Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08845/2018

THE IMMIGRATION ACTS

Heard at Birmingham Justice Centre	**Decision & Reasons Promulgated**
On 8 March 2022	**On 07 June 2022**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KW
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Bates, Senior Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

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

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent is granted anonymity. No-one shall publish or reveal any information, including the name or address of the respondent, likely to lead members of the public to identify the respondent. Failure to comply with this order could amount to a contempt of court.

1. This decision is a re-making of KW's appeal brought on Article 8 ECHR grounds against a deportation decision of the respondent dated 7 May 2018 which followed the making of a deportation order on 6 June 2018.

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

Background

3. The appellant is a national of Zimbabwe born in 1974.

4. The appellant came to the UK on 24 May 1998 as a visitor. She was granted extensions of stay as a student until 2001. She then became an overstayer.

5. The appellant had a daughter, NM, on 3 July 2002 with another Zimbabwe national. NM was diagnosed as having a high level of level of autism and learning difficulties. In 2004 the appellant claimed asylum and included NM as a dependant in that application. The asylum claim was refused in 2005. The appellant appealed but her appeal was dismissed and she became appeal rights exhausted in 2007.

6. On 16 January 2007 the appellant and her partner had another daughter, ZM. Social Services first became aware of issues arising from the appellant's alcoholism from 2007 onwards, concerns being raised by NM's school.

7. On 4 April 2008 the appellant was convicted of being drunk while in charge of a child and given a conditional discharge of 18 months.

8. In August 2008 the father of the children left the family home leaving the appellant as a single parent.

9. On 22 February 2009 the appellant was granted indefinite leave to remain (ILR) exceptionally outside the Immigration Rules under the legacy exercise. Her daughters were granted ILR in line with the appellant. The children have both subsequently become British citizens.

10. The appellant began a relationship with another Zimbabwe national, VM, in 2010. VM also had difficulties with alcohol and it is not disputed that there was domestic violence in the home. Social Services continued to have concerns about the children's circumstances.

11. On 5 October 2010 the appellant was convicted of driving a motor vehicle with excess alcohol and assaulting a constable. She was sentenced to a supervision requirement, a community order until 5 April 2012 and 120 hours' unpaid work.

12. On 16 March 2011 the appellant was convicted of using a vehicle while uninsured and driving whilst disqualified. She received a suspended imprisonment of 4 weeks wholly suspended for 12 months, a supervision requirement, a curfew rehabilitation of 3 months to remain at a specified address and was disqualified from driving for 2 years.

13. The appellant obtained a non-molestation order against VM in 2012 but did not enforce it consistently and Social Services remained concerned about the children's wellbeing.

14. On 16 February 2014 the appellant had a serious car accident whilst driving under the influence of alcohol. VM and the two children were in the car at the time. VM died from injuries he received in the accident.

15. Following the accident, Social Services made arrangements for the children to be cared for on a temporary basis by the appellant's aunt, MZ. A full care order was made in favour of MZ on 8 September 2014.

16. Whilst those matters were proceeding, on 24 April 2014 the appellant was convicted of assaulting a constable and racially/religiously aggravated common assault for which she was given a community order until 4 May 2015, a programme requirement and ordered to pay £75 compensation.

17. On 12 November 2014 the appellant was convicted of being drunk and disorderly, assaulting a constable and destroying or damaging property. She received a suspended imprisonment of 8 weeks wholly suspended for 12 months.

18. On 9 December 2014 the appellant was convicted in relation to the car accident which resulted in the death of VM. She was found guilty of causing death by careless driving when under the influence of drink – driver over the prescribed limit. She was sentenced to 56 months' imprisonment and disqualified from driving for 5 years. She did not appeal against the conviction or sentence.

19. On 23 October 2015 the respondent served the appellant with a notice of a decision to deport. The appellant responded, making submissions as to why she should not be deported, relying on asylum and human rights grounds.

20. The appellant was released from prison on licence on 5 May 2017.

21. On 6 June 2018 the respondent made a deportation order against the appellant. In a decision dated 7 August 2018 the respondent provided reasons for deporting the appellant and for making a Section 72 certificate under the Nationality, Immigration and Asylum Act 2002 precluding the appellant from pursuing an asylum claim. The decision also refused an Article 3 medical claim and an Article 8 ECHR claim. The appellant appealed against that decision on Article 8 ECHR grounds.

