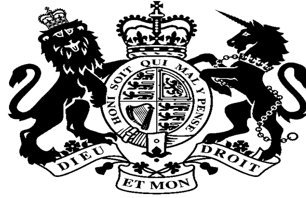

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01874/2014**

THE IMMIGRATION ACTS

Heard at Birmingham
On 7 July 2016

Sent to parties on:
On 19 July 2016

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MRS FIONA RWAMBIWA

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mrs Aboni (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appellant's appeal to the Upper Tribunal, brought with the permission of a judge of the First-tier Tribunal, against a decision of the First-tier Tribunal (Judge Andrew hereinafter "the Judge") made after a hearing of 19 June 2015 to dismiss her appeal against the respondent's decision of 25 September 2014 refusing to revoke a deportation order.

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2. By way of background, the appellant is a female citizen of Zimbabwe and was born on 26 July 1983. She has a total of three children, one of whom is resident in Zimbabwe and is a national of that country and two of whom are resident in the United Kingdom and who are British citizens.

3. The appellant entered the United Kingdom, for the first time, on 20 June 2002. She was granted leave to enter as a student and subsequently obtained further periods of leave on the same basis. However, she returned to Zimbabwe in July 2005 and on 14 April 2006 (as I understand it while still in Zimbabwe) she gave birth to her first child. She returned to the UK and, indeed, in February 2007 sought further leave to remain as a student but that was refused on 27 July 2007. Her leave expired and she was served with notice as an overstayer in October 2007. It would seem that, at some point after that, she left the UK. Records show that on 12 November 2008 she approached the British Embassy in South Africa seeking a Visit Visa under a false identity and that that application was refused. Nevertheless, she managed to find a way of securing entry into the UK and it is recorded that on 8 April 2009, whilst in the UK, she claimed asylum. It seems it was at that stage that her previous deception came to light and this led to her facing criminal charges and on 3 August 2009 she was convicted, at Croydon Crown Court, of seeking leave to enter the United Kingdom by deception and received a sentence of six months imprisonment along with a recommendation that she be deported. On 8 June 2010 her asylum claim was refused and an appeal against that decision was dismissed on 26 July 2010. Shortly after that permission to appeal to the Upper Tribunal was refused and she became "appeal rights exhausted". Some considerable time after that, in fact on 12 June 2012, she was served with a decision to make a deportation order in respect of her. She appealed that decision but the appeal was dismissed on 26 November 2012. In the meantime, however, she had entered into a relationship with one Philip Jack Baker, a British citizen, (it was accepted by the Judge that the two had been in a relationship since 2011) and on 18 January 2013 she gave birth to her second child who is, as mentioned earlier, a British citizen. On 26 March 2013 she and Mr Baker married each other and on 15 September 2014 the respondent signed a deportation order in respect of her. On 25 September 2014 the respondent refused to revoke the deportation order (a decision which has ultimately led to this appeal) and on 30 October 2014 she gave birth to her third child, also a British citizen. It is my understanding that Mr Baker is the father of her two youngest children.

4. The appellant's appeal was, as indicated, heard on 19 June 2015. In a determination promulgated on 29 June 2015 that appeal was dismissed. The Judge considered, inter alia, the content of paragraph 390 and 390A of the Immigration Rules and sections 117A-D of the Nationality, Immigration and Asylum Act 2002. In so doing the Judge did resolve some matters in the appellant's favour. She concluded that the offending could not be said to have caused "serious harm" despite its nature, and that the appellant was not a "persistent offender" (there was only one offence). This meant that paragraph 398(c) of the Immigration Rules had no application with the consequence that "the regime set out in paragraphs 398, 399 and 399A" did not apply. Further, the Judge accepted that the appellant did not fall within the definition of "foreign criminal" under section 117D(2). Nevertheless, in light of the public interest in the deportation of persons who have committed crimes, the Judge concluded that her deportation would be proportionate such that revocation of the deportation order was not the proper course.

5. In considering whether the order should be revoked it was necessary for the Judge to consider the family situation and the position of the British citizen partner and the two British citizen children. In addressing those sorts of considerations the Judge said this:

" 38. Nevertheless I have considered the position of the two children, in accordance with section 55, both of whom are British citizens. The children are both very young and, as such, will not have formed any life outside their family. It is clear they cannot be removed from the United Kingdom and to this extent it is the choice of the appellant and her husband as to whether the children should accompany her to Zimbabwe if she is deported, stay with Mr Baker in the United Kingdom, or in the alternative Mr Baker and the children can, of course, accompany the appellant to Zimbabwe.

39. I had no submissions before me that Mr Baker and the children would be unable to do so, other than he was not qualified and would not be able to obtain employment and that the children would be better off remaining in the United Kingdom where they would be educated, in the case of [the second born child], and in the case of [the third born child] he would be able to have medical treatment for his eczema. However, I have no evidence before me to show that Mr Baker would not be able to find some sort of employment to provide for his family in Zimbabwe. I note that he has been employed in the same company in the United Kingdom since he left school at 16 and thus he must be a loyal and respected worker.

