



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/01691/2013

**THE IMMIGRATION ACTS**

Heard at Manchester  
On 29<sup>th</sup> April, 2014  
Signed 15<sup>th</sup> May 2014

Determination Promulgated  
On 15<sup>th</sup> May 2014  
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Before

Upper Tribunal Judge Chalkley

Between

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

and

**MR SPENCER KUDITA**

Respondent

**Representation:**

For the Appellant: Mr McVitie, a Home Office Presenting Officer  
For the Respondent: Mr Nyamayaro, an assistant solicitor with Bake & Co Solicitors

**DETERMINATION AND REASONS**

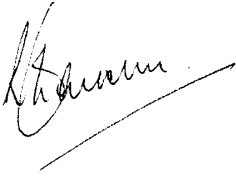
1. The Secretary of State for the Home Department is the appellant in these proceedings and to avoid confusion I shall refer to her as “the claimant.”
2. The respondent is a citizen of Zimbabwe, who was born on 1<sup>st</sup> October, 1971, and who entered the United Kingdom as a visitor on 19<sup>th</sup> September, 1999. The respondent was granted six

months' leave to remain and he joined his wife, Yvonne Vuyo Hela,, to whom he had been married since 23<sup>rd</sup> December, 1995, and who was a domestic worker at the Zimbabwean High Commission in London.

3. The respondent and his wife have two British born children, Y who was born in 2002 and T, who was born in 2005. Both attend school in the United Kingdom.
4. Following the respondent's arrest for using a French passport, the respondent came to the attention of the immigration authorities and was served with a notice as an overstayer, liable to removal.
5. He was not removed but I do not know why.
6. On 29<sup>th</sup> June, 2007, at Birmingham Crown Court, the respondent was convicted of using a false instrument, obtaining an advantage for self by deception and remaining in the United Kingdom beyond the time limit. He was sentenced to twelve months' imprisonment on each of the first two offences and to three months' imprisonment on the third, all concurrent.
7. It was on 11<sup>th</sup> July, 2007, that the respondent was notified of his liability to deportation and on 23<sup>rd</sup> July, that year, he claimed asylum. On 10<sup>th</sup> October, 2007 the Secretary of State for the Home Department made a decision to deport the respondent and on 18<sup>th</sup> October, 2007 the respondent lodged appeal against deportation which was dismissed on appeal on 21<sup>st</sup> January, 2008. The deportation order was signed on 11<sup>th</sup> September, 2008.
8. For reasons which have not been explained to me the respondent was not then removed from the United Kingdom.
9. On 24<sup>th</sup> February, 2009, representations were made on behalf of the respondent to the Secretary of State. Further representations were made on 20<sup>th</sup> April, 2010.
10. Nothing further was heard from the Secretary of State until, in a letter dated 6<sup>th</sup> August, 2013, responding to his solicitor's letters of 23<sup>rd</sup> February, 2009 and 20<sup>th</sup> April, 2010, the UK Border Agency advised that it refused to revoke the deportation order. Its decision to refuse to revoke the deportation order was dated 6<sup>th</sup> August, 2013 and it was against that decision that the respondent appealed to the First-tier Tribunal.
11. The respondent's appeal was considered by a panel of the First-tier Tribunal (First-tier Tribunal Judge A K Simpson sitting with Mrs S A Hussain) who, in a determination dated 20<sup>th</sup> April, 2014, allowed the respondent's appeal on immigration and human rights grounds
12. The claimant challenged that decision and in granting permission to appeal First-tier Tribunal Judge Holmes suggested that it was arguable that the Tribunal failed to properly engage with the evidence and the Immigration Rules and to note that the respondent's spouse and children were not British citizens, but Zimbabwean, like him. Given that he did not meet the requirements of the Immigration Rules criticism was made that the determination makes no reference to how to approach the issue of the effect upon a family of deportation and in particular the weight to give to the best interests of the children who are not British citizens, but citizens of the country to whom the respondent will be deported, when balancing the public interests in his deportation.

13. Mr McVitie told me he relied upon the grounds as drafted. He suggested that at paragraph 27 of the determination, the panel had sought to retry the deportation appeal. He told me that the respondent's children were now in fact both British.
14. I have carefully read the panel's determination and do not accept that the panel sought to retry the deportation appeal. What they did, at paragraph 27, was to note that the respondent acknowledged the offences which were all committed during the course of the same incident, that he has committed no further offences during the six years since his conviction and that given the nature of the offences, namely using a false passport in order to work illegally, they found that he was at low risk of reoffending. The panel acknowledged that the respondent has worked illegally whilst in the United Kingdom, but concluded that he had clearly demonstrated his desire to support himself and his family from his own resources, rather than to merely rely on receipt of benefits.
15. The first challenge made by the respondent suggests that the Tribunal has found that the respondent's deportation would breach the guidelines set in the case of *Maslov v Austria* [2009] INLR 47, but when one actually reads paragraphs 27 and 33 it is clear that the Tribunal had in mind the advice of the European Court in *Boultif v Switzerland* [2001] 33 EHRR 1179 and *Uner v the Netherlands* [2007] INLR 273 and the factors that were thought to be relevant in assessing whether the removal or deportation of a foreign national is proportionate. The Tribunal bore in mind that the respondent and his children were, at that time, all citizens of Zimbabwe and not British, although they were born in the United Kingdom and had lived in the United Kingdom exclusively for the whole of their lives. They formed the view that the respondent's removal to Zimbabwe would result in both a short term and longer term impact on the children's relationships with both parents and in time the children would regard themselves as having been abandoned by their father. They went on to note that the respondent's removal would also mean that his wife would be left alone to raise their children which was not something that she had ever anticipated and given her occupation and shift pattern it would lead to particularly serious practical difficulties in her case. Given the current economic climate in the United Kingdom it was not reasonable to expect her to seek other occupation which will prevent her being able to care for her children whilst earning an income. They believe that the respondent's removal to Zimbabwe was likely to lead to his wife's eventual inability to continue her present job which would be to the detriment of both children.
16. Both children are now acknowledged to be British subjects, although at the date of the determination they were not.
17. The Tribunal considered whether the removal of the respondent's children to Zimbabwe would be in the best interests of these children, but noted that the older child was now a secondary school pupil and believed that a change in syllabus and teaching methods at this stage in her educational career was likely to have a profound effect on her GCSE achievement. The other ground suggested that the Tribunal's proportionality reasoning was faulty. I believe that the grounds are entirely misguided.
18. One can quite understand a very strong public interest in the removal from the United Kingdom of foreign prisoners, but it took the UK Border Agency in excess of four years to reply to representations made to it on behalf of the respondent, when in September, 2008 the Secretary of State signed a deportation order. The Secretary of State for the Home Department has now granted the appellant's children British nationality.

19. I am satisfied that the determination of First-tier Tribunal Judge Simpson does not contain any error on a point of law and I uphold her determination. The appeal by Spencer Kudita is granted.

A handwritten signature in black ink, appearing to read 'Chalkley', with a long horizontal flourish extending to the right.

Upper Tribunal Judge Chalkley