



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA/01632/2014

**THE IMMIGRATION ACTS**

**Heard at Centre City Tower Birmingham**

**Determination**

**On 5 March 2015**

**Promulgated**

**On 22 May 2015**

**Before**

**UPPER TRIBUNAL JUDGE PITT**

**Between**

**ATM  
(ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Brooks, instructed by RBM Solicitors

For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Frankish promulgated on 19 November 2014 which refused the deportation appeal of the appellant on asylum and human rights grounds.
2. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal

or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant or his wife and children. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim and to his children.

3. ATM is a citizen of Zimbabwe.
4. He claims to have arrived in the UK in 2002. He entered unlawfully and has remained unlawfully since then.
5. He claimed asylum but absconded and his claim was refused on 13 October 2004 for non-compliance.
6. On 26 September 2008 the appellant was arrested for drug dealing. On 15 April 2009 he was convicted of supplying class A drugs, heroin, crack and cocaine. On 18 May 2009 he was sentenced to 3 years' imprisonment concurrent.
7. On 2 July 2014 a deportation order was made against him under the provisions of s.32 of the UK Borders Act 2007. It is that decision which gives rise to this appeal.
8. The appellant's wife was originally from Zimbabwe but is now a British citizen having benefited from the legacy provisions. It was common ground that although only one of the couple's children had British nationality, the second child would qualify were an application to be made.
9. The appellant appealed the deportation order on asylum and human rights grounds. First-tier Tribunal Judge Frankish found that he was not in need of international protection and that the Article 8 claim could not defeat the public interest in deportation.
10. The grounds of appeal challenged the refusal of the asylum claim on the basis that EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) had been applied at [18] and [19] when the correct County Guidance case was CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 59 (IAC). The grounds also maintained that whichever case was considered, the judge failed to consider the criteria for risk on return identified therein.
11. I saw no merit in this ground. Firstly, no material difference between the criteria to be assessed as set out in EM or CM was identified in the written grounds or at the hearing. Secondly, the appellant's case before the First-tier Tribunal was that he came within paragraph (3)(1) of the head note of CM as he had "a significant MDC profile". That case was not accepted by Judge Frankish and there is no challenge to her findings in the grounds before me.

12. The appellant's case did not include any evidence or, as far as the documents before me show, argument that he would be returning to a rural area of Zimbabwe, thus bringing him within a risk category identified in CM. On the contrary, in his asylum claim he states that he was born in Harare and left Zimbabwe from Harare when he came to the UK. I was not taken to any evidence indicating that he would be returning to a high-density area of Harare, another criteria for consideration identified in CM. His wife works in the UK and his evidence is that he has family in Zambia and nothing suggested that he could not support himself financially if he returned, in any event, thus avoiding the need to live in a high-density area of Harare.
13. Mr Brooks sought to argue that the First-tier Tribunal also erred in failing to indicate whether the appellant was credible as regards his MDC profile or make adequate findings in that regard. That was not a point argued in the grounds of appeal. In any event, reading the determination as a whole and fairly, with particular reference to [17], it is clear Judge Frankish did not find the appellant's claim to have a "significant MDC profile" as required by EM and CM was made out.
14. I noted that the First-tier Tribunal failed to address the s.72 certification of the appellant's asylum claim; see paragraphs 61 to 72 of the respondent's refusal letter dated 2 July 2014. That is a surprising omission from the decision of Judge Frankish and clearly erroneous. I do not find it to be material, however, where the asylum claim was refused by the First-tier Tribunal and no challenge of any merit to that aspect of the decision has been made out.
15. It was my view, however, that the consideration of the Article 8 claim by the First-tier Tribunal disclosed a material error on a point of law such that it had to be set aside.
16. It was common ground that the judge was required to apply the provisions of the Immigration Rules and paragraph 399(a) in particular and consider whether the appellant's deportation would amount to "unduly harsh" circumstances for his two children. The judge was also required to assess and weigh the best interests of the children.
17. Mr Smart was unable to persuade me that in the sections of the determination addressing the appellant's family life that the First-tier Tribunal addressed the "unduly harsh" test regarding the children; see [20] to [26]. There is no reference to paragraph 399(a) or the "unduly harsh" test or any substantive consideration of it.
18. The judge also failed to address in any substantive way the social work report dated 22 October 2014 of Mr Charles Musendo. There is a reference to it at [20] but no more. The report could only be potentially material given its conclusion that the appellant's deportation would have "severe devastating effects on the family and therefore would be contrary to the

best interests” of the children; see [58]. Mr Brooks identified a number of other passages in the report to the same effect.

19. I therefore set aside the Article 8 decision and proceeded to remake it.
20. The essential issue in this appeal is the situation of the appellant’s children and whether his deportation will be “unduly harsh” for them or, if not, whether there are exceptional circumstances that defeat the public interest in deportation.
21. Mr Brooks did not seek to suggest that the provisions of paragraph 399(b) were relevant here where the appellant’s relationship with his wife was established entirely whilst he was here unlawfully.
22. I considered whether the appellant’s deportation amounted to unduly harsh circumstances for his children.
23. The document entitled “IDIs: Chapter 13 – Criminology Guidance in Article 8 ECHR Cases” states at paragraph 2.5.2:

“2.5.2 When considering the public interest statements, words must be given their ordinary meanings. The Oxford English Dictionary defines ‘unduly’ as ‘excessively’ and ‘harsh’ as ‘severe, cruel’.

2.5.3 The effect of deportation on a qualifying partner or a qualifying child must be considered in the context of the foreign criminal’s immigration and criminal history. The greater the public interest in deportation, the stronger the countervailing factors need to be to succeed. The impact of deportation on a partner or child can be harsh, even very harsh, without being unduly harsh, depending on the extent of the public interest in deportation and of the family life affected.”

