Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04067/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th December 2019	**On 8th January 2020**

Before

UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

TATENDA RYAN GUWA

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr M Mohzan of CB solicitors

DETERMINATION AND REASONS

1. Mr Guwa is a Zimbabwean citizen born on 22nd June 1991. On 16th August 2010 he was convicted at Guildford Crown Court of 3 counts of robbery and sentenced to 28 months imprisonment with a further 2 months imposed to run consecutively for theft from a person and a further 1 month to run concurrently for breach of a previous order. A deportation order was signed on 28th March 2012; his human rights claim was refused. His appeal against the refusal of his human rights claim was allowed by the First-tier Tribunal, referring the matter back to the Secretary of State for reasons set out in a decision promulgated on

5th September 2012. An appeal by the Secretary of State was allowed, the First-tier Tribunal decision set aside by Upper Tribunal Judge Jordan and a decision dismissing Mr Guwa's appeal against the refusal of his human rights claim was made for reasons set out in a decision promulgated on 4th March 2013.

2. Mr Guwa did not leave the UK. He made further submissions in June 2018 to the Secretary of State which were considered by her to be a fresh human rights claim but refused for reasons set out in a decision dated 22nd February 2019. His appeal against that decision was heard by First-tier Tribunal Judge Ian Howard and allowed for reasons set out in a decision promulgated on 14th August 2019.

3. The Secretary of State sought, and was granted, permission to appeal.

Mr Guwa's unchallenged family situation

4. Mr Guwa arrived in the UK on 18th February 2001 as a child dependant. He was granted indefinite leave to remain in line with his mother on 24th July 2008. He has a child, T, born on 28th March 2011, from an earlier relationship. T was born whilst he was in prison. On release from prison in November 2011 he lived at his mother's home with T and T's mother, Safari Russell. His relationship with Ms Russell broke down in 2014 at which point T and Ms Russell went to live with T's maternal grandmother. T is a British Citizen; Ms Russell is a Jamaican citizen. Ms Russell returned to Jamaica sometime in 2014, leaving T with her maternal grandmother. Mr Guwa had regular and frequent access and the child spent a considerable amount of time with him and his mother, at his mother's home. As noted in Judge Howard's decision, T "*recently*" moved from her maternal grandmothers to live with Mr Guwa, his current partner, her paternal grandmother and her half-brother TR. Although no date for this move appears in the documentation, it seems from the letters written to the First-tier Tribunal and the witness statements to the First-tier Tribunal that this move occurred in about May/June 2019 because T's maternal grandmother was no longer able to remain living in her previous accommodation.

5. Mr Guwa is and has been in a genuine and subsisting relationship with Adelaide Nyathi, a British citizen, since 2015. They have one child TR, a British citizen born 14th August 2016. They live and have lived together at Mr Guwa's mother's home since the commencement of their relationship.

Issues arising from the First-tier Tribunal decision

6. The First-tier Tribunal judge found, it having been accepted by the Secretary of State that it would be unduly harsh for either child to relocate with Mr Guwa to Zimbabwe on his deportation, that it would be unduly harsh for his current partner to relocate. This conclusion was not the subject of appeal by the Secretary of State.

7. The First-tier Tribunal judge found that Mr Guwa did not meet the criteria required for Exception 1 (s117C(4) Nationality Immigration and Asylum Act 2002). This was not the subject of appeal by Mr Guwa.

8. The First-tier Tribunal judge did not consider, in terms, whether there were very compelling circumstances requiring the deportation of Mr Guwa over and above those described in Exceptions 1 and 2. For some unexplained reason, the First-tier Tribunal judge having found that it would be unduly harsh on the child T if Mr Guwa were deported, directed himself "*to consider Article 8 outside the Rules*". In undertaking this consideration, he directed himself that he should, in considering the conflicting interests of the Secretary of State and Mr Guwa adopt the approach set out in *MM (Uganda)* [2016] EWCA Civ 450. He set out, in his decision, paragraphs 23 and 24 of *MM*. He then set out the balancing exercise he undertook in paragraphs 42 to 46 of his decision:

