Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: **AA/03811/2012**

THE IMMIGRATION ACTS

Heard at Field House	**Date Sent**
On 31 May 2013 and 7 August 2013	**On 21 August 2013**
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Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

AS
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C. Jacobs, Counsel, instructed by Howe & Co Solicitors
For the Respondent: Ms H. Horsley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This determination is the culmination of the appellant's appeal to the Upper Tribunal against a decision of the First-tier Tribunal, whereby it dismissed his appeal against a decision to refuse to revoke a deportation order. I had previously

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found an error of law in the decision of the First-tier Tribunal after a hearing on 5 November 2012. That error of law decision dated 7 November 2012, described as "Decision and Directions", suffices to set out the history and background to the proceedings. That decision is as follows:

DECISION AND DIRECTIONS

Introduction

1. The appellant is a citizen of Zimbabwe born on 9 February 1982. He arrived in the UK on 11 April 2001, ostensibly as a visitor. The further history of his stay in the UK and the progress of appeals through the immigration courts is detailed. For the purposes of this decision the following summary suffices.

2. He was arrested in 2007 for dangerous driving and related offences, found to be an overstayer, and then claimed asylum. The asylum claim was refused but there was no appeal against that decision. Subsequent to his convictions for the driving offences, deportation proceedings were instituted. The appellant's appeal against the deportation decision was dismissed. He made a fresh application for asylum which was also taken to be an application to revoke the deportation order.

3. Those applications were refused and an appeal was brought before the First-tier Tribunal, before First-tier Tribunal Judge M.R. Oliver. His appeal was dismissed on all grounds, including with reference to Article 8 of the ECHR. Permission to appeal against the decision of the First-tier Tribunal having been granted, the matter came before me.

The grounds and submissions

4. The grounds of appeal before the Upper Tribunal include a contention that there was an error of law in the First-tier Tribunal's decision because the judge had taken into account evidence that had not been provided to the appellant or his representatives, or on which they had not had an adequate opportunity to take instructions. That evidence consisted of two interviews conducted with the appellant (in relation to his asylum claim in 2007).

5. However, at the hearing before me, Mr Jacobs very properly informed me that he had spoken to counsel who had had conduct of the case before the First-tier Tribunal, and he had informed him that he had been provided with those documents in the respondent's bundle and had had time to consider them. In the circumstances, this ground of appeal was not pursued before me.

6. As regards the asylum ground of appeal, it is contended that there was an error of law in the decision of the First-tier Tribunal because the judge decided the case on the basis of EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC), which was then the current country guidance. However, that decision was quashed by the Court of Appeal on 13 June 2012, with the appeal being remitted to the Upper Tribunal for further consideration. In those circumstances, it was submitted by Mr Jacobs that the appeal ought to have been considered in the light of RN (Returnees) Zimbabwe CG [2008] UKAIT 00083, to which the position reverts in terms of country guidance.

7. As to whether the decision should be set aside on that basis, Mr Jacobs submitted that the error of law was material. The decision in RN had to be considered in the light of the decision of the Supreme Court in RT (Zimbabwe) [2012] UKSC 38. Although the appellant's credibility has been found wanting, the issue of adverse credibility was said in RT not to be a matter of great significance. It is also important to consider the fact that the appellant's mother and his aunt have been granted refugee status.

8. Mr Wilding conceded that it was an error of law for the judge to have relied on country guidance which was found by the Court of Appeal to have been in error. He did nevertheless contend that the error of law was not material to the decision and thus does not require the decision to be set aside.

9. Mr Wilding referred in submissions to the fact that the appellant had been found not to be credible. His mother's evidence was also disbelieved, notwithstanding that her appeal had previously been allowed. Despite the fact that EM was quashed, that does not mean that there was any materiality in the error of law. Even considering the appeal on the basis of RN, the appellant's lack of credibility means that he could not have succeeded in his appeal. The decision in RT would not have affected the outcome. Furthermore, the quashing of the decision in EM does not affect the evidence that was given in that appeal, for example from Professor Ranger. The background evidence points to a change in circumstances since the decision in RN.

10. Part of the challenge to the First-tier judge's determination in relation to Article 8 relates to the "best interests" consideration in relation to the appellant's daughter. The grounds assert that the judge did not make a finding on what his daughter's best interests are, and had failed to consider those interests first, as a discrete issue.

11. In developing the point before me Mr Jacobs submitted that it is evident from [31] that the judge conflated the issues, referring to what he regarded as the appellant's efforts to thwart his removal, giving the appearance of being a concerned father. The judge had not considered the evidence given by the child's mother about the level of contact that he has with her. I was referred to MK (best interests of child) India [2011] UKUT 00475 (IAC).

12. Mr Wilding submitted that the judge's findings on Article 8 go wider than a simple reliance on the credibility assessment made with respect to the asylum aspect of the appeal. The appellant and his mother had been found not to be credible in terms of the level of contact. There was little other evidence in relation to the child's best interests. The judge had taken the child's best interests into account as a primary consideration.

13. In reply, Mr Jacobs referred me to the decision in EB Kosovo [2008] UKHL 41. In addition, the appellant could have a bond with his daughter regardless of the motive. ZH (Tanzania) [2011] UKSC 4 was also relevant.

