



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: PA/12850/2016**

**THE IMMIGRATION ACTS**

**Heard at Royal Courts of Justice, London**

**Decision & Reasons  
Promulgated**

**On 25 September 2017**

**On 27 September 2017**

**Before**

**UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

**SS**

**ANONYMITY DIRECTION MADE**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Mupara, Counsel

For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.*

1. I have made an anonymity order because this decision refers to the circumstances of the appellant's son, L, born in December 2008.

2. The appellant has appealed against a decision of First-tier Tribunal Judge G Clarke dated 17 May 2017, in which he dismissed his appeal against a decision dated 10 November 2016 to refuse a protection and human rights claim and to maintain a deportation order signed on 11 July 2016. The appellant was sentenced to five years and six months' imprisonment for rape on 11 October 2013 and has been imprisoned or in immigration decision ever since.
3. Permission to appeal was granted by Upper Tribunal Judge Blum on a limited basis.

### **Adjournment application**

4. At the beginning of the hearing Mr Mupara renewed an adjournment application that had been refused on the papers on 22 September 2017. Mr Mupara submitted that the First-tier Tribunal did not have adequate evidence regarding L's best interests and the impact of the appellant's deportation upon him, and therefore did not make a full best interests assessment. He sought an adjournment to obtain reports from a psychologist and independent social worker ('ISW').
5. I entirely agree with the reasons provided by Upper Tribunal Judge Gill for refusing the adjournment application on the papers. The appellant was represented by solicitors before the First-tier Tribunal and throughout these proceedings. They prepared a bundle of evidence containing witness statements from family members. The appellant had every opportunity to provide relevant evidence and it is wholly inappropriate to seek to produce new evidence not available to the First-tier Tribunal, with a view to establishing that there was an error of law.
6. As I pointed out to Mr Mupara, the grounds of appeal did not argue that L's best interests were not adequately considered. The grounds focus entirely upon (i) an inconsistent finding regarding L's visits to his father, (ii) a failure to have regard to compelling circumstances, (iii) a failure to give the appellant the benefit of the doubt when assessing his risk of reoffending, (iv) minor factual errors. Moreover, the sole issue in dispute has been identified by Upper Tribunal Judge Blum when granting permission to appeal. He considered that the inconsistencies in the First-tier Tribunal's findings as to whether L visited the appellant in detention may have made a material difference to the First-tier Tribunal's overall assessment of section 117C of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). Upper Tribunal Judge Blum expressly found there to be no merit in the other grounds of appeal.
7. The application for an adjournment was entirely misconceived. The determination of whether the First-tier Tribunal has committed a material error of law can fairly be determined by reference to the

evidence available to the First-tier Tribunal, and I refused the adjournment application.

### **Application to rely upon additional grounds of appeal**

8. Mr Mupara sought to rely upon an additional ground of appeal, which he accepted was being raised for the first time orally before me. It was argued that insufficient care was taken when assessing risk to the appellant in Zimbabwe. I did not need to hear from Mr Melvin and refused the application. Mr Mupara acknowledged that he was raising a new matter very late yet offered no explanation for the lateness or the failure to particularise the alleged error in writing. The appellant has been represented throughout. He had two opportunities to draft grounds of appeal and it is simply too late to seek to raise a vaguely expressed and unparticularised ground of appeal at this stage of the proceedings. I refused permission to amend the grounds of appeal.

### **Issues in dispute**

9. Having refused the application for an adjournment and the application to amend the grounds of appeal, Mr Mupara agreed that the appeal before me should proceed on the basis that the First-tier Tribunal was entitled to make all the findings of fact it did, save for the findings regarding L's visits to the appellant in detention. The following findings, inter alia, remain intact: the appellant has committed a very serious crime; in any event his asylum claim is not credible or well founded; there are no insurmountable obstacles preventing the appellant's re-integration in Zimbabwe notwithstanding the appellant's blindness; L and the appellant have a genuine and subsisting relationship.

### **First-tier Tribunal findings**

10. The First-tier Tribunal's decision is very detailed (running to 198 paragraphs) and for the most part, carefully drafted. Unfortunately, the First-tier Tribunal has not made clear findings of fact regarding L's contact with his father whilst imprisoned / detained. Earlier on in the decision from [107] the First-tier Tribunal made general findings of fact regarding the appellant's family life in the United Kingdom. These include the clear findings at [109] that:
  - (i) the appellant has a genuine and subsisting relationship with L;
  - (ii) L visited the appellant in prison and in detention;
  - (iii) the appellant keeps in regular telephone contact with L;
  - (iv) there is credible evidence of an ongoing parental relationship.

11. The First-tier Tribunal then returns to the subject of the relationship between the appellant and L at [157-160]. At [159] the First-tier Tribunal makes a clear finding that L, a British citizen, has always resided with his mother. The First-tier Tribunal repeats the finding that the appellant keeps in regular contact with L. The First-tier Tribunal has however made a regrettable error when referring to the appellant's claims regarding L's visits to him whilst in immigration decision. The appellant's claim is summarised as being both that L "*has not visited him in immigration detention*" and "*has also visited him in detention*".
12. The First-tier Tribunal repeats the finding that the appellant has family life with his son at [178], an ongoing relationship with his son at [182] and a genuine and subsisting relationship with his son at [194]. This suggests that the First-tier Tribunal entirely accepted the claimed relationship between father and son.
13. Rather confusingly the First-tier Tribunal finds at [195] and [196] that L has not visited his father or had contact with him whilst in detention. I have no doubt that in making these findings and in so far as these inconsistent findings were taken into account when considering the impact of his father's deportation upon L, the First-tier Tribunal has erred in law.
14. Mr Melvin acknowledged the only error of law in relation to which permission to appeal was granted, but invited me to find that it is not a material error of law and in the premises the decision should not be set aside. Mr Mupara submitted that the error infected the First-tier Tribunal's assessment of undue harshness and was therefore a material error of law. The only disputed issue was therefore significantly narrowed. It was agreed that there was an error of law and the real question is whether that error of law is a material one. I reserved my decision on this after hearing from both representatives.

## Legal framework

15. It is important to recall that the appellant must meet a very demanding test, having been sentenced to a term of imprisonment in excess of four years – see section 117C of the 2002 Act:
 

“(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.”
16. These statutory provisions provide a "*particularly strong statement of public policy*" (see NA (Pakistan) v SSHD [2017] 1 WLR 207 at [22]),

such that "*great weight*" should generally be given to it and cases in which that public interest will be outweighed, other than those specified in the statutory provisions and Rules themselves, "*are likely to be a very small minority (particular in non-settled cases)*" (Hesham Ali v SSHD [2016] UKSC 60 at [38]), i.e. will be rare (NA (Pakistan) at [33]). The Court of Appeal has very recently helpfully summarised the relevant legal framework in SSHD v KE (Nigeria) [2017] EWCA Civ 1382, per Hickinbottom LJ.

"33. More importantly for the purposes of this appeal, where an offender has been sentenced to at least four years' imprisonment, or otherwise falls outside the paragraph 399 and 399A exceptions, the decision-maker, court or tribunal entrusted with the task must still consider and assess whether there are "very compelling circumstances" that justify a departure from the general rule that such offenders should be deported in the public interest. That requires the decision-maker to take into account, not only that general assessment (and give it the weight appropriate to such an assessment made by Parliament), but also the facts and circumstances of the particular case which are not – indeed, cannot – be taken into account in any general assessment. As Lord Reed, giving the majority judgment, said in Ali:

"49. ... It is necessary to feed into the analysis the facts of the particular case and the criteria which are appropriate to the context, and, where a court is reviewing the decision of another authority, to give such weight to the judgment of that authority as may be appropriate. In that way, relevant differences between, for example, cases where lawfully settled migrants are facing deportation or expulsion, and cases where an alien is seeking admission to a host country, can be taken into account.

50. 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 appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders..., and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest on deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed – very compelling, as it was put in [MF (Nigeria)] – will succeed".

## 17. The judgment continues:

"34. Therefore, as Lord Reed emphasises, whatever the seriousness of the offences or length of sentence, the ultimate question is the same – would deportation be in breach of article 8 – but the sentence imposed affects the approach to the exercise of assessing proportionality for article 8(2) purposes. If it is at least four years' imprisonment, any decision-maker must attach very considerable weight to the general assessment of the public interest in deporting foreign criminals, now directly adopted by Parliament in statute, under which such a sentence represents a level of offending in respect of which the public interest almost always outweighs countervailing considerations of private or family life, only being

outweighed by countervailing factors which are very compelling (see Ali at [46]). Where there is a challenge to a decision involving the article 8(2) balancing exercise by a decision-maker on behalf of the Secretary of State in an individual case, as I have already described, the court or tribunal must give that general assessment substantial weight, because it is endorsed by Parliament; and it must also take into account – but no more than take into account – the application of that general assessment to the facts of the specific case by the original decision-maker (OH (Serbia) at [15(d)]). As independent judicial bodies, on hearing a challenge to an executive decision in an individual case, it is the duty of the court or tribunal to make its own findings of the relevant facts and then make its own assessment of the proportionality of the proposed deportation (Ali at [46]).

...

36. In NA (Pakistan) at [37], Jackson LJ considered the correct approach to a case in which section 117C(6) ("very compelling circumstances") applies:

"... [I]t 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 the 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)."

I respectfully commend such an approach."

