Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10572/2017**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 14 February 2019	**On 6 March 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS
ANONYMITY DIRECTION MADE

Respondent

Representation:
For the appellant: Mrs Pettersen, Senior Home Office Presenting Officer
For the respondent: Ms Pickering, Counsel instructed by Parker Rhodes Hickmott Solicitors

DECISION AND REASONS

1. The appellant ('the SSHD') successfully appealed against a decision of the First-tier Tribunal ('FTT') dated 17 April 2018 in which it allowed the appeal of the respondent ('MS') against a decision to refuse his human rights claim dated 7 September 2017. I found an error of law in the FTT decision in a decision sent on 20 November 2018 and gave directions for MS to provide all evidence relied upon in a comprehensive bundle and for the SSHD to provide a position statement in response. In this decision I remake MS's appeal.

Background

2. MS is a citizen of Zimbabwe. He first arrived in the United Kingdom ('UK') in 2006 as a working holiday maker. He returned to Zimbabwe and entered the UK again as a student in 2008 with leave until 2010. On 16 November 2009 MS was sentenced to 12 months imprisonment, having pleaded guilty to being concerned in the proceeds of crime by acquiring criminal property. Deportation proceedings followed, and he unsuccessfully appealed against a deportation order on asylum and human rights grounds. He became appeals rights exhausted on 31 August 2010.

3. On 19 February 2014, MS was sentenced to 12 months imprisonment suspended for 12 months, on pleas of guilty to counts of theft and making false representations for gain. In a decision dated 7 September 2017 the SSHD refused his human rights claim to remain in the UK.

4. As the FTT observed in its decision, by the time of its hearing on 11 April 2018, MS's circumstances were very different to the circumstances as at the last FTT hearing in 2010. The FTT considered that MS and his partner, B, provided credible evidence and accepted it entirely. The bare factual background in support of MS's claim to remain in the UK on the basis of Article 8 as summarised below is not disputed.

   (i) MS has a daughter, T, born in January 2014. T is a British citizen. His relationship with T's mother, A, ended in October 2014, with T remaining living with her mother (T's grandmother) in Greater Manchester.

   (ii) A was opposed to contact and MS issued family proceedings. In an order dated 20 September 2017 a final order was made giving MS a gradual timetable of contact with T. This began as indirect contact, then contact at a contact centre. By the time of the April 2018 FTT hearing MS had contact with T twice a week.

   (iii) That contact has increased and developed. A now fully supports contact. Indeed MS assists A in taking T to school and collecting her from school 3-4 times a week. There is also extensive weekend and school holidays contact.

   (iv) MS began a relationship with a new partner, B, in 2015 and her son J, with whom he lives in Doncaster.

5. The above represents the basic factual background only. The more detailed facts are set out below. Although the basic factual background is not in dispute, there are aspects of the evidence adduced on behalf of MS and by MS which are not necessarily accepted. I address this evidence in more detail below.

Hearing

6. At the beginning of the hearing before me, both parties accepted that as a result of MS's 12 months sentence of imprisonment in 2009, he is a "foreign criminal" and he must meet the requirements in the Immigration Rules for 'medium level'

offenders, who have been sentenced to at least 12 months but under four years imprisonment. Mrs Pettersen accepted that all the requirements of 399(a) and (b) of the Immigration Rules are met save in one respect each. The SSHD did not accept that it would be unduly harsh for T or J (for the purposes of 399(a)) or B (for the purposes of 399(b)) to remain in the UK without MS. Ms Pickering made it clear that the updated evidence and her submissions focus entirely upon the relationship between MS and T. That includes a report dated 20 December 2018 prepared by Mr Stott, an independent social worker ('ISW'). Both representatives agreed that the factual background must be considered by reference to the principled approach in sections 117A to C of the Nationality, Immigration and Asylum Act 2002, as explained in KO Nigeria v SSHD [2018] UKSC 53.

