



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/01977/2014

THE IMMIGRATION ACTS

Heard at : Royal Courts of Justice  
On : 23 November 2015

Decision and Reasons Promulgated  
On: 8 December 2015

Before

UPPER TRIBUNAL JUDGE FREEMAN  
UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SM

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr K Norton, Senior Home Office Presenting Officer  
For the Respondent: Unrepresented

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD) against the decision of the First-tier Tribunal allowing SM's appeal against a decision to deport him from the United Kingdom. For the purposes of this decision, we shall refer to the Secretary of State as the respondent and SM as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

**Background to the Appellant's Case**

2. The appellant is a national of Zimbabwe, born on 24 December 1984. He entered the United Kingdom on 11 April 2000 as a visitor, together with his aunt and sister, at the age

of 15 years. His mother, brother and other sister were already living in the United Kingdom. His mother and the sister with whom he came to the United Kingdom returned to Zimbabwe in 2002 and he went to live with his other sister and her husband and son, before moving in with his partner CS, a British citizen, in 2003, having commenced a relationship with her in 2002. After being arrested for an offence in January 2003 he claimed asylum but was refused on non-compliance grounds and was unsuccessful on appeal.

3. The appellant and CS had a son TM, born on 12 August 2003. In 2006 the appellant and CS separated for a period of time, during which CS fell pregnant by another man and had a son, MS, born on 4 November 2006. Prior to the birth of her son, she and the appellant got back together and the appellant brought up her son as his own, with no further contact from the biological father. The relationship between the appellant and CS ended in 2008 and the appellant moved out and returned for some time to live with his sister. He retained some contact with his children, although the evidence is not entirely clear on the level of contact.

4. On 5 November 2008 the appellant was convicted of battery and received a community order with a supervision requirement of 18 months. He was also convicted of destroying or damaging property and failing to surrender to custody and received a community order with an 18 month supervision requirement. On 6 October 2009 the sentences were varied to 14 days' imprisonment, with 7 days served. The appellant was also convicted, on 5 November 2008, of using disorderly behaviour or threatening/abusive/insulting words and was fined £50. On 17 June 2009 he was convicted of breach of a community order and the order was continued. He was given a 14 day prison sentence and served 7 days for failing to surrender to custody. On 10 November 2009 he was convicted of possessing a knife blade/ sharp pointed article in a public place and imprisoned for 20 weeks. The Home Office decided not to pursue deportation action against him at that time.

5. In 2010 the appellant met another woman, AK, and moved in with her and her two daughters. Their relationship deteriorated after his nephew moved in with them and he became aware that AK was having a relationship with his nephew. One evening, on 5 April 2012, after consuming a quantity of alcohol, the appellant returned home and argued with AK, kicking her and threatening her with a heated iron and kettle, brandishing a large knife, verbally abusing her and throwing eggs at her. He was arrested the following morning and charged with false imprisonment, threats to kill and assault. He pleaded not guilty, but on the day of the trial changed his plea to guilty for the offence of affray and was convicted on 7 August 2012 of affray and sentenced to 12 months' imprisonment, with a restraining order preventing him from contacting AK or her children (judge's sentencing remarks at Annex L and trial record sheet at Annex N of the respondent's bundle).

6. As a result of that conviction, the respondent commenced deportation proceedings against the appellant and a deportation order was issued against him on 14 February 2013 pursuant to section 32(5) of the UK Borders Act 2007. The appellant appealed against the deportation decision and the appeal was heard in the First-tier Tribunal on 8 April 2013. His appeal was allowed, with the consent of the respondent, on Article 8 grounds with a

view to his having limited leave to remain pending ongoing care proceedings concerning the two children, which had been commenced by the local authority while the appellant was in prison and to which he had become a party. The proceedings had been commenced as a result of concerns about the presence of drugs in the home and anti-social behaviour, and concerns about the children's mother CS's ability to care for them and the children had been taken into care and then gone to live with their grandmother JS, CS's mother in April 2013.

7. Following the appellant's successful appeal, the deportation order was revoked in May 2013 and the respondent indicated that a period of discretionary leave would be granted although that in fact did not happen. A Care Order was made in the family court on 3 October 2013 in which the children were made subject to a Special Guardianship Order to JS. The appellant was permitted contact with the children at least twelve times a year, with the expectation that that would move to overnight staying contact as and when considered appropriate. Once the care proceedings were concluded deportation action was again pursued by the respondent. A new deportation order was signed on 6 October 2014 and the same day a decision was made that section 32(5) of the UK Borders Act 2007 applied. The appellant appealed against that decision.