22. The appellant was recalled to prison in October 2018 following arrest for common assault and relapse into problematic alcohol use which impacted negatively on her engagement with the Probation Service. The assault concerned someone the appellant knew allegedly taking her computer. The case was dismissed due to the victim not attending court.

23. The appellant appealed against the refusal of her asylum and human rights claims on Article 8 ECHR grounds only. The appeal came before First-tier Tribunal Judge Juss on 7 November 2018. The appellant was produced from prison for the hearing and represented herself. Judge Juss allowed the appeal, finding that it would be unduly harsh for the children if the appellant was deported and that there were very compelling circumstances outweighing the public interest in deportation.

24. The respondent appealed against the decision of First-tier Tribunal Judge Juss. Permission to appeal to the Upper Tribunal was granted by the Upper Tribunal on 25 March 2019.

25. The appellant was finally released from prison on 6 May 2019.

26. In a decision dated 21 August 2019 I found that the decision of the First-tier Tribunal disclosed an error on a point of law and set it aside to be remade in the Upper Tribunal. In summary, the First-tier Tribunal decision was in error as it focussed on whether deportation would be unduly harsh for the appellant rather than the children, failed to assess correctly the very limited contact that the appellant had with the children in the previous 5 years and failed to show how there were very compelling circumstances capable of outweighing the public interest.

27. The hearing for the remaking of the appeal took place on 8 March 2022. The appellant provided additional materials that had not been before the First-tier Tribunal in annexes A-Y.

28. On 8 and 11 March 2022 the appellant submitted further evidence by email in the form of annexes Z1-Z5. The documents contained further evidence on the circumstances of NM and ZM. The respondent objected to the admission of these materials after the hearing, out of time and where there had been no opportunity to cross-examine on them. In all the circumstances, it was my view that the new materials were not contentious where they really only updated or confirmed parts of the evidence that the appellant had provided at the hearing on 8 March 2022 and that it would be disproportionate to adjourn to allow the respondent to consider any further cross-examination on them. It was my conclusion that annexe Z should be admitted in the interests of justice.

The Law

29. Part 5A of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) sets out the legal framework that must be applied to an Article 8 ECHR claim brought in the context of a deportation order.

30. Section 117A of the 2002 Act provides, insofar as material, that:

> "(2) In considering the public interest question, the court or tribunal must (in particular) have regard –
>
> (a) in all cases, to the considerations listed in Section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in Section 117C
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private life and family life is justified under Article 8(2)".

31. Section 117C is entitled "Article 8: additional considerations in cases involving foreign criminals". It is the central provision in this appeal and provides:

> "(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".

32. There have been a significant number of cases addressing the correct application and interpretation of these provisions, including how to approach an assessment of very compelling circumstances. A summary of the principles relevant to this appeal is set out here.

33. The appellant has received a sentence of 4 years and 8 months imprisonment. She cannot rely on the Exceptions in s.117C(4) and (5) to show that it is not in the public interest that she is deported. The appellant is required to demonstrate "very compelling circumstances, over and above those described in Exceptions 1 and 2" as set out in s.117C(6). This is a demanding test. In Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, the Supreme Court set out at [46] that:

> "… a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life."

Hesham Ali at [38] and HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 at [32] set out the need to respect the "high level of importance" which the legislature attaches to the deportation of foreign criminals. It remains the case, however, that if an appellant cannot come within the Exceptions in s.117C(4) and (5), notwithstanding the "great weight" attracting to the public interest, "it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed"; Hesham Ali at [38].

34. The Court of Appeal in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 at [37] provided guidance on how to approach the very compelling circumstances assessment:

> "In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

35. As to section 117C(4)(c), the concept of "integration" into the proposed country of deportation was considered in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 at [14] where Sales LJ explained in a now well-known passage:

> "… the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-today basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life"

36. When considering the undue harshness test in s.117C(5), the description of the elevated test set out in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) has been approved by the higher courts, including by the Supreme Court in KO (Nigeria) v SSHD [2018] UKSC 53:

> "… 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."

37. HA (Iraq) provides additional guidance on the correct approach to the assessment of whether deportation would be unduly harsh for a child, Underhill LJ setting out at [56]:

> "… As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold 'acceptable' level. It is not necessarily wrong to describe that as an 'ordinary' level of harshness, and I note that Lord Carnwath did not jib at UTJ Southern's use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, 'ordinary' is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of 'undue' harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being 'is this level of harshness out of the ordinary?' they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of 'ordinariness'. Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with

> them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child".