My assessment

14. That there is an error of law in the decision as regards asylum is not disputed. The First-tier judge was bound to consider the appeal on the basis of the country guidance that was then thought to be applicable. However, it has now been found that that decision was subject to legal error and has been set aside.

15. Mr Wilding urged me to find that notwithstanding that error, the decision does not require to be set aside because it is not a material error. However, I am satisfied that the decision does require setting aside. I do not consider that it could be said that the outcome of the asylum appeal would necessarily have been the same even though the appellant was found not to be credible. Merely because an appellant is found to be lacking in credibility, that does not on RN terms automatically lead to the conclusion that an assertion of inability to show loyalty to the regime will be found to be false. It *may* on the facts of this case, but that is not necessarily so. In addition, I consider that there is force in the submission made on behalf of the appellant to the effect that what was said about credibility issues by the Supreme Court in RT must be considered.

16. There is another reason why I consider that the decision should be set aside. As the parties are aware, it is expected that in a matter of a few weeks, there will be a new country guidance decision on Zimbabwe chaired by the President of the Upper Tribunal, this being the appeal remitted by the Court of Appeal. In those circumstances, it is appropriate that the asylum aspect of the appellant's appeal be considered in the light of up-to-date country guidance, rather than on the basis of country guidance (RN) that is considerably out of date, and on the basis that some of the evidence in EM could be taken into account, along with further up-dated evidence. It was on the basis of that suggested approach to the country background situation that Mr Wilding suggested the matter could be considered in terms of assessing whether the error of law was material.

17. Even aside from the question of materiality, it is necessary for this appeal to be considered in the light of up-to-date country guidance. 'Materiality' is not required to be found before a decision can be set aside. The word 'material' does not feature in Section 12 of the Tribunals, Courts and Enforcement act 2007, by which provision the Upper Tribunal has power, in its discretion, to set a decision aside where an error of law is found.

18. In relation to the challenge to the Article 8 assessment, the grounds suggest that that assessment, based as it was in part on the judge's finding that the appellant was not credible in the asylum claim, was flawed since the assessment of credibility in relation to asylum was itself flawed. However, this appears to relate to the issue concerning the interviews said not to have been made available to the appellant's representatives. As indicated above, that ground was not pursued and the related argument in relation to the Article 8 findings must in the circumstances also fall away.

19. I am however, persuaded that there is an error of law in the judge's decision in relation to Article 8. It is not that the judge has not considered his daughter's best interests first; I am satisfied that he has. Although he referred in [31] to the appellant giving the "appearance" of a concerned father, what the judge was doing there was putting the Article 8 issue, including with reference to the child's best interests, into context.

20. There is a finding at [32] that the appellant's removal would mean a separation of him from his daughter. However, having stated that the child's best interests must be taken into account as a primary consideration, the judge does not set out what he considers her best interests to be. I do not consider that it could be said to be implicit that he found that her best interests are to remain in contact with the appellant. There is no finding to that effect and the judge does focus on the appellant's lack of credibility and what he finds to be his cynical motives for remaining in contact, or establishing regular

contact with her. As was submitted on behalf of the appellant, those motives do not in themselves reflect what is in his daughter's best interests, whatever may be said about his motives. It was open to the judge to have found that the appellant was not likely to remain in contact with her if he were to succeed in his appeal; but there was no such finding. It may even have been open to a judge to find that it is not in a child's best interests to maintain a relationship with a father who could be said to be a poor role model or a bad influence. Again, there is no such finding in this case.

21. I am satisfied therefore, that there is an error of law in the Article 8 assessment in terms of the assessment of the best interests of the appellant's daughter. For that reason the decision in respect of Article 8 must also be set aside.

22. Neither party suggested, in the event that I decided to set aside the decision of the First-tier Tribunal for error of law, that it was appropriate to remit the matter for re-hearing before the First-tier Tribunal. In any event, I do not consider that this would be appropriate taking into account paragraph 7.2 of the President's Practice Statement. The hearing will be adjourned for the decision to be re-made by the Upper Tribunal after the promulgation of the forthcoming country guidance case on Zimbabwe.

23. There appears to me to be no reason why, in the re-making of the decision, the findings of fact made by the First-tier Tribunal on the asylum aspect of the appeal cannot stand. There was no challenge to those findings in the appeal against the First-tier Tribunal's decision, or none that was pursued. Similarly, in relation to Article 8, in so far as the judge's findings are not affected by the error of law, those findings are to stand.

24. I was invited by Mr Jacobs to indicate that I would allow further evidence to be called both on the asylum and Article 8 aspects of the appeal at the resumed hearing. That is a decision that can be deferred until the resumed hearing in the light of any further written or documentary evidence that is served.

25. The parties must be prepared at the next hearing to make submissions on the effect, if any, of the 'new' Immigration Rules on the decision to refuse to revoke the deportation order.

2. On 31 May 2013 the appeal only proceeded so far as hearing evidence from the appellant's former partner, SH, the mother of his daughter K. This was because the appellant's solicitors had not complied with directions involving the service of witness statements.

The hearing on 31 May 2013

3. SH adopted her witness statements. In cross-examination she said that their daughter K stays with the appellant at weekends. She has been with him since last Friday since she broke up from school for half term. Prior to that she had stayed with him about three weeks earlier.

