Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/03207/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 22 June 2016	**On 6 July 2016**

Before

UPPER TRIBUNAL JUDGE C N LANE
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

J E
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms R Head (counsel) instructed by Lawrence Lupin, solicitors

DECISION AND REASONS

1. We make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, to preserve the anonymity direction made in the first tier.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Perry, promulgated on 4 August 2015

which allowed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 2 October 1979 and is a national of Zimbabwe. On 12 January 2015 the Secretary of State refused the appellant's human rights claim and made a deportation order relying on s.32(5) of the UK Borders Act 2007.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Perry ("the Judge") allowed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 30 November 2016 Judge Davies gave permission to appeal stating *inter alia*

> The Judge, in relation to the deportation order has made an error of law when proceeding on the basis that the appellant had been sentenced to four years' imprisonment when in fact she received a sentence of five years' imprisonment. This is relevant as whilst clearly stating at paragraph 4 of the decision that the appellant received a sentence of five years, the Judge goes on to consider section 117C on the basis that the appellant had received "a period of imprisonment of less than four years".

6. In a decision promulgated on 18 February 2016 the Upper Tribunal set aside the Judge's decision, finding that it contained material errors of law. The Upper Tribunal directed that the case should be considered of new at a resumed hearing of the Upper Tribunal.

The Hearing

7. We heard evidence from the appellant and her two witnesses, AA and NR. Each witness adopted their witness statement before answering questions in cross examination. We then heard parties' agents' submissions.

8. Ms Isherwood reminded us that the appellant was senteced to 5 years imprisonment in 2010, and then, when released from prison on licence, committed a further offence, and was sentenced to a further 30 months imprisonment. She told us that, because of the convictin in 2010, a deportation order has been served on the appellant. As the appellant has received a cusotfdial sentence of more than 4 years, she told us that we must consider the test set out in s.117C of the Nationality, Immigrtion ans Asylum Act 2002 (as amended). Ms Isherwood reminded us of parahraphs 398, 399 & 399A of the Immigration rules, and emphasised final clause of paragraph 398 of the rules:

> …the public interest in deportation will only be outweighed by other facotrs where there are very compelling circumstancesover and above

those described in paragraphs 399 and 399A

9. (a) For the appellant, Ms Head adopted the terms of her skeleton argument. She rehearsed the history of this case, and argued that the appellant establishes very compelling circumstances over and above those set out in paragraph 399 & 399A of the Immigration rules. She explained that the appellant might be a national of Zimbabwe, but she left that country when she was 3 years old, and did not even know that Zimbabwe is her country of origin until comparatively recently. The appellant has no ties to Zimbabwe, she know s no-one there, she has no network of support there, and she cannot speak any language other than English.

(b) Ms Head told us that the appellant is a vulnerable young woman, who experienced rejection as a child and spent a lot of her childhood in care. She told us that the appellant has learnt form her mistakes, and the purpose of the criminal justice penalties imposed on the appellant have been served. She reminded us that rehabilitation of the offender is a cornerstone of the purpose of criminal justice, and told us that the appellant has no outstanding cases, no outstanding fines, and is not in a position of trust – so that her rehabilitaion has been achieved.

(c) Ms Head told us that the appellant has a British citizen child who she had to entrust to her brother whilst she was in prison, and that the appellant has a genuine and subsisting relationship with her son. She has residential contact to her son for at least three nights each week. Ms Head told us that if the appelant were removed to Zimbabwe, she could not take her son with her, so that her relationship with her son would be destroyed. She argued that the detrinental effect of separating the appellant from her son, and effectively terminating the relationship of mother and young child, is a very compelling circumstances over and above those described in paragraphs 399 and 399A.

(d) Ms Head urged us to allow the appellant’s appeal.

Our Findings of fact

10. The appellant entered the UK on 11 October 1992, when she was only three years old. She has remained in the UK since then. The appellant’s childhood was disrupted by problems within her own family, and the appellant was taken into the care of the local authority when she was 12 years old. As a young adult, the appellant descended into drug addiction.

11. On 15 February 2008 the appellant was convicted of burglarly and sentenced to a community order. On 22 May 2009, the appellant was convicted of two offences of dishonesty and sentenced to a 24 month community order. On 4 October 2010 the appelant was convicted of an offence under the Misuse of Drugs Act 1971. She was sentenced to 5 years imprisonment. On 13 October 2011 the respondent wrote to the appellant informing her of her laibility to deportation. On 4 December 2012 the appelant was released on Licence.