38. In [52] of HA (Iraq) the Court of Appeal cautioned against conflating "undue harshness" with the still higher test of "very compelling circumstances"; [52]. The underlying concept is of an "enhanced degree of harshness sufficient to outweigh the public interest in the medium offender category"; see [44] of HA Iraq.

39. In the case of RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 at paragraph 22, the President of the Upper Tribunal set out that there must be something of "great force for Article 8 purposes" even after a finding of undue harshness to meet the test of very compelling circumstances:

> "It is important to keep in mind that the test in section 117C(6) is extremely demanding. The fact that, at this point, a tribunal is required to engage in a wide-ranging proportionality exercise, balancing the weight that appropriately falls to be given to factors on the proposed deportee's side of the balance against the weight of the public interest, does not in any sense permit the tribunal to engage in the sort of exercise that would be appropriate in the case of someone who is not within the ambit of section 117C. Not only must regard be had to the factors set out in section 117B, such as giving little weight to a relationship formed with a qualifying partner that is established when the proposed deportee was in the United Kingdom unlawfully, the public interest in the deportation of a foreign criminal is high; and even higher for a person sentenced to imprisonment of at least four years."

40. When considering whether there are very compelling circumstances, an assessment of the particular weight that attracts to the public interest is required. The public interest is "minimally fixed" as it "can never be other than in favour of deportation"; [45] of Akinyemi v Secretary of State for the Home Department (No. 2) [2019] EWCA Civ 2098. The public interest is flexible, however; Akinyemi No.2 at [50].

41. Concerning rehabilitation, [141] of HA Iraq provides:

> "… the weight which it will bear will vary from case to case, but it will rarely be of great weight bearing in mind that … the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern."

42. The statutory framework is a "complete code" and "… the entirety of the proportionality assessment required by article 8 can and must be

conducted within it": HA (Iraq) at [27]. That means that I must also take into account Strasbourg case law and I set out the main cases below.

43. The Strasbourg cases of particular relevance are well known. They include Boultif v Switzerland (2001) 33 EHRR 50, Üner v Netherlands (2007) 45 EHRR. 14 and Maslov v Austria [2009] INLR 47. The factors identified in [57] (the Boultif criteria) and [58] of Üner have been approved subsequently in both European and domestic case law and are uncontentious. Of relevance here are (i) the nature and seriousness of the offence committed by the appellant (ii) the length of the appellant's stay in the country from which he or she is to be expelled (iii) the time elapsed since the offence was committed and the appellant's conduct during that period (iv) the appellant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life and (v) whether there are children of the marriage, and if so, their age. There is an obvious overlap between these factors and the statutory provisions set out in s.117C.

44. The Supreme Court in Sanambar at [18] and the Court of Appeal in [106] of CI (Nigeria) v SSHD [2019] EWCA Civ 2027 set out the important distinction in European Court case law, for example in Jeunesse v The Netherlands [2004] 60 EHRR 17, between settled migrants with a right of residence in the host country and those without such status. In paragraph 112 of CI (Nigeria), Leggatt LJ identifies:

> "… the distinction of principle drawn in the case law of the European Court is between the expulsion of a person who has no right of residence in the host country on the one hand and, on the other hand, expulsion which involves the withdrawal of a right of residence previously granted.

45. Notwithstanding the potential complexities raised by the statute, there is a basic task to be undertaken, identified by Lord Reed JSC in [50] of Hesham Ali:

> "In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest. . . and also consider all factors relevant to the specific case in question."

Analysis: Article 8 ECHR

46. Following the guidance in NA (Pakistan), I assess first whether there are circumstances set out in s.117C (4) and (5) shown here so as to inform the very compelling circumstances assessment.

Exception 1 – s.117C(4)

Factor (a): lawful residence

47. The appellant came to the UK on 28 May 1998 at the age of 23. She has lived here for nearly 24 years. She has not lived here lawfully throughout that time, however. She had limited leave from 1998 to 2001 and ILR from 2009. She has not been lawfully resident in the United Kingdom for most of her life.

Factor (b): Social and cultural integration

48. There was little evidence addressing the appellant's social and cultural integration in the UK. She has lived in the UK for an extensive period of time, albeit not wholly lawfully. She came here as an adult aged 23 years old. Her children were born and brought up here and she must have become involved in UK society to some extent whilst bringing them up. It is also not disputed that the appellant has studied and worked here at some points. She has not worked since being released from prison but has studied. I noted that she has written a book, however, which she has published on the internet. The evidence about her life since being released from prison focussed mainly on her involvement with her children and not on the appellant's private life, however.