18. The high threshold that is required and the inevitable consequences upon children that flow from deportation decisions made pursuant to the correct legal framework is illustrated in WZ (China) v SSHD [2017] EWCA Civ 795, a case that did not involve a sentence of over four years. At [14] Sir Stanley Burnton said this:

"In my judgment, the Upper Tribunal was right to set aside the determination of the First-tier Tribunal. Quite apart from the reasoning of the First-tier Tribunal, I cannot see how a tribunal properly applying the law as it was at the date it heard the Appellant's appeal, and giving the public interest in the deportation of a person sentenced to 2 years' imprisonment the weight that was appropriate, could have allowed his appeal. I take into account that until he committed his offence he had been of good character, and that the reports before the Tribunal showed that he was unlikely to reoffend. I bear in mind that he has an established family life in this country, that his family and children have UK nationality, and that his wife would have to give up work to look after the children if he were removed and they were to remain in this country. However, none of these facts takes his case out of the ordinary. Deportation necessarily results in the break-up of the deportee's family if they remain in this country after his removal."

## Discussion

19. When the commended approach referred to above, is applied to the factual matrix of this father / son relationship taken at its highest, together with the other preserved findings, the following emerges.
- (a) The appellant and L have a genuine and subsisting relationship. There was very little evidence before the First-tier Tribunal to explain or detail the nature and extent of the relationship. For the first five years of his life and until the appellant was imprisoned in 2013 L “*visited his father quite often*” – see email from L’s mother dated 15 December 2016. Upon the appellant’s imprisonment and detention, his aunt brought L to visit – see the letter dated 11 February 2017 from the aunt and the appellant’s witness statement. The relationship between the appellant and his son has therefore been limited to prison / detention visits and telephone contact from 2013.
  - (b) There was evidence from the aunt that L would find it very difficult to cope with his father’s deportation to Zimbabwe. The aunt did not give evidence and was not cross-examined – see [110].
  - (c) There was no independent evidence from any source (other than family members) to verify the strength of the relationship or the impact of the termination of face to face contact with his father upon L. That this would have been helpful in a case such as this is acknowledged belatedly in the appellant’s adjournment application not before the First-tier Tribunal but before the Upper Tribunal at a very late stage.
  - (d) Even when the evidence available to the First-tier Tribunal is taken at its highest, on no legitimate view could it be said that the impact upon L would be unduly harsh. When the appellant’s very serious offending, lack of remorse or rehabilitation and the First-tier Tribunal’s assessment that he represents a danger to the community (see [142] and [190]) are factored in, the position becomes even starker.
  - (e) When the factors falling within the Exceptions 1 and 2 are considered, either by themselves or taken in conjunction with any other relevant factors, they would not satisfy the ‘very compelling factors over and above those described in Exceptions 1 and 2’ test. The appellant is a long way short of meeting the requirements of Exception 1 for the reasons explained by the First-tier Tribunal at [164-168 and 192]. He is a long way short of meeting Exception 2 for the reasons I have outlined above. The only potential additional compelling factor is the appellant’s blindness. This has not impacted upon telephone contact from prison and it is difficult to see how this will adversely impact upon telephone contact from Zimbabwe given the findings at [166-7]. It is well known that there

are various free ways to communicate overseas through mobile phone 'applications'.

- (f) In any event even if the appellant's blindness can be described as compelling, it is difficult to see how this can properly on any legitimate view be described as very compelling given the other findings of fact uninfected by any error of law.
20. In those circumstances, the error of law identified was not material, and the First-tier Tribunal reached the only decision that was open to it on the facts. In order for the appellant to succeed, he would now have to demonstrate that there were very compelling circumstances in his case over and above any unduly harsh effect on L. It should be noted that whilst Hesham Ali stated that the Immigration Rules do not constitute a 'complete code', even a consideration of Article 8 cases involving foreign criminals requires an assessment of whether the private and family life considerations are sufficiently 'compelling' or 'exceptional' so as to outweigh the public interest in deportation. Looking at the matter realistically, there is no prospect whatsoever of the appellant meeting the very high threshold applicable.

## **Conclusion**

21. Had the First-tier Tribunal considered and accepted the father/son contact in detention at its highest, alongside all the findings of fact uninfected by an error of law, the outcome would inevitably have been the same. The First-tier Tribunal would have been bound to attach very significant weight to the appellant's very serious offending as reflected in a sentence of over four years. When that is balanced against the particular nature and extent of private and family life, by reference to the section 117B and 117C considerations, on no legitimate view could the family / private life be said to outweigh the weight to be attached to the public interest in this case.

## **Decision**

22. The decision of the First-tier Tribunal did not involve the making of a material error of law and I do not set it aside.

Signed:

Ms M. Plimmer  
Judge of the Upper Tribunal

Date:  
26 September 2017