Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24277/2018

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 9 August 2019	**On 15th August 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

L H
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms Isherwood, Senior Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born on 28 June 1989 and is a male citizen of Zimbabwe. The appellant claims arrived in the United Kingdom in 2002/2003. Whilst living here, he has been convicted on seven occasions for a total of 29 offences committed between June 2007 and June 2015. The convictions include several for drug-related offences. By a decision dated 25 September 2015, the Secretary of State decided to deport the appellant to Zimbabwe. By letter dated 29 October 2018, the appellant provided reasons why he

wished to remain in the United Kingdom on human rights grounds. He has a partner [A] with whom he has two children who were born in 2014 and 2017 respectively. He lives with his partner and children. By a decision dated 22 November 2018, the Secretary of State refused the appellant's human rights claim. The appellant appealed against that decision to the First-tier Tribunal which, in a decision promulgated on 29 March 2019, allowed the appeal. The Secretary of State no appeals, with permission, to the Upper Tribunal.

2. Throughout these proceedings, the appellant has not been represented by solicitors. He and his partner attended before the Upper Tribunal in person at the initial hearing. I was careful to explain the procedures of the tribunal to the appellant and to ensure that he understood them. I explained the nature of the legal test relevant in his case and the reasons why the Secretary of State argued that the judge had erred in law. I was satisfied that the appellant understood the proceedings.

3. Before the First-tier Tribunal, the appellant argued that it would be unduly harsh for him to be deported whilst his partner and the children remained in the United Kingdom. The Secretary of State agrees that it would be unduly harsh to expect partner and children to travel to Zimbabwe with the appellant. The partner and children are British citizens.

4. The appellant's appeal falls to be considered under section 117C of the 2002 Act:

> (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.

5. The same test of undue hardship also arises under paragraph 399a of HC 395 (as amended). If the deportation of the appellant would not have unduly harsh consequences for either the appellant's partner or the children, his appeal will fail.

6. At [12], the judge also proceeded to consider Article 8. However, there is nothing in the facts of this appeal which would indicate that the appellant might succeed on human rights grounds in the event that he is unable to show that his deportation would have unduly harsh consequences for his family members.

7. The decision of the judge is problematic. In parts, it is not very clearly expressed. The main analysis appears at [10-11]. The judge noted that the respondent did not accept that the appellant had a genuine and subsisting parental relationship with his children. The judge rejected that submission and it is clear from the grounds of appeal that the Secretary of State now accepts that such relationships do exist. The judge went on to consider the strength of the relationships noting that the appellant and his partner had met at school, that the appellant had become integrated in the United Kingdom having been educated here and observing that the appellant's partner had not considered that any problem would arise over the appellant's immigration status.

8. It is at this point in the analysis that the reasoning becomes obscure. The judge wrote that, 'I found that a genuine and subsisting relationship exists between the appellant and his children for the reasons which I have given. In view of the fact that this is the only basis put forward by the respondent for not accepting that it would be unduly harsh for the children to remain in the UK without the appellant, I find it would be unduly harsh for the children to remain in the UK if the appellant was to be deported.' [10]. It is the case that the refusal letter at [29] states that, 'as it is not accepted that you have a genuine and subsisting relationship with [A] it is not accepted it would be unduly harsh for her to remain UK even though you are to be deported.' However, the judge's reasoning is, with respect, disingenuous. Having found that there was a genuine and subsisting relationship, the judge was still required to apply the statutory provisions to the facts as he found them, that is he was required to determine whether or not the deportation of the appellant would have unduly harsh consequences for the partner and children. Further, at [11], the judge states that he has 'explained why it would be unduly harsh for the children to remain in the UK without the appellant'; other than the inadequate argument which I have identified above, he has provided no reasons whatever the so concluding. The remainder of the decision, which goes on to deal with Article 8, consists of reiterations of the judge's conclusion as to the consequences of deportation; no attempt is made to provide reasons for the decision.

9. It is important that a decision should be written with sufficient clarity to enable the losing party fully to understand why he/she has lost. That is not the case with this decision. Moreover, if the judge believed that he did not need to go beyond making a finding that a genuine and subsisting relationship existed between the appellant and his family members, then he has erred in law by failing to apply the statutory test of undue harshness to the facts as he found them. He was required to apply that test

irrespective of the reasons given by the Secretary of State for refusing the appellant's human rights claim.

10. I therefore set aside the decision of the First-tier Tribunal. I have proceeded to remake the decision. I asked the appellant to address me. He said that he feared deportation to Zimbabwe because of the effect it would have upon his relationship with the family. He drew attention, in particular, to the difficulty of keeping in touch with the family from such a distance and whilst he was living in a society where using modern means of communication might prove difficult.

11. I have considered also the evidence which was before the First-tier Tribunal including the letter written by the appellant to the respondent indicating why he believed he should remain in the United Kingdom with his family. As the First-tier Tribunal had observed, the family had run into problems whilst the appellant had been in detention. The judge noted that the appellant's partner had encountered severe financial difficulties when the appellant was in prison, running up debts of approximately £3000 and a substantial risk of being evicted [10]. The appellant's partner works and pays the rent whilst the appellant provides childcare.

12. It is significant that, beyond a fear of falling into further financial difficulties and being unable to maintain contact from Zimbabwe, no other evidence has been put forward to indicate why may be unduly harsh for the children and the partner to be separated by deportation from the appellant. It is clear that the test of undue hardship is a severe one (see *KO (Nigeria)* 2018 UKSC 53); any deportation is likely to cause hardship, both on a practical basis and by way of emotional distress for partners and, particularly, children who have to face the prospect of a lengthy and possibly permanent separation from a parent. The appellant has been given every opportunity to advance his case. However, I do not find that even the prospect of further financial difficulties for the family which may arise if A, for example, has to give up work in order to look after the children can properly be described as an unduly harsh consequence of appellant's deportation. The same is also true of possible future difficulties in communication; such difficulties are likely to arise in almost every case of deportation. I fully accept, as did the First-tier Tribunal, that this appellant enjoys a genuine and subsisting relationship with his children and partner but, as I explained the appellant, that is not enough to establish undue harshness. I find, therefore, on the basis of the evidence before me, that the appellant has failed to establish the consequences of his deportation would be unduly harsh either for his partner, A, or for his two children. I therefore remake the decision dismissing the appellant's appeal against the Secretary of State's refusal of his human rights claim.

Notice of Decision

The decision of the First-tier Tribunal is set aside. I have remade the decision. The appellant's appeal against the decision of the Secretary of State dated 22 November 2018 is dismissed.

Signed Date 9 August 2019
Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.