49. It is my conclusion that the length of time that the appellant has spent in the UK, bringing up her children here and studying and working at times indicated that she had socially and culturally integrated but not to a degree that could amount to a significant factor in the very compelling circumstances assessment. She has had only one period of imprisonment and I did not find, against the extensive period of residence and other factors identified, that this was sufficient to show that her integration was broken. I found that this provision was met but not strongly so given the limited evidence on the appellant's social and cultural integration.

Factor (c): very significant obstacles to integration in Zimbabwe

50. There was also limited evidence of difficulties for the appellant if she returns to Zimbabwe. The appellant's asylum claims were not found to have merit. The Social Services assessment from 2014 which considered which family members might be able to care for the children whilst the appellant was in prison referred to the appellant's mother and sister applying for visas to come to the UK to assist. This indicates that the appellant has family in Zimbabwe from whom she could obtain some support on return. I accept that she had a difficult childhood in Zimbabwe but she is returning as an adult and lived there until the age of 24 years old. She has a good knowledge of the country albeit things will have moved on since she left in 1998. I accept that as well as being away from the country for an extended period, the economic and social conditions in Zimbabwe are difficult. It remains my view that the evidence showed that

the appellant may well find it difficult to reintegrate in Zimbabwe after her extensive absence but not that there would be very significant obstacles to her reintegration.

Conclusion on s.117C(4)

51. The appellant has not met s.117C(4)(a) or (c). She meets s.117C(4)(b) but only to a limited extent and this is not a factor of such force that it has a significant impact in the very compelling circumstances assessment.

Exception 2 – s.117C(5)

52. The position of the appellant's children in the event of her deportation is at the heart of this appeal. Both children were born here, have lived here all their lives and are British. The respondent concedes that they cannot be expected to go to Zimbabwe with the appellant.

53. NM is now 19 years' old and therefore does not come within the provisions of s.117C(5) as she is not a minor. I consider her position in the section below headed "Factors against Deportation". Some of the evidence relating to ZM also concerned NM, however, and it is expedient to refer to NM at times in the consideration of whether ZM will face unduly harsh circumstances.

54. ZM is 15 years' old and is a British national. She is a qualifying child for the purposes of s.117C(5). The respondent submitted that the appellant did not have a genuine and subsisting parental relationship with NM or ZM, however, and that s.117C(5) was not engaged. I did not find that to be the case. The case of SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC) indicates that it is possible to have a genuine and subsisting parental relationship with a child in cases where contact has only recently resumed and when contact is on a limited basis and can even include a situation where the parent does not play an active role in the child's upbringing. The guidance provided by the Court of Appeal in Secretary of State for the Home Department v VC [2017] EWCA Civ 1967 indicates that the assessment should include whether there is a relationship between the child and the foreign criminal and whether the relationship is "parental", "genuine" and "subsisting". Notwithstanding the obvious limitations set out below, I was satisfied that the appellant has the required parental relationship with ZM. Even though their contact has been very limited and almost entirely indirect for the past 8 years, they have spoken regularly on the telephone, the appellant offers as much support as she can given the limitations on contact and cooperates with Social Services. I accept that the appellant has a genuine and subsisting parental relationship with ZM.

55. ZM lived with the appellant until she was 7 years old. A Deprivation of Liberty Safeguarding (DOLS) assessment for NM from September 2021 referred to the children being known to Social Services from 2007 onwards; see page 8 of annexe S. The evidence also showed that Social

Services were involved with the children continuously from 2011 onwards as a result of the appellant's alcoholism and other safeguarding concerns; page 1 of annexe Q1. Whilst VM was in the family home, he was violent to the appellant and this was witnessed by the children. The appellant obtained a non-molestation order against him in 2012 but this was breached as the appellant did not enforce it consistently. The appellant accepted that she had breached a written agreement not to be drunk when in charge of the children. The evidence from Social Services also indicated that both children have flashbacks to the accident in 2014 when they were in the back of the car when it crashed, killing VM; page 9 of annexe S.