7. Unfortunately MS's solicitors only submitted a woefully inadequate 51-page bundle. This did not include a witness statement to explain the relevance of the evidence contained in that bundle. In addition, it was only on the morning of the hearing that Ms Pickering appeared to discover from MS that an ISW report had been prepared but not served. Arrangements were made to obtain this. The hearing was then adjourned to enable Ms Pickering to take an updated statement from MS and then for myself and Mrs Pettersen to read the further evidence. I enquired whether MS was the only witness and was told by Ms Pickering that he was.

8. MS relied upon the witness statement he prepared that morning. Mrs Pettersen cross-examined him, and I asked questions in clarification.

9. Mrs Pettersen invited me to find that the evidence, including the views of the ISW was simply insufficient to reach the high threshold required by the unduly harsh test.

10. Ms Pickering submitted that there are particularly compelling features in this case, which supported a finding that the high threshold set out in KO was met vis a vis T. In this case T would be deprived of more than just mere contact with her father.

11. At this point and for the first time during the course of the hearing, Ms Pickering referred to an updated witness statement from A. Mrs Pettersen and I did not have a copy of this statement and the matter once again had to be adjourned for copies to be made.

12. MS's solicitors failed to comply with directions to provide all evidence relied upon in one paginated bundle by 20 December 2018. This has caused inconvenience and delay to both parties and to the Tribunal. The SSHD completely ignored the direction to provide a position statement. There was no excuse or explanation from either party. This is increasingly common and regrettable. The Upper Tribunal faces a difficult task when remaking appeals of such significance to both parties and the public interest. Bespoke directions have a purpose and should be respected. I indicated at the hearing that I expected that the managing partner of Parker Rhodes Hickmott solicitors, will be able to offer a written explanation for

the failings in this case and to provide the necessary assurances that the failings exposed in this case will not be repeated, within seven days of the hearing.

13. The hearing resumed after lunch and after I had an opportunity to consider A's witness statement dated 30 January 2019 and supporting letters written in December 2018 from T's grandmother, A, B and MS's friend of over 15 years. In these letters the authors each describe a very close and loving relationship between MS and T. Mrs Pettersen did not wish to ask MS any questions arising from this and Ms Pickering resumed her submissions.

14. Ms Pickering relied upon three particular features to support her submission that the impact of MS's deportation on T would be unduly harsh. Her submissions can be summarised as follows

    (i) Speech therapy – MS has led the way in this and is the key contact in the facilitation of speech therapy. The speech therapy has brought them even closer. The successful completion of the speech therapy is contingent on TS's involvement.

    (ii) ISW report – This has been prepared by an independent and experienced social worker and as such considerable weight should be attached to his views on the impact of separation upon T, particularly bearing in mind T is a child that does not cope well with change (2.15 and 1.16), she has a particularly close relationship with her father (2.16 and 2.19), and T has already had to cope with two significant changes in her life: her move to primary school from nursery and her mother commencing full-time University. Her father's role is all the more important given these changes.

    (iii) Nature and extent of contact – letter from school dated 17 December 2018 echoes the ISW report that MS is a very supportive influence in T's life.

15. In response to my request for clarification, Ms Pickering accepted that her submissions deliberately focussed solely upon T and this reflected MS's case: although he has a relationship with B and J, in the light of the FTT's findings and the evidence available, his sole focus for the purposes of this hearing is upon the submission that the effect of his deportation on T would be unduly harsh (on the basis as everyone accepts, she shall remain in the UK with her mother).

16. I reserved my decision, which I now provide with reasons.

Legal framework

17. Paragraphs 399 and 399A are reflected within section 117C of the 2002 Act. This states:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where –

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(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) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

18. It is to be noted however that the question whether "the effect" of C's deportation would be "unduly harsh" is broken down into two parts in paragraph 399, so that it applies where:

"(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 who is to be deported."

19. In the instant case it is only the second limb of 399 set out at (b) above, as reflected in section 117C(5) that requires consideration, as far as the children are concerned.

20. The correct approach to paragraphs 399(b) and section 117C of the 2002 Act has recently been considered by the Supreme Court in KO. In the only judgment, Lord Carnwath said this at [23]:

> "One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence."