12. On 19 September 2013 the appellant was recalled to prison because she had reoffended. On 27 February 2014 the appellant was sentenced to 30 months imprisonment for burglary. On 12 January 2015 the respondent served a deportaiton order on the appellant because she is a foreign criminal who has been sentenced to more than 4 years imprisonment.

13. The appellant has one child, born on 13 February 2006. The appellant is not married to her son's father and her relationship with her son's father is at an end. The father of the appellant's child is now serving a custodial sentence. When the appellant was first taken into custody in 2010, her child was cared for by the local authority. On 14 August 2013 the appellant's child was released into her care. The appellant lived with her son for about two months before being recalled to prison.

14. Since the appellant was recalled to prison on 2013, her son has been cared for by her brother. The appellant's brother was granted a residence order for the child whilst the appellant was in prison. That residence order has not been recalled. During each of the appellant's periods in prison, contact with her son was maintained. The appellant had contact visits once per month and enjoyed regular telephone contact with her son. On release from prison, the appellant went to live with her brother and her son, but in January 2016 the appellant and her brother disagreed, and the appellant left her brother's house (where her son remains). She has relied on friends for acommodation since then.

15. Since January 2016, the appellant has enjoyed residential contact to her son each weekend. She collects her son on a Friday and returns him to her brother each Monday morning. The appellant's son knows the appellant as his mother. There is a genuine bond of affection between the appellant and her son.

16. The appellant's two brothers and three half siblings continue to reside in the UK. The appellant's son is a Britsh citizen. The appellant has no memories at all of Zimbabwe. For many years the appellant believed she was a South African citizen, and only found out that she is Zimbabwean as a young adult. If the appellant's Zinbabwean origins had been known to social services whilst she was in care as a teenager, she might have been naturalised as a British Citizen. The appellant has no relatives in Zimbabwe, and no friends there. The appellant knows nothing of Zimbabwean traditons and culture.

Analysis

17. Section 117C of the 2002 Act says

> 117CArticle 8: additional considerations in cases involving foreign criminals
>
> (1)The deportation of foreign criminals is in the public interest.

(2)The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3)In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4)Exception 1 applies where—

(a)C has been lawfully resident in the United Kingdom for most of C's life,

(b)C is socially and culturally integrated in the United Kingdom, and

(c)there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5)Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6)In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7)The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

18. Paragraphs 398, 399 and 399A of the Immigration Rules say

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and
(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

19. The deportation order against which the appellant appeals proceeds on the basis of paragraph 398(a) of the Immigration rules. Paragrapghs 399 & 399A only come into effect if the deportation order relies on paragrapgh 398 (b) or (c). There is no need to consider paragraphs 399 or 399A in this case. In any event, paragraphs 399 and 399A set out certain presumptions which an appellant can rely on. In this case the appellant's appeal proceeds entirely on the effect deportation will have on her relationship with her son. On the facts as we find them to be, if paragraphs 399 and 399A had relevence the appellant could argue that she falls within the exception set out in paragrapgh 399(a).

20. Because of the operation of paragrapgh 398(c), we must look for

> …very compelling circumstances over and above those described in paragraphs 399 and 399A.

21. In *MF (Nigeria)* [2013] EWCA Civ 1192 the main issue concerned the position when the appellant could not succeed substantively under paragraphs 398 or 399 of the rules on a deportation and the determinative question is whether there are "exceptional circumstances" such that the public interest in deportation is outweighed by other factors (paragraph 398 of the new rules). The Court accepted a submission for the SSHD that

> the reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under article 8(1) trump the public interest in their deportation (paragraphs 39 and 40).

The Court went on to say:

> In our view, [this] is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal (paragraph 42).

Accordingly, the new rules applicable to deportation cases should be seen as

> a complete code ... the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence

22. In *SSHD v AQ (Nigeria) CD (Jamaica) and TH (Bangladesh)* [2015] EWCA Civ 25 it was held that when a foreign criminal appealed against a deportation order on the ground that the public interest in his deportation was outweighed by his private or family life in the UK, the tribunal would need to examine the factors that would, under the Respondent's policy in part 13 of the Immigration Rules, outweigh the public interest in deportation. Ultimately, the assessment of proportionality was for the tribunal or the court to make, but national policy as to the strength of the public interest in deporting foreign criminals was a fixed criterion against which other factors and interests had to be measured.

23. In *McLarty (Deportation- balance)* 2014 UKUT 00315 it was held that there can be little doubt that in enacting the UK Borders Act 2007 Parliament views the object of deporting those with a criminal record as a very strong policy, which is constant in all cases *(SS (Nigeria) v SSHD* [2013] EWCA Civ 550). The weight to be attached to that object will, however, include a variable component, which reflects the criminality in issue. Nevertheless, Parliament has tilted the scales strongly in favour of deportation and for them to return to the level and then swing in favour of a criminal opposing deportation there must be compelling reasons, which must be exceptional; (ii) What amounts to compelling reasons or exceptional circumstances is very much fact dependent but must necessarily be seen in the context of the articulated will of Parliament in

favour of deportation; (iii) Where the facts surrounding an individual who has committed a crime are said to be “exceptional” or “compelling”, these are factors to be placed in the weighing scale, in order to be weighed against the public interest; (iv) In some other instances, the phrase “exceptional” or “compelling” has been used to describe the end result: namely, that the position of the individual is “exceptional” or “compelling” because, having weighed the unusual facts against the (powerful) public interest, the former outweighs the latter. In this sense “exceptional” or “compelling” is the end result of the proportionality weighing process.

24. In *PF (Nigeria) v Secretary of State for the Home Department* [2015] EWCA Civ 251 it was held that the First Tier’s determination did not identify the features of the Claimant’s case that amounted to compelling reasons or exceptional circumstances justifying the success of his deportation appeal, given the seriousness of his repeated criminal offending. If the Judge’s factual findings were well founded, there would be a real and damaging impact on the Claimant’s partner and children, but that was a common consequence of the deportation of a person with children in the UK.

25. In *SSHD v LW (Jamaica)* (2016) EWCA Civ 369 it was held that where a foreign national was subject to automatic deportation because of his criminal conviction unless there were exceptional circumstances under paragraph 398(a) of the Immigration Rules, a proportionality test, taking all the relevant Article 8 of the ECHR criteria into account and balanced against the very strong public interest in deportation was to be conducted through the lens of the Immigration Rules, rather than as a free-standing exercise. "Exceptional" meant something "very compelling”.

26. In *PF (Nigeria) v Secretary of State for the Home Department* [2015] EWCA Civ 251 it was held that deportation would normally be appropriate in cases such as the instant, even though children would be affected, and their interests were a primary consideration. In *AD Lee v SSHD* 2011 EWCA Civ 348 Sedley LJ said

> the tragic consequence is that this family… Would be broken up forever, because of the appellant's bad behaviour. That is what deportation does.

27. In this case, what is plead for the appellant is that deportation will sever her relationship to her only son, and will deposit her in a country she knows nothing about. Had the appellant committed only one offence, and had the penalty for that offence been a custodial sentence of less than four years, then the appellant would probably succeed. In this case, the appellant cannot succeed. The appellant has established a pattern of criminality. The appellant has not committed minor offences. Her offences have attracted custodial sentences, one of which was for five years. The appellant offended again soon after release from prison. That offence, serious in itself, is aggravated by the fact that it was committed whilst the appellant was on licence. When in a position of trust, the appellant had to be recalled to prison to serve the unexpired portion of the sentence imposed in 2010.

28. The appellant will be removed to Zimbabwe, where she knows no-one, but it is not realistically argued that the appellant cannot start again, nor that the appellant will be destitute. No background materials are placed before us. Only passing reference has been made (by the witnesses in this case) to the appellant's ability to cope if returned to Zimbabwe. In reality this case is plead entirely on the effect of deportation on the appellant's family life with her son.

29. The best interests of the appellant's son are a primary consideration. In *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2011] UKSC 4 Lady Hale noted Article 3(1) of the UNCRC: which states that

> in all actions concerning children, whether undertaken by … courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 3 is now embodied in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions

> are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.

30. The arrangements for the appellant's son's care will continue. There will be separation between the appellant and her son, but that is a factor set out in paragraph 399 of the rules. We have to look for more, and, on the facts as we find them to be, there is nothing in this case which raises the effect of the deportation order beyond the factors set out in paragraph 399 of the immigration rules (and repeated in s.117C of the 2002 Act). This appeal cannot, therefore, succeed.

Decision

31. The decision of the First-tier tribunal is tainted by a material error of law and has already been set aside

32. We substitute the following decision.

33. The appeal is dismissed.

Signed Date: 6th July 2016

Deputy Upper Tribunal Judge Doyle