IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000414
First-tier Tribunal No:
HU/57942/2021
LH/00405/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 September 2024

Before

UPPER TRIBUNAL JUDGE KAMARA
UPPER TRIBUNAL JUDGE NEVILLE

Between

FN
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr A Badar, counsel instructed by Imperium Chambers
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 14 August 2024

DECISION AND REASONS

Introduction

1. The Secretary of State was granted permission to appeal the decision of First-tier Tribunal Judge Howorth allowing the appellant's appeal, following a hearing which took place on 30 January 2023. Following an error of law hearing which took place on 20 June 2023, that decision was set aside in a decision of Upper Tribunal Judge Rintoul which was issued on 9 August 2023.

2. The appeal was retained in the Upper Tribunal for remaking, with the following directions as to the issues to be determined at [11] of the error of law decision.

> The appeal will be remade in the Upper Tribunal. There is no cross appeal so the findings with respect to the asylum claim stand. If it is sought to adduce further evidence then an application will need to be made at least fourteen days before the next hearing. There is no reason not to preserve the findings of fact at paragraph 17, 18 and 19 or 21 or 22. I do

not think that what is set out at 23 is controversial. It may be that further evidence has to be called in respect of the child and or the child's mother. It is often the case that this is the kind of situation which can fluctuate and it may be that further evidence has to be produced with respect of the child. {…] The parties would are advised to focus on how and why Exceptions 1 or 2 are met and if so, whether they meet it by a significant margin; and, why the very significant obstacles test is met.

Anonymity

3. No anonymity direction was made previously and no such application was made. However, a direction is now imposed owing to the need to make extensive reference to Family Court documents concerning an especially vulnerable child and his mother. The risk of the child being identified and the harm that this could cause justifies derogation from the principle of open justice.

Factual Background

4. The appellant is a national of Zimbabwe facing deportation following his 2018 conviction and sentencing to 68 months' imprisonment for causing death by careless driving which involved the consumption of drink and drugs.

5. The appellant first arrived in the United Kingdom, aged nine, in 1999. He entered with a visitors' visa and after that expired, an application was made for leave to remain as a student. The appellant was granted leave to remain initially until March 2003 and extended until September 2004. A late application for further leave as a dependent child was initially rejected but granted until June 2006, after a further application was made. Further leave to remain was granted to the appellant as a dependent child until May 2011. Thereafter the appellant made an in-time application for indefinite leave to remain on long residence grounds. That claim was rejected, however he was granted Discretionary Leave until October 2013. Thereafter he overstayed for over a year before a further grant of Discretionary Leave was made which expired on 9 March 2018. That leave was further extended until 9 March 2021. Thereafter the appellant has had no leave to remain in the United Kingdom.

6. The appellant's custodial sentence came to an end in September 2021 and following a short period of immigration detention he has been on bail since November 2021.

7. In a decision dated 25 November 2021, the Secretary of State decided to refuse the appellant's protection and human rights claim. We need only address the human rights aspect of that decision given the parameters of this appeal. The appellant's attempt to resist deportation on mental health grounds was rejected owing to the fact that he was not receiving treatment for his mental health conditions in the United Kingdom and that treatment was available in Zimbabwe. It was not accepted that the appellant met the requirements of Exceptions 1 or 2, the latter based on his relationship with his partner. At the time the decision letter was produced the appellant had yet to establish a relationship with his son. The respondent considered there to be no very compelling circumstances which outweighed the public interest in his deportation.

The remaking hearing

8. The hearing was attended by representatives for both parties as above. We heard oral evidence from the appellant and his partner. The appellant's mother and one his friend's, 'D,' also attended and were available for cross-examination

however there was no challenge to their evidence. Both representatives made submissions and the conclusions below reflect those arguments and submissions where necessary. We had before us a composite bundle containing, inter alia, the core documents in the appeal, including the appellant's and respondent's bundles before the First-tier Tribunal.

9. At the end of the hearing we reserved our decision.

Legal Framework

10. The appellant argues that his removal from the United Kingdom would be a breach of the United Kingdom's obligations under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The burden of proof is on the appellant to establish an interference with his rights under Article 8(1) ECHR and the standard of proof is a balance of probabilities. The burden is then upon the Secretary of State to establish to the same standard that the interference is justified under Article 8(2) ECHR.