4. K staying with him every other weekend is a fixed arrangement unless she has to cancel it for some reason. She would definitely stay with him every holiday. Those weekend visits began when he came out from detention. Sometimes it is a bit of a struggle because of the appellant's mother's working hours. The appellant

does not drive since his licence was taken away as a result of the criminal convictions. The appellant's mother collects K, although sometimes she has done so herself. On the first day of the school holidays she would usually go to stay with the appellant.

5. Sometimes K is collected on Saturday morning depending on his mother's work, for example if she comes straight from the night shift. It varies between Fridays and Saturdays. K sees the appellant generally twice a month; every other weekend.

6. Her son, M, has been staying with the appellant every other weekend for about the last eight months or longer. That was during the time that she was pregnant with her daughter P and they used to take care of M, to help her (during her pregnancy).

7. M is not the appellant's child. She does not live with M's father. M's father is happy for him to stay at weekends with the appellant. M's father lives in Northampton. She is not in a relationship with P's father who is not the same father as that of M. Their respective fathers do not really help out with them although M's father sometimes takes him overnight. He also takes K.

8. She lives with her three children and her sister who stays three or four times a week as she helps her with the school runs. M is at nursery half day and K is at school. After she had her daughter (P) she was struggling to get them to school and nursery as they go to different places. At that time her sister was not around so the appellant asked for his bail conditions to be changed so that he could live at her address. Within the coming year her sister would be starting a college course so she would not be around.

9. The appellant's relationship with K is not motivated by a desire to remain in the UK; he is interested in K as his daughter. As to whether she could rely on him to continue that level of contact if he is allowed to remain in the UK, she has a lot of trust in him. She can see how much he does for K.

10. In answer to my questions she said that M's date of birth is 20 April 2009 and P's is 6 January 2013.

11. She thinks that the last time that the appellant got in trouble with the police was in 2007 when she was pregnant with K. He was in prison when she was in labour. As far as she knows he has not been in trouble since then.

The hearing on 7 August 2013

12. The appellant adopted his various witness statements in examination-in-chief. He said that the date of birth given on the OASys report is incorrect. His daughter K and his former partner's son M have been staying with him for about two weeks, since the last day of school.

13. Asked about his attitude to his offending he said that it is something which he really regrets and which has put him and everyone in his family behind. He teaches his younger brother and the children not to do things that are wrong.

14. In cross-examination he said that K and M stay with him at his mother's house. They are going back to their mother's home at the end of the summer holidays in September. Her mother wants to take them on holiday although he does not know where.

15. He gave evidence about K staying with him at weekends, how that is done, who collects her and when she goes back. When K and M stay with him he is the one who mostly looks after them as his mother does shift work.

16. If he is deported K would live with her mother. He would keep in contact with her by phone and letters but he would not be able to provide material support because of the economy in Zimbabwe.

17. If he were allowed to remain in the UK he would increase his involvement with K in terms of her education and well-being. If possible he would like to live with her. He would work if he could. In the school holidays, if he was at work, arrangements could be made with his mother. It was only the opinion of the judge (in the First-tier) that his contact with his daughter was motivated by the aim of remaining in the UK. The day he went to prison was the day that she was born, and that was the biggest mistake of his life. She is the only child that he has.

18. In answer to my questions he said that his surname is a common name in Zimbabwe. He was last convicted of an offence in 2007 and has not been arrested for anything since then.

19. In further cross-examination he said that he was released from detention in June or July 2011.

20. MS, the appellant's mother, adopted her witness statements in examination-in-chief. K has been at her home since the end of the last school term.

21. As to the appellant's attitude to his criminal behaviour, he is now a father and has changed totally. Culturally, he is a father to everyone in the family. He cares about her if she is not well and is so loving.

22. She is a CIO deserter. The appellant would be identified if he goes back. They would know him because he used to stay with her and she sent him to the UK. She did not want him to become a Green Bomber. The authorities would have a record of him as her son.

23. In cross-examination she gave evidence about K's weekend stays, when she comes to stay and who collects her and brings her back home.

24. If the appellant is deported she would still have contact with K.

25. In answer to my questions she said that she came to the UK in 2001. The relatives she has in Zimbabwe are her brother and sister. Her brother is out of work but buys and sells what he can. He lives with his wife. She is not sure whether or not he is involved in politics. She does not know if he has had any trouble from the authorities as he lives somewhere else from where she used to live. Her sister is a housewife. She does not know if she has had any trouble from the government but she is an invalid and suffering from cancer.

26. In re-examination she said that her surname (the same as the appellant's) is her married name. As to why the appellant would be at risk despite her brother and sister not being at risk, he has her marriage surname and her former workmates and people around her know him.

Submissions

27. Ms Horsley relied on the refusal letter dated 27 March 2012. Judge Oliver did not find the appellant credible as to his asylum claim. His lack of credibility is relevant to the risk on return. He would not in any event have to demonstrate loyalty to the regime. He would be returning to Bulawayo. He had no problems with the authorities whilst he was there and so his mother having left the CIO would not give rise to any risk. He had remained in the family home after she left the country.

28. Judge Oliver had made an adverse credibility finding in relation to the appellant's mother, although he accepted that she had been a member of the CIO. Her appeal was allowed on facts specific to her. She appears to have left the country on her own passport and left on one occasion before the appellant had himself left the country. The appellant has no profile in Zimbabwe and there is no evidence that the authorities would have a record of him as her son.

