Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/25337/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th February 2019	**On 19th March 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

A U K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Gill Q.C, instructed by Connaughts Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Zambia born in June 1968. He appeals against the decision of First-tier Tribunal Judge Alis, dated 8 August 2017, dismissing his appeal against deportation on human rights grounds. The Appellant is married to a British citizen and they have a son, A, who is 13 years old.

2. The Appellant appealed on the grounds that the judge made the following errors of law:
   (i) Failed to take into account material evidence and properly apply section 117C;

(ii) Failed to follow Devaseelan;
(iii) Reached a conclusion which was not open to him on the evidence, namely that the Appellant's wife had a choice about accompanying him to Zambia;
(iv) Failed to properly apply Zambrano and other relevant EU provisions; and
(v) Misdirected himself in finding that the Appellant represents a genuine, present and sufficiently serious threat to society and failed to give adequate reasons for this conclusion.

3. Permission was granted by Upper Tribunal Judge Coker on the ground that the Zambrano issue was just arguable. She gave permission on all grounds.

The Appellant's immigration history

4. The Appellant arrived in the UK on 11 April 1983 for the purposes of adoption. His leave expired on 21 September 1988. His application for leave to remain made in April 1992 was refused with no right of appeal. On 22 May 1998 he was advised that that he was liable to deportation, but no action was taken as the Respondent failed to demonstrate a deportation order had been made. On 3 June 2008 he was served with notice of liability to deportation and a decision to deport was made on 3 February 2010. His appeal was allowed to the extent that the Respondent was required to make a decision under the UK Border Act 2007. In 2012 the Appellant was diagnosed with a cancerous stomach tumour. A new decision to deport was made on 12 March 2013. His appeal was allowed on 21 August 2013 and he was granted leave to remain on Article 8 grounds until 15 April 2016.

5. On 23 April 2014, the Appellant was convicted of the five counts of conspiracy to defraud and sentenced to six years imprisonment. The offences were committed in 2007. A further decision to deport was made on 1 November 2016, the subject of this appeal.

The Appellant's previous convictions

6. The Appellant was convicted of the following offences:
(1) 19 August 1995: Taking a conveyance without authority. Conditional discharge.
(2) 7 May 1987: Obtaining property by deception and two counts of attempting to obtain property by deception. Sentenced to 12 months imprisonment suspended for two years.
(3) 13 July 1990: Obtaining property by deception and theft. Sentenced to 24 months imprisonment.
(4) 17 February 1992: Obtaining property by deception and handling. Sentenced to 24 months imprisonment. Warned of deportation on 25 September 1992.
(5) 28 October 1996: Two counts of theft and one count of theft of a vehicle. Sentenced to 36 months imprisonment (consecutive sentences of 21 months and 15 months).

(6) 3 April 2008: Making false representations to gain and obtain a money transfer by deception. Sentenced to 18 months imprisonment (time served from March 2008 to January 2009 including immigration detention).
(7) 10 January 2013: Driving whilst disqualified. Sentenced to 12 months community order.
(8) 23 April 2014: Five counts of conspiracy to defraud (£3.5 million). Sentenced to six years imprisonment (time served from April 2014 to April 2017).