21. Lord Carnwath also approved of the following guidance relevant to the term "unduly harsh" at [27]:

> "Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015]

UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:

> "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."

22. It is therefore now clear from KO that the assessment of "unduly harsh" does not require a balancing of the relative level of severity of the parent's offence. The assessment solely requires a careful consideration of whether the elevated threshold is reached from the point of view of ether the child or partner. If that threshold is met then deportation would be a breach of Article 8 of the ECHR and no further analysis is required.

23. In BL (Jamaica) v SSHD [2016] EWCA Civ 357 the Court of Appeal concluded that the Tribunal did not undertake a sufficient inquiry into whether there was any other family member who could be able to care for his children and emphasised the need to consider the extent to which social services would be able to assist in reducing the adverse impact of the children losing their father to deportation at [53].

> "What the UT did in the course of their detailed and no doubt conscientious decision was to accept KS's son's evidence that KS could not manage her money and drank more that was good for her and made the inference that without BL the family would descend into poverty and require the support of social services. As against this, however, KS had looked after the family while BL was in prison or immigration detention and the UT had not made any findings that the family had then descended into poverty or required the support of social services, or that if that were to happen, there would not be adequate support services for these children. The UT were entitled to work on the basis that the social services would perform their duties under the law and, contrary to the submission of Mr Rudd, the UT was not bound in these circumstances to regard the role of the social services as irrelevant. The Secretary of State had made the point in the decision letter that there was no satisfactory evidence that KS had not coped with the children's upbringing in BL's absence and so the UT were aware that this point was in issue. KS's son's evidence was an insufficient evidential basis for the UT's conclusion on this point. His evidence was in reality uncorroborated and self-serving hearsay on this issue."

Findings

24. In reaching my findings, I have applied the preserved factual findings made by the FTT, but updated these findings in the light of the further evidence available to me.

MS's relationship with T

25. I entirely accept that MS has a close relationship with T that has strengthened over time. MS lived with A and T in Manchester when T was a baby during the course of 2014. A financially supported all three of them and MS was T's primary carer at the time. The relationship between MS and A broke down toward the end of 2014 and the beginning of 2015. MS did not see T for the first half of 2015 when he was on remand. MS lived with A and T briefly on his release but has been living with B in Doncaster since August 2015. There then followed a lengthy period of some two years when A prevented MS from seeing T. That changed from September 2017 when a contact order was drawn up in family proceedings. Contact commenced gradually at first but after a few months MS was seeing T for full days on the weekends and during the school holidays. Mr Stott has described in his report, and I accept, that since T started school in September 2017, MS's involvement in T's care has increased further. He now shares the school run with A and is very involved in taking her to extra-curricular activities such as swimming.

26. I do not doubt that MS and T love each other dearly. Since returning to her life MS has been a doting father. He has loved her and cared for her when her mother has been working and studying. He has played an important role in school life at T's school – see the letter from T's class teacher dated 17 December 2019 and 2.21-2.24 of the ISW report to this effect. In addition, MS has been instrumental in initiating and taking part in speech therapy sessions with T. He has made financial sacrifices by paying for her activities and treats for her birthday. T's best interests clearly support the continued presence of MS in her life in the UK. She would be deprived of regular contact with the only father-figure in her life. He plays an important role in her life even though they do not live together on a full-time basis. He makes a valuable contribution to her happiness and well-being. T's best interests are to be treated as a primary consideration.

27. I do not accept that T's speech therapy sessions would not be able to continue without MS. I appreciate that MS has been significant in conducting the speech therapy sessions. However, the work he has done can and will be replicated by A. I note that they "co-parent" and according to the ISW at 2.13 share the transportation duties to school (albeit MS probably does a little more of the school run). I entirely accept that A and T's grandmother are in full-time study and employment respectively. I acknowledge that it will be difficult and inconvenient to make adjustments to their schedules in order to take T to school and collect her after school on a daily basis and in order to ensure that she attends her speech therapy, as well as extra-curricular activities. I do not accept that without MS in the UK it will be impossible for T to be well looked after and taken to every appointment and activity that is necessary for her well-being. I am confident that by working together and flexibly the responsible adults in T's life shall be able to ensure that she attends the requisite speech therapy appointments. A has explained in her statement that her University course is full-time and ends at 5pm each day. Given that the speech therapy is likely to be limited in time, it is