40. So far as 'the second born child's' education is concerned I note the evidence that Mr Baker pays for the appellant's son's schooling in Zimbabwe and thus it is apparent there are educational facilities there. I have no medical evidence before me to show that [the third born child's] eczema would be made any worst by his going to live in Zimbabwe and I have nothing before me to show that he would be unable to receive treatment there either.

41. I accept the children would be separated from their extended family in the United Kingdom. However, they also have family in Zimbabwe, including a stepbrother. The children are, of course, British citizens and there would be nothing to prevent them from coming to the United Kingdom for visits.

42. If the choice was made for the appellant to return alone to Zimbabwe I accept that this would mean separation from her two children here. However, she has already chosen to be separated from her child in Zimbabwe, who it would appear, she has not seen for a considerable period of time. In addition the appellant does have other family members in Zimbabwe, in particular her parents. Although the evidence was vague it is apparent that the appellant's father has some kind of employment in that country and lives in his own house. The appellant would not be without support in that country.

43. Although Mr Baker works at present there is nothing to prevent him from caring for the children. If he wished to continue working then it may be that other members of his family would step in to assist. I do not know and it would be wrong of me to speculate. If not then he may have to seek professional assistance with the children. Mr Baker could take the children to visit the appellant in Zimbabwe and in the meantime, although I accept it is no real substitute, contact with the children could continue by letter, cards, and electronic means. Once again I bear in mind that this is all the appellant's child in Zimbabwe has.

44. It would, of course, mean separation from Mr Baker. However, both should have known full well when their relationship was developing that a time may well come when separation would be forced upon them because of the appellant's lack of status and also because she was already subject to a recommendation for deportation. They took the risk, such as it was, to allow their relationship to develop and to have the children knowing that the appellant should, in fact, have left the United Kingdom and because she had not might well be removed at any time."

6. The appellant, who was at that stage represented, sought permission to appeal to the Upper Tribunal. The grounds contended that the Judge had erred in failing to consider the best interests of the two British citizen children, in failing to properly consider, from the perspective of

proportionality in the context of Article 8 of the European Convention on Human Rights (ECHR) what the position might be with respect to the three possible options it had identified at paragraph 38 of the determination and in (so far as I understand this ground at all) failing to consider the question of revocation first before considering "other human rights issues" and finally in failing to attach weight to delay on the part of the Secretary of State in seeking to implement deportation.

7. The Judge who granted permission said this:

> "On 3 August 2009 at Croydon Crown Court, A was sentenced to six months imprisonment for seeking leave to enter the UK by deception; a recommendation was also made for deportation. She was served with a decision to make a deportation order on 12 June 2012 and the deportation order was signed on 15 September 2014. The Judge found that A's offence cannot be said to have caused 'serious harm', that she is not a persistent offender, that this is her only conviction and that she does not come within the definition of a 'foreign criminal' in para 117D(2). Moreover, it is arguable that the Judge has not adequately considered whether it would be reasonable to expect A's British husband and children to join A in Zimbabwe and/or whether such a course of action would be in the best interests of the two British children or be proportionate in all the circumstances of the case."

8. The matter was then listed for a hearing before the Upper Tribunal (before me) so that consideration could be given to the question of whether the Judge had, in fact, erred in law and, if so, what ought to flow from that. The appellant, by this time, had lost her legal representation (she explained to me at the hearing that this was because public funding was no longer available to her) so she represented herself though she did have some assistance, by way of support, from a McKenzie friend. Mrs Aboni represented the respondent. The appellant had lodged some further documentation for the purposes of the hearing and copies were provided to Mrs Aboni but it is clear that that documentation was relevant to potential remaking of the decision if I were to set the Judge's decision aside rather than with respect to the error of law issue itself. Directions had indicated that the hearing was to be confined to a consideration of the error of law issue unless any necessary remaking could be undertaken without the need for any further oral evidence.

9. Mrs Aboni submitted that the determination of the Judge was full and complete. She argued that the Judge had properly considered the best interests of the children and had correctly treated such as a primary consideration (albeit that it is not <u>the</u> primary consideration and nor is it a paramount consideration) even though she had not actually said she was doing so. She had properly considered the various available options for the family and had factored all of that into her overall consideration of the case. There was no error of law. The appellant argued that the Judge had not considered the best interests of her two youngest children in any meaningful way. Her third born child has some breathing difficulties and would not be able to cope in Zimbabwe. Her second born child is in a nursery and it is not fair to make her cease that education.

10. As I indicated to the parties, I have decided that the decision of the Judge did involve an error of law and that, in consequence, the decision should be set aside. I set out my reasoning below.