8. The appeal was heard in the First-tier Tribunal on 8 December 2014 before First-tier Tribunal Judge Gibbs and was allowed on Article 8 grounds. The appellant was unrepresented, his representatives having withdrawn shortly before the appeal hearing. Judge Gibbs heard from the appellant, his aunt and his children's grandmother JS. She found that the requirements of paragraph 399(a)(i) and (ii) of the immigration rules had been met with respect to the two children and that Exception 2 of section 117C of the Nationality, Immigration and Asylum Act 2002 applied on the basis that it would be unduly harsh for the children to remain in the UK without the appellant.

9. Permission to appeal to the Upper Tribunal was granted to the respondent on 9 July 2015 in relation to the judge's assessment of the "unduly harsh" consequences to the children of remaining in the United Kingdom without the appellant.

10. The appeal came before us on 23 November 2015 and, having heard submissions from both parties, we concluded that the judge's assessment of the "unduly harsh" consequences was materially flawed, in that it failed to take account of the public interest and did not involve any proper balancing of the relevant interests. Accordingly we set aside Judge Gibbs' decision, albeit preserving her findings of fact which were in any event not disputed.

11. In re-making the decision we heard submissions from Mr Norton and gave the appellant and his mother-in-law, JS, an opportunity to provide a response. Mr Norton relied upon the case of KMO (section 117 - unduly harsh) [2015] UKUT 543 in submitting that, taking account of the best interests of the child, the appellant's criminal offence and the public interest, it would not be unduly harsh for the appellant's two children to remain in the UK without the appellant. JS, in response, told us that the appellant's offending behaviour had been linked to alcohol and to the people with whom he had been associating and that he had stopped drinking altogether and had moved to a different area

away from his previous influences. He had completely changed and was committed to the children, whom he saw at least once a fortnight. He was unable to work but she would give him some tasks around the house, such as gardening. He would not re-offend. The children had become very challenging and needed their father. He was not a danger to the public and should be allowed to stay in the United Kingdom.

### Re-making the Decision

12. The appellant pursues his appeal on the basis that he falls within an exception to automatic deportation under section 33 of the UK Borders Act 2007, on the grounds that his deportation would be in breach of his Article 8 human rights. He relies upon his relationship with his two British children (one biological and one not) and therefore claims that paragraph 399(a) of the immigration rules and section 117C(5) of the 2002 Act applies in his case. For the sake of completeness, we conclude that paragraph 399(b) does not apply to the appellant as he is not in a relationship and paragraph 399A does not apply as he has not been lawfully resident in the United Kingdom for most of his life.

13. With regard to paragraph 399(a), it is not disputed that the appellant has a genuine and subsisting parental relationship with the two children and that the children are British. There is no suggestion that it would not be unduly harsh for the children to live in Zimbabwe with the appellant, and we agree: first, the children have a close relationship with their grandmother JS who is their legally appointed guardian, further to the family court proceedings; next, their mother remains in the United Kingdom albeit that there is little evidence of contact with her; and finally their ties in terms of schooling and friendships are in the United Kingdom. The issue in this appeal is whether or not it would be unduly harsh for the children to remain in the United Kingdom without the appellant, pursuant to paragraph 399(a)(b).

14. When considering the phrase "unduly harsh" the Upper Tribunal, in KMO, found that *"the word "unduly" in the phrase "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh."* Accordingly the test was considered to be a rounded one, not only focussed upon the impact on the children, but also taking into account the public interest and the seriousness of the criminal offending.

15. The starting point has to be the best interests of the children, which is clearly informed by the care order made by the family court. It cannot be disputed that the children's best interests lie in remaining with their grandmother JS who provides them with attention and stability, which they previously lacked when living with their mother. It is clear from the parenting assessment report from the specialist assessment team, prepared for the family court proceedings, that the children suffered severe trauma and neglect whilst in their mother's care (paragraph 11.0).

16. It is significant also that the family court, despite the history of domestic violence in the appellant's relationship with CS, considered that the appellant should continue to have contact with his children, albeit limited contact. Accordingly we find it also in the children's best interests for them to have the continued contact with their father that they

do and that, to that extent therefore it would not be in their best interests for him to be deported from the United Kingdom. We have to say, however, that that has to be contingent upon the appellant maintaining the level of contact and the change in character that he has thus far achieved, since a withdrawal by the appellant of his affections and interest would no doubt have a particularly detrimental effect on the children, given their past experiences of neglect. It is therefore paramount to consider the sincerity of the appellant's intentions towards his children, particularly in light of the threat of deportation.