difficult to see why A cannot leave a little early to attend the remaining sessions. I note that according to the ISW A has been able to undertake some of the transportation to and from school. There is also the potential for T's grandmother to take annual leave or adjust her working hours in order to assist in this area on a temporary basis. I was told that she lives in Manchester city-centre and is therefore well-placed to assist with school arrangements. I note that Mr Stott has recorded in his report that prior to MS's increased involvement, A was assisted by her mother, sister or a friend. I accept the evidence from A that the current arrangement is better for T as she receives consistent care from her parents. However it remains the case that A has the support of others to the extent that she finds this necessary to care for T.

28. T resides with A and has a close relationship with her. A has coped with very difficult times in the past when she did not have the benefit of MS's assistance and has demonstrated sustained resilience. Although A's siblings reside in southern England, MS explained that they assist A and T's grandmother in funding private education for T in Manchester. A obviously has a close relationship with her family members and she can turn to them for emotional and financial support. Practical support may be more difficult because the siblings live far away, and the grandmother has a full-time job as a cleaner. MS indicated during oral evidence that this means that the grandmother will only be able to see T and is only able to assist on a Sunday. I do not accept this evidence. A full-time job does not necessarily mean that a person cannot assist with school drop offs and pick-ups. Families with two working parents manage. In addition, I do not accept that from time to time T could not be collected by a childminder, friend or if necessary stay in after school club. The family clearly are able to find the resources to pay for private education. It may be more convenient and cheaper for MS to collect T, but it is not necessary. However, no doubt T would much prefer for the current arrangements with her father to continue and I bear this in mind when factoring in her best interests.

29. Ms Pickering emphasised that there was evidence that T does not cope well with change and would not be able to cope with the momentous change of losing her father. Most children cope better with established routines. T is no different. Ms Pickering reminded me that T has had to cope very recently with two significant changes: she has moved from nursery to primary school and her mother has started full-time education. I also note that A has described in her letter that T has found it difficult to cope with family members moving to Australia and there are "frequent occasions" when T gets emotional and distressed. These are normal events that children have to cope with. T has settled into her new school and is coping well with her changed routine. She is likely to find the loss of her father challenging and distressing. As her class teacher put it this is likely to be felt as a "devastating blow" for a child aged 5. A explained that T would be "devastated" and would not be able to understand why MS is no longer around for her. However T will have the love and support of her mother, her mother's family members, her school friends and teachers during this time. I have no doubt that

although it will be initially difficult for T, with the love and support around her, she will be able to cope.

30. I have carefully considered Mr Stott's concerns and analysis. I have no doubt that his views are genuinely held. I accept that MS has in the last few months in particular been making a major contribution to T's care and upbringing and is genuinely committed to a long-term relationship. I accept that T is a central part of MS's life and he is a central part of her life. I accept that in the short-term T would be very upset about the loss of her father and this may have a negative effect on her school and home lives. However, when all the evidence is considered in the round, I have concluded that Mr Stott has overstated the position when he concludes that T would not be able, with time and support, to make sense of and cope with the sudden loss of her father. Mr Stott's conclusion that there is a high risk of T suffering trauma is not particularised or explained. No timeframe is provided. The nature and the extent of the trauma is unexplained. T does not live with her father on a full-time basis and will have her mother and her mother's circle of support from family and friends. The impact of MS's deportation will be harsh upon T and she will suffer emotionally. This will clearly be contrary to her best interests but with time and support it cannot be properly said that the effect on T will be unduly harsh.

