Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15230/2018

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 17th September 2019	**On 26th September 2019**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LEON [S]
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr. D Mills, Home Office Presenting Officer
For the Respondent: Mr. H Rashid, Counsel instructed by Tann Law Solicitors

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Leon [S]. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr [S] as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Zimbabwe. He arrived in the United Kingdom on 1 November 2000 and claimed asylum. His claim was refused in November 2000 and an appeal against that decision was dismissed in March 2001. In 2003 the appellant married Ms [MN] in a traditional ceremony and there are two children of that relationship. [DN] was born on 12 November 2004 and is now 14 years old. [DL] was born on 1 September 2010 and is now 9 years old.

3. The appellant's partner and their eldest child, DN, were granted indefinite leave to remain in the UK on 14 October 2010, exceptionally, outside the immigration rules. The appellant and their youngest son, DL, were granted indefinite leave to remain in the UK on 22 July 2014, again exceptionally, outside the immigration rules.

4. The appellant has been convicted of a number of offences, both prior to, and since the grant of indefinite leave to remain. In January 2016, the appellant was convicted at South Derbyshire Magistrates Court of using a motor vehicle while uninsured, driving whilst disqualified, taking a motor vehicle without consent, and driving a motor vehicle with excess alcohol. He received a sentence of 18 weeks imprisonment and was disqualified from driving for five years. Following that conviction, the respondent sent a letter to the appellant dated 4 March 2016, informing the appellant that should he come to the adverse attention of the respondent in the future, the respondent would be obliged to consider whether he should be deported. Notwithstanding that letter, the appellant reoffended, and on 23 October 2017 he was convicted at South Derbyshire Magistrates Court of failing to provide a specimen for analysis, failing to stop when required by a constable, using a vehicle while uninsured, and driving whilst disqualified. He was sentenced to 20 weeks imprisonment and again disqualified from driving for five years.

5. On 1 November 2017, the respondent served a deportation decision upon the appellant. As a result of the appellant's repeated offending, the respondent considered his deportation to be conducive to the public good and the appellant

was advised that he is liable to deportation by virtue of s3(5)(a) of the Immigration Act 1971. The respondent decided to make a deportation order against the appellant under s5(1) of the Immigration Act 1971.

6. The appellant made representations to the respondent under cover of a letter dated 7 December 2017, setting out reasons why the appellant should not be deported from the UK. For the reasons set out in a decision dated 6 July 2018, the respondent refused the human rights claim made by the appellant, giving rise to a right of appeal before the First-tier Tribunal ("FtT"). The appellant's appeal was allowed for the reasons set out in the decision of FtT Judge Gurung-Thapa ("the judge") promulgated on 29 January 2019.

The decision of First-tier Tribunal Judge Gurung-Thapa

7. The judge summarises the appellant's criminal history at paragraph [6] of her decision:

> "… Between 13/11/2002 and 23/10/2017 the appellant received 9 convictions for 29 offences the majority of which appeared to be driving a motor vehicle with excess alcohol, driving whilst disqualified and using a vehicle while uninsured. He was sentenced to imprisonment as follows, on 10/06/2004 a total of 10 weeks, on 23/03/2005 for 4 months, on 04/11/2005 2 months but this was wholly suspended for 2 years, on 19/09/2008 for 5 months, on 24/06/2013 for 18 weeks, on 06/01/2016 for 18 weeks, and on 23/10/2017 for 20 weeks."

8. The judge summarises the appellant's case at paragraphs [8] to [16] of the decision. The judge's findings and conclusions are set out at paragraphs [30] to [75] of the decision. The judge referred to paragraphs 398, and 399 of the immigration rules, and s117C of the Nationality, Immigration and Asylum Act 2002. The judge found that the appellant is a persistent offender. At paragraphs [35] and [36] she stated:

> "35. The respondent asserts that the appellant's deportation is conducive to the public good and in the public interest because he is a persistent offender. In his submission, Mr Hogg relied on the case of SC (Zimbabwe) v SSHD [2018] EWCA Civ 929 and submitted that in view of the appellant's convictions he is a persistent offender.

