Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09646/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 April 2019	**On 30 April 2019**

Before

UPPER TRIBUNAL JUDGE WARR

Between

GH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss A Muzira of Counsel, instructed by Thompson & Co Solicitors
For the Respondent: Mr L Tarlow

DECISION AND REASONS

1. The appellant is a citizen of Zimbabwe born on 27 February 1985. He appeals the decision of a First-tier Judge following a hearing on 5 November 2018 against the decision of the Secretary of State to refuse to revoke a deportation order made against him.

2. The appellant claimed to have arrived in this country in December 2002. He was granted leave to remain as a student from June 2003 until April 2004 but was then served with a notice to an illegal entrant on 5 August 2005 as he had remained in breach of his period of leave.

3. The appellant's subsequent immigration history is summarised by the First-tier Judge as follows:

> "2. On 21 June 2011 he was convicted of two offences at the Crown Court at Harrow and sentenced to 6 months imprisonment and four months imprisonment to be served consecutively in respect of breach of a suspended sentence. On 26 August 2011 he claimed asylum but this claim was refused. A subsequent appeal to the Tribunal was dismissed and he became "appeal rights exhausted" on 2 February 2012.
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> 3. On 31 July 2012 at the Crown Court at St Albans he was convicted of an offence of fraud by means of obtaining personal bank and credit card information from individuals and sentenced to 3 years imprisonment for the more serious offence and 12 months to be served concurrently in respect of another offence. He was served with a notice concerning his liability to deportation as a foreign criminal on 7 July 2012 and responded. On 10 January 2013 he claimed protection but on 28 November 2013 the deportation order was signed. An appeal was lodged against that decision and dismissed, as was permission to appeal the decision at the First Tier and he became "appeal rights exhausted" in respect of this decision on 23 July 2014."

4. The judge heard oral evidence from the appellant and from his partner and helpfully made the following agreed factual findings:

> "• the Appellant is a 33-year-old national of Zimbabwe
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> • he came to this country in December 2002, about two months shy of his 18th birthday
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> • he was granted further leave to remain but he has remained here since that leave expired in 2004 and has done so unlawfully
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> • he has twice claimed protection but his claims have been refused by the Respondent and subsequent appeals to the Tribunal have been dismissed
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> • he now has a partner in this country and between them they have two young children, who are aged just 4 and approaching 2 years of age
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> • he has a genuine and subsisting relationship with his partner
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> • he has a genuine parental relationship with the two young children, living with them and taking an active role in their upbringing
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> • the partner and the children are all British citizens
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> • he has served terms of imprisonment for at least four separate offences
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> • most pertinently in late summer 2012 he was sentenced to a term of three years imprisonment for an offence of fraud
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> • he has been made the subject of a deportation order by the Respondent

- his younger son, C 1, has no health issues
- the older boy, C 2, has difficulties, particularly in connection with speech and possibly behaviour, but there is no complete diagnosis of such problems
- his partner is a well-educated woman who has previously held responsible and presumably remunerative employment as a project manager and she is actively seeking work
- her parents live in Hayes, Middlesex which is in an adjacent borough to where the Appellant and his partner live, although about 9 miles distant
- the Appellant has not reoffended for a period of about 6 years, although part of that period would have been in detention or as a serving prisoner."

5. The judge further notes that it was undisputed that the appellant was a foreign criminal liable to automatic deportation under the provisions of Section 32 of the UK Borders Act 2007. He had been sentenced to a term of imprisonment of twelve months or more. The judge referred to Section 117C of the Nationality, Immigration and Asylum Act 2002. He concentrated on the second exception as the first was irrelevant. The issue was whether the appellant "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 [the appellant's] deportation on the partner or child would be unduly harsh." It is undisputed that both the children are qualifying children.

6. While the judge accepted that the appellant had not been convicted of any offence since 2012 the judge noted that the appellant did not appear to have been at liberty until early 2014 and comments as follows in paragraph 21 of his determination:

> "21. The sentencing judge remarked upon "a record for offences of deception and dishonesty which goes back a number of years" and he then refers in his remarks to convictions from 2006 onwards. The judge also referred to the second offence of dishonesty (which attracted the term of 3 years imprisonment) as being one "of extreme seriousness". He later stated "as I have indicated, these are extremely serious matters". Notwithstanding a guilty plea, the judge imposed a term of imprisonment of three years. It follows that the original tariff for the offence is likely to have been between 4 and 5 years. With a considerable record for offences of dishonesty over a number of years, I find that the period since 2014 without conviction is not a significant factor."

7. The judge accepted that the appellant was in a relationship with his partner and that they had been living together in early March 2015.