11. Section 32(4) of the UK Borders Act 2007 ['the 2007 Act'] provides that "the deportation of a foreign criminal is conducive to the public good". Sub-section 5 requires the Secretary of State to make a deportation order in respect of a "foreign criminal," defined as a person who is not a British citizen and who is convicted in the UK of a criminal offence for which they are sentenced to a period of imprisonment of at least twelve months, unless it would be a breach of a person's rights under the European Convention on Human Rights ['ECHR']. Foreign criminals are divided into categories which includes: those with sentences of between one and four years imprisonment (medium offenders) and those sentenced to four years or more (serious offenders).

12. Part 5A of the 2002 Act was introduced by the Immigration Act 2014 with effect from 28 July 2014.

13. When considering whether deportation is justified as an interference with a person's right to respect for private life and family life under article 8(2) of the ECHR, section 117A(2) of the 2002 Act requires decision makers to have regard in all cases to the considerations listed in section 117B, and in cases concerning the deportation of foreign criminals to the considerations listed in section 117C.

14. The relevant parts of section 117C of the 2002 Act, 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 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.

Discussion

15. In reaching this decision, we have taken into consideration sections 117B and 117C of the 2002 Act, as amended as well as all the evidence and submissions, both oral and written. There was no dispute between the representatives as to the facts of the case. Indeed Mr Terrell made no challenge to the evidence of the appellant or that of his witnesses. The area of disagreement between the representatives came down to whether the appellant met the requirements of Exception 2 and whether he had established that there were very compelling circumstances over and above those described in the Exceptions to deportation.

16. We set out the findings of the First-tier Tribunal which were preserved following the error of law hearing before Judge Rintoul, redacted where required.

17. The Appellant's sentence was that of 68 months, so over the four year threshold which denotes the seriousness of the crime. I note the Appellant's representative's submissions that the Appellant suffered significant injuries himself, suffered the trauma of losing his best friend and submitted an early guilty plea, however these were factors taking into account by the sentencing judge when reducing the sentence from the starting point.

18. I accept that the Appellant is of low risk of reoffending, but medium risk of harm to the public. I also accept that the circumstances of the offence is undeniably tragic. The Appellant's intention was to drive his friends and he took a risk when doing so, it was not his intention for them to suffer the consequences they did, that is the death of one passenger and the very serious injury of others. These can be the results of driving under the influence of drugs and alcohol and were realistically foreseeable.

19. Looking at the Appellant's circumstances in the UK I find that the Appellant does have a relationship with his son. That relationship was formed when the Appellant had knowledge of his potential deportation, but I do not believe that it was formed for cynical reasons. I find that the Appellant discovered he was the father of the child and formed the relationship with him subsequently not to evade deportation but because of the biological relationship.

21. I also find that the Appellant and (his partner), have been in a long term relationship spanning some eight years. The couple live together currently and (his partner) is clearly committed to (the appellant). For the Appellant to be removed would either cause an end to that relationship, or would involve great hardship to both parties in continuing it. I place weight on the upheaval that will be caused to (his partner) in her life as a partner of the Appellant, her work, he career, her family.

22. The economic situation in Zimbabwe is difficult, neither the Appellant nor (his partner) have any meaningful connection there that could help with finding work. I find that the Appellant has some knowledge of the Ndebele language and probably communicates in it to a low level. It is also likely that he has an understanding of the Shona language. I find this is as the Appellant lived in Zimbabwe until he was nine where he was schooled, there is also a remand form in the Respondent's bundle which indicates he can communicate in Ndebele. The Appellant has connections with adults who resided all their childhood in Zimbabwe. It would be

difficult for the Appellant to integrate, given his upbringing in the UK although his Grandmother lives in Zimbabwe and may be able to offer some support.

23. Adding significant weight to the Appellant's Article 8 private life is his significant residence in the UK as a child. The Appellant arrived in the UK as child of nine years old, he was resident for a considerable period of his life. The Appellant only returned to Zimbabwe in 2017 to obtain a passport to extend his leave. When the Appellant was convicted he had discretionary leave to remain, most likely on account of his long residence in the UK as a child. Whilst this leave is precarious and residence prior to the first grant of discretionary leave was unlawful, I do place weight on the private life. The Appellant was a child when he came to the UK and could not have been expected to regularise his stay in the UK at that time. I also note that by the time the Appellant was deported his discretionary leave had expired (he had not been able to apply to renew it from prison) and he was unlawfully resident in the UK.