7. The judge made the following remarks when sentencing the Appellant:

> "A K , I have had the advantage of seeing you give evidence over a very long period of time, you struck me as a thoroughly dishonest man, you enjoyed an expensive lifestyle at the expense of other people, you stayed in the most expensive hotels in London, you lived, for a substantial period of months, in an expensive hotel in Birmingham, you required a chauffeur driven limousine to be available to take you wherever you wished throughout the country, incurring substantial bills with the hirer and yet seemed to have little interest in repaying it. You acquired a number of very expensive houses and apartments, both in London and in Greater Manchester. When giving evidence, it was clear to me (and it must have been to the jury) that you were deliberately trying to avoid answering questions, you displayed the most unattractive arrogance and condescension, this may be exemplified by noting that, on one occasion during your evidence, you admitted that you would not be volunteering information and would only give it if directly asked, on a number of occasions, I exhorted you to answer questions in your own interest, you declined to do so.
>
> Your role was to curry favour with people and facilitate MJ's actions in seeking to obtain loans, the frequency of false documentation, which related to properties you had owned, or were connected with and your constant contact with lawyers involved in affecting the securities, lead me to conclude that you were substantially responsible for the organisation of this fraud. I bear in mind your criminal record demonstrates a propensity to dishonesty, but I say in this case I do not attach significant weight to it as an aggravating factor. I have read carefully the medical reports, which have been submitted on your behalf and it is good to read that the serious medical conditions, which you suffered from, have been dealt with, with considerable success. I bear in mind that these offences were committed in 2007 and 2008 and that it was over five years before they came to trial, on the other hand, you did little to expedite matters."

Relevant law

8. Section 117C Nationality Immigration and Asylum Act 2002:

> Article 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.

9. The following cases were relied on in submissions. The relevant paragraphs are as follows:

Heshim Ali v SSHD [2016] UKSC 60 at 52, 53, 77, 80, 94, 89

MF (Nigeria) v SSHD [2013] EWCA Civ 1192 at 39

NA Pakistan v SSHD [2016] EWCA Civ 662 at 19, 20, 28, 30

KO (Nigeria) v SSHD [2018] UKSC 53 at 21 to 23, 33 to 36

Boultif v Switzerland (2001) 33 EHRR 50

Uner v Netherlands (2007) 45 EHRR 14

Chavez-Vilchez (Case C-133/15) at 71

Rendon Marin (Case C 165/14) at held (3) of headnote

Nilay Patel v SSHD [2017] EWCA Civ 2028 at 70 to 72, 75, 79

VM Jamaica v SSHD [2017] EWCA Civ 255 at 54 to 60

Appellant's submissions

10. Mr Gill relied on his amended grounds and submitted that the judge had misdirected himself in treating the Immigration Rules as a complete code and in applying a threshold test which was too high; exceptionally compelling rather than very compelling. Further, the judge adopted the wrong approach in his assessment of Article 8, viewing it through the lens of the public interest rather than applying the

approach advocated in Heshim Ali. Mr Gill relied specifically on paragraphs 52, 53, 77, 80, 89, and 94. Although the Rules did not mirror Strasbourg case law, they had to be interpreted consistently with it: MF (Nigeria) at paragraph 39.

11. Mr Gill submitted that the judge failed to make any findings on the exceptions in section 117C following NA (Pakistan). He submitted that 'over and above' did not mean 'extra' because circumstances falling within the exceptions could succeed if the case was strong enough. He relied on paragraphs 19, 20, 28 and 30 and submitted that the judge failed to look at the factors in the exceptions.

12. Following Boultif, the Appellant's deportation was plainly 'unduly harsh' on his wife and his son, A. They had never been to Zambia and knew nothing of the country. The judge failed to address 'unduly harsh' or consider the best interests of A in accordance with paragraphs 21 to 23 of KO (Nigeria). This was a really strong case under Exception 2 such that there were very compelling circumstances, but the judge failed to deal with this point. The judge failed to appreciate the seriousness of the Appellant's medical condition.

13. Mr Gill submitted that the judge failed to take into account the medical report and the psychological assessment. The circumstances did not need to be unusual or exceptional (Heshim Ali at paragraph 77). The judge failed to evaluate the hardship of the dilemma facing the Appellant's wife. She did not have a choice. The Appellant's case was strong enough to succeed following Strasbourg case law and the judge erred in law in failing to look at Article 8 outside the Immigration Rules.

14. In relation the Zambrano issue, Mr Gill submitted that there was no reference to 'choice' in EU law and the mother's realistic choice did not determine the child's EU rights. In Chavez-Vilchez (at paragraph 71) the court must also consider whether there was such a relationship of dependency, with the third country national, that the child would be compelled to leave the EU. In this case, the Appellant's wife was not willing or able to remain in the UK because the Appellant needed her care and there was no one to provide it in Zambia. There was evidence of A's dependence on the Appellant in the psychologist's report. Mr Gill relied on Rendon Marin and submitted that A would be obliged in practice to leave the EU, thereby denying him the genuine enjoyment of the substance of his rights as a British citizen. He submitted that deterrence and retribution were not relevant to the assessment of proportionality in EU law. Rehabilitation was also marginal. On the evidence, the Appellant did not represent a genuine, present and sufficiently serious treat to one of the fundamental interests of society.
15. Mr Gill submitted that in Nilay Patel, at paragraph 75 and 79, the mother had a choice, but that there was no mention of choice in CJEU case law. He submitted that CJEU case law referred to whether an EU citizen was compelled 'in practice' to leave the EU, not as a matter of law. There was no question of choice in this case because looking at all the evidence the Appellant's wife did not have a choice. The judge had misapplied CJEU case law. The Appellant's child would be compelled to leave the UK and EU and, taking into account all relevant factors, the Appellant's deportation was disproportionate.

Respondent's submissions

16. Mr Lindsay relied on the Rule 24 response and VM Jamaica at paragraphs 54 to 60. He submitted that the issues in this case were narrow and there were essentially two grounds: Article 8 and Zambrano.

17. Mr Lindsay submitted that, in demonstrating very compelling circumstances over and above the Immigration Rules, the Appellant relied on the unduly harsh effect on the Appellant's wife and son and the Appellant's medical issues. The failure to make a finding on 'unduly harsh' was not material to the decision because there was nothing over and above the typical effects of deportation in this case. The psychological report was not capable of demonstrating that it would be unduly harsh if the Appellant's wife and son remained in the UK without the Appellant. The matters referred to in the report did not go beyond what happens in every deportation case. There was nothing over and above the harsh effect of the separation of the family. On the evidence, the Appellant had failed to establish that it would be unduly harsh for the Appellant's wife and son to remain in the UK without the Appellant.

18. Mr Lindsey submitted that the Appellant's medical condition did not give rise to very compelling circumstances. There was no evidence to show that the Appellant could not obtain treatment in Zambia. Professor Lingham's opinion was speculative on this point. The Appellant had failed to show very compelling circumstances. In the Appellant's case, there was nothing capable of amounting to very compelling circumstances and his Article 8 claim could not succeed outside the Immigration Rules.

19. For the Appellant to succeed on the Zambrano issue he had to show that his British citizen child would be compelled to leave the EU. The Court of Appeal decisions of VM (Jamaica) and Nilay Patel were binding. The EU ground must fail. The Appellant's wife was able to look after A while the Appellant was in prison and she did not need to go to Zambia to care for the Appellant. There was no compulsion. It was a difficult choice.

20. In VM (Jamaica) at paragraph 54, the court considered all relevant CJEU authorities and the factual matrix was the same. There was no breach of EU law (paragraph 60). This case could be distinguished from Chavez-Vilchez because A was not dependent on the Appellant and A was not compelled to leave the UK in practice (Nilay Patel at paragraphs 70 to 72).

21. In any event, the Appellant's criminal record was appalling and his personal conduct, escalating criminal behaviour, lengthy prison sentences, risk of re-offending and sentencing judge's remark that he was a thoroughly dishonest man were sufficient to show that the Appellant was a genuine, present and sufficiently serious threat.

22. The judge applied the correct test and took into account all relevant matters. Taking the Appellant's case at its highest, it was not unduly harsh for the Appellant's wife and child to remain in the UK without him (KO (Nigeria) at paragraphs 33-36). The evidence in the psychological report did not show that it was unduly harsh and the Appellant's medical condition did not amount to very compelling circumstances. There was nothing over and above the separation of the family. The Appellant's medical condition taken with the effect on A could not amount to very compelling circumstances. The judge's conclusion that the Appellant's deportation was proportionate was open to him on the evidence before him.

Appellant's response

23. Mr Gill submitted that the judge failed to properly consider very compelling circumstances because there was no assessment of 'unduly harsh'. A wide range of factors had not been considered. On the facts and consistent Boultif and Uner, this was a compelling case. The judge had misunderstood the seriousness of the Appellant's medical condition and there was no consideration of the psychological report, save for a limited analysis at [48] of the decision. The judge failed to assess this in conjunction with the report of Professor Lingham and look at the effect on the family. The judge failed to properly carry out a fact finding exercise.

24. In EU law, the test was one of compulsion. The Appellant's wife did not have a choice. She was not willing to stay in the UK and intended to go to Zambia with the Appellant. He was not able to care for himself and there was no evidence that he could obtain care in Zambia. The practical impact on A was that he was compelled to leave the UK. The judge failed to consider the impact on the family unit.

The Appellant's medical condition

25. In 2012 the Appellant was diagnosed with a cancerous stomach tumour and had to have the majority of this stomach removed. As a result, he suffers from significant multiple health problems including recurrent severe vomiting and uncontrollable diarrhoea, leading to severe physical exhaustion and sleep deficiency. His diet is severely restricted and he is able only to eat very small portions of food at a time. He suffers pain and discomfort and wears incontinence pads when going out. He is unable to walk long distances owing to weakness and dizziness and he passes out intermittently without warning. When his health permits, the Appellant is able to take his son to and from school. He suffers from a moderately severe level of depression related symptomology, but this does not prevent him from performing tasks that he would normally carry out on a daily basis.

26. The medical report of Dr Lingham dated 17 July 2017 stated that the Appellant's tumour was large so during the operation part of the stomach was removed. In addition, the vagus nerve was permanently damaged causing dumping syndrome. There was a stricture of the stomach which, coupled with the small stomach, has resulted in severe reflux and reverse peristalsis. The Appellant was to undergo a

further operation to address this complication in August 2017. It was expected that reflux would get better. At the date of examination, the Appellant was physically and mentally weak and clinically depressed because of stress. Mr Lingham stated that he would assess his needs after the operation in August. The Appellant would need medical and social support for at least six months. He doubted whether doctors in Zambia could easily manage these complex medical problems.

Evidence relevant to the best interests of A

27. The psychological assessment report stated that A has a very close bond with his father and worried about his future. He worried and was sad about his father's illness and experienced sleep related problems when his father was in pain or distress. It would cause a great deal of emotional upset if A had to uproot to live in Zambia. He had close relationships with his immediate and extended family in the UK and a very extensive social support network. It would be incredibly disruptive for him at a crucial time in his transformation into a young man. His ambitious plans for the future would have to be cancelled and his future development, educationally, personally and emotionally would be place in jeopardy. His best interests were to remain in the UK with his mother and father.

28. The social worker's report dated 8 April 2018 was not before the First-tier Tribunal. The independent social worker stated that the Appellant supervised the care of A in the evenings when his wife was working. There was a strong father and son bond. Although A's basic needs would be met in Zambia, his need for stability, security, family life, friends, emotional well being and education would not be met. The Appellant was close to his grandmother and had many friends in the UK. His parents could not afford to educate him privately in Zambia. His mother would be a single working parent if she and A remained in the UK and, given his current level of anxiety, A's future development emotionally and personally would be in jeopardy if separation was enforced. It was in A's best interests to remain in the UK.

Discussion and Conclusions

29. I am not persuaded by Mr Gill's argument that the judge misapplied the law in treating the rules as a complete code and applying too high a threshold. The judge's application of the immigration rules and the test of very compelling circumstances were consistent with paragraphs 36 to 38 of Heshim Ali.

30. I am not persuaded by the submission that the Appellant's medical condition gives rise to very compelling circumstances. The Appellant is able to look after his son, A, when his wife is at work and he is able to take him to school. The medical evidence does not support a finding that the Appellant could not live independently in any meaningful way. The report of Professor Lingham does not state that the Appellant is unable to cope independently with day to day activities.

31. There was insufficient evidence before the judge to show that there would be very significant obstacles to integration. There was no challenge to the judge's finding that

the Appellant had failed to show that he would be unable to obtain treatment in Zambia. It was accepted that it would not be the same as in the UK, but the Appellant's medical condition did not prevent his integration nor did the fact that he had no ties to Zambia and he came to the UK when he was 14 years old. The Appellant could not satisfy Exception 1 on the facts.

32. I am not persuaded that this is a strong Exception 2 case such that it could amount to very compelling circumstances. The judge considered the best interests of A, which were to remain in the UK, and his strong bond with the Appellant. The judge fully appreciated the seriousness of the Appellant's medical condition and his lengthy residence in the UK [92 to 93].

33. The judge considered the medical evidence at [34, 41 and 79] and the psychological report at [48]. I was initially concerned that the effect on A had not been fully considered, but on reviewing those reports (and all the evidence available) I am satisfied that all relevant matters were taken into account. There was nothing in those documents which were capable of leading to a different conclusion.

34. The Appellant's medical condition was not such that he could not live in Zambia without his wife and A. The Appellant was supported by his wife, but her care was not essential to enable the Appellant to function on a daily basis. His illness was extremely unpleasant, painful and difficult, but he would not be incapacitated if she remained in the UK.

35. Any error in the structure or form of the decision of the First-tier Tribunal was not material because this case could not succeed on its facts. Had the judge asked the questions relied on in the grounds, he would have come to the same decision. On the evidence before the judge, the Appellant had failed to show very compelling circumstances. His Article 8 claim could not succeed because the weight to be attached to the public interest was substantial and the impact of deportation on his family and private life could not, on the evidence before the judge, outweigh it. This case was not one of those rare cases in which an applicant could not satisfy the Immigration Rules, but could succeed under Article 8. There was no material error of law in the judge's conclusion at [94] that, having rejected the Appellant's claim under the Rules, his Article 8 claim failed.

36. I have read A's witness statement dated 9 April 2018 and understand that it would be unthinkable for A to live in the UK without his father and relocation to Zambia would be very distressing and disruptive to A's education and relationships with his family and friends. Unfortunately, these are the usual consequences of deportation. The failure to make a finding on whether it was unduly harsh for A to remain in the UK without his father was not material because there was insufficient evidence before the judge to support such a finding and, in any event, there were no additional circumstances which would make deportation even harsher. The circumstances were not very compelling over and above those usually associated with separation or relocation. Parliament has set a very high threshold in section

117C and applying it to the facts of the Appellant's case, his deportation is in the public interest.

37. An assessment of Article 8 outside the Immigration Rules would not lead to a different conclusion. The weight to be attached to the public interest in this case is significant. The Appellant has an appalling criminal record and was sentenced to six years imprisonment in 2014. The sentencing judge found him to be a thoroughly dishonest person. Although the Appellant has a strong family and private life and it is in the best interests of A to remain in the UK, this was insufficient to outweigh the strong public interest in this case.

38. The Appellant's son, A, would not be compelled, in practice, to leave the UK. Although A has a strong bond with the Appellant, A was not dependant on him. A could remain in the UK with his mother. The level of dependency was not such that the Appellant's deportation compelled A to leave the UK. On the facts, the Appellant's wife was not compelled, in practice, to relocate to Zambia to care for the Appellant. The Appellant's deportation did not engage EU law.

39. Even if it did, the Appellant represented a genuine present and sufficiently serious threat to one of the fundamental interests of society. His personal conduct and criminal behaviour were sufficient to establish this.

40. I find that there was no error of law in the decision dated 8 August 2017 and I dismiss the Appellant's appeal.

Notice of Decision

The appeal is dismissed

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

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

J Frances

Signed Date: 15 March 2019

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 15 March 2019

Upper Tribunal Judge Frances