17. We were very impressed by the evidence given before us by JS as to the appellant's close relationship with and support for the children and were impressed by the fact that she continued to support the appellant despite the abusive nature of the former relationship between him and her own daughter. JS spoke of her belief in the appellant's change of character, his abstinence from alcohol and his dedication to his children and to the increased involvement he had in the lives of his children. From weekly supervised contact with the children at a contact centre following his release from detention, and then weekend visits to her house once or twice a month following the issuing of the Care Order, he has now increased his contact to a week at a time once or twice a month, staying at her house. JS's evidence was that the boys would be devastated if the appellant had to leave the United Kingdom and that the effect on the boys would be "horrendous". Indeed it was on the basis of JS' evidence, as well as the parenting assessment report, that the First-tier Tribunal concluded that it would be unduly harsh for the children to remain in the United Kingdom without the appellant.

18. However that has to be considered against the background of the appellant's previous involvement with his children, which the First-tier Tribunal did not address in any detail and which was said in the parenting assessment report to have been inconsistent and intermittent (paragraph 4.6 and 9.5.8). It is relevant to note that, according to that report, the children were subject to a child protection plan on three occasions between 2004 and 2012 (paragraph 4.2) which, aside from the most recent period, would have included at least one period of time when the appellant lived with the children. At paragraph 9.1 of the report, the author refers to neglect of the children when in their mother's care but also an indication that that was happening when the appellant was visiting home. The report refers to the appellant's inability to make meaningful changes in the past (paragraph 11.6) and to a lack of commitment in the past to giving up alcohol, to the extent that CASCADE alcohol treatment services closed his file (paragraph 9.4.5), albeit that he has subsequently been assisted by his pastor and his aunt in maintaining his abstinence from alcohol (paragraph 9.4.6). The report refers at paragraph 9.6.4 to the risk of the appellant being unable to put the children's needs first, no matter how much he speaks of wanting to do so. Whilst he attended all the parenting sessions and undertook various courses in prison and was considered in the parenting assessment report to have been moving forward (paragraph 11.6), the report also refers to progress in the past being short-lived despite the guidance and support offered to him (paragraph 11.7). It is also of relevance that the family court, having taken account of the findings and recommendations in the report, was not willing to give the appellant care of the children and limited his contact at that time to at least 12 times a year in accordance with the local authority's care plan.

19. Of course our concern, in considering the best interests of the children, is not the appellant's ability to care for them, but rather the effect on the children of being deprived of their father's involvement in their lives. The parenting assessment report, in its risk assessment at paragraph 12, refers to the very good relationship the appellant had with the two boys (paragraph 12.1) and the strong bond between the appellant and the boys (paragraph 10.6). That was the position at the time the report was prepared over two years ago and, since that time, as we have already said, JS's evidence is that he has become very much involved in their lives, spending a great deal of time with them. The parenting assessment report referred, at that time, to a risk of the appellant forming further unsuitable relationships diverting attention from his children (paragraph 12.2) and there is no evidence before us of such concerns having come to fruition. It is also the case, however, that there have not been any new relationships, unsuitable or not. Whilst it is not for us to speculate about risks which the evidence of JS would suggest will not arise, we cannot ignore the concerns previously held by independent professionals. That is particularly so, given the absence of any more recent independent evidence.

20. It remains the case that the only independent evidence we have before us of the appellant's relationship with his children is the reports from Health Farm Children's Services of the parenting sessions in June and July 2013 and the parenting assessment report referred to above which is dated 29 July 2013. Whilst the parenting assessment report refers to the appellant undertaking counselling, there is no evidence of that having continued or the outcome of that counselling. There is no evidence from the children's schools as to any impact on their progress of their changed circumstances. There are no further social worker's reports. We note that the appellant's previous legal representatives made a written request to the First-tier Tribunal, prior to the appeal hearing on 8 December 2014, for further time to produce an independent social worker's report and provided evidence of having contacted two social workers who had agreed to see the appellant with a view to producing reports. The adjournment request was refused. The representatives subsequently ceased representing the appellant and no further social worker's report was ever produced, whether that was for financial reasons or otherwise. Whatever the reason, we consider the absence of recent independent evidence to be relevant, particularly in view of the reservations previously expressed. Accordingly our conclusion, that the best interests of the children lie in the appellant being able to continue his current level of involvement in their lives, is inevitably subject to such reservations.

21. In any event, the best interests of the children are only a consideration, albeit a primary one. We have to take account of the public interest and the circumstances and seriousness of the appellant's criminal offending. The appellant and JS both stressed that he was not a risk to the public and the appellant said that his offending in the past was only in a domestic setting. However that is not the only consideration. Deportation of foreign criminals is in the public interest and the appellant has to demonstrate that he falls within an exception to the requirement of the public interest for his deportation. We therefore turn to his criminal offending.