31. At [35] of KO, Lord Carnwath made it clear that when making its alternative assessment regarding the impact of KO's deportation, the judge applied "*too low a standard*" and treated unduly harsh as no more than "*undesirable*". The impact on the children in KO's case might be said to be more serious than in the present case. KO lived with his children, their relationship could not be described as short-lived and the main household income would be lost by his deportation. None of these apply here. MS has not lived with T since she was a baby. Contact resumed in 2017, albeit since then it has been increasingly intensely positive for T. T's mother coped without MS's support after they separated to such an extent that she opposed contact for an extended period of time. Although he provides some financial support with the assistance of B, MS is not the main household income source. It is A's family members who pay her private school fees.

32. MS's deportation will adversely affect T's best interests, but I do not accept that it would involve a degree of harshness going beyond what would necessarily be involved for any child face with deportation of a parent. The nature and extent of the speech therapy required by T comes nowhere close to constituting particularly compelling or compassionate circumstances. T is a happy, settled member of her class, who works hard and has a positive attitude to learning. Although she may find it difficult to work alongside someone else, I have no doubt that with the support she has, she will also work hard at her speech therapy, even in the absence of her father. The end of the patently close relationship between MS and T will undoubtedly be very sad. I do not however accept that the effect of MS's deportation will be unduly harsh on T.

MS's relationship with B

33. There is no dispute that MS and B have a genuine and subsisting relationship. However, it quite properly has not been argued on MS's behalf that the effect of his deportation on B (or J) would be unduly harsh.

Private life

34. Ms Pickering did not rely upon MS's private life, but I address it for the sake of completeness. The consideration of 399A and section 117C(4) involves three elements. MS is unable to meet both the first and third of these.

    (i) MS has not had any leave since he became appeals rights exhausted in 2010. In any event, MS is 35 and cannot be said to have been lawfully present in the UK for most of his life.

    (ii) MS is probably social and culturally integrated into the UK.

    (iii) Having undertaken a broad evaluative judgement (see SSHD v Kamara [2016] EWCA Civ 813), I do not accept that MS has established that there would be serious obstacles to re-integrating into Zimbabwe. MS has been resident in the UK for a lengthy period, but this began when he was an adult. He has demonstrated resilience and a sustained ability to adapt to his new environment. Those traits and that experience can be applied to his advantage in Zimbabwe. I bear in mind that there have been widely publicised recent human rights abuses toward those perceived to support protests against the government in Zimbabwe. I have not been taken to any evidence that MS will be perceived adversely given the current climate in Zimbabwe. There is no suggestion that he cannot easily make friends. There is no reason why, initially at least, he should not be supported by his partner and friends in the UK.

35. In order for the exception in paragraph 399A or section 117C(4) to apply, MS would need to establish all three elements. In my judgement he only meets the second requirement. The exception therefore does not apply to him.

Very compelling circumstances

36. MS has been unable to meet any of the statutory exceptions. Ms Pickering did not make any submissions to this effect but for the sake of completeness I have gone on to consider all matters in the round and whether viewed cumulatively, these are sufficient to give rise to very compelling circumstances – see Hesham Ali v SSHD [2016] UKSC 60 and KE (Nigeria) v SSHD [2017] EWCA Civ 1382.

37. MS's offending is at the lower end of the scale. His risk of reoffending is probably low. There are also protective factors to assist in the maintenance of the low risk of offending. He has demonstrated resilience in rebuilding his life. He is clearly committed to and has a close relationship with T as well as his newer family with B and J. These are indicators that demonstrate MS's clear commitment to living a good and law-abiding life in the UK. I have already described MS's very close

family relationship with T, B and J and aspects of his private life. MS speaks English very well and between his partner and his own earning potential is likely to be financially independent. These matters relevant to section 117B of the 2002 Act therefore militate in his favour. Even when all relevant matters are viewed cumulatively, they do not amount to very compelling circumstances. Whilst B and the children will find MS's deportation difficult and it will be contrary to their best interests, it's effect does not meet the threshold required to be unduly harsh. They will cope with time and support. MS will find life in Zimbabwe initially difficult but has the requisite skills and resilience to integrate. The public interest in his deportation may have lessened over time but it still remains.

Decision

38. I remake the decision by dismissing MS's appeal.

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.

Signed: *UTJ Plimmer*

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
15 February 2019