29. In relation to Article 8, the First-tier judge had made a finding in relation to the appellant's motives for maintaining contact with his daughter, being to prevent his removal. In an earlier appeal the judge had concluded that the appellant would say anything to prevent his removal. The issue of whether he would continue his relationship with his daughter should be approached with great caution in the circumstances. That issue is also relevant to his daughter's best interests. The evidence of the weekend and holiday visits was however, accepted.

30. There was no independent evidence of the affect on his daughter of the appellant's removal. There is a strong family network that would support her. Even if it was in her best interests for him to remain here, those best interests are outweighed by his offending, the fact that he had false stamps in his passport, that he is an overstayer and that his family life was established when he knew that he had no right to remain in the UK.

31. It was submitted that the 'new' immigration rules on deportation at paragraph 398-399 apply and I was referred to the decisions in Izuazu (Article 8 – new rules)

[2013] UKUT 00045 (IAC) and Nagre [2013] EWHC 720, as well as the current guidance in relation to the Article 8 rules.

32. Mr Jacobs submitted that it did not matter whether or not the appellant left Zimbabwe after his mother. Given the findings in her appeal it is clear that she has a high profile, having deserted a government position. He would be at risk as being the son of a deserter. The situation is different for his mother's brother and sister as they do not have his name. The appellant had lived with his mother and had been known to her colleagues. It would come to light that he is the son of a deserter. His situation can be distinguished from the current country guidance.

33. Even though his mother left 12 years ago, it has been found by the First-tier Tribunal that she would be at risk now. Her other sons were not at risk because the authorities were satisfied that they did not know her whereabouts. He could not be expected to lie if asked as to her whereabouts. His mother is a deserter and a traitor and he is a failed asylum seeker

34. In relation to Article 8, there is significantly more evidence now than there was before Judge Oliver. There is evidence of a genuine and subsisting relationship and there has now been regular contact over two years. It would be in K's best interests to remain with both parents. The appellant would be excluded from the UK for 10 years by which time his daughter would be 15 years old.

35. There has been no offending since his release and his convictions are not such as require the need to express society's revulsion. The Article 8 rules are not retrospective and thus have no application.

Conclusions: asylum, humanitarian protection and Article 3

36. The asylum ground relies on the fact of the appellant's mother having been a member of the CIO in Zimbabwe, a matter that was accepted by First-tier judge Oliver who, coincidentally, also dealt with her asylum appeal as well as that of this appellant. As explained at [26] of the determination in this appellant's appeal, the Secretary of State had accepted that the appellant's mother had worked for the CIO. That is also apparent from the determination of her appeal. A copy of the determination in her appeal is at page 67 of the appellant's bundle that was before the First-tier Tribunal. That appeal was heard on 17 February 2010.

37. Judge Oliver did not find the appellant's mother to have given a credible account of having left Zimbabwe in fear of persecution. At [26] of the determination in her son's, this appellant's, appeal he explained that he had made an adverse credibility finding in her case. Her appeal was allowed on the basis that she would, in 'RN' terms, have been unable to demonstrate loyalty to the regime.

38. When I decided that there was an error of law in Judge Oliver's decision the Upper Tribunal had not by then promulgated the decision in CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC), which was promulgated on 31 January 2013. In that decision, EM and Others (Returnees)

Zimbabwe CG [2011] UKUT 98 (IAC) was affirmed. Thus in fact, before Judge Oliver EM did represent the appropriate country guidance. Nevertheless, his decision has been set aside and needs to be re-made.

39. Neither party put before me any background material additional to that set out in CM. I did canvass with the parties the relevance of the publicly known fact that there have very recently been elections in Zimbabwe which Zanu-PF won. It was agreed on a minimum basis that I could take judicial notice of the fact that there had been elections which resulted in victory for Robert Mugabe. Mr Jacobs urged that I should go further and also take into account that concerns had been expressed by the British Foreign Secretary about the election process. What are the terms of that expression of concern is not in evidence before me. Suffice to say, it is common knowledge that concerns have been expressed in some quarters, both within and outside Zimbabwe in relation to the election.

40. However, that does not do much, if anything, to inform the decision to be made about the claimed risk to the appellant on return. There is no evidence before me as to whether the fact of the elections has increased or decreased any possible risk, for example because of heightened or lessened tensions. In the circumstances, I proceed on the basis that this is not a matter that has any proven bearing on the issues I have to determine.

41. In his determination Judge Oliver stated at [26] that he could not rely on anything the appellant said. At [27] he found that "The inconsistencies and contradictions belie his claim at every turn." The adverse credibility assessment is unaffected by the error of law. At [27] he referred to the appellant's evidence to the effect that he had not been targeted in any way whilst he was in Zimbabwe. At [27] he found that both the appellant and his mother lied about the appellant's situation in Zimbabwe in terms of whether or not he had lived with his father and whether his mother arrived in the UK before or after his mother.

42. At [4] there is reference to the refusal letter dated 23 July 2007 which itself refers to the appellant's interview in which he said (at question 24) that he lived in his mother's (government) house for between four and six months after his mother left the CIO. There was no evidence that he suffered any problems from the authorities in that time.

43. There is reference in the determination at [12] to the appellant's oral evidence to the effect that he had one brother and an uncle who, at that time, still lived in Zimbabwe. There is nothing in the evidence to indicate that they have experienced any problems on account of the appellant's mother having left the CIO.