> "42. … the offending while unpleasant is very much at the lower end of the continuum of offences on the criminal calendar. This is reflected in the sentence… Robbery is a serious offence.
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> 43. The appellant accepts his guilt and the punishment. He has shown himself to be rehabilitated by the fact he has not re-offended. The family relationship he has with his partner and children is ongoing. The consequences of his removal are those I have set out above.
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> 44. In performing the balancing exercise a further factor in this case lies in the fact the respondent has sought to deport the appellant. The consequences of deportation is a prohibition on return within 10 years. By that time his children will be teenagers and their relationship with the appellant will in all likelihood, be markedly different to that it is today and the prospect of a return to the UK then cannot mitigate my findings as to the impact on [T].
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> 45. given the substance in the public interest argument and the ways the significant consequences flowing from deportation and separation would be mitigated by the fact of telephone contact with his family in the UK and the prospect of family visits to Zimbabwe, for all the foregoing reasons, in this case the balance does not lie in favour of deportation."

9. These paragraphs of the First-tier Tribunal decision are confusing. They minimise the offence committed – a street robbery of mobile phones and cash, including an assault with a bottle, in which Mr Guwa took the lead. Although Mr Guwa pleaded guilty, his plea was very late in the day and he committed another similar offence whilst on bail. The First-tier Tribunal judge was simply incorrect to state it was at the lower end of the spectrum; the sentencing guidelines for the offence were in the range of two to seven years with a target of 4. Had he not pleaded guilty, the judge said he would have imposed a custodial sentence of roughly three and a half years. These were the first offences committed by Mr Guwa. It verges on the perverse to conclude as the First-tier Tribunal judge did, that these offences were "at the lower end of the continuum". The judge has included in his assessment that Mr Guwa has not re-offended. Yet the judge has failed to consider that rehabilitation is to be expected; rehabilitation of the kind exhibited by Mr Guwa is unlikely, in the absence of detailed reasoning, to contribute to the existence of very compelling

circumstances given the seriousness of the crimes committed by Mr Guwa and the public revulsion in such crime.

10. The judge has factored in the potential separation of Mr Guwa from his children for 10 years and contact being restricted to telephone calls and occasional visits as a matter of importance in the balancing exercise. Yet deportation *does* separate families. The reasoning of the First-tier Tribunal judge seems little more than a passing nod to the public interest in deportation with separation from family acquiring significant importance. The judge has failed to take into account that Mr Guwa lost his deportation appeal in 2013 and became appeal rights exhausted in July 2013 but failed to leave the UK. He embarked upon another relationship whilst in the UK with no lawful basis of stay, failed to respond to a request by the Secretary of State for further information following submissions made in October 2014 and did not make any further submissions until June 2018.

11. If this consideration given by the First-tier Tribunal is read as consideration of whether there are "very compelling circumstances", which seems to be how the Secretary of State read it in formulating her grounds of appeal, and in the absence of any particular submissions by Mr Mohzan on these paragraphs, we conclude that the judge erred in law in finding 'outside the Rules' that deportation was disproportionate. The judge failed to include relevant matters in the balancing provision and did not identify matters that could be considered to amount to very compelling circumstances. In so far as the judge found there to be "very compelling circumstances" for the purposes of s.117C(6), he erred in law. We do not consider that this error of law is material, such that his ultimate decision to allow the appeal must be set aside for reasons we now turn to.

12. The parties agreed that the significant and pivotal issue is whether the judge erred in law in finding that separation of T from Mr Guwa would be unduly harsh i.e. that Exception 2 was met. If this was a finding open to the judge, he was entitled to allow Mr Guwa's appeal on Article 8 grounds, irrespective of any other errors on discrete issues.

13. Mr Jarvis, very sensibly, did not rely on the submissions in the grounds seeking permission to appeal that (i) no expert report had been filed to show the effects the proposed separation may have, and (ii) no evidence was given of how T coped when Mr Guwa was in custody. T was only 8 months old when her father came out of prison and during that time it would have been unusual for such a young baby to show any long-lasting effects from separation from birth. The judge identified the nature and extent of the relationship between Mr Guwa and T, and was entitled to make findings based upon the straightforward evidence before him. The provision of a report from an independent social worker merely to confirm a close relationship was unnecessary in these circumstances. Indeed, the circumstances involved in such a report could result in a potentially abusive interrogation of a child for no or little purpose.