> 36. It would be fair to say that there was no challenge to this assertion by Mrs Alfred in her submission. I am also aware of the case of Chege ("is a persistent offender") [2016] UKUT 00187 and I have noted the guidance. In view of the appellant's nine convictions for 29 offences, I find that he is a persistent offender."

9. At paragraph [44] of the decision, the judge notes that the respondent accepts that the appellant has a genuine and subsisting parental relationship with his two children who are under the age of 18, are in the UK, and are settled here. She states:

> "… The issues to be considered are whether it would be unduly harsh for the children to live in the country to which the appellant is to be deported and in this case Zimbabwe and whether it would be unduly harsh for them to remain in the UK without the appellant pursuant to paragraph 399(a)(ii)(a) and (b)."

10. At paragraphs [47] and [48] of the decision the judge refers to the decisions of the Supreme Court in KO (Nigeria) [2018] UKSC 53 and the Upper Tribunal in MK (Sierra Leone) [2015] UKUT 223 and MAB (USA) [2015] UKUT 435, noting that "unduly harsh" does not equate with uncomfortable, inconvenient, undesirable or merely difficult. She notes that it poses an elevated threshold and that "harsh" in this context, denotes something severe, or bleak. She notes that it is the antithesis of pleasant or comfortable, and the addition of the adverb "unduly" raises an already elevated standard, still higher.

11. At paragraphs [52] to [54], the judge refers to the evidence regarding DL, who is autistic, and refers to the Education Health and Care Plan drawn up in September 2016, and a letter from DL's school that confirms that the appellant takes DL to school and collects him most days, attends parents evenings and any other meetings associated with his schooling. The judge accepted, at [55], that the appellant plays an active role in his children's upbringing. The judge accepted, at [56], that DN is now aged 14, and is attending secondary school which is a critical juncture of his life. At paragraphs [57] and [58], the judge refers to the evidence given by the appellant's wife. Her evidence, as set out at paragraph [58] was:

> "… The children were born here and it would be difficult for them to relocate to Zimbabwe. It would be difficult for her to support her children on her own and when the appellant was in prison she struggled even with the support of her friends. It would be difficult to carry on with her job because it requires her to move from one town to another. She stated that it would be impossible for their relationship to continue if the appellant is deported to Zimbabwe. She has spoken to her older son and this worries him a lot."

12. The judge accepted, at [59], that the appellant and his wife enjoy a genuine and subsisting relationship. The judge accepted her evidence that she will not be able to manage to look after the two children and pursue her career and accepted that she has no one else to turn to, who could provide the support that the appellant provides. At paragraphs [60] to [64], the judge states:

> "60. I take into account the fact that both the children were born in the UK and are now aged 14 and 8 respectively and although they have visited Zimbabwe on two occasion *sic*, this would not be the same as having to live permanently in Zimbabwe. Considering the level of their integration and support structures in place in the UK and the interruption to their current education, I find that living in Zimbabwe would have a serious impact on the children.
>
> 61. I also accept that it would be unduly harsh for the children to remain in the UK without the appellant as I find that it is in the best interests of the children to be cared for and to be raised by both parents.
>
> 62. I am satisfied that their mother would have significant difficulties in managing and looking after the children and hold the family together without the help she receives from the appellant.
>
> 66. Applying the approach set out in MM (Uganda) and KO (Nigeria), I find that in the circumstances of the appellant and his family, his deportation would be unduly harsh for the children and his partner and that the requirements of paragraph 399(a) and (b) are met."