17. We begin our consideration with noting that the appellant can be considered a serious offender owing to the fact that he was sentenced to four years and eight months' imprisonment. In the judge's sentencing remarks, credit was given for the appellant's guilty plea. Reference is made to a series of poor decisions made by the appellant, including to drink alcohol, take cannabis and to 'drive at break-neck speed' on a night out with close friends. The sentencing judge states that one of the appellant's friends suffered a catastrophic head injury and another passenger suffered severe and life-changing injuries.

18. It is set out in statute that the more serious the offence committed, the greater the public interest in deportation. Clearly, there is a significant public interest in deporting the appellant from the United Kingdom.

19. Mr Badar did not seek to argue that the appellant met the requirements of Exception 1. Given that the appellant has had periods of residing in the United Kingdom without leave, Mr Badar was correct to do so. Nor did he argue that there were very significant obstacles to the appellant's reintegration in Zimbabwe in view of the facts of this case as set out in the preserved findings from the First-tier Tribunal.

20. Nor was it argued on the appellant's behalf that the effect of his deportation would be unduly harsh on his long-term partner. Indeed, her candidly given evidence was that she would, notwithstanding any practical difficulties of such a move, be willing to follow him to Zimbabwe. Therefore it is not inevitable that the decision to deport the appellant would sever his family life with his partner.

21. The first question to be considered, given the focus of this appeal, is whether the effect of deportation would be unduly harsh upon the appellant's six year old son, who we will refer to as A, as required by Exception 2. It is not contended by the respondent that it would not be unduly harsh for A to accompany the appellant to Zimbabwe.

22. In *HA* (Iraq) [2022] UKSC 22 and *KO* (Nigeria) the Supreme Court endorsed what the Upper Tribunal said in MK (section 55 – Tribunal options)[2015] UKUT 223 (IAC) [at 46] that 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.

23. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher.' The Supreme Court also endorsed the finding of the Court of Appeal in *HA* that undue harshness should not be evaluated with reference to the distress that 'any child' might face when their parent is deported as to apply such a notional comparator would be contrary to s55 of the Borders, Citizenship and Immigration Act 2009.

24. The focus of the appellant's case is the likely emotional impact on A owing to the appellant's central role in his life since a DNA test carried out shortly after his release from prison in 2021 revealed him to be A's father.

25. While we heard oral evidence from the appellant and his partner as to his role in A's life and had an independent social work before us, we found that clear and contemporaneous evidence of the position is contained in the documents relating to the recent Family Court proceedings which resulted from the appellant's application for a Child Arrangements Order and a Prohibited Steps Order. We should add that on 11 March 2024, a Deputy District Judge of the Family Court gave leave for the papers in the proceedings to be disclosed to the Upper Tribunal.

26. A CAFCASS case analysis was prepared for use in the Family Court proceedings which was completed at the end of 2023. Relevant information includes that it was initially believed that another man was A's father until the early part of 2022 when a DNA test was carried out. That gentleman had been involved in A's life for over three years and A considered him to be his father, albeit contact between them has since ceased. A is now aged six, he is of multiple mixed ethnicity and that there are no current safeguarding concerns relating to his mother and none have been identified regarding the appellant. Concern is expressed regarding incidents of late collection from school of A by his mother as well as many late arrivals and unauthorised absences. A was referred to speech and language therapy when he commenced reception class and the report notes that he 'continues to struggle to make and sustain friendships and has a lack of social skills.' Following a referral to NHS Speech and Language Therapy Team, in June 2023 A was diagnosed with 'social communication difficulties (with signs of improvement), speech delay with hearing concerns...Concerns were raised around communication and attention. ' A is awaiting a hearing assessment. A is also described as having a stammer. We note that A's mother told the CAFCASS officer that A had no formal diagnosis.