24. The Court of Appeal has indicated at [43] of PF (Nigeria) v SSHD [2015] EWCA Civ 251 that:

“I fully recognise that if the Judge's factual findings are well founded, there will be a real and damaging impact on his partner and the children; but that is a common consequence of the deportation of a person who has children in this country. Deportation will normally be appropriate in cases such as the present, even though the children will be affected and the interests of the children are a primary consideration.”

25. Against those matters I must weight the circumstances of the appellant’s children, Mr Musendo’s report providing important evidence in that regard. It was not suggested for the respondent that the social work report was in any way unreliable. I am content to take it at its highest given that is so, the qualifications of Mr Musendo and the consistent comments throughout as to the serious damage to the children here if the appellant is deported, evidence of this arising from the period that he was in prison. His resumption of their care on release, increased since his wife started studying as well as working, confirms the conclusions of Mr Musendo as to “severe devastating effects” ensuing if the appellant is deported.

26. Acutely concerning though it must be that the children here face such a future as a result of the conduct of their father, I did not find that this was sufficient to show that the “unduly harsh” test was met in the face of the seriousness of the appellant’s criminal offending and the public interest in his deportation. As set out above, the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal. The appellant drugs offences here attracted concurrent sentences of 3 years and must be considered as very serious indeed.
27. The appellant’s immigration history must also weigh against him where he entered the country illegally and has been here illegally ever since.
28. Set against his offending and immigration history, it is not my judgement that the very concerning conclusions of Mr Musendo in the social work report are sufficient to show that the appellant’s deportation would result in ‘excessively’ and “severe, cruel’ circumstances for his children such that they could be characterised as unduly harsh.
29. Where that was so, I proceeded to consider whether there were “very compelling circumstances over and above those described in paragraphs 399 and 399A” as required by paragraph 398.
30. When conducting that assessment, I referred to the case of Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC) which provides in the head note that:

“... such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B”

and

“[c]ompelling as an adjective has the meaning of having a powerful and irresistible effect; convincing.”

and, at [25]:

“What are “very compelling circumstances over and above those described in paragraphs 399 and 399A” referred to in the closing words of paragraph 398? They can only be circumstances, which are sufficiently compelling to outweigh the public interest in deportation and render such deportation a breach of Article 8. The present Rules set out particular aspects that must be taken into account in the weighing of proportionality; they allow for consideration of other circumstances that may not fall within that rubric but, in the language of the Rules, those circumstances “must be very compelling”

and, at [28]:

“Those individuals who do not come within paragraph 399 or 399A will need to establish very compelling circumstances over and above those described in paragraphs 399 and 399A because nothing else will be weighty enough to outweigh the public interest in deportation.”

31. The Court of Appeal has also indicated at [24] of LC (China) v SSHD [2014] EWCA Civ 1310 that:

“The Secretary of State was obliged to make a deportation order in respect of him pursuant to section 32 of the UK Borders Act 2007 unless he could bring himself within one of the exceptions in section 33, in this case by establishing that to remove him would involve an unlawful interference with his article 8 rights, and in making her determination she was obliged to weigh up the competing considerations in accordance with paragraphs 398 - 399A of the Immigration Rules. The starting point for any such assessment is the recognition that the public interest in deporting foreign criminals is so great that only in exceptional circumstances will it be outweighed by other factors, including the effect of deportation on any children. However, in cases where the person to be deported has been sentenced to a term of imprisonment for less than 4 years and has a genuine and subsisting parental relationship with a child under the age of 18 years who enjoys British nationality and is in the UK, less weight is to be attached to the public interest in deportation if it would not be reasonable to expect the child to leave the UK and there is no one else here to look after him. By contrast, however, where the person to be deported has been sentenced to a term of 4 years' imprisonment or more, the provisions of paragraph 399 do not apply and accordingly the weight to be attached to the public interest in deportation remains very great despite the factors to which that paragraph refers. It follows that neither the fact that the appellant's children enjoy British nationality nor the fact that they may be separated from their father for a long time will be sufficient to constitute exceptional circumstances of a kind which outweigh the public interest in his deportation. The appellant's children will not be forced to leave the UK since, if she chooses to do so, their mother is free to remain with them in this country.”

32. In my judgement there was nothing in the evidence before me which fell outside the “rubric” of or was “over and above” the provisions of paragraph 399 and 399A, certainly nothing that could be characterised as sufficiently compelling so as to defeat the public interest in deportation. Paragraphs 399 and 399A provide for the appellant's relationship with his partner and their children and his length of residence. The provisions of s.117B(4) allow little weight to be placed on the appellant's relationship with his wife where it was formed whilst he was here illegally and the same principle applies to his private life. It was not my view that other factors such as his speaking English or the family being able to support themselves were matters that could weigh at all heavily against the very significant weight attracting to the public interest here given the seriousness of the appellant's offending.
33. This is, in my judgement, sadly, one of those cases such as that considered by the Court of Appeal in Ad Lee v Secretary of State [2011] EWCA Civ 348 where the Court accepted that one tragic consequence of serious criminal offending by a foreign national could be that a family will be broken up.
34. For all of those reasons, I did not find that the deportation of the appellant amounted to a breach of his rights or those of his family under Article 8 of the ECHR.

**Decision**

35. The decision of the First-tier Tribunal contains an error on a point of law and is set aside.

36. I remake the appeal as dismissed.

Signed:   
Upper Tribunal Judge Pitt

Date: 14 May 2015