13. The judge found, at [65], that the appellant cannot meet the requirements of paragraph 399A of the immigration rules. At paragraphs [66] to [75] of the decision, the judge considered the human rights claim outside the immigration rules. The judge found, at [69], that the appellant's deportation would be an interference with his right to respect for his family life and that of his family. She found it is in accordance with the law and is for the legitimate aim of preventing disorder and crime within Article 8(2). The judge referred to Part 5A of the Nationality, Immigration and Asylum Act 2002. She noted that s117C

requires her to consider whether the effect of deportation on a partner or child would be unduly harsh and that this provision raises factors virtually identical to those considered under paragraph 399 of the immigration rules. At paragraphs [73] to [75], the judge concluded as follows:

> "73. I take into consideration what I have already said in relation to the children's best interests and to the reasons why I find that it would be unduly harsh to expect them to go to Zimbabwe or to remain in this country without the appellant. I also take into consideration the effect the appellant's removal would have on the partner and the consequential impact on the life of the family in this country.
>
> 74. As the court said in Beoku-Betts (at [4]) the totality of family life is greater than the sum of its individual parts. I find that modern means of communication are an inadequate substitute for the real bonds that unite family members.
>
> 75. I accept that that *(sic)* the very strong interests of the children in having a reliable and stable parent present in their lives outweigh the public interest in deporting the appellant."

The appeal before me

14. The respondent claims that the Judge erred, at [64], in determining the appeal applying the approach set out in MM (Uganda) and KO (Nigeria). They are competing decisions and following the decision of the Supreme Court in KO (Nigeria), the judge should not have applied the approach set out in MM (Uganda). The judge correctly identifies that the Supreme Court in KO (Nigeria) approved the approach in MK (Sierra Leone) and MAB (USA) as to the "unduly harsh" threshold, but the judge gives inadequate reasons for finding that the threshold is met. The judge fails to identify adequate reasons for the conclusion that it would be unduly harsh for the children to remain in the UK without the appellant. The respondent submits that although it may be in the children's best interests to be raised by both parents, that is insufficient to establish that it would be unduly harsh for the children to remain in the UK without the appellant. Although the deportation of the appellant would impact upon the ability of the appellant's wife to look after the children, the reasons given by the judge fall significantly short of establishing undue hardship.

15. Permission to appeal was granted by First-tier Tribunal Judge McClure on 11th March 2019. The matter comes before me to consider whether the decision of First-tier Tribunal Judge Gurung Thapa is tainted by a material error of law, and if so, to remake the decision.

16. Mr Mills submits that it is now clear from the authorities that there is a high threshold to be met by a foreign national criminal who contends that it would be unduly harsh for a child to live in the country to which the person is to be deported, or to remain in the UK without the person who is to be deported. Mr Mills submits that the only reasons identified by the judge for concluding that the relevant threshold is met, are those set out at paragraphs [61] and [62] of the decision. The fact that it is the best interests of the children to be cared for, and to be raised by both parents, or that the appellant's partner would have significant difficulties in managing and looking after the children without the help she receives from the appellant, are matters that amount to inconvenience or mere difficulty and are the sort of difficulty faced by any parent when the other parent is removed, but are insufficient to satisfy the elevated test of undue hardship.

17. In reply, Mr Rashid submits there is no material error of law in the decision of the judge. He submits the judge refers at paragraph [48] to the elevated threshold and in reaching her decision, the judge had regard to a number of factors. At paragraph [53], the judge noted that DL has a diagnosis of ASD and referred to the evidence of DL needing a greater than identified level of support at school. At paragraph [54], the judge considered the part played by the appellant in dropping the children off, and picking the children up, from school. The judge was satisfied that the appellant plays an active role in the children's upbringing. The judge noted that DN is now at a critical juncture of his life, and it would be difficult for the appellant's partner to support the children on her own. She had struggled when the appellant was in prison even with the support of her friends. The judge accepted the evidence of the appellant's partner that she will not be able to manage to look after the two

children and pursue her career, and she has no one else to turn to, who could provide the support that the appellant provides. Mr Rashid submits that when the decision is read as a whole, the judge identifies a number of reasons which taken together, were sufficient to enable the Judge to conclude that it would be unduly harsh for the children to remain in the UK without the appellant.