56. After the accident in 2014, Social Services and made arrangements for the children to be cared for by the appellant's maternal aunt, MZ. As above, a full care order was made in favour of MZ on 8 September 2014. Social Services were satisfied that the children were being adequately cared for by MZ but in January 2020 MZ said that she could no longer care for the children; page 8 of annexe S. NM was already being cared for most of the time in a residential home. ZM had to be placed in emergency foster care, moving in August 2020 to a culturally appropriate foster care placement where she remains.

57. The children had very limited contact with the appellant whilst she was in prison. She was supposed to have visits four to six times a year but in the event they only visited approximately two times a year. She was able to have weekly telephone contact with them. When she came out of prison in May 2017, the agreed arrangement was for her to see the children once a month under the supervision of Social Services and to have weekly telephone contact. When she was recalled to prison between October 2018 and May 2019 she had no direct contact with them. Thereafter the earlier arrangements resumed until direct contact was prevented by the Covid-19 pandemic in March 2020.

58. The appellant commenced two applications to the Family Court to have the care orders obtained by Social Services discharged. The first application was withdrawn on 30 January 2018; Family Court order of Mr Recorder Afzal OBE dated 30 January 2018. The order indicated that arrangements were being made for NM to go to a residential school and for respite care for ZM who was still living with MZ. At that time, the Local Authority had been informed by the respondent that that it was intended that the appellant would be deported and Social Services were aware that work would have to be done with the children to manage the impact of that event. A Position Statement from the appellant dated 26 January 2018 indicated that she withdrew the application, in part, because the application for a care order was against ZM's wishes.

59. The second application to discharge the care order was withdrawn in March 2020; Family Court order of HH Judge Lea dated 17 March 2020. The Judge ordered that the appellant would not be permitted to make any further such applications in respect of ZM for 3 years without the leave of

the court. The Court also found that it was in the children's best interests to have ongoing regular contact with their mother. The appellant accepted that it was appropriate to withdraw the applications where it was not realistic for the children to be returned to her care at that time.

60. I requested up to date information from the children's Social Workers, including their views of the impact of the appellant's deportation. ZM's Social Worker, Ms Erica Ofori, provided a report dated 24 November 2021. She stated that ZM had progressed in her current foster care placement. She appeared to be doing well at school, for example, forming friendships. The appellant's contact with ZM had been indirect since 2019. ZM had been clear that she only wanted indirect contact via telephone with the appellant. The report indicated that KW respected this wish and ZM was allowed to initiate contact, the appellant recognising the need to take things at ZM's pace. ZM did not agree to the appellant attending her care reviews. ZM had referred to flashbacks of negative experiences when living with her mother. She had a good relationship with her great-aunt with whom she continued to have direct contact. Her stated preference was to live with MZ, her great-aunt, or in a residential placement. She did not talk about wanting to live with her mother. She appeared to be more drawn to MZ than she did to the appellant, the relationship with her mother being described as "strained". There was no plan for ZM to return to the care of KW on any basis.

61. Further, ZM was aware of the possibility of her mother being deported. She had expressed an understanding of what this would mean but had said "I'm not bothered" in a meeting on 17 August 2021. She had not shared any concerns about the possible deportation of her mother. The social worker considered that as ZM had coped well with indirect contact this might also be the case if the appellant were to be deported. It was not considered that the appellant's deportation would have "any detrimental impact" on ZM.

62. Matters moved on a little in 2022, however. ZM visited NM in December 2021 for the first time since she went into foster care in 2020. It was suggested that the appellant might also visit at the same time but there was insufficient time for the appellant obtain permission where she was not permitted to have direct contact with ZM. Permission was given by ZM's Social Services team in early 2020, however. The appellant went to NM's care home at the same time as ZM on 5 February 2022 with a further joint visit planned for 19 March 2022. The visits were supervised. A contract was drawn up between the appellant and Social Services for the format of further visits to see NM.

63. I accept that it is in ZM's best interests for her to have regular contact with her mother. This is stated by the Family Court in the order dated 17 March 2020. That same order made no change to the ongoing arrangements for that contact to be in the form of weekly telephone calls only, however. There has been only indirect contact for several years at

the express wish of ZM until the monthly visits to see NM commenced in February 2020. The appellant's contact with ZM has been very limited since 2014. They have not lived together since then and ZM has now lived away from the appellant for longer than she has lived with her. That is so even though ZM is aware of the possibility of the appellant being deported and what this means. It is understandable that the professional view of ZM's Social Worker was that the appellant's deportation "would not have any detrimental impact on ZM" and would not "give rise to any unduly harsh and very compelling circumstances" for ZM. That assessment has to be tempered somewhat by the fact of the visits to NM commencing in 2022. Those meetings did not, in my judgment, displace the overall clear indication that the appellant's physical presence in the UK is not a critical factor in ZM's life and her deportation will not have serious implications for ZM. There is no indication that ZM wishes contact to increase beyond the currently monthly visit to see NM. It is speculative as to whether ZM might want more direct contact in the future or increased involvement with the appellant in future.