44. At [30] of his mother's determination Judge Oliver concluded that she had not established that any member of the family, including two of her sons or her brother, had been subjected to ill-treatment on account of her. There is some ambiguity in his conclusions in that paragraph in terms of whether the CIO did

make enquiries of family members as to her whereabouts, but the fact remains that there is no evidence that any of them were ill-treated.

45. In evidence before me the appellant's mother said that she has a brother and sister in Zimbabwe. Whilst it may be that they have a different name from her, hers being her married name, there is again a lack of evidence that those family members have been the subject of any adverse attention on account of the appellant. Given the reliance by the appellant on the intelligence led process of investigation by the CIO, it is reasonable to assume that family members of the appellant's mother present in Zimbabwe would be able to have been located by the CIO.

46. The country guidance in CM, in essence, affirmed the country guidance in relation to the situation at the point of return as set out in HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094, although in CM the Tribunal expressly stated that it was not giving country guidance on that issue. The guidance in HS from [264] is to the effect that the intelligence led process at the airport is to identify those who may be of interest to the regime. The mere fact of returning as a failed asylum seeker would not be a basis from which to conclude that an individual would be at risk.

47. The appellant left Zimbabwe in 2001, as it seems did his mother. I was not referred to any country background material or any aspect of any country guidance case which would support the proposition that the appellant would be targeted on account of his association with his mother, still less having regard to the length of time that he has been out of the country. The evidence particular to his family circumstances and to which I have referred does not indicate that any family member has been the subject of any adverse attention by the authorities in Zimbabwe on account of his mother having left the CIO.

48. Notwithstanding that Mr Jacobs suggested that a distinction could be drawn between other family members who had not left the country and the appellant who had, I am not satisfied that the evidence establishes a reasonable likelihood that the appellant would be subjected to any adverse attention leading to ill-treatment, either at the point of return or subsequently. Even if I were to accept that a connection would be made between the appellant and his mother on return, I am not satisfied that there would be a risk to him given that lack of evidence that the appellant, or any family member have experienced such problems in the past.

49. Indeed, the appellant has not established that any connection between him and his mother is reasonably likely to be made on his return. Aside from the fact, accepted in evidence, that the appellant's surname is a common one in Zimbabwe, I was not referred to any evidence in terms of the intelligence gathering process which would indicate that after 12 years the CIO would make a connection between the appellant and his mother, the appellant being much older than when he left aged 19.

50. In any event, as I have indicated, I am not satisfied that the evidence establishes that there would be any adverse interest in the appellant as his mother's son, even if such a connection was made.

51. More generally, it is significant to note that the appellant is from Bulawayo, where it was concluded in CM that an individual would not in general suffer adverse attention.

52. Accordingly, I am not satisfied that the evidence establishes that the appellant would be at risk of persecution on return for any reason. It follows that he is not entitled to humanitarian protection and his removal would not breach his human rights in respect of Article 3.

Conclusions: Article 8 and paragraph 390

53. Mr Jacobs submitted that there had been no consideration by the Secretary of State of Section 55 of the Borders, Citizenship and Immigration Act 2009. Ms Horsley suggested that there had been sufficient consideration of 'section 55' as reflected in the respondent's summary (formerly known as the 'PF1') which shows that letters had been written to the appellant's solicitors and to K's mother requesting information about K and her relationship to and with the appellant.

54. It has to be said that Mr Jacobs position on this issue was to some extent ambiguous, on the one hand suggesting that the lack of consideration of section 55 rendered the decision not in accordance with the law, yet also accepting that there was sufficient evidence before me from which I could determine the Article 8 ground, including with reference to the best interests of K.

55. The question of whether this appeal should be allowed on the limited basis that the decision is not in accordance with the law for want of a consideration of section 55 can be answered shortly. In the first place, I was not directed to any evidence which suggested that the Secretary of State had received any information in response to her enquiries about K, in particular the request for confirmation that K is the biological daughter of the appellant. Secondly, AJ (India) [2011] EWCA Civ 1191, suggests that where the Tribunal has sufficient information from which to make a determination of the relevant issues, it should go on to do so, rather than finding that the decision is not in accordance with the law and allowing the appeal on that limited basis.

56. So far as Article 8 is concerned, I am not satisfied that the Article 8 rules have any application to this appeal, either in a direct sense, or as a factor in the proportionality assessment. In MF (Article 8 – new rules) Nigeria [2012] UKUT 00393(IAC) it was decided that the 'new' Article 8 rules are not retrospective. The decision in this case was taken before those rules came into effect, on 9 July 2012. Neither the decision in Izuazu nor that in Nagre, relied on by Ms Horsley, undermine the correctness of the decision in MF on this point. Thus, I am not satisfied that paragraphs A362, 398 or 399 of HC 395 (as amended) apply.

57. As to Article 8 proper then, I adopt the structured approach set out in Razgar [2004] UKHL 27. It is sufficient at this stage simply to state that I am satisfied that the appellant has family life with his daughter K, aged 5. It is not disputed that she is his daughter and it is accepted that he has the contact with her that has been claimed.

58. Since arriving in the UK in 2001 he will have established a private life, although there is little evidence of the extent of that private life. In any event, the focus for the Article 8 ground is his family life with his daughter.