11. It was, of course, as the Judge fully appreciated, necessary to consider the situation of the two British citizen children. In the event of the deportation order not being revoked the options appeared to be that the children would remain in the UK with their father and thus be separated from their mother, that they would go with the appellant to Zimbabwe with Mr Baker remaining in the UK such that they would be separated from their father or the whole family would relocate to Zimbabwe together such that they would lose much of the enjoyment or privilege (if it is to be

thought of in that way) of being British citizens. So, whatever option was to be chosen, it was clear that there would be some impact upon those two children.

12. There is no doubt that the interests of the two British children had to represent a primary consideration for the Judge. That is not to say, as Mrs Aboni correctly points out, that those interests would be the only primary consideration or that they would be a paramount consideration. Further, it is right to say that, in general terms, citizenship is not to be regarded as a trump card with respect to Article 8 considerations or as to a consideration as to whether it would be proper to revoke a deportation order. However, the Judge did not say in her determination that she was regarding the interests of those two children as being a primary consideration. Mrs Aboni argued that that did not matter because it was clear she had done so from what she had said at paragraph 38 of her determination to the effect that she had:

> "Considered the position of the two children, in accordance with section 55"

and that that amounted to the same thing. Clearly that was a reference to section 55 of the Borders, Citizenship and Immigration Act 2009 but the mere passing reference to that section does not demonstrate that the Judge appreciated she had to treat the interests of the British children as a primary consideration or that she actually and consciously did so. Whilst the matter might be finally balanced I have decided I cannot simply assume or infer from the various comments the Judge made about the children that she did treat their interests as a primary consideration. Further, although the Judge did clearly note the three possible options for the family, which I have identified above, she did not embark on any consideration or make any findings as to the extent to which any of those options would impact adversely upon the interests of the children other than what was said quite briefly at paragraphs 40 and 41 regarding what the position might be if the whole family were to relocate to Zimbabwe. What was said even in that context though does not, in my judgment, amount to a proper evaluation of what the children would be giving up in terms of rights as British citizens. As to the other options there is no proper consideration as to the impact of separation from one or other of the parents.

13. I do not mean the above to sound like criticism of the Judge who, in many ways, can be said to have undertaken quite a full evaluation of a number of relevant matters. However, I do think that there was not quite the sufficiently holistic examination and consideration as to the interests of the children as was needed.

14. My having informed the parties of my decision there was some further discussion as to whether it would be appropriate to remit the appeal to the First-tier Tribunal or whether the decision should be remade on a future date when oral evidence could be given, by the Upper Tribunal. Both Mrs Aboni and the appellant expressed a preference for remittal. It does seem to me that there will be a need for some further oral evidence concerning the interests of the children regarding the various possible scenarios and it may be there would be a need for some further evidence concerning the implications for the appellant's husband if he was to go to Zimbabwe or was to be separated either from one or other of the children or from his wife. It also seems to me, in general terms, that the taking of oral evidence and the subsequent finding of facts is a task best suited to the First-tier Tribunal given its status as an expert fact-finding body. Accordingly, and with the agreement of the parties, I have decided to remit. There are set out below, some directions for the new First-tier Tribunal which I hope will assist it in its task.

Directions for the First-tier Tribunal concerning the remaking of the Decision

A. This case is remitted to the First-tier Tribunal for the remaking of the decision. Nothing shall be preserved from the determination. The appeal shall be heard by a Judge other than Judge Andrew.

B. The new First-tier Tribunal will be required to undertake a full rehearing of the appeal and make fresh factual findings and reach fresh conclusions with respect to all matters raised by the appeal.

C. There are no interpreter requirements. If, however, the appellant does consider, for whatever reason, that the services of a professional interpreter will be required at the next hearing she should notify the First-tier Tribunal in Birmingham, as to that requirement, forthwith.

D. The new hearing shall, if practicable, take place at the Birmingham Hearing Centre (Sheldon Court) with a time estimate of three hours.

E. Either party may file further documents in addition to those which were before the Upper Tribunal at the hearing of 7 July 2016. However, any further documentation is to be served in the form of an indexed and paginated bundle. A copy of any such bundle should be lodged with the First-tier Tribunal at Birmingham and a copy should be sent, at the same time, to the other party. Any such bundles must be filed with the First-tier Tribunal and served upon the other party in sufficient time to be received at least five working days prior to the date which will be fixed for the hearing.

Decision

The decision of the First-tier Tribunal involved an error of law and is set aside.

The case is remitted to the First-tier Tribunal for a complete rehearing.

No anonymity direction is made (none was sought and none had been made by the First-tier Tribunal).

Signed **Date 19 July 2016**
Upper Tribunal Judge Hemingway

TO THE RESONDENT
FEE AWARD

As no fee is payable there can be no fee award.

Signed **Date 19 July 2016**
Upper Tribunal Judge Hemingway