64. It is therefore my conclusion that the evidence did not show that it would be unduly harsh for ZM if the appellant were to be deported. I have no doubt that separation from ZM will be profoundly difficult for the appellant but the evidence does not show that will be so for ZM. The position of ZM in the event of the appellant's deportation is therefore not a factor that can add significant weight to the appellant's side of the balance in the very compelling circumstances assessment.

65. I turn now to the issue of very compelling circumstances: section 117(C)(6) of the 2002 Act. This is the "over and above" issue.

Factors in favour of deportation

66. The appellant has received a sentence of 4 years and 8 months for death by careless driving. She committed a very serious offence and the public interest in her deportation is very high. Hesham Ali provides that a sentence of 4 years or more means that the public interest will "almost always" outweigh family and private life considerations.

67. The sentencing Judge said this:

> "You've pleaded guilty at an early stage to this offence … and I do think you have shown some awareness of the very serious offence you have committed and I will give you full credit for your early plea, of course, for that degree of recognition on your part.
>
> I'm not going to say anything at all about your relationship with the man who died in this accident. I'm quite sure that there is more than one side to it but none of that really matters today. The fact is that he has been killed and that was due to your careless driving under the influence of alcohol, and so nothing that I'm going to say today or a sentence that I'm going to impose has anything to do with your past relationship in anyway at all.

> Your record shows, as counsel has quite rightly acknowledged, a condition of entrenched alcoholism and it may well be that the level of alcohol in your blood at this time was in a sense an operating level and it may well be that you did not fee as drunk as you were but, as I suspect, you know and certainly all of us in these courts know, when you get behind the wheel of a car with that kind of level of blood, it's simply a physical matter that you don't have the degree of control that is required for safe driving. You apparently negotiated about 35 miles and were not driving unduly fast but you had really an appallingly high level of alcohol in your blood, particularly given the – your claim to have stopped drinking at 4 o'clock the preceding morning.
>
> The serious nature of this offence really requires me to pass a significant custodial sentence; there's simply no way round that … .
>
> I accept that the sentence that I'm bound to impose will cause great hardship to you, but not only to you but to your children as well, particularly one daughter who I am told is afflicted. All I can do in these circumstances is impose a sentence that I think is appropriate and as low as I can, given the fact that this man's death was caused while you were very much under the influence of alcohol although not driving too fast and probably guilty of only a moment or two of inattention.
>
> In view of your previous record which features a previous matter in 2010 for excess alcohol and then subsequently driving whilst disqualified, I don't think that the starting point represents the appropriate sentence. On the other hand, given the mitigation that has been put before me, nor do I think it would be right to increase it unduly much."

68. No OASys report was provided but a Parole Board decision dated 7 May 2019 indicated that at that time the appellant was assessed as being at a low risk of reoffending generally, a medium risk of non-violent offending and a low risk of violent offending. In the event that she offended she was assessed as posing a high risk of serious harm to known adults and a medium risk of harm to the public and staff.

69. In addition to the index offence the appellant has incurred five other convictions which also appear to have arisen, in part, because of her difficulties with alcohol. Those difficulties continued over an extended period of time and after her release from imprisonment for the index offence and after these proceedings commenced. The Parole Board decision dated 7 May 2019 set out the circumstances of her recall to prison from October 2018 to May 2019. She had continued to abuse alcohol and was arrested for common assault. Nothing indicated that there had been any adverse incidents since May 2019, however.

70. As above, however, the public interest side of the balance is very high here given the seriousness of the index offence. Following Hesham Ali again, it can only be outweighed by "a very strong claim indeed".

Factors against Deportation

71. As above, the appellant has not shown that her private life or difficulties she might face on return to Zimbabwe can attract significant weight in the very compelling circumstances assessment. The appellant's long residence of nearly 24 years in the UK and her having settled status must attract some weight on her side of the balance but not so as to make a meaningful difference on her side of the balance.