59. The respondent's decision amounts to an interference with his family life with his daughter. It was accepted in submissions on behalf of the respondent before me that K is a British citizen and could not be expected to return to Zimbabwe with him. The decision would also amount to an interference with his private life.

60. The interference with his family and private life will have consequences of such gravity as potentially to engage the operation of Article 8, applying the second principle in Razgar. It does however, pursue a legitimate aim namely the prevention of disorder and crime. A further aim is the economic well-being of the country expressed as the maintenance of effective immigration control, given that the appellant has been an overstayer in the UK since 2001, having initially been granted leave to enter for six months as a visitor. The decision to refuse to revoke the deportation order is in accordance with the law.

61. The analysis of the Article 8 ground turns on proportionality. In that context I take as a primary consideration the best interests of the appellant's daughter, K.

62. The evidence of the contact that the appellant has with his daughter was accepted on behalf of the respondent at the hearing before me. In summary, he sees her every two weeks when she stays with him at his mother's home. She is staying with him for the summer school holidays. The written evidence in the statements of the appellant and his mother also says that she stays during other holiday periods. In his witness statement dated 29 July 2013 the appellant refers to his having attended school meetings and a Christmas play in 2012. He states at [8] that he intends to be even more involved with her school life once term resumes in September 2013 and that he contributes to the purchase of uniform and so forth. The statement also refers to the things that they do together when she and her step-brother M come to stay and his joint involvement with her mother in decisions about her daily life.

63. The witness statements from SHD, the mother of K, refer to the closeness of the relationship between the appellant and K as do the witness statements from the appellant's mother. I note that in about January 2013 the appellant had asked the UKBA to allow him to move from his mother's address in Luton to SHD's address in Northampton. She had then just had a baby and the appellant suggested that because she was unwell he felt that K needed him, for example to take her to school. There is a letter from the UKBA dated 10 January 2013 confirming the

request made in the appellant's letter. SHD's witness statement dated 20 May 2013 also refers to the request that he made, stating that with her new baby it was difficult to look after three children on her own.

64. There are significant credibility issues that arise in respect of both the appellant and his mother, as is apparent from my conclusions and reasons in the determination of the asylum appeal, as well as from further matters set out below. However, given the acceptance of the evidence of the contact between the appellant and his daughter it is likely that at that age she will have become closely attached to the appellant.

65. That this is the case is apparent from the oral evidence of SHD and from her manuscript witness statement. No concerns have been expressed on behalf of the respondent in relation to her credibility. She refers to K being jealous for his attention, and that she has difficulties at school but listens to the appellant whom, she says, K has respect for. She refers to K being a very emotional person who is very close to the appellant. SHD states that if the appellant was deported K would feel his loss deeply.

66. The appellant's mother states in her witness statement dated 29 July 2013 at [10] that it has been decided not to tell K that there is a possibility that her father will be deported. I am prepared to accept this, given K's age and the evidence as to her relationship with the appellant.

67. It is important to have regard to the fact that Judge Oliver found at [31] that the relationship between the appellant and K has been tenuous and that the appellant "had tried to give the appearance of a concerned father, involved in the upbringing of his daughter" going on to conclude that because of the lies he had told and the "quite extraordinary efforts he had made to thwart his removal from the United Kingdom that the latter has been his primary motive in seeing more of his daughter."

68. Ms Horsley reminded me of what I said in my error of law decision at [23], namely that in so far as not affected by the error of law, the findings of fact by Judge Oliver in his Article 8 consideration could stand. The error of law related to K's best interests but not to his distinct findings of fact in relation to Article 8 and his contact with his daughter.

69. However, as was pointed out by Mr Jacobs, there is evidence before me which was not before Judge Oliver when he determined the appeal over a year ago now. Nevertheless, that evidence does not detract from the conclusions that Judge Oliver came to as to the appellant's cynical motives for keeping in contact with her at the time of his assessment of the evidence.

70. An issue to be decided is, is that still his motive for keeping in contact with his daughter and is it likely, as suggested by Ms Horsley, that if the appellant succeeds in his appeal, he would cease contact with her. His motive for keeping in contact with her is relevant to her best interests for that reason, although it is not

determinative. From his daughter's perspective, the question purely of motive is probably irrelevant in so far as she has developed a close bond with him. It becomes relevant to her best interests in terms of his future intentions.

71. The appellant has a propensity to deceive. So much is evident from Judge Oliver's determination, as well as from the determination of his deportation appeal in May 2008 before Immigration Judge Fisher and Mr T.A Jones MBE. In that determination at [16] it was concluded that he was a person who would say anything to his advantage.

72. The appellant said in evidence before me that K was his only child, and he confirmed his answer to me. In the OASys report (at section 6) he refers to having two children, one of whom at the date of the report in November 2011 was aged 1½ months. That could not be K, who was born in 2007. There are other references to two children in other parts of the report.

73. At [16] of the determination of May 2008 it is recorded that the appellant said that he had *three* children, two with a previous partner and one with his then current partner in Northampton. His evidence to that effect is recorded at [5] of that determination. The Panel noted that in the screening interview at that time he said that he had no children and confirmed in evidence that that was what he had said, stating that he said that because he did not think that they were important. In the then pre-sentence report he said that he had two children. These aspects of the evidence, amongst other matters, led the Panel to make the observation referred to at the end of [71] above.