18. At the conclusion of the hearing before me, I informed the parties that in my judgement, the decision of First-tier Tribunal Judge Gurung-Thapa is infected by a material error of law, and the decision is set aside. I informed the parties that in my judgement the judge failed to adequately consider and set out her reasons for reaching the conclusion that it would be unduly harsh for the children to live in the UK without the appellant. Furthermore, the judge failed to adequately consider and set out her reasons for reaching the conclusion that the requirements of paragraph 399(b) are met. I said that I would provide full written reasons for my decision in due course. That I now do.

Discussion

19. I accept, as Mr Rashid submits, that the judge correctly refers at paragraphs [47] and [48] of the decision, to the decision of the Supreme Court in KO (Nigeria) and the test to be applied when considering whether it would be unduly harsh for the children to live in Zimbabwe, or to remain in the UK without their father. The issue for me is whether the judge has properly applied that test in reaching her decision, and whether the judge has given adequate reasons for the conclusions that she reached.

20. At paragraph [64] of the decision, the judge states that applying the approach set out in MM (Uganda) and KO (Nigeria), she finds that in the circumstances of the appellant and his family, the appellant's deportation would be unduly harsh for the children and his partner and that the requirements of paragraph 399(a) and (b) are met. It is not clear what approach the judge adopted. If the "unduly harsh" test applied by the judge was that set out by the Court of Appeal in MM (Uganda), with reference not only to the children's best interests

but also to the overall circumstances, including the wider public interest considerations for the deportation of foreign national offenders, the judge erred in law in applying the wrong test, the test set out in MM (Uganda) having been expressly overturned by the Supreme Court in KO (Nigeria). At paragraph [63], the judge accepted that the appellant is genuinely remorseful for his past actions and that he is trying to turn his life around. She accepted that he is financially supporting the family through his self-employed work. The judge plainly had in mind, the appellant's offending, although she did not go so far as to refer to the nature or seriousness of the offences. She then reached her conclusion, at [64], that *"in the circumstances of the appellant and his family"* the effect of deportation on the appellant's partner and children would be unduly harsh. It is not in dispute that in the light of the Supreme Court decision in KO (Nigeria) at paragraph [22], the seriousness of the offences committed are not a relevant factor in the inquiry under Exception 2 and paragraph 399(a).

21. In my judgement, at paragraphs [52] to [64] of the decision, the judge conflates a number of issues and adopts a somewhat confused structure. In considering paragraph 399(a) of the immigration rules, the judge was required to consider whether it would be unduly harsh for the children to live in Zimbabwe; and, whether it would be unduly harsh for the children to remain in the UK without the appellant. In considering paragraph 399(b) of the immigration rules, the judge was required to consider (i) whether the relationship between the appellant and his wife was formed at a time when the appellant was in the UK unlawfully and his immigration status was not precarious; and (ii) whether it would be unduly harsh for the appellant's partner to live in Zimbabwe because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and (iii) whether it would be unduly harsh for the appellant's partner to remain in the UK without the appellant.

22. At paragraphs [52] to [53] of the decision, the judge refers to the evidence of the appellant and his wife that they have returned to Zimbabwe on at least three occasions and the children have visited Zimbabwe on two occasions. The judge

refers to the evidence that DL is autistic and receives support in school, and that *"sometimes support is different in Zimbabwe because of lack of resources."*. The judge found that the appellant plays an active role in his children's upbringing. The evidence of the appellant's wife, as set out at [58], was that "*it would be difficult for her to support her children on her own and when the appellant was in prison she struggled even with the support of her friends. It would be difficult to carry on with her job because it requires her to move from one town to another. She stated it would be impossible for their relationship to continue with the appellant is deported to Zimbabwe. She has spoken to her older son and this worries a lot.*". At paragraph [59], the judge states that she accepts the appellant and his wife enjoy a genuine and subsisting relationship. She accepted the evidence of the appellant's partner that she will not be able to manage to look after the two children and pursue her career. The judge also accepted that she has no-one else to turn to, who could provide the support that the appellant provides.

