Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/04448/2015**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 16 February 2016	**On 4 March 2016**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

TWC
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: No Representative

REMITTAL AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Knowles) allowing TWC's appeal against a decision of the Secretary of State taken on 23 January 2015 to deport TWC to Zimbabwe on the basis that his deportation is conducive to the public good under s.3(5)(a) of the Immigration Act 1971.

3. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Background

4. The appellant is a citizen of Zimbabwe who was born on 11 March 1976. He arrived in the UK on 5 May 1999 with leave to enter as a visitor valid until 3 November 1999. Thereafter, the appellant's leave expired. On 14 February 2002, the appellant made a claim for asylum which was refused on 12 November 2003. On 10 May 2002, he made an application for indefinite leave to remain as a spouse but that was also refused on 10 June 2002. Thereafter, the appellant voluntarily left the UK either in 2005 or in April 2006 – the precise date is not clear from the papers.

5. On 6 April 2006, the appellant applied for entry clearance as a spouse but this was refused on 4 May 2006. His appeal against that decision was allowed on 23 February 2007 and in July 2007 he entered the UK with leave as a spouse valid until 13 July 2009.

6. On 9 July 2009 the appellant submitted a further application for indefinite leave to remain as a spouse but that application was refused on 16 March 2010. Again he appealed and his appeal was allowed on 29 July 2010. On 15 September 2010 he was granted indefinite leave to remain.

7. Whilst the appellant has been in the UK he has been convicted of a number of criminal offences between September 2001 and September 2014. These offences include a number of motor vehicle offences resulting in community punishment orders, obtaining a false passport for which he was sentenced to 8 months imprisonment, obtaining services by deception for which he received a community punishment order and shoplifting for which he received a conditional discharge.

8. On 6 November 2013, he was convicted at the Cardiff Crown Court of two offences of possession with intent to supply Class B drugs. He was sentenced to 8 months imprisonment which was suspended for 2 years.

9. On 13 October 2014, having been committed for sentence, at the Cardiff Crown Court the appellant was sentenced for two offences of common assault involving domestic violence against his partner and he was sentenced to 2 months imprisonment. In addition, as he was in breach of the suspended sentence order, that sentence was activated and a consecutive term of 6 months imprisonment imposed. The total period of imprisonment was, therefore, 8 months.

10. Following these offences, on 4 December 2014 the appellant was notified of his liability to be deported on the basis that his deportation was

conducive to the public good. On 5 January 2015, submissions were made on behalf of the appellant as to why he should not be deported. In a decision dated 23 January 2015, the Secretary of State rejected the appellant's claim not to be deported on the basis that it would breach Art 8 of the ECHR. On that same date, the respondent made the decision to deport the appellant which is the decision the subject of this appeal.

The Appellant's Claim

11. The appellant's claim not to be deported relied upon Article 8 of the ECHR. He relied both upon his family life in the UK and also his private life. As regards the former, he relies upon his relationship with his partner whom he met in 1999 and they were married in October 2011. They have two children, a daughter R who was born on 22 January 2011 and a son, F who was born on 19 July 2007. The appellant's wife also has a son who is 22 years of age. All the appellant's family are British citizens. As regards his 'private life', the appellant relied upon the time he has spent in the UK and the time he has spent outside Zimbabwe.

12. The Secretary of State rejected the appellant's claim not to be deported under the Rules, namely para 399(a) and (b) (based upon his relationships with his partner and children) and para 399A (based on his private life). Accepting the relationships were genuine, the Secretary of State concluded that it would not be 'unduly harsh' for the appellant's family to move with him to Zimbabwe or, if they so chose, to remain in the UK without him. Further, the Secretary of State concluded that there were no 'very significant obstacles' to his reintegration into Zimbabwe, despite his period of absence, given his age and links with Zimbabwe. Finally, the Secretary of State concluded that there were no 'very compelling circumstances' to outweigh the public interest so as to prevent his deportation.

The Judge's Decision

13. Judge Knowles considered a substantial body of evidence including oral evidence from the appellant, his wife and two family friends.

14. The appellant again relied upon his private and family life and Article 8 of the ECHR. There was evidence before the Judge that the appellant's daughter R was autistic and that she had a long-term history of self-harm and that separation from her father would have a negative effect upon her.

