Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08566/2019**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 3 December 2019 **On 20 December 2019**

Before

THE HON. MR JUSTICE PEPPERALL
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR TAFADZWA JASON CHIKOVE
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mrs P Chiguri of IPS Legal LLP

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Rowlands who allowed the appeal of Mr Chikove under Article 8 ECHR.

2. For the purposes of this decision, we refer to Mr Chikove as the appellant and to the Secretary of State for the Home Department as the respondent, reflecting their positions before the First-tier Tribunal.

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Background

3. Mr Chikove is a citizen of Zimbabwe, born on 3 February 1998. He came to the UK on 15 July 2002 at the age of 4 with his aunt and was granted leave to enter as a visitor until 14 August 2002. On 14 August 2002 his mother applied for leave as a student with the appellant as her dependant. On 8 October 2002 the appellant and his mother were granted leave to remain until 31 January 2003. On 13 February 2004 the appellant was granted further leave on the same basis until 31 August 2012. On 28 August 2012 the appellant's mother applied for indefinite leave to remain (ILR) as the spouse of a British citizen with the appellant as her dependant. On 10 January 2013 the appellant was granted ILR.

4. The appellant has an extensive criminal history. Between 27 May 2015 and 1 June 2018 he amassed eleven convictions for eighteen offences namely: theft – shoplifting, burglary with intent to steal, assault occasioning actual bodily harm, being drunk and disorderly, failing to surrender to custody at an appointed time, assault on a constable, travelling beyond the distance for which rail fare was paid, failure to comply with the requirements of a community order and resisting or obstructing a constable.

5. The appellant received sentences comprising various fines and some periods of imprisonment for those offences. The periods of imprisonment were as follows. On 1 June 2018 the appellant was convicted of assault, resisting arrest and two counts of theft (shoplifting), and was sentenced to a total of three months' detention. On 8 August 2018 he was convicted of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence, using threatening abusive insulting words/behaviour or disorderly behaviour to cause harassment/alarm and battery. He was sentenced to twelve weeks' detention in a Young Offenders' Institution, suspended for twelve months.

6. As a result of these offences the respondent concluded in the decision dated 15 February 2019 that the appellant was a persistent offender and that his deportation was conducive to the public good under Section 3(5)(a) of the Immigration Act 1971.

First-tier Tribunal Decision

7. The appellant appealed that decision to the First-tier Tribunal and came before First-tier Tribunal Judge Rowlands at a hearing on 7 August 2019.

8. First-tier Tribunal Judge Rowlands found that the appellant's deportation would be unduly harsh for his son, O, a British citizen, who was born on [ ] 2018, concluding that the provisions contained in paragraph 399(a) of the Immigration Rules were met such that the appeal was allowed.

9. The parties were in agreement that the correct approach to an assessment of undue harshness was that set out by the Supreme Court in the case of KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53. Lord Carnwath indicates in paragraph 23 of KO (Nigeria) that:

> "... the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under Section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further, the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is the level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by Section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child facing the deportation of a parent."

10. In paragraph 27 of KO (Nigeria), the Supreme Court approved the comments of the Upper Tribunal on the meaning of "unduly harsh" in the case of MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) which stated:

> "... unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the additional adverb "unduly" raises an already elevated standard still higher."

11. The evidence before the First-tier Tribunal about the relationship between the appellant and O was that although he did not live with him and his mother he saw him "at least once a week" and was "an active father"; see paragraph 12. The judge found in paragraph 23 that "He sees the child on a regular basis and plays as much an active part in his upbringing as possible". He set out his conclusion in paragraph 27 as follows:

> "27. ... The only other issue then is whether it will be unduly harsh for the child to remain in the UK without the person who is to be deported i.e. the Appellant. Most people would agree that a child should have the opportunity to be brought up with both parents, that is not to say that single parents are not capable of bringing up their children but it is not the child's fault, in this case, that it might be deprived of the opportunity to be brought up in the company of its father. I accept that the Appellant has committed some terrible crimes including assaults on a police officers (sic) which are not to be minimised whatsoever but it seems to me that if it was possible for a child to be brought up with both its parents even if they are not living together then it would be wrong for the child to be deprived of that opportunity. I have to take into account the welfare of the child as required by Section 55 of the Borders, Citizenship and Immigration Act 2009 and in those circumstances I have reached the conclusion that, in this particular case and on the particular facts of this case it would be unduly harsh for [O] to remain in the United Kingdom without his father even though he would be properly brought up by his mother."

Respondent's Grounds and Appellant's Response

12. The respondent was granted permission to appeal against the decision of Judge Rowlands by the First-tier Tribunal in a decision dated 9 October 2019.

13. The respondent's written grounds maintained that the First-tier Tribunal had not set out rational reasons for finding that O would face undue hardship if the appellant was deported. The First-tier Tribunal judge acknowledged in paragraph 27 of the decision that the child would be "properly brought up by his mother" notwithstanding the appellant being deported. Although it might be preferable for a child to be brought up by both parents, O being brought up only by his mother was not a factor capable of meeting the high threshold required for a finding of undue harshness. At the hearing Ms Everett also maintained that nothing in the material before the First-tier Tribunal permitted a finding of undue harshness for O if the appellant were to be deported to Zimbabwe.

