balancing all of the facts and factors, our conclusion is that the severity of the impact on the children's lives of the Appellant's abrupt exit with all that would flow therefrom would be of such proportions as to be unduly harsh."

9. Each case must be decided on its own facts. In order to succeed, the appellant must show that the effect upon the children of his deportation to Zimbabwe and his separation from them is not merely harsh but unduly harsh. The evidence indicates that the appellant, the children and GB live as a family unit, the harmonious operation of which depends upon the presence of the appellant as primary day-to-day carer of the children. The rupture of those strong bonds would, in my opinion and on the basis of the evidence before the Tribunal, result in an effect upon the children which may properly be described as unduly harsh. For that reason I find the appellant's case falls within the exception identified in Section 117C(5). Further, in the light of the children's nationality, their length of residence in the United Kingdom and the settled and secure nature of their current home arrangements, I find that it would be unduly harsh to expect the

children to live in Zimbabwe. If the appellant left and GB remained with the children she would have to replace him as primary carer which though possible would not be in their best interests.

10. It is vitally important not to lose sight in these deliberations of the public interest concerned with the deportation of this appellant. The more serious the appellant's offending, the greater the public interest concerned with his removal. The appellant's offence was serious, essentially involving theft but there is no indication of violence having been used or of any sexual/drug-related element in the crime. Furthermore, the crime took place a number of years ago following which the appellant appears to achieved some rehabilitation. Having regard to all the evidence, and whilst in no way seeking to diminish the importance of the public interest concerned with his removal, I find, referring again to the reasons which I have set out above, that the appellant's appeal should be allowed.

Notice of Decision

11. The appellant's appeal against the decision of the Secretary of State to refuse to revoke the deportation order is allowed.

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

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

Signed Date 1 January 2016

Upper Tribunal Judge Clive Lane