



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/07461/2017

THE IMMIGRATION ACTS

**Heard at Birmingham
On 26 April 2019**

**Decision & Reasons Promulgated
On 9 May 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S M

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Miss H Aboni, Home Office Presenting Officer

For the Respondent: Mr M Azmi, instructed by Genesis Law Associates Ltd

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge E M M Smith promulgated on 30 November 2017, allowing the appellant's appeal against the decision made by the Secretary of State made on 26 July 2017 to refuse his human rights and protection claim.
2. I have anonymised this decision in order to protect the identity of the respondent's stepchild.

3. The respondent is a citizen of Zimbabwe who entered the United Kingdom in 2001. His asylum claim made in 2008 was refused and his appeal dismissed in 2009. He was, however, on 8 July 2012, granted Discretionary Leave to Remain in the United Kingdom with his wife, a Zimbabwean national resident born in the United Kingdom. The couple have two children born in 2011 and 2013; there is also an older child who is the appellant's stepson.
4. On 13 December 2013 the appellant was convicted of doing an act of cruelty to his stepson for which he was sentenced to two years' imprisonment.
5. There was at that time extensive involvement with social services and the children were placed in care. That situation was, however, resolved, and the children now live with the respondent and his wife as part of the family unit and there is no longer any social services involvement.
6. The Secretary of State made a deportation order against the respondent in light of his conviction. In response to that he made a claim for asylum. Representations were also made in response to an invitation from the Secretary of State to rebut the presumptions of the conviction for which he was convicted excluded him from Convention protection.
7. The judge heard evidence from the respondent and his wife; he also had before him reports from social services including recommendations from the family social worker.
8. The judge noted the evidence that despite what had occurred in the past, the stepson and the respondent see their relationship as father and son and that the son seeks him out for fatherly advice, the respondent participating in all aspects of family life and that [27] there are a number of factors which showed a very positive change in the situation since the conviction. The judge concluded that [30] they are now a stable functioning family and that there is clear evidence from the social worker that it is in the children's best interests that the respondent remains with them. The judge noted also [29] that if the respondent was deported to Zimbabwe that contact will be effectively severed and that "if the father was deported to Zimbabwe it would be devastating to S and his siblings".
9. The judge found the children could not go to live in Zimbabwe [32]; and, having directed himself [33] in accordance with Section 55 and that he must have regard to Section 117C of the 2002 Act, the judge concluded that "to remove this respondent from the United Kingdom would be disproportionate".
10. The respondent sought permission to appeal on the grounds that the judge had erred:-
 - (i) in failing properly to apply the undue harshness test, in particular failing properly to consider Rule 399(a) and the prospect of the family remaining in the United Kingdom without the respondent, there being

nothing exceptional about the family situation which would outweigh the compelling public interest in the respondent's removal, the judge failing properly to explain why the circumstances are such that deportation would be unduly harsh;

- (ii) in wrongly attributing significant weight to the respondent's rehabilitation and remorse, failing also to cite any evidence of long-term effects on the family as a result of his absence when serving his prison sentence.

11. On 13 May 2018 Upper Tribunal Judge Bruce granted permission stating:-

"The First-tier Tribunal was entitled to reach the conclusions it did in respect of paragraph 399(a)(i)(a) of the Immigration Rules. Permission is however granted because it is arguable that the Tribunal erred in omitting to squarely address the test in 399(a)(i)(b)."

The Law

12. The Immigration Rules provide

- '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.'

13. The judge did not directly address this paragraph. Nor is there any indication that the judge applied the high threshold established by the phrase "undue harshness" – see KO (Nigeria) [2018] UKSC 53

14. That, in my view, is a significant error. Whilst I accept that, as Mr Azmi submitted, the judge appears to have accepted the conclusions reached by the social worker, he does not say so and there is no proper attempt to relate that to the relevant test, that is undue harshness. I accept that the use of the word "devastating" is strong but equally there is, again, no attempt by the judge to consider why this is different from the normal effects of deportation on a family. There are no proper findings about what would happen to the children if the respondent were deported.

15. Similarly, the judge does not properly address Section 117C and the focus appears to have been more on how the respondent has rehabilitated himself rather than on the test set out in the Immigration Rules and in Section 117C.

16. Accordingly, I am satisfied that the decision of the First-tier Tribunal did involve the making of an error of law as the judge failed properly to address the relevant legal test and to make proper findings on material aspects necessary to that test.
17. Given the length of time that has elapsed since the last hearing and given the ages of the children involved I conclude that although the fact-finding error that needs to be remade is relatively small, it would be appropriate to remit this appeal to the First-tier Tribunal for a fresh decision on the issue of whether the respondent meets the requirements of paragraph 399(a)(i)(b) of the Immigration Rules. For the avoidance of any doubt I make it clear that the finding that paragraph 399(a)(i)(a) is met is preserved.

Notice of Decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside insofar as it relates to article 8 and paragraph 398 to 400 of the Immigration Rules. There is no challenge to the dismissal of the appeal on asylum, article 3 and humanitarian grounds, and those findings are preserved
- (2) I remit the appeal to the First-tier Tribunal to be remade on the issue of whether the respondent meets the requirements of paragraph 399(a)(i)(b) of the Immigration Rules and/or, having had regard to Section 117C, there is public interest in his removal. The finding that paragraph 399 (a) (ii) (a) is satisfied is preserved.

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

Unless and until a Tribunal or court directs otherwise, the respondent 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 respondent and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 3 May 2019



Upper Tribunal Judge Rintoul