74. The evidence suggests that the appellant has more children than he was prepared to admit in evidence. Certainly he has referred to other children in evidence before a Tribunal, in a pre-sentence report and in the OASys report. I have come to the conclusion that his evidence before me that K is his only child was a deceitful attempt to maximise the claimed impact on him of a separation from his daughter by his removal.

75. Whilst the evidence does, in terms of the facts, support the amount of claimed contact that the appellant has with K, there is little if anything to displace the negative assessments that have been made as to the appellant's propensity to be deceptive. This is relevant to the point made by Ms Horsley in terms of what continuing contact the appellant could be expected to maintain if he were to succeed in his appeal.

76. In the circumstances of this appeal, notwithstanding the lack of any professional evidence of K's best interests, it is reasonable to conclude that her best interests would be for her to maintain a close relationship with the appellant, continuing at least on the basis of the contact at present. It has not been suggested that her best interests are directly compromised by his character or criminality.

77. The appellant's lack of credibility is such that I have significant reservations in relation to his assertions that he would maintain the present contact and indeed,

build on it. He was not prepared to admit in evidence before me that he has another child or children when other evidence establishes that it is likely that he does. There is no evidence that he sees his other child or children. There may be many reasons for that but as a matter of evidence what would appear to be his lack of contact with his other children has the potential to raise doubt about what he says will be the extent of his future commitment to K.

78. Nevertheless, there is evidence that the appellant's mother has contact with K. Although she too has previously been found to be lacking in credibility, it does seem to me to be likely that as K's grandmother she would want to maintain contact with her and I accept that she would; she has significant contact at present with K staying with her and the appellant on a regular basis. There are several photographs of them all together. Furthermore, given the extent of the appellant's present contact with K, notwithstanding the reservations I have expressed it is likely that he will have formed a bond with her which would encourage him to maintain significant contact with her in the future. Contact significant enough to mean that his removal would adversely affect her. I do not believe the evidence of his deceitfulness goes so far as to indicate that his regular contact with her has all been 'for show', as it were, although the evidence suggests that that is likely to have been at least a factor in his contact with her.

79. His removal would therefore adversely affect her best interests given that the only contact she could have with him from Zimbabwe would be by phone, letter, perhaps Skype, or the occasional visit. I accept the evidence in the witness statements which suggest that K has formed a close bond with the appellant, and such would be a reasonable conclusion in any event.

80. However, whilst K's best interests are a primary consideration, they are not the only consideration. The offences which led to the decision to make a deportation order were offences of dangerous driving, driving with excess alcohol, failing to stop at the request of police, no insurance and no licence. He received a sentence of nine months' imprisonment for dangerous driving, four months' imprisonment concurrent for failing to stop and was disqualified from driving for four years. The offences were committed in May 2007 and he was sentenced in November 2007.

81. The sentencing remarks illustrate just how bad the appellant's driving was on that occasion. He drove at speeds reaching 113 mph on a motorway having consumed excess alcohol. He swerved at times towards a police car, lost control and hit the central barrier. He resisted arrest.

82. He had been convicted of other offences previously. According to the letter dated 10 April 2008 from the UKBA to the appellant, on 1 February 2006 he was convicted of two offences of assaulting a police constable and one offence of possession of cannabis and was sentenced to six months' imprisonment. On the other hand, the refusal letter dated 7 February 2012 states that for those offences he received three months imprisonment. The sentencing remarks in 2007 state that

he had been convicted of a driving offence involving excess alcohol in December 2004. The OASys report at 2.12 states that he was disqualified from driving for three years in 2005. It also refers to an offence of assaulting a police officer.

83. The decision letter of 27 March 2012 at [13] refers to stamps in the appellant's passport showing extensions of stay and a "no time-limit" stamp having been found to be counterfeit. Ms Horsley made reference to this in submissions and it has not been disputed on behalf of the appellant that his passport did have those counterfeit stamps in them.

84. The OASys report in November 2011 described the risk of reoffending, and the risk to the public, as medium. Given that he has not offended since November 2011 it is reasonable to conclude that the risk has diminished to some degree. Mr Jacobs relied on the fact that the appellant has not committed any offence since being released from (what was presumably immigration) detention in July 2011. Those are relevant matters although it has not been suggested on his behalf that the category of 'medium' risk does not still apply to him.

85. I have taken into account the decision in N (Kenya) [2004] EWCA Civ 1094 and what was said there about the public policy need to deter and to express society's revulsion at the seriousness of the criminality. At [65] it was said that the risk of reoffending is a factor in the balance but not the most important public interest factor in the case of very serious crimes. The principle of deterrence expressed in N (Kenya) is again reiterated in RU (Bangladesh) [2011] EWCA Civ 651 at paragraph 43 in which it was said that:

> "The point about "deterrence" is not whether the deportation of a particular "*foreign criminal*" may or may not have a deterrent effect on other prospective offenders. It concerns a much more fundamental concept which is explained by Judge LJ at [83] of his judgment in ***N (Kenya).*** The UK operates an immigration system by which control is exercised over non-British citizens who enter and remain in the UK. The operation of that system must take account of broad issues of social cohesion in the UK. Moreover, the public has to have confidence in its operation. Those requirements are for the "public good" or are in the "public interest". For both of those to requirements to be fulfilled, the operation of the system must contain an element of deterrence to non-British citizens who are either already in the UK (even if refugees) or who are thinking of coming to the UK, "*so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation*". That element of "public interest" or "public good" is a part of the legislative policy, declared by Parliament in ***section 32(4)*** of the UKBA, that the deportation of "*foreign criminals*" is conducive to the public good."