8. The judge concludes his determination as follows:

> "24. I should start with the children because their best interests are important and the primary consideration, within the constraints of the legislation. I have read the report from the social worker, Ms Austin, carefully. I accept that she has seven years post qualification experience as a social worker. In my judgement, however, her report goes a little further than it would in

respect of any family of this nature, apart from the particular issues that may affect C 2. Miss Austin explains why she considers there will be difficulties for the family (and C 2 in particular) if they all removed to Zimbabwe and refers particularly to the question of whether he would receive adequate professional support as a young boy diagnosed as being on the Autistic Spectrum.

25. I accept that the best interests of these children would almost definitely be served if they were able to continue to exercise their rights as young British citizens and live in this country with both of their parents. Removal to Zimbabwe would have to be a decision for the family as a whole. Both the adults were born in Zimbabwe and the Appellant lived there until he was almost 18. It is apparent that they have some relations there, although I accept they may be of little immediate practical help. Ms M is an educated person with a history of employment in responsible positions. It is by no means an impossible choice for them to make but that has to be their choice.

26. I consider that it would be harsh to suggest these three British citizen family members move with the Appellant to Zimbabwe, particular perhaps having regard to the personal difficulties that C 2 has. I do not consider it to be unduly harsh with two loving parents, both of them in their early 30s and with education behind them.

27. Even if I had considered that it might be unduly harsh for any or all of them to relocate to Zimbabwe, I do not consider it is unduly harsh for them to live in this country without the Appellant. This is not because of the nature of the criminality of the Appellant. In the case of children, the sins of the father should not be visited upon them in such an assessment as I have to make. This appears to have been reaffirmed in the recent decision of the Supreme Court in KO (Nigeria) & Others v SSHD [2018] UKSC 53.

28. In that decision, however, Lord Carnwath (giving the judgement of the Court) approved (paragraph 27 of his judgement) the comments of McCloskey J, then President of the Tribunal, in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) on what comprised "unduly harsh" circumstances:

> *"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."*

29. Sedley LJ in AD Lee v Secretary of State for the Home Department [2011] EWCA Civ 248 stated in relation to the appeal before the Court:

> *"The tragic consequence is that this family, short-lived as it has been, would be broken up for ever, because of the Appellant's bad behaviour. That is what deportation does".*

30. I mention this short comment from Sedley LJ not of itself to justify a conclusion concerning undue harshness but to reflect that the normal consequence of deportation will often be severance of a young family.

I accept that the Appellant has played a diligent role as father and the two children will have bonded with him and that one of them has some special needs, although the extent of his needs going forward have yet to be identified. In my judgement, however, their mother is a competent person. She has family around her in the United Kingdom and a good record of work. On the evidence before me C 2 is in mainstream schooling but with the prospect of the need of quite a lot of support there and C 1 is in good health.

31. I do not for a moment suggest that life will be easy for this young family if the British citizens remain in the United Kingdom without the Appellant. The consequences of his removal may be harsh. I do not consider, however, in the circumstances which I have outlined that they are unduly harsh. The issues in C 2's young life do add to his needs and are relevant but in my judgement, given the circumstances I have set out concerning him and the other factors I have identified, they do not elevate the appeal to the standard of undue harshness.

32. There are additional considerations which I am required to take into account and these are set out in section 117B of the 2002 Act. The maintenance of effective immigration controls is in the public interest and the Appellant has been in this country for 13 years without leave and thus has circumvented those controls. He does speak good English. I have no evidence of this own finances but he may be capable of being maintained by his partner. In respect of her, however, theirs is a relationship established wholly whilst Appellant has been in this country unlawfully and for that reason alone I should have called it a little weight. The provisions of section 117B(6) do not apply in respect of the children, because their father is liable to deportation.

33. On the basis of these findings, considerations and conclusions, the Appellant cannot succeed in respect of his private or family life having regard to the Immigration Rules or the 2002 Act. There is little to be said otherwise. The interests of the State are very strong in his removal. He may not have offended since his release in 2014 but he has a very poor criminal record before then of repeated offences of dishonesty and the sentencing judge, with all the facts before him, had no doubt that the index offence was a very serious one. Public expectation is that foreign nationals who commit serious (and particularly where repeated) offences should be removed. The decision taken by the Respondent, initially to deport and now to refuse a human rights claim was not unlawful."

9. There was an application for permission to appeal. Permission to appeal was refused by the First-tier Tribunal. The application was renewed on the footing that the judge had erred in failing to have regard to the independent social worker's report and the background evidence about conditions in Zimbabwe. Permission to appeal was granted by the Upper Tribunal on 13 March 2019. A response was filed on 5 April 2019. On the same day a consolidated bundle was filed by the appellant. Counsel relied on the grounds of appeal and submitted that the judge's approach had been flawed. He had failed to engage with the background evidence and the social worker's report. It was acknowledged that he had referred to the bundle provided in paragraphs 8 to 10 of the decision. It was clear from the background material that

there would be food shortages and other problems. Had the judge taken these matters into account he would find that the impact on the children would have been unduly harsh. The judge had accepted the social worker's report had been provided by an experienced social worker but had failed to take into account her evidence. It was clear that C 2 needed parental support. Counsel referred to the care plan that had been prepared for the appellant. Counsel submitted that there was a need for continuity of care.