14. Mr Jarvis clarified the grounds relied upon as being essentially that the First-tier Tribunal judge, seemingly unaware of *KO (Nigeria) & others* [2018] UKSC 53[1],

[1] Despite it being in the appellant's bundle, judgment having been given on 24th October 2018 some 8 months before the First-tier Tribunal hearing.

had failed to identify anything that reached the demanding threshold of unduly harsh and further or alternatively that the finding that it was unduly harsh was, on the evidence before the First-tier Tribunal, perverse. He relied on the approach to the test of unduly harsh being particularly demanding – see *PF (Nigeria)* [2019] EWCA Civ 1139 applying *KO,* and to *RA (s.117C; unduly harsh; offence: seriousness) Iraq* [2019 UKUT 123 (IAC) that it is not enough for the outcome to be severe or bleak; proper effect must be given to the adverb "unduly". He drew specific attention to what he described as the incoherence of paragraph 32 of the First-tier Tribunal decision and submitted the judge had failed to consider the whole picture which included the caring and close family role played by the grandparents and the injustice done to the grandparents in the findings made. He submitted that it was unsafe to attempt to separate elements of a factual decision that are predicated from an incorrect legal standpoint.

Discussion

15. The First-tier Tribunal judge found the evidence of the witnesses to be consistent, candid and scrutinised thoroughly in cross-examination. In his summary of the evidence he referred to:

> "16. The appellant describes the role that he played in his daughter [T's] life following her mother's departure.
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> 17. …
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> 18. Next I heard from Petra Guwa the appellant's mother. It is at her home, she told me, that the appellant has lived since his release from prison in November 2011. She is a school teacher and the primary breadwinner for this extended family. In addition to telling me about her son's family she told me about her remaining family in Zimbabwe….
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> 19. She was asked if she could support her son financially is you [*sic*] were returned to Zimbabwe. She said not as she simply could not afford to….
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> 20. I also asked her about [T's] circumstances following Safari's departure. She stated that initially [T] lived with her maternal grandmother but that recently she came to live permanently with her. She explained that the reason for this was that her maternal grandmother lost her accommodation when her friend with whom she lived passed away. She also said that her son has been a father to [T] since his release in November 2011. She too describes all the activities he carries out for his daughter. She described how her son takes his daughter to school and his son to nursery, collecting them at the end of the day. She described how he takes his daughter to the doctor when she is ill. She described the bedtime routine. Returning to the theme of [T's] mother she told me that in the months after her departure there were regular video calls, but that they have tailed off in recent times. She stated but [*sic*] [T] looks to her father for guidance as she knows but [*sic*] her mother is not there, adding that she takes all issues to her father. She also told me that in the month after her mother left Jamaica [T] was not herself she would ask repeatedly when her mother was coming home.

> 21. …
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> 22. Finally I heard from the appellant's partner is [*sic*] Adelaide Nyathi. She too adopted her witness statement and a letter she has written, she was asked about the role that the appellant plays in his two children's lives. She explained that she works part-time and that as a consequence the appellant does the school runs and takes them to the doctor. Asked what would happen is the appellant were removed she told me that she would have to give up work to be a full-time mother. …Before the birth of her son she had worked full time at Gatwick airport….
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> 23. I asked her about [T's] relationship with her maternal grandmother. She told me that [T] has a great relationship with her grandmother. In all the time she has no [*sic*] [T] she has never heard her say anything bad about her grandmother. She told me that she and her son [TR] have no relationship with her parents."

16. The First-tier Tribunal judge went on to state:

> "30. … I am satisfied the only remaining issue for me to determine is whether it would be unduly harsh for Mr [*sic*] Nyathi and the two children to remain in the UK without the appellant. I find the answer to this question in the circumstances of [T] as they would be in the event of the appellant's removal.
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> 31. It is common ground the mother has already left UK. While this was undoubtedly an unhappy episode for her it is one that she has successfully negotiated. On the evidence before me I am satisfied that in large part the reason for her so doing was the presence of her father in her life at that time. In his submissions Mr Sartorius suggested there was no evidence that [T] had struggled particularly with her mother's departure. This submission ignores the fact that while her mother had gone her father it [*sic*] was still very much in her life. This happened after he was released from custody. Where [*sic*] the appellant to be removed it would be to expect this eight year old girl simply to take it in her stride and for there to be no significant adverse effect upon her.
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> 32. As an eight year old she knows her mother and she knows her father. She knows the respective roles they currently play in her life. As a consequence she knows only too well what her relationship with her father will be reduced to. She will be required to negotiate her formative years without the immediate support of either parent. No solution can be found in the prospect of her mother returning UK actually it's not a British Citizen [*sic*]. To require an eight-year old girl to grow up without either parent at side [*sic*] and simply expect her fill the gaps [sic] in emotional support by reference to my [*sic*] grandmothers all [*sic*] electronic communication with her parents it is to ask too much on a child [*sic*]. The bar of what is "unduly harsh" is a high one, but in the case of [T], that is what the consequences of the appellant's deportation upon her would be."

17. The First-tier Tribunal judge does not appear to have read through his decision prior to promulgation. Paragraphs 31 and 32 are the core of the decision and although the errors make them difficult to read, it cannot be sustainably argued that they are incoherent. When the decision is read as a whole, it is tolerably clear that the First-tier Tribunal judge found that in the circumstances of this family unit, the role played by Mr Guwa with his daughter T is not and cannot be replicated by the grandparents, even though they form part of a loving family.

The judge identified the key issue for the purposes of Exception 2 to turn on Mr Guwa's relationship with T, and the effect of his deportation to Zimbabwe without her, upon her. This cannot be faulted - if T were not in the picture, the separation of Mr Guwa from his partner and TR could plainly not reach the high unduly harsh threshold. But T is a young child who has been abandoned by her mother and for whom her father has played a crucial and critical role. The judge was entitled to find that T's grandparents, no matter how loving and caring, are unable to replace the care, support and stability provided by a loving father who has enabled the child to deal with abandonment by her mother at such a tender age.

18. Of course criminality leads to deportation and deportation can have the inevitable consequences of splitting families – as reiterated in numerous leading cases. Mr Jarvis provided us with a comprehensive bundle of authorities which make very clear that the threshold to be crossed is very high and that the nature of the criminality is of no relevance when determining whether one of the Exceptions applies. We have no disagreement with these propositions. Each case has to be determined on its own factual matrix.

19. The First-tier Tribunal judge referred to *MM (Uganda)* [2016] EWCA Civ 450 We are satisfied that this reference was in the context of his purported consideration of the human rights claim "outside the Rules". His decision does, in our view, make that plain. The First-tier Tribunal judge does not, in assessing whether the separation of T from Mr Guwa reaches the high threshold required, consider the extent or nature of the criminality. We take note of Mr Jarvis' submission that it was unsafe to separate elements of a factual decision that are predicated upon an incorrect legal standpoint. However, when the decision is read as a whole we do not accept that the judge's finding that the effect upon T would be unduly harsh (for the purposes of Exception 2) is predicated upon an incorrect legal standpoint. Rather, the incorrect legal standpoint arises from the judge's consideration of the appeal "outside the Rules". The conclusion that it would be unduly harsh was arrived at from an analysis of this child's particular history and situation, and did not involve any consideration of criminality other than in the context that Mr Guwa was subject to a deportation order. We do not accept that the decision is perverse, given the evidence accepted by the judge regarding T's circumstances.

20. We are therefore satisfied that the First-tier Tribunal judge did not err in law in finding that the deportation of Mr Guwa would be disproportionate on the basis that Exception 2 is met.

21. In so far as our finding in paragraph 11 is concerned, we are satisfied that there is no need for us to remake that element of the decision. Having found that Exception 2 is met, there is no requirement to go on to consider whether there are very compelling circumstances over and above Exception 1 or 2. Had we found that the judge's decision that Exception 2 was met was infected by a material error of law, then it would have been correct to consider whether there were very compelling circumstances. If that had been the case we note that Mr Mohzan was unable to identify any matters that could reach that significant and high test.

Conclusions:

The decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision is set aside. The decision of the First-tier Tribunal allowing the appeal on human rights grounds stands.

Upper Tribunal Judge Coker

Date 6th January 2020