86. In *Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048(IAC)*, at [48] the Upper Tribunal said this:

> > "It is long established that the legitimate aim of the prevention of disorder or crime does not depend on a person who has been convicted of a particularly serious offence being likely to further threaten the public interest by re-offending. As the decisions of the Court of Appeal in N (Kenya) and OH (Serbia)

> demonstrate, the maintenance of respect for the law, public indignation at past conduct, the deterrence of others by the adoption of the supplementary measure of deportation in addition to the criminal sentence may all contribute to the legitimate aim and justify deportation providing the interference is proportionate in all the circumstances of the case. The more serious the offending, the stronger is the case for deportation, but Parliament has not stated that every offence serious enough to merit a custodial penalty or a penalty of twelve months or more imprisonment, for that reason makes interference with human rights proportionate."

87. This, of course, is not an automatic deportation under the UK Borders Act 2007. No doubt in many deportation appeals the offending is more serious than the offences for which this appellant has been convicted and which resulted in the decision to make the deportation order. Certainly in N (Kenya) itself that appellant had been convicted of far more serious offences involving abduction, threats to kill, three counts of rape and false imprisonment, resulting ultimately in a sentence of 11 years' imprisonment. Nevertheless, the principle of deterrence applies to this appellant in the same way, as set out in the decisions to which I have referred.

88. So what is the answer to the proportionality question in this appeal? On the one hand the appellant is an overstayer, and has been since 2001. His passport contained counterfeit stamps, albeit that no evidence was before me as to whether he was prosecuted for any offence in relation to those stamps. As Ms Horsley suggested, his family and private life have been established in circumstances when he knew of his illegal status in the UK. He has committed criminal offences, including a serious offence of dangerous driving. There is a risk that he will commit further offences, although he has not committed any offences since his last conviction in 2007.

89. He has developed a close bond with his 5 year old daughter whom he sees on a regular basis. His deportation would mean their separation in a physical sense for a period of at least ten years, and the contact they could have in the interim would be no substitute for the close contact they have at present. The period of separation would constitute a very significant portion of K's developmental years.

90. I do not consider that the appellant's private life, about which there was little evidence beyond the non-family life relationships evident from the facts evident in this determination, weigh much in his favour in the balancing exercise. Likewise, whilst it may be that his removal may have an effect on his relatives in the UK, in particular his mother, that again is of little weight on the facts of this appeal.

91. That the appellant would prefer to remain in the UK and would himself be affected by the loss of direct contact with his daughter are similarly not matters that attract much weight. The appellant's feelings are of very little significance set against the factors which weigh in favour of deportation. He has only himself to blame for the situation that he faces.

92. In submissions Mr Jacobs emphasised what was said at [46] by Lord Kerr in *ZH (Tanzania) [2011] UKSC 4*, as follows:

> "It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

93. I do consider that it is in K's best interests for the appellant to remain in the UK, continuing as a father to support her in her development. He would not be able to provide anything like that level of support if he were to leave the UK. She would not doubt, as suggested on behalf of the respondent, be provided with support by the appellant's mother and other family members in the UK. That however, is plainly no substitute for having and being able to develop a close relationship with her father.

94. Balancing all the completing factors, I am satisfied that the decision to remove the appellant does amount to a disproportionate interference with his right to family life with his daughter. Her best interests are of such importance in this case that they do outweigh the factors militating in favour of removal. Thus, I am not satisfied that the respondent has established that the appellant's removal is a proportionate response to the legitimate aims pursued. The appeal is therefore allowed under Article 8.

95. Both parties agreed that the immigration decision in this case is a decision to refuse to revoke a deportation order. It was also agreed that paragraph 390 of HC 395 (as amended) applies. Whilst paragraph 390 requires distinct consideration, the matters set out in that paragraph are subsumed within my consideration of Article 8. It follows that the appeal is also to be allowed under the Immigration Rules, with reference to paragraph 390.

96. However, in concluding that his deportation would be disproportionate, the appellant must be in no doubt that if he commits any further offences there is every prospect that he will again face deportation proceedings which may well result in his removal, with all that that entails for his relationship with his daughter. Further offending will be an indication that he has made the choice of returning to Zimbabwe and separation from his daughter. Such offending would probably require a reassessment of whether it was any longer in K's best interests for the appellant to remain in the UK.

97. I make those observations in the expectation that if there is any further offending which results in deportation proceedings, this determination will be put before any Tribunal dealing with any future appeal.

Decision

98. The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. The decision is re-made as follows:

the appeal on grounds of asylum, humanitarian protection and Article 3 of the ECHR is dismissed;

the appeal under Article 8 of the ECHR and under the Immigration Rules with reference to paragraph 390 is allowed.

Anonymity

Given that these proceedings involve children, I make an order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008). Consequently, this determination identifies the appellant's child and other children, and the adults associated with them, including the appellant, by initials only in order to preserve the anonymity of those children.

Upper Tribunal Judge Kopieczek

15/08/13