23. At paragraph [60], the judge found that living in Zimbabwe would have a serious impact on the children. I accept, for present purposes, that that is a finding that it would be unduly harsh for the children to live in Zimbabwe. At paragraph [61], the judge states that she also accepts that it would be unduly harsh for the children to remain in the UK without the appellant. The only reason given in that paragraph is that it would be in the best interests of the children to be cared for, and to be raised by both parents. At paragraph [62], the judge states that she is satisfied that their mother would have significant difficulties in managing and looking after the children and holding the family together without the help she receives from the appellant.

24. In KO (Nigeria), Lord Carnwarth stated, at [23]:

> "23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6) , taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context

> is that set by section 117C(1) , that is the public interest in the deportation of foreign criminals. 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. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932, [2017] 1 WLR 240*, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

25. On their own, the reasons given by the judge at paragraphs [61] and [62] of the decision are an entirely irrational and inadequate basis for finding that it would be unduly harsh for the children to remain in the UK without the appellant. It is in the bests interests of most children to be cared for, and to be raised by both parents. Furthermore, the judge fails to identify the significant difficulties that would be encountered by the appellant's partner in managing and looking after the children without the help that she receives from the appellant. There will undoubtably be a degree of hardship and inconvenience for the children and the appellant's partner, but that is not sufficient to establish that it would be "unduly harsh" for the children or the appellant's partner to remain in the UK without the appellant.

26. Even reading the decision as a whole, as I am invited to by Mr Rashid, the judge simply fails to identify anything that begins to meet the relevant threshold. Reading the decision as a whole, 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 or a degree of harshness going beyond what would necessarily be involved for any partner faced with the deportation of their partner

27. Furthermore, although the judge states at [64] that the requirements of paragraph 399(b) are met, beyond the finding, at [59], that the appellant and his partner enjoy a genuine and subsisting relationship, the judge does not engage with the requirements set out at paragraph 399(b)(i),(ii) and (iii).

28. In a human rights appeal, the question of whether or not an appellant meets the requirements of particular immigration rules may go to the question of proportionality. Here, the decision to allow the appeal on human rights grounds for the reasons set out at paragraphs [72] to [75] of the decision is inextricably linked to the judge's erroneous findings that the requirements of paragraph 399(a) and (b) are met by the appellant. In my judgement the decision of First-tier Tribunal Judge Gurung-Thapa is infected by a material error of law and cannot stand. I set the decision aside.

Re-making the decision

29. Part 13 of the Immigration Rules relating to deportation provide 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 the 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 paragraphs 399 and 399A.
>
> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (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; 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.

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.'

30. First-tier Tribunal Judge Gurung-Thapa found that the appellant is a persistent offender and the appellant does not challenge that finding. The judge also found that the appellant cannot meet the requirements of paragraph 399A of the immigration rules. Again, the appellant does not challenge that finding. The judge found that the appellant plays an active role in his children's upbringing. Mr Mills does not challenge that finding.

31. The burden of proof is on the appellant to establish his case on a balance of probabilities.

The evidence

32. The appellant relied upon the evidence set out in a bundle that had been filed by Tann Law Solicitors under cover of a letter dated 22 December 2018. Signed copies of the relevant witness statements were filed with the Tribunal under cover of a letter dated 2 January 2019. I have read the signed witness statements, and the material contained in the appellant's bundle. I have had regard to the documents relied upon by the appellant, in reaching my decision whether or not I expressly refer to them. I have also had regard to the evidence given by the appellant and his wife at the hearing before the FtT, as set out in the decision of FtT Judge Gurung-Thapa.

33. The appellant has made a witness statement dated 30 December 2018. The appellant refers to his immigration history and his convictions. He states that he has a very close relationship with his children and his partner. He claims that if he were to be deported, his children would not have anyone to guide them. He wishes to reside in the UK with them so that he can provide them with the best upbringing. He claims that the decision to deport him would severely impact his children and in particular, it would affect DL, his performance at school and his behaviour at home. The appellant confirms that DL is autistic. He has disordered language, difficulties relating to play and social interaction, and sensory sensitivities. The appellant claims that whilst he was in prison, DL's health deteriorated. The appellant states that DN is in secondary school and he struggled whilst the appellant was in prison as he was lacking the father figure that he needed in life, to assist him with the challenges he faced. He states that he cannot expect his children to leave the UK with him, as they are settled here and are progressing well. The appellant states that he is exercising his full parental responsibilities, and the children require his support. He claims it would be in the best interests of the children for him to continue residing with them in the UK so that he can provide them with the love, care and support that they need. The appellant claims that his parents are deceased, and he has no family in Zimbabwe.