15. In approaching the appellant's appeal, the Judge stated at paragraph 48:

> "It is an appeal on human rights grounds (Article 8) and not an appeal against a decision to make a deportation order under the Immigration Rules."

16. Applying that, Judge Knowles made no reference to the relevant and applicable Immigration Rules, namely paras 398-399A. Instead, the Judge considered the appellant's claim directly under Article 8 applying the 5-

stage process in Razgar [2004] UKHL 27. The Judge accepted that the appellant had established private life in the UK and also family life with his wife and children. The Judge accepted that the appellant's deportation would interfere with that private life and as a consequence Article 8.1 was engaged.

17. Turning to Article 8.2, the Judge accepted that the respondent's decision was for a legitimate aim and in accordance with the law. The Judge then turned to consider whether the appellant's deportation would be proportionate. In doing so, the judge considered the factors set out in s.117B and 117C of the Nationality, Immigration and Asylum Act 2002.

18. The Judge concluded that the appellant's claim could not succeed on the basis of his private life. However, having regard to his family life, in particular the impact upon his daughter R, the Judge concluded that the appellant's deportation would be "unduly harsh" and, as a consequence, a disproportionate interference with his family life.

The Respondent's Appeal

19. The respondent appealed to the Upper Tribunal on two grounds which Mr Richards adopted in his submissions.

20. First, it was submitted that the Judge had erred in law by failing to consider the appellant's Article 8 claim under the Immigration Rules and through the "lens" of those Rules. Reliance was placed upon the Court of Appeal's decision in AJ (Angola) v SSHD [2014] EWCA Civ 1636 in particular at [39]-[40].

21. Secondly, it was submitted that the Judge had been wrong to approach the appellant's Article 8 claim on the basis that the Presenting Officer had conceded that the appellant's family could not go with him to Zimbabwe. It was submitted that the Presenting Officer had simply stated that there was "no expectation" that they would do so in the sense that they would not be required to do so. As a consequence, the Judge had failed to consider whether it would be unduly harsh for the appellant's family to relocate to Zimbabwe.

Discussion

22. There is no doubt that the appellant's case fell to be considered under the relevant Immigration Rules, in particular paragraph 398(c) which provides as follows:

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> ….(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in 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, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraph 399 and 399A."

23. Paragraph 399 deals with the 'family life' aspects of a claim that deportation would breach Art 8. So far as relevant, para 399 provides as follows:

> "This paragraph applies where paragraph 399(b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 who is in the UK, and
>
> (i) the child is a British citizen; … and …
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person to be deported; or
>
> (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK, and
>
> (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
>
> (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
>
> (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported."

24. Paragraph 399A deals with the private life aspects of a claim that deportation would breach Art 8. It provides as follows:

> "399A. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has been lawfully resident in the UK for most of his life; and
>
> (b) he is socially and culturally integrated in the UK; and
>
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

25. In a series of decisions beginning with MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal has consistently held that paragraphs 398-399A of the Rules provide a comprehensive code for determining whether the deportation of a foreign criminal is contrary to Article 8 of the ECHR.

26. In AJ (Angola), Sales LJ (with whom Sullivan LJ and Newey J agreed) set out the position at [39]-[40] as follows:

> "39. The fact that the new rules are intended to operate as a comprehensive code is significant, because it means that an official or a tribunal should seek to take account of any Convention rights of an appellant through the lens of the new rules themselves, rather than looking to apply Convention rights for themselves in a free-standing way outside the new rules. The feature of the new rules makes the decision–making framework in relation to foreign criminals different from that in relation to other parts of the Immigration Rules, where the Secretary of State retains a general discretion outside the rules in exercise of which, in some circumstances, decisions may need to be made in order to accommodate certain claims for leave to remain on the basis of Convention rights, as explained in *Huang* and *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).
>
> 40. The requirement that claims by appellants who are foreign criminals for leave to remain, based on the Convention rights of themselves or their partners, relations or children, should be assessed under the new rules and through their lens is important, as the Court of Appeal in *MF (Nigeria*) has emphasised. It seeks to ensure uniformity of approach between different officials, tribunals and courts who have to assess such claims, in the interests of fair and equal treatment of different appellants with similar cases on the facts. In this regard, the new rules also serve as a safeguard in relation to rights of appellants under Article 14 to equal treatment within the scope of Article 8. The requirement of assessment through the lens of the new rules also seeks to ensure that decisions are made in a way that is properly informed by the considerable weight to be given to the public interest in deportation of foreign criminals, as declared by Parliament in the 2007 Act and reinforced by the Secretary of State (as the relevant Minister with responsibility for operation of the immigration system), so as to promote public confidence in that system in this sensitive area."