72. I have also found above that the appellant's deportation would not be unduly harsh for her daughter, ZM, and that is not a matter that can weigh heavily in the proportionality assessment. I do take into account, however, that the appellant will inevitably suffer greatly if she is returned to Zimbabwe and separated in a more definitive way from ZM.

73. I must also consider here impact of the appellant's deportation on NM. NM's circumstances are very troubling. She has had severe autism and learning difficulties since childhood. She presents with challenging behaviours that can include self-harm and physical attacks on others. She has a heightened sensitivity to the environment, past trauma, changes in routine and unfamiliar interactions. She has a very limited ability to communicate.

74. The disrupted family history has obviously been very difficult for NM given her diagnosis. It is of note that even though she was a single mother with her own significant challenges, the appellant's GP considered that she coped well with NM's behavioural problems; paragraph 8 of annexe. It was also the case, however, that Social Services has concerns about the children being at risk because of the appellant's alcoholism and the domestic violence when VM was in the home. They were also concerned that NM may have PTSD as a result of being present during the car accident in 2014; page 4 of annexe S.

75. As above, NM was cared for her by great-aunt, MZ, after the car accident in 2014. MZ found caring for her difficult and in 2018 NM lived mainly at the Maples Children's Home in Peterborough. In January 2020 MZ indicated that she could no longer care for NM who became permanently resident at the Maples. The Family Court order dated 17 March 2020 confirmed that a DOLS authorisation for NM's care at the Maples was lawful and in her best interests.

76. Another Family Court order of the same dated confirmed that it was in NM's best interests to have ongoing regular contact with the appellant. I accept that to be so. The same order indicated that the Local Authority would consider an increase in duration of contact with NM and consider contact in the appellant's home if she could secure appropriate accommodation. The order also allowed for a reduced level of supervision during the appellant's visits with NM and provided for the appellant to meet NM's Social Worker and be updated about the plans for NM's transition to Adult Services.

77. The appellant had visits with NM after she came out of prison and until prevented from doing so by the Covid-19 pandemic. I accept that the evidence shows that she has been having regular direct contact with NM of up to one visit a week for some time and that this is supported by the Local Authority. When NM's care needs could no longer be met at the Maples she moved to the Big House in Leicester in 2021 where she remains under a DOLS authorisation. The reports from Social Services indicated that the move to Leicester was in part in order for NM to be closer to the appellant. Unfortunately, NM continued to present with challenging behaviour and since moving to the Big House has required 3:1 care. She remained prone to aggressive outbursts and on occasions required restraint and tranquilizing medication. She also self-harmed on occasion, hitting herself and saying things like "stupid girl" which were believed to be echoes of things said to her in the past. There have been a number of incidents of aggression, including towards the appellant. The Local Authority identified in an email dated 26 March 2021 that this could be for a number of reasons including routine changes due to Covid 10, no longer seeing her maternal great aunt, physical conditions, age and past trauma.

78. The materials before me showed that the appellant is understandably very concerned indeed about NM and the care she is receiving. There was a large amount of correspondence between her and NM's carers and social workers in which the appellant raises her concerns and how she felt that she could assist in improving NM's quality of life. Those caring for NM were also clear that she was being carefully monitored and assessed and provided with appropriate care; see email from Bernadette Charehwa in annexe Z1. NM has been cared for by Adult Services from July 2021 onwards and the transition was thought to have gone well.

79. The appellant has, nevertheless, taken embryonic steps to make an application under s.21A of the Mental Capacity Act 2015 to discharge NM's DOLS authorisation with a view to NM living with her. The appellant's s.21A statement dated 9 February 2022 set out her concerns about NM's care and her view of their relationship. She considered that NM was "a prisoner" in care and should be allowed to live with the appellant if the appropriate level of support could be provided. The appellant remains concerned NM communicated better with her than anyone else, is aware of her presence and will be conscious of her absence if she is deported.

80. The Upper Tribunal requested up to date information from NM's Social Worker on the impact on NM if the appellant is deported. Mr Ian Price responded on 22 September 2021. He stated that the appellant had visited NM consistently since 2020. She had consistently demonstrated her willingness to work alongside Social Services in promoting NM's care and wellbeing. It was expected that contact would increase over time as NM settled into her new home in Leicester. NM might be able to visit the appellant's home in the future but only with a high level of support. The appellant had kept in touch with NM via video calls during the Covid-19 pandemic. NM appeared to benefit more from direct visits.