27. Reference is made in the CAFCASS report to homework being rarely completed and reading records never filled in by his mother. The report states that the appellant met with A's teacher and followed up the recommendation to obtain books including handwriting books for when he spends evenings with A. The appellant's interest in A's learning is described as proactive. The appellant was collecting A from school from June last year and was engaging with safeguarding lead, attending parent consultations and showing awareness of A's goals. From this report it is apparent that A's mother is a vulnerable person. Indications of this include that she reported to the school that she experienced severe depression which led her to return to live with her parents for support, that there was difficulty in her dropping A at school, at times she is described as 'chaotic and agitated.'

28. The author of the CAFCASS report spoke to A shortly before the report was completed. A's 'confusion' was noted at having two fathers, that it was

emotionally harmful for A to spend no time with the man he previously knew as his father and that A needs support 'to understand the situation better for his own emotional well-being.' The author was also concerned with the decision of A's mother to change A's surname to her own father's name and recommended that A have the appellant's surname.

29. The recommendations made in the CAFCASS report are, in summary, that A continues to live with his mother and to spend alternate weeknights and weekends with the appellant, that the mother should seek support in respect of her mental health and that A 'requires both parents and possibly school to support him to understand who is daddy is and what has happened in his life.'

30. The written reasons of the Family Court which took place in April 2024 accepted the CAFCASS recommendations as to contact between the appellant and A and noted the view of the CAFCASS author that the application before the court was not based on his immigration issues but on his desire to build a genuine relationship with his son. In addition, the written reasons state that it's the court's view that the appellant 'has shown consistency in wanting to build a relationship with his son,' that A's surname be double-barrelled to help him understand his heritage and that the former partner of A's mother should not be reintroduced into his life to avoid 'further confusion and to enable the appellant 'the opportunity to establish his relationship' with A. The court commended the appellant and A's mother for being child focused and recommended 'this to continue and for the parents to coparent amicably, long term…'

31. Taking A's interests as a primary consideration, we are satisfied that it is in his best interests for the appellant to remain in the United Kingdom to enable their relationship to continue to develop.

32. While the harm envisaged to A caused by the appellant's deportation is of an emotional nature, this is no less significant than other forms of harm, applying *MI* (Pakistan) [2021] EWCA Civ 1711 at [159]. Furthermore at 49 of *MI* the court rejects the notion that evidence of psychological injury would be required:

> There is no requirement for such harm to amount to recognised psychiatric injury before it can be considered relevant to meeting the "unduly harsh" test.

33. Owing to the vintage of the decision letter, the question of undue harshness was not addressed by the Secretary of State in relation to A. Mr Terrell did not argue that it would not be unduly harsh for A to accompany the appellant to Zimbabwe. Nor did he dispute that the appellant had a genuine and subsisting relationship with A.

34. It is the case that it was only after his release from prison in that the appellant became aware that he had a son and he has established a strong bond with A. The deportation of the appellant now will abruptly sever that family life which has been built up since his release from prison. In the particular circumstances of this case, we attach very significant weight to the emotional harm likely to be caused to A were his regular and weekly in person contact with the appellant to come to an end and find that this renders the deportation of the appellant unduly harsh.

35. That the appellant can meet the requirements of Exception 2 is insufficient for him to succeed in this appeal owing to the length of his prison sentence. He must demonstrate that there are very compelling circumstances over and above

the Exceptions to deportation, albeit the ability to meet the Exceptions must be considered in conjunction with other factors, applying *NA (Pakistan)* [2016] EWCA Civ 662 at [32].

36. It is trite law that it will be only be rare cases where a foreign national offender will be able to show the existence of very compelling circumstances and that the public interest in deporting offenders will almost always outweigh considerations of private or family life in such a case, applying *Hesham Ali* (Iraq) [2016] UKSC 60 at [46]. However, the weight to be attached to the public interest must be approached flexibly, applying *Akinyemi* [2019] EWCA Civ 2098, at [39]

> The correct approach to be taken to the 'public interest' in the balance to be undertaken by a tribunal is to recognise that the public interest in the deportation of foreign criminals has a *moveable* rather than fixed quality. It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal. The number of these cases will necessarily be very few i.e. they will be exceptional having regard to the legislation and the Rules. I agree with the appellant that the present appeal is such a case.