34. The appellant's wife has also signed a witness statement dated 30 December 2018. She confirms that the appellant is her partner, they have two children together, and they reside together as one family unit. She confirms that the appellant has a very close bond with both children. They wish to provide the best future for their children by continuing to reside as one family. She states that she cannot expect their children to leave the UK as they are settled here and are progressing well at school. She cannot leave the UK as she has commitments here. She also states that DL is very close to the appellant and when the appellant was in prison, that severely impacted upon the mental and emotional well-being of DL. She claims it started to affect his performance in school and

his behaviour at home. She claims that DN also struggled whilst the appellant was in prison, as he was lacking the father figure that he needed in life to assist him with the challenges he faced.

35. In reaching my decision I have also had particular regard to the letter from DN that is at D1-D2 and the other documents within that section relating to the education of the children, and health of DL.

36. It is entirely understandable that DN would, as he states in his letter, love and want his dad to remain in the UK. Having read the letter written by DN, DN candidly states that if his father went away, there would be no-one to take him to football or pick him and his brother up from school, and that would cause huge difficulty for their mum.

37. The letter from St Albans Catholic Primary School dated 20th November 2017 confirms that the appellant takes DL to school and collect him most days. The letter also confirms that the appellant attends parents' evenings and any other meetings associated with DL's schooling. Similarly, the letter from 'First Friends' Nursery dated 15th November 2017 confirms that the appellant has taken part in dropping and picking up his children from the out-of-school club since September 2014. The remaining evidence in section D of the appellant's bundle is accurately summarised at paragraphs [53] and [54] of the decision of First-tier Tribunal Judge Gurung-Thapa.

Findings and conclusions

38. Like First-tier Tribunal Judge Gurung-Thapa, I am left in no doubt that the appellant enjoys a close and loving relationship with his children, and that the appellant plays an active role in his children's upbringing. I have no doubt about the appellant's devotion to his children and their well-being.

39. The children were cared for by Ms [N] when the appellant was in prison. There is no evidence to indicate that the children were neglected to the extent that any outside intervention was required.

40. I start by assessing the children's best interests and my obligation under section 55 of the 2009 Act. In so doing I leave out of account any adverse matters relating to the appellant's conduct. It is very clear that the children's best interests lie in having the appellant as part of their lives in United Kingdom. They have a strong bond with their father, and as I have found, he plays as an active role in their lives. Having considered the letter from DN in particular, I fully accept that the children would be very, very upset by the departure of their father. It is likely that this would have an adverse emotional impact on their lives. I take into account that DN attends secondary school and is at a critical juncture of his life. The school reports demonstrate that he is doing well at school.

41. The appellant's practical involvement in the lives of his children is also important, and a facet of the best interests' assessment. The appellant undoubtably supports his partner in the day to day care of the children, and in particular, with the arrangements for dropping the children off to school and picking them up from school. He is also involved in ensuring they can attend leisure activities such as playing football and play in the park. However, there is no evidence before me to suggest that the children will not be adequately cared for by their mother if the appellant is deported. She is plainly an able parent, who has properly taken care of the children whilst the appellant has been in prison. She does not suffer from ill health so as to prevent her from adequately caring for the children in the absence of the appellant. The children were able to attend school and no doubt enjoyed leisure activities when the appellant was in prison, albeit perhaps to a lesser extent.