81. Mr Price commented as follows (verbatim) on whether there would be a detrimental effect on NM if the appellant were to be deported:

> "[NM] sees her mother on a weekly basis and [NM] enjoys her mom visiting and it has been noted by both placements' staffs (that [KW] visiting [NM]) is beneficial to [NM]."

I did not find that this indicted that it was Mr Price's view that NM would be significantly impacted by the appellant's deportation. I found that understandable given the family history, NM not living with the appellant for 8 years, the limited contact they have even now, the intervening years of residence with her great-aunt and her extended period of time in residential care.

82. The appellant also provided a document at annex G1 which was a letter from Mr Price dated 6 August 2021. The letter set out brief details of NM's condition and history and also said this:

> "Since moving into Adult Services [KW] has been fully involved in all aspects of the transitions work that needed to be completed and has provided weekly support to [NM] during the Covid 19 Pandemic. [KW] is the single most important person in NM's life. She is pivotal to her daughter's health and wellbeing and the person NM appears to trust's (sic) above all others. [KW] has been fully open about the past and has not shied away from discussing the impact this has had on her daughter.
>
> I would like to add that I have experienced [KW]'s devotion to her daughter. As NM progresses through life it is of the utmost importance that she continues to have the consistency and support that the relationship with her mother awards her."

83. The content of this letter appeared to me to be very different from that provided in the response given by Mr Price in September 2021. The purpose of and context for the 6 August 2021 letter is unclear. It is addressed only to "Sir/Madam". It does not comment on the specific issue of any detrimental impact on NM in the event of the appellant's deportation. The letter appears to have been provided by Mr Price to the appellant in email format and is not an original letter. I cannot be certain that it is a full and complete copy, a great deal of what has been provided by the appellant comprising extracts from documents rather than the complete document. As above, much as there is to admire in the appellant's devotion to NM, there were difficulties even prior to the index offence, they have not cohabited since then and contact is still limited. Having considered this email letter with some care, it was my conclusion that it did not carry a great deal of weight. The marked difference from the opinion provided in response to the Upper Tribunal's specific request for the view of the Social Worker NM's circumstances was not explained. The format of the email letter and it provenance and purpose were also unclear.

84. I accepted that the appellant is an important figure in NM's life, however. She has made consistent efforts to maintain and increase contact with NM and has worked with Social Services to promote NM's wellbeing. The evidence indicated that NM benefits from visits from her mother. Any move to increase contact or NM visiting the appellant at home remains speculative, however. NM's significant care needs are being met by the Local Authority, under the supervision of the courts. I did not find that the evidence showed that the appellant's role in NM's life was so significant that there would be a serious impact on NM if she were to be deported. NM's Social Worker was specifically asked about this and did not indicate that this would be a significant issue for NM.

85. I accept that separation from NM would be a very serious matter indeed for the appellant herself. She has shown consistent devotion to both of her daughters in the face of many obstacles and setbacks. Separation from NM and ZM for, at the very least, an extended period of time, likely to be at least 10 years, will be extremely hard for her. I found that to be a factor that weighed heavily on the appellant's side of the balance even where the evidence did not show that there would be a similar detrimental impact on NM and ZM.

86. I also weighed on the appellant's side of the balance that whilst in prison she completed a number of diplomas including psychology, CBT and drug and alcohol misuse. She supported other women with recovery from addiction. She continued to work with Turning Point on her alcohol misuse issues after her release from prison. There have been no concerns about her alcohol abuse since 2019. I also take into account that her behaviour as an adult followed a difficult childhood and that she has experienced mental health problems including depression in the past. I accept that she is genuinely remorseful concerning the death of VM and what has happened to her children as a result of her actions.

Conclusion on the very compelling circumstances assessment

87. Notwithstanding my deep sympathy for the appellant given that it means that she will live apart from her daughters for many years, it is my conclusion that the evidence does not show that there are very compelling circumstances here over and above those set out in s.117C(4) and (5). Events have meant that the appellant does not have the kind of relationship with NM and ZM that makes her deportation unduly harsh for them. Her own difficulties on return to Zimbabwe are not sufficient to outweigh the high public interest in her deportation. After weighing all of the material factors at play, in my judgment the respondent's decision is not a disproportionate breach of Article 8 ECHR.

Decision

88. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.

89. The Article 8 EHCR appeal is remade as refused.

Signed: S Pitt Date: 5 May 2022
Upper Tribunal Judge Pitt