37. We have taken into consideration the very high threshold involved as well as that the term compelling was approved as meaning circumstances which have a 'powerful, irresistible and convincing effect' in *Garzon* [2018] EWCA Civ 1225.

38. In making an assessment of this demanding test, we have undertaken a wide-ranging holistic evaluation of all relevant factors including those assessed in the context of the Exceptions to deportation, including an application of the principles in the Strasbourg authorities.

39. We have carefully considered the nature and seriousness of the index offence committed by the appellant and remind ourselves that the deportation of criminals is in the public interest not only for reasons of the protection of the public, the prevention of crime but also the wider policy considerations of deterrence as well as to mark the public's revulsion at an offender's conduct, applying *Danso* [2015] EWCA Civ 596 at [20].

40. All the indications are that the appellant is rehabilitated, nonetheless, rehabilitation cannot in itself constitute a very compelling circumstance and, applying *Velasquez Taylor* [2015] EWCA Civ 485 at [21], we note that a case is likely to be rare in which rehabilitation could make a significant contribution. Given the short period since the appellant has been released from custody, we cannot find there to be sustained evidence of positive rehabilitation in this case, such as would reduce the weight to be placed on the protection of the public from further offending.

41. Considering factors which appear on the appellant's side of the balance sheet, the appellant has now been residing in the United Kingdom for over twenty-four years, having lawfully entered at the age of seven and having been granted several periods of leave to remain with minor interruptions. We are satisfied that during this time he has developed a private life capable of protection under Article 8(1) and that carries significant weight, as anticipated by *CI (Nigeria)* [2019] EWCA Civ 2027 at [58].The applicant has visited Zimbabwe just once since arriving in the United Kingdom, solely in order to obtain a replacement passport. He is in a committed long-term relationship which predated his conviction but was formed when his immigration status was precarious. The appellant's mother and siblings reside in the United Kingdom lawfully. A period of

six years have elapsed since the appellant's only conviction and more than two years have passed since the appellant's release from prison without any further offending.

42. In the OASys report dated 9 December 2020, the appellant was assessed as having a low risk of reoffending, albeit posing a medium risk of harm to the public were he to offend again. The appellant has provided a detailed account of the offence and we do not doubt that his expressions of remorse at his hand in the death of a close friend are genuine.

43. There are additional factors connected to the appellant's relationship with A which elevates this case to one of very compelling circumstances. These factors include that A was led to believe that another man was his father for three and a half years, that this other man is no longer a part of his life and this has led to considerable confusion on A's part. In addition, A has been referred to speech and language therapy, he continues to struggle to make and sustain friendships and lacks social skills. Furthermore, A has been diagnosed with social communication difficulties, speech delay and is awaiting a hearing assessment. The CAFCASS report also speaks to the vulnerability of A's mother and the challenges she faces in her parenting of A and recommends she receive support to manage her mental health.

44. We have carefully considered the submission that the appellant could continue to have contact with A remotely from Zimbabwe. The appellant addressed this point in some detail during his oral evidence, stating that locating the family member looking after A and arranging for him to be settled enough to take part in a conversation were proving difficult to arrange from the United Kingdom. Given A's young age, the nascency of his relationship with the appellant and his additional needs, we do not accept that remote methods of communication would enable the father and son relationship to become well established or to mitigate the interference in family life in this case.

45. This was very finely balanced decision however, taking all of the evidence into account before us, we find that section 117C(6) is met and that this is a rare instance when the public interest in deporting the appellant is outweighed by the very compelling circumstances identified above. In summary, those circumstances include a combination of the undue harsh effect of deportation on A, the specific vulnerabilities of A and his mother, the appellant's length of residence and family ties in the United Kingdom. While we accept Mr Terrell's criticism of many aspects of the independent social work report, we find that the conclusion that A's 'wide-ranging needs would be significantly impacted and impaired' if the appellant was deported, was well-made and is supported by the CAFCASS report which was in turn accepted by the Family Court. It follows that to deport the appellant would be disproportionate and a breach of Article 8 ECHR.

Notice of Decision

The appeal is allowed on human rights grounds.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Case No: UI-2023-000414
First-tier Tribunal No: HU/57942/2021
LH/00405/2022

18 September 2024

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email