42. First-tier Tribunal Judge Gurung-Thapa found that it would be unduly harsh for the children to live in Zimbabwe and it is not suggested by Mr Mills that I should depart from that finding. The issue in this appeal is whether in the circumstances set out above, the appellant's deportation would be unduly harsh on his two children, remaining in the United Kingdom without him. Thus, if the appellant is able to establish that it would be unduly harsh for the children

to remain in the UK without the appellant, they would meet the exception to deportation set out in paragraph 399(a) of the Immigration Rules, as replicated in section 117C(5) of the Nationality, Immigration and Asylum Act 2002.

43. As I have set out in my error of law decision, the meaning of unduly harsh is now set out in the Supreme Court's decision in KO Nigeria, at paragraph [23] of the judgment of Lord Carnworth. Within the Supreme Court's consideration of the specific appeal in KO, reference was made to the authoritative guidance on the meaning of unduly harsh given in MK (Sierra Leone).

44. Here, aside from the strength of the parental relationship between the appellant and his children and his general role in the day to day care of the children, the main factor relied upon to take the circumstances over the threshold of unduly harsh, to go beyond the likely consequences on any child faced with the deportation of a parent, is primarily the health of DL. Even focusing solely on the situation of the children, there is nothing in the evidence before me, except the vague claim by the Ms [N] that the appellants absence whilst he was in prison had severely impacted DL's mental and emotional wellbeing, to suggest that the children were not adequately cared for by Ms [N]. I find that the appellant's partner is able to adequately care for the children in the absence of the appellant. She would obviously encounter some difficulties and would understandably, wish to have the support of the appellant, but that is not to say it would be unduly harsh for the children to remain in the United Kingdom without the appellant. There is nothing in the evidence before me to establish that any adverse consequences for the children go beyond being merely harsh or part of the usual consequences of deportation, but taken together with all of the other factors, make deportation unduly harsh on the children on the facts of this particular case.

45. I therefore find, on the evidence before me, that that the appellant is unable to meet the exception to deportation set out in paragraph 399(a) of the Immigration Rules. I equally find, on the evidence that the appellant is unable

to meet the exception to deportation set out in paragraph 399(b). I cannot find on the evidence that it would be unduly harsh for the appellant's partner to remain in the UK without the appellant.

46. In a human rights appeal, the ability to satisfy the immigration rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim.

47. I find that the appellant enjoys family life with his wife and children. I also find that the decision to deport the appellant, will have consequences of such gravity as to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary for the prevention of disorder or crime, the protection of health or morals, and for the protection of the rights and freedoms of others.

48. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved. I have had regard to the public interest considerations set out in s117C of the 2002 Act. The deportation of foreign criminals is in the public interest. For the same reasons that the appellant cannot benefit from paragraphs 399(a) and (b) of the immigration rules, the appellant could not benefit from Exception 2 set out in s117C(5) of the 2002 Act.

49. Having carefully considered the evidence, whilst I accept that the appellant, his wife and their children might prefer to continue their relationship together in the UK, that does not equate to a right to do so in law.

50. On the evidence before me, there are no exceptional circumstances capable of establishing that the public interest in the deportation of the appellant is outweighed by other factors, such that it amounts to a disproportionate interference with the appellants right to enjoyment of family life. Having carefully considered the evidence before me, and taking all the relevant factors

into account including the best interests of the appellant's children as a primary consideration, I find that the decision to deport the appellant is not disproportionate to the legitimate aim. Accordingly, I dismiss the appeal on Article 8 grounds.

51. Having set aside the decision of the First-tier Tribunal, I remake the decision, dismissing the appellant's appeal on Article 8 grounds.

Notice of Decision

52. I set aside the decision of First-tier Tribunal Judge Gurung-Thapa.

53. I remake the decision. The appeal on human rights grounds is dismissed.

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

54. The First-tier Tribunal did not make an anonymity direction. No application for an anonymity direction was made before me, and no such direction is made. I have however in this decision referred to the appellant's children by their initials rather than setting out their names.

Signed Date 24th September 2019

Upper Tribunal Judge Mandalia

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and there can be no fee award.

Signed Date 24th September 2019

Upper Tribunal Judge Mandalia