10. The appellant was responsible for putting the children to bed every night and stayed with the children at home and in his absence the children would be alone. There would be difficulties for C 2 to be understood in Zimbabwe and he would be isolated. There were no speech therapists in Zimbabwe. He would not be able to maintain communication through Skype. The judge had materially erred in law in not finding that it would be unduly harsh, rather than simply harsh.

11. Mr Tarlow relied on the response that had been filed and submitted that the arguments were simply a disagreement with the findings of fact made by the First-tier Tribunal. The judge had correctly referred to the best interests of the children and to relevant authorities such as **KO (Nigeria)**. He had referred to the decision of Lord Justice Sedley in **Lee v Secretary of State**. Deportation had tragic consequences. He was entitled to conclude that the effect would be harsh but not unduly harsh.

12. In response Counsel submitted that the grounds went further than disagreeing with the judge's decision. There was no dispute that he had applied the correct legal framework and had not given it the correct scrupulous analysis. The decision was materially flawed in law.

13. At the conclusion of the submissions I reserved my decision. In order to succeed in this appeal it is necessary for the appellant to establish an error of law. In this case it is accepted that the judge directed himself appropriately on legal issues but complaint is made about his treatment of the material in front of him.

14. At the hearing the judge was presented with what he describes as extensive bundles and Counsel refers in particular to paragraphs 8 to 10 of the decision which it is perhaps helpful to reproduce here:

> "8. In addition to his notice and grounds of appeal, the Appellant is also provided a bundle of documents, through his solicitors. This may be seen under cover of a letter dated 30 October 2018. It extends to 381 pages in five separate sections. The last 241 pages are copies of reported decisions relied upon by the Appellant and background evidence concerning Zimbabwe. The first 140 pages contain subjective evidence. Because this bundle is helpfully both indexed and paginated, I see no need to set out the details of its contents either.
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> 9. On 2 November 2018, solicitors for the Appellant again wrote to the Tribunal. With this letter they included a skeleton argument relied upon in

submissions on his behalf and several items of additional background evidence concerning Zimbabwe.

10. At the hearing the Tribunal was served with two witness statements and an independent social worker's report and other documents. These may now be seen under cover of another letter dated 2 November 2018. Neither Ms Dogra nor I had seen these additional documents and I adjourned for about 35 minutes to enable each of us to consider them. At the end of that period I was assured by Ms Dogra that the time given had been sufficient."

The judge states in paragraph 13 that he had taken full account of the documents provided by both parties. The judge makes express reference to the report of the social worker in paragraph 24 of his decision. The judge also makes express reference to the particular difficulties faced by C 2. The judge observes in paragraph 25 that while it would be in the best interests of the children to remain in the UK with both their parents "removal to Zimbabwe would have to be a decision for the family as a whole." It was a matter of their choice. The options are explored by the judge in paragraphs 26 and 27 of the decision which I have reproduced above. The judge accepted that the appellant had played "a diligent role as father" and that the two children would be bonded with him, although the extent of C 2's needs "going forward have yet to be identified". The judge acknowledged the difficulties that the family would face if left in the United Kingdom without the appellant. The judge clearly had in mind C 2's circumstances and his needs. He did not arguably err in law in concluding that such circumstances did not "elevate the appeal to the standard of undue harshness". As the judge says, the interests of the state were very strong in the appellant's removal.

15. The essential question in this case is whether the judge had regard to the material before him. The determination makes it quite clear that the judge did have regard to the documents. In particular it is apparent that the judge adjourned the proceedings to enable the additional documents to be looked at as he says in paragraph 10 of the decision. Further, in paragraph 13 the judge states, and I have no reason to doubt, that he had taken full account of the documents provided. He refers in paragraph 15 to the agreed facts which included C 2's difficulties and the fact that there was no complete diagnosis of his problems.

16. I do not find that the judge erred in concluding that while it would be harsh for the family to move with the appellant to Zimbabwe, it would not be unduly harsh for any or all of them to relocate there. The judge's decision is satisfactorily reasoned and while it is concise it is none the worse for that. I agree with the submissions made by Mr Tarlow and do not find that the judge neglected to consider any relevant matter or failed to take into account the evidence to which he makes reference.

17. For the reasons I have given I find the decision raises no material error of law.

Appeal dismissed. The decision of the First-tier Judge stands.

Anonymity Direction

18. An anonymity order has been made in this case which I direct shall continue.

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 their 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.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 23 April 2019

G Warr, Judge of the Upper Tribunal