27. That approach has been approved and applied in a number of subsequent decisions of the Court of Appeal including CG (Jamaica) v SSHD [2015] EWCA Civ 194; SSHD v AQ (Nigeria) and Others [2015] EWCA Civ 250; SSHD v Boyd [2015] EWCA Civ 1190 and SSHD v ZP (India) [2015] EWCA Civ 1197.

28. It follows from this line of jurisprudence that a judge will err in law, in determining whether an individual's deportation would breach Article 8, if he or she does not follows and remain within the rubric of paras 398-399A (for a very recent example, see SSHD v Suckoo [2016] EWCA Civ 39).

29. There is no doubt that the appellant falls within para 398(c). The Secretary of State considered that his offending "caused serious harm" but, equally, given his offending history there is no doubt that he could also be characterised as "a persistent offender who shows a particular disregard for the law".

30. As a consequence, the Judge was first required to consider whether the appellant succeeded under para 399 or 399A. If he did, then, his appeal fell to be allowed. If he did not, then the Judge was required to consider whether there were "very compelling circumstances" over and above those in paras 399 and 399A sufficient to outweigh the public interest in

his deportation. As the Upper Tribunal recently noted in Greenwood (No. 2) (para 398 considered) [2015] UKUT 629 (IAC) as set out in the head note:

> "The exercise of considering whether there are very compelling circumstances over and above those described in paragraphs 399 and 399A of the Immigration Rules must, logically, be preceded by an assessment that the appellant's case does not fall within paragraph 399 or 399A."

31. If the appellant could not succeed under either para 399 or 339A then the Judge was required to consider whether there were "very compelling circumstances" – and the following words are important – "over and above" those set out in paras 399 and 399A. In that context, the Judge would need to "have regard" to the statutory factors set out in ss.117B and 117C of the 2002 Act (see Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 415 (IAC)).

32. In this appeal, the Judge failed to consider the application of para 399 or 399A. That, in itself, amounts to an error of law. Instead, he engaged in a "free-wheeling" proportionality assessment taking into account the factors set out in s.117B and 117C of the 2002 Act. He did not, as para 398 mandates, first consider para 399 and 399A and only then (if the appellant could not succeed under one or both of those rules) consider whether there were "very compelling circumstances" over and above those set out in paras 399 and 399A so as to outweigh the public interest in deportation. The Judge's failure then to apply the rubric of para 398 was also a clear error of law.

33. I do not see any escape from the structural error in approaching Article 8 that the Judge fell into in his determination. He has clearly engaged in the very process which the Court of Appeal has repeatedly held to be improper namely a "free-wheeling" assessment of the proportionality of the appellant's deportation without reference to the relevant rules and, if they are not met, a consideration of whether there are "very compelling circumstances" beyond matters set out in the Rules to outweigh the strong public interest in the appellant's deportation as a foreign criminal falling within para 398 of the Rules.

34. In my judgment, it cannot be said that the Judge has in effect considered the application of the Rules (by considering s.117C(5) of the 2002 Act) such that any error is immaterial.

35. First, whilst there are similarities between paragraph 399(a) and s.117C(5) where an individual relies upon a "genuine and subsisting" relationship with either a qualifying partner or with a qualifying child, the wording is not identical.

36. Under s.117C the issue is whether the effect of deportation: "on the partner or child would be unduly harsh". That, at least in relation to the effect upon the appellant's daughter R, was at the core of the Judge's decision in this appeal.

37. Paragraph 399(a), in respect of a claim based upon a parental relationship with a child who is a British citizen in the UK requires that (a) it would be unduly harsh for the child to live in the country to which the individual is to be deported and (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported.