14. The appellant's Rule 24 response argued that the First-tier Tribunal had not erred in finding that deportation would leave O in unduly harsh circumstances, particularly given his very young age. At the hearing, Mrs Chiguri maintained that there was material before the First-tier Tribunal permitting the decision on undue harshness. Paragraph 23 of KO (Nigeria) set out that the unduly harsh test did not require there to be "very compelling reasons". Mrs Chiguri submitted that the difficult circumstances the appellant would face in Zimbabwe meant that he would be unable to provide support to his son either by way of contact or finance and that his role as a father would be significantly diminished. Also, the appellant was on antidepressants and had experienced a panic attack that had required hospital treatment. If he were returned to Zimbabwe his physical condition would also impair his ability to develop and maintain a parental relationship with the child. These matters would prevent him from forming a proper parental bond with O who was still only just over a year old and this would have a significant impact on the child, reliance being placed on Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213 for this submission.

Decision on Error of Law

15. Our conclusion was that, first, the decision of the First-tier Tribunal disclosed an error on a point of law as it did not provide a rational basis for finding that the high threshold of unduly harsh circumstances was met. The undesirability of O growing up without his father was the only reason given by Judge Rowlands in paragraph 27 of the decision for the finding that he would face unduly harsh circumstances. As set out in paragraph 10 above, KO (Nigeria) indicates specifically that something that is merely undesirable cannot meet the elevated threshold of undue harshness. The difficulties O will face growing up without his father are circumstances that "would necessarily be involved for any child facing the deportation of a parent."

16. Secondly, we did not accept that the factors highlighted by Mrs Chiguri in her oral submissions on the appellant's difficult circumstances in Zimbabwe reducing his ability to develop and maintain a relationship with O were matters capable of leading to unduly harsh circumstances for the child. A child having a very limited (or no) relationship with a parent who has been deported is a very sad but entirely expected consequence of deportation. The First-tier Tribunal found that O would still be brought up

"properly" by his mother. We did not find that the case of PG (Jamaica) was authority for the submission that deportation would lead to unduly harsh circumstances for O because he had not yet been able to form a meaningful bond with his father. PG (Jamaica) indicates that a father who has lived with teenage children for all of their lives with strong bonds having been formed was a weighty factor (see, for example, paragraph 39) but makes no comment on the separation of a very young child from a parent. We found the submission that the appellant being absent for O's formative years would necessarily give rise to unduly harsh circumstances was, at best, speculative.

17. For these reasons, it was our conclusion that the decision of the First-tier Tribunal disclosed an error on a point of law and had to be set aside to be remade.

18. The parties were in agreement that we could proceed to remake the decision on the basis of the materials before us and the submissions made by the representatives. For essentially the same reasons that we have set out in our error of law decision, in our judgment the evidence relied upon by the appellant here is not capable of showing unduly harsh circumstances for O in the event of the appellant's deportation. We reach that conclusion having taken into account at their highest the points made by Mrs Chiguri concerning the appellant's limited circumstances on return to Zimbabwe and O's young age. It remained our view that a significantly reduced relationship with O was not sufficient to take his circumstances beyond, at best, harshness in the event of the appellant's deportation and did not approach the high threshold of undue harshness required under paragraph 399(a).

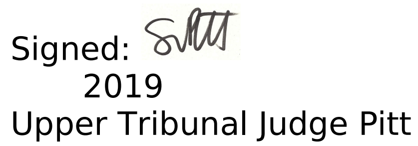
19. It was also our view that there is nothing further in the materials here that could show very compelling circumstances over and above the factors already provided for in paragraphs 399(a) and paragraph 399A of the Immigration Rules. We have set out above why paragraph 399(a) is clearly not met. The First-tier Tribunal found that the appellant had relatives in Zimbabwe who could offer some support on return and that he would not face very significant obstacles to reintegration. He was not found to meet paragraph 399A notwithstanding his lawful residence since the age of 4 years' old therefore. Those findings were not challenged before us. We were not taken to any further evidence or factors beyond those provided for under the Immigration Rules that could outweigh the public interest in deportation. We reached that conclusion mindful of the appellant's length of residence in the UK, his circumstances in Zimbabwe on return and the sadness and hardship that his deportation will cause for him, his son and his family who remain in the UK. It remains our conclusion that there are no very compelling circumstances here and that the decision to deport the appellant is a proportionate one.

20. For all of those reasons, we found that the appellant had not shown that the decision to deport him would breach his rights under Article 8 ECHR.

Notice of Decision

The decision of the First-tier Tribunal discloses an error on a point of law and was set aside, in part, to be remade.

The appeal under Article 8 ECHR is refused.

Signed:  Date: 6 December 2019

Upper Tribunal Judge Pitt