22. The appellant has a history of criminal offending, in particular in 2008 and 2009, albeit that that offending was not sufficiently serious to lead to deportation proceedings,

but nevertheless demonstrating a propensity towards violence. The parenting assessment report makes reference to ongoing domestic violence in the appellant's relationship with the children's mother and to the appellant's excessive drinking leading to violent behaviour. The index offence was a serious offence, involving threats with a hot iron, a kettle and a knife against another former partner and it is relevant to note that that was witnessed by the partner's child who was woken up by the noise. The sentencing judge, in her sentencing remarks on 7 August 2012, described it as a "very ugly incident of domestic violence" which required a sentence of immediate custody. She referred to the fact that it was not until the day of the trial that the appellant accepted guilt, having previously denied assault and using threats. The National Offender Manager Service (NOMS) report prepared after the appellant's conviction refers to the appellant posing a medium risk of serious harm towards current/ past/ future partners and states that the risk is of violence in a domestic setting.

23. Other than the assurances of the appellant and JS there is no independent evidence to show that the risk assessed in the NOMS report has reduced. As with the concerns in relation to the children, aside from a statement from his pastor and the manager of a day centre where the appellant used to volunteer, there is a complete lack of recent evidence, which is particularly unhelpful.

24. The public interest in deporting foreign criminals is strong and Mr Norton relied on the recent case of The Secretary of State for the Home Department v Boyd [2015] EWCA Civ 1190 in that respect. We have to take account of the fact that the appellant has never had any lawful basis of stay in the United Kingdom. Although he was a child when he came to the United Kingdom and cannot be held responsible for failing to do anything to regularise his status before his mother and sister left in 2002, his 18<sup>th</sup> year, he did not seek to follow through his asylum claim, which he subsequently made and which was then refused on non-compliance grounds. As an adult he has not sought to regularise his stay and has demonstrated a lack of responsibility in that regard. He has never had any leave to remain and, although a grant of discretionary leave was mentioned pending the outcome of the care proceedings, none was ever granted.

25. It is relevant that the appellant does not live with his children but sees them for limited periods of time. According to the parenting assessment report he has never had sole care of them and at one stage, when imprisoned, had no face-to-face contact with them for a year. The children are at last in a stable environment, in the care of their grandmother. Whilst there is evidence that the appellant's presence has a positive effect on the children, with particularly supportive evidence from the children's grandmother JS, there is also evidence of concerns in the past as to his commitment and a lack of recent independent evidence to assuage concerns of any remaining risks to the children in the event of future relationships with potential partners. Although modern means of communication are no substitute for physical contact, the children would be able to maintain a relationship with the appellant through letters and Skype upon his return to Zimbabwe and may be able to visit him. There is no independent evidence before us to show that the effect of separation would be so adverse as to outweigh the public interests. Should the appellant be able to obtain such evidence in the future, it is always open to him to make a fresh human rights claim and apply for the deportation order to be revoked.

26. For all of these reasons, and after very careful consideration of the matter, we conclude that it would not be unduly harsh for the children to remain in the United Kingdom without their father and we consider that the appellant has not been able to show that the exception in paragraph 399(a) and section 117C(5) of the 2002 Act applies to him.

27. For the same reasons as we have set out above, having taken account of the public interest considerations in sections 117B and 117C, we find there to be no very compelling circumstances over and above those described in paragraphs 399 or 399A, or sections 117C(4) and (5), such as to outweigh the public interest in deportation for the purposes of paragraph 398 of the rules. We take account of the fact that the appellant came to the United Kingdom as a child of 15 years of age and that he has lived here for 15 years, but we find no reason why he would not be able to reintegrate into society in Zimbabwe. Whilst his aunt's evidence in her statement for the appeal hearing on 8 April 2013 was that there were no family members remaining in Zimbabwe, we note from the more independent evidence in the parenting assessment report of 19 July 2013 that at that time the appellant referred to his parents and younger sister as remaining in that country. We find that there are therefore remaining family and other ties to Zimbabwe to enable the appellant to re-establish himself. As already stated, he has never had any lawful basis of stay in the United Kingdom.

28. Whilst we appreciate that this decision will not be welcomed at all by the appellant or JS, and whilst we have the utmost admiration for JS in her support of the appellant, our task is to apply the law in accordance with the immigration rules, statute and jurisprudence and we are obliged to acknowledge and apply the significant weight of the public interest in such cases. We accordingly conclude that the appellant's deportation would not breach his human rights and that he does not fall within the exceptions to automatic deportation and we dismiss his appeal.

## **DECISION**

29. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. We re-make the decision by dismissing SM's appeal on all grounds.

### **Anonymity**

We continue the anonymity order previously made by the First-tier Tribunal, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Upper Tribunal Judge Kebede