38. Likewise, in respect of a claim based upon a relationship with a partner who is a British citizen the requirement under paragraph 399(b) is that (a) the relationship be formed when the individual was in the UK lawfully and their immigration status was not precarious; (b) that it would be unduly harsh for the partner to live in the country to which the person is deported because of "compelling circumstances" over and above those set out in EX.2. of Appendix FM, namely "insurmountable obstacles" as there set out and (c) that it would be unduly harsh for the partner to remain in the UK without the person who is to be deported.

39. Judge Knowles did not, in fact, base his decision on the effect upon the appellant's partner of his deportation but rather on the effect upon R which he characterised as "unduly harsh". At paragraph 61 he made this clear when he said:

> "The appeal succeeds, therefore, for what I say about [R]."

40. It is not clear to me precisely what Judge Knowles would have decided had he sought to apply, as he was required, the terms of para 399 and, in particular, para 399(a) in relation to the impact upon the appellant's children especially upon R.

41. Secondly, the Judge made no effective finding in relation to whether it would be unduly harsh for the appellant's children to live in Zimbabwe as a family. This links into the Secretary of State's second ground of appeal to this Tribunal. In my judgment, the Judge was wrong to conclude that the Presenting Officer had conceded that it would be "unduly harsh" for them to do so. The respondent had expressly taken the opposite position in the refusal letter. Seen in context, the Presenting Officer was not conceding that it would be "unduly harsh" for the appellant's family to live in Zimbabwe but rather was acknowledging that it was not "expected" that they would leave the UK. That was, in my judgment, recognition of the practical effect, and reality of, the appellant's deportation that his family would remain in the UK: but *not* that they could not go to Zimbabwe because it would be "unduly harsh". That might have been a finding properly open to the Judge had he made it but it was not a finding he was bound to make and, as I have said, he made no effective finding on that basing himself wrongly on a misunderstanding of the Presenting Officer's position at the hearing.

42. There remains, however, the systemic error in failing to follow the rubric of para 398(c) in that the Judge failed to consider whether there were "very compelling circumstances" to justify outweighing the public interest in deportation "having regard" to the s.117C factors (see s.117A(2)).

43. I should add, although it formed no part of the Secretary of State's grounds of appeal, that the Judge's approach to the phrase "unduly harsh" in paragraph 59 is premised upon "a balancing exercise" weighing the degree of harm against the seriousness of the offence. That approach was found to be imthe wrong approach proper by the Upper Tribunal in MAB (Para 399; "Unduly Harsh") [2015] UKUT 435 (IAC) but was accepted in a subsequent Upper Tribunal as the correct approach in KMO (Section 117- Unduly Harsh) [2015] UKUT 543 (IAC). It is an issue which, I understand, the Court of Appeal is due to resolve in the near future. I do not conclude that the Judge erred in law by adopting the approach, in effect, set out in KMO as opposed to that in MAB. But, it is noteworthy, that the Judge gave no clear indication of the level of "harshness" necessary to engage the phrase deployed in para 399(a) and s.117C(5) of the 2002 Act which, speaking with one voice the Upper Tribunal decisions agree, requires consequences that are "severe" or "bleak" such that they are "inordinately" or "excessively" harsh for the individual (see MAB at [56]-[66] and KMO at [26]). As I consider that the Judge's decision cannot stand for the reasons I have already given, I need say no more about this issue other than to note that it will be a matter for the First-tier Tribunal remaking the decision in due course.

Decision and Disposal

44. For the above reasons, the First-tier Tribunal's decision to allow the appellant's appeal under Article 8 involved the making of an error of law. That decision cannot stand and is set aside.

45. Mr Richards indicated to me that, although the appellant was not represented at this hearing, he had spoken to the appellant's solicitors who had indicated that they would represent the appellant at any rehearing and further Mr Richards indicated that there was significant new evidence both from the respondent and appellant which the Tribunal would need to consider in remaking the decision. He indicated, without further elaboration, that the appellant's circumstances had significantly changed since the initial appeal before the First-tier Tribunal. He invited me to remit the appeal to the First-tier Tribunal to be heard *de novo*.

46. In the light of those submissions, and having regard to para 7.2 of the Senior President's Practice Statement, I considered it appropriate to remit the appeal to the First-tier Tribunal for a *de novo* rehearing before a Judge other than Judge Knowles. None of the Judge's findings is preserved.

Signed

A Grubb
Judge